

ALCOHOL (LICENSING, PUBLIC HEALTH AND CRIMINAL JUSTICE) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Non-Government Bills Unit on behalf of Dr Richard Simpson MSP. Its purpose is to assist consideration by the Delegated Powers and Law Reform Committee, in accordance with Rule 9.6.2 of the Parliament's Standing Orders, of provisions in the Alcohol (Licensing, Public Health and Criminal Justice) (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill Provisions

2. This is a multi-purpose Bill containing ten separate policy strands all relating in different ways to alcohol.

3. Section 1 imposes new mandatory licence conditions relating to pricing of multi-packs for both premises and occasional licences under the Licensing (Scotland) Act 2005 ("the 2005 Act").

4. Section 2 imposes new licence conditions prohibiting the sale of alcohol with a caffeine content in excess of such amount as may be prescribed. Section 3 prevents licence conditions and licensing policy statements from discriminating against young adults in connection with off-sales of alcohol. Section 4 enables Licensing Boards to vary existing premises licences in order to impose conditions requiring participation in container marking schemes. These are schemes whereby licensees mark drink containers with a code or other mark identifying the premises which sold them, enabling the source of alcohol confiscated from minors to be traced. Section 5 strengthens the consultation requirements for applications for new premises licences and variations of existing ones.

5. Sections 6-13 contain restrictions on various methods of alcohol advertising, to be jointly enforced through a single criminal offence (section 10) and fixed penalty scheme (section 12 and schedule). Section 14 requires the Scottish Ministers to publish at regular intervals and review statements of their policy on the provision of public information and education about alcohol consumption.

6. Sections 15-29 introduce drinking banning orders, which may be imposed either on an application to a civil court by a "relevant authority" (police or local authority) or by a criminal

court on conviction for an alcohol-related offence. Such an order may impose prohibitions necessary to protect others from future criminal or disorderly conduct by the subject of the order while under the influence of alcohol, including bans on entering pubs, bars and clubs.

7. Section 30 relates to the provision of alcohol awareness training as an alternative to payment of a fixed penalty under sections 128-9 of the Antisocial Behaviour etc. (Scotland) Act 2004, and provides for a pilot scheme and its roll-out. Section 31 provides for a court which has convicted an individual of an offence to notify that individual's GP practice where that individual was voluntarily under the influence of alcohol and this was a contributory factor in the commission of the offence. Sections 32-35 deal with interpretation, ancillary provision, commencement and short title.

Rationale for Subordinate Legislation

8. The powers to make subordinate legislation contained in the Bill are explained in detail in the following paragraphs, but in considering if and how provision should be made in subordinate legislation rather than on the face of the Bill the member has had regard to:

- the need to strike a balance between the importance of ensuring full Parliamentary scrutiny of the core provisions of the Bill and making proper use of Parliamentary time;
- the possible need to change provisions in a way which responds to changes in the wider legislative environment, emerging scientific knowledge and experience of provisions of the Bill in operation;
- enabling a flexible and responsive approach on matters of administrative detail;
- the need to respond to changes in the value of money.

DELEGATED POWERS

Sections 2(3) and (4)- Prescription of maximum amount of caffeine per litre

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by statutory instrument

Parliamentary procedure: affirmative procedure

Provision

9. Section 2 imposes new mandatory conditions in respect of both premises licences and occasional licences (used for temporary events) granted under the 2005 Act. These conditions prohibit the sale of alcoholic drinks with a caffeine content in excess of such amount as may be prescribed (section 147(1) of the 2005 Act defines "prescribed" as meaning prescribed by regulations made by the Scottish Ministers). For premises licences, the new condition is contained in a new paragraph 8A inserted into schedule 3 to the 2005 Act. For occasional licences, it is contained in a new paragraph 7A inserted into schedule 4. Paragraphs 8A(5) and 7A(5) require the Scottish Ministers to prescribe a maximum amount no later than 12 months after Royal Assent. Section 7 of the Interpretation and Legislative Reform (Scotland) Act 2010

will operate to permit further regulations to adjust the limit subsequently. Amendments to section 146 of the 2005 Act made by section 2(2) of the Bill apply the affirmative procedure.

Reason for taking power

10. The member wishes to ensure that a maximum limit for the caffeine content of caffeinated alcoholic drinks is set, but intends that the correct level at which to set that limit is fully explored during the Bill's Parliamentary process. The member's initial proposal was for a maximum level of 150 mg per litre, a limit which is already applied in Denmark. However, the member recognises that the Scottish Ministers may wish to consider other options based on evidence concerning the particular problems posed by the interaction of caffeine and alcohol in Scotland. It is also necessary for the maximum limit to be adjustable over time, in line with any new scientific evidence.

Choice of procedure

11. Given the policy significance of the maximum level of caffeine content and the potential impact on drinks manufacturers and the licensed trade, the affirmative procedure is considered appropriate.

Section 16(11)- drinking banning orders- modification of minimum period to be served where an approved course is completed

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by statutory instrument

Parliamentary procedure: affirmative procedure

Provision

12. Section 16 deals with the duration of drinking banning orders ("DBO's") and of individual prohibitions contained within them. Section 16(3) provides for a DBO or a prohibition contained in it to cease to have effect earlier than it otherwise would have done where the subject of the order has completed an approved course (such a course would cover matters such as risks of excessive alcohol intake and management of alcohol consumption). Section 16(4) states that, where a court makes an approved course provision in a DBO, that provision must permit the DBO/prohibition concerned to cease to have effect at either the time specified by the court for that purpose (which must be a point no less than halfway through what would otherwise be the duration of the DBO/prohibition) or the time when the approved course is completed, whichever is the later. Section 16(11) enables the Scottish Ministers by regulations to alter the reference to half of the specified period to some other proportion, so that a subject who had completed the course would also need to have served e.g. one third or three quarters of what would otherwise have been the term of the DBO/prohibition.

Reason for taking power

13. This power will enable the Scottish Ministers to adjust a detail of the DBO provisions in the light of experience of their operation. For example, the Scottish Ministers may wish to be able to respond to evidence about the effectiveness of approved courses in preventing further criminal or disorderly behaviour, or the willingness of individuals to complete approved courses in return for a particular reduction in the length of their DBO.

Choice of procedure

14. As it is anticipated that there could be public and political interest in the length of the “minimum term” required to be completed, and because the power enables the modification of a provision of primary legislation, the affirmative procedure is considered appropriate.

Section 27(5)- Provision about approval of courses

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by statutory instrument

Parliamentary procedure: negative procedure

Provision

15. This power enables the Scottish Ministers to provide by regulations for various matters relating to approval by them of courses for the purposes of section 16 (section 16 is discussed at paragraph 12 above). These include the process for making applications, levels of fees (for making an application and for attending a course) and arrangements for monitoring course provision.

Reason for taking power

16. It is considered that putting provision of this nature on the face of the Bill would tip the balance away from core policy matters towards matters of administrative detail. Matters such as fee levels should be determined after discussion between the Scottish Ministers and potential course providers. Future flexibility as regards fees is required to enable account to be taken of changes in the value of money. It is also likely that experience of operating an approvals process will suggest ways in which it could be improved for the future, and this power will provide the necessary flexibility to incorporate these.

Choice of procedure

17. This power relates to fairly minor administrative matters and the negative procedure therefore appears appropriate. Regulations setting fees are generally subject to the negative procedure, while other provisions may be fairly detailed and technical and are likely to need to reflect discussions with potential course providers. Negative procedure is considered to strike the right balance between Parliamentary scrutiny and best use of Parliamentary time.

Section 27(6)- Guidance about conduct of approved courses

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: None

Provision

18. This subsection enables the Scottish Ministers to issue guidance about the conduct of approved courses. The Scottish Ministers are to take such guidance into account when considering matters related to the approval of courses, and the courts are to take it into account in determining whether particular instructions or requirements of a course provider are reasonable

under section 28 (which enables the subject of a DBO to appeal to the courts against a refusal by a course provider to supply him or her with a certificate confirming completion of the course in accordance with that provider's reasonable instructions or requirements). While the provision does not require the guidance to be published, the need for course providers, the Scottish Ministers and the courts to refer to it makes it likely in practice that it will be readily accessible.

Reason for taking power

19. It is likely that thinking on these matters will need to be developed in conjunction with the more prescriptive regulations about approval of courses and the actual approval of applications, and then refined and altered over time as experience of the provision of approved courses improves.

Choice of procedure

20. The guidance will be concerned with matters to take into account, rather than rules to be followed. This is also an area where the relevant expertise is likely to lie very much with those responsible for dealing with approval of courses. Quick responses to problems which may arise in course provision may also be needed to ensure just results for individuals who may be subject to instructions from course providers affecting their ability to complete the relevant course. For all these reasons we consider that Parliamentary procedure would not be appropriate. Parliament will of course still be able to scrutinise the guidance where it considers this to be merited.

Section 28(2)- Power to determine form and content of certificate of completion of approved course

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by statutory instrument

Parliamentary procedure: negative procedure

Provision

21. This subsection enables the Scottish Ministers to make regulations specifying the form and content of a certificate stating that an individual has completed an approved course, or providing for how the form and content are to be determined. Such a certificate supplied by a course provider will result in the duration of the DBO or one or more individual prohibitions within it being shortened (see paragraph 12 above). Under section 28(3), a certificate must be provided unless the subject has failed to pay the course fees, attend the course in accordance with the reasonable instructions of the course provider or comply with any other reasonable requirements of that person.

Reason for taking power

22. This is a minor matter which should be decided after discussion between the Scottish Ministers and others having an interest in the provision of approved courses. There may well be a need for the form and contents of the certificate to be adapted over time, in line with changes to the nature of courses and the identities and types of course provider.

Choice of procedure

23. This is a matter of administrative detail which is considered to be best suited to the negative procedure. Provision about forms is usually dealt with under that procedure. It does not appear appropriate to require a committee debate about the form and contents of a certificate.

Section 28(8)- Notice of refusal to provide a certificate

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Provision

24. This subsection enables the Scottish Ministers to make provision about the form of a notice issued by an approved course provider refusing to supply a certificate of completion of the course, the manner in which such a notice is to be given and the time at which it is to be taken as having been given (e.g. time of sending, time of receipt or some intermediate point).

Reason for taking power

25. These are considered to be minor administrative matters best dealt with as part of the process of establishing approved courses rather than in the Bill. This process would involve discussions between the Scottish Ministers and potential course providers about such matters.

Choice of procedure

26. These are minor matters in relation to which the negative procedure is considered to be sufficient. Provision about forms is usually dealt with under that procedure. Negative procedure is considered to strike the best balance between Parliamentary scrutiny and use of Parliamentary resources.

Section 29(3)- Treatment of additional authorities as relevant authorities

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Provision

27. This provision enables the Scottish Ministers to provide for additional authorities to be treated as relevant authorities for any or all of the purposes of the Bill. Such a power could be used for example to allow a particular authority to apply for the making, variation or revocation of a DBO in civil proceedings, either generally or in specific types of case.

Reason for taking power

28. Changes in the public sector landscape or experience of the operation of DBO's may lead to the conclusion that another type of authority should be involved in the process, either generally or in relation to situations where it may have particular expertise.

Choice of procedure

29. Such regulations would not detract from the role of existing relevant authorities, but would provide an additional option for taking forward aspects of DBO procedure. They would not impact on the core DBO provisions. The negative procedure is considered appropriate.

Section 29(4)- Modification of list of persons to be consulted prior to applying for DBO

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Provision

30. This power allows the Scottish Ministers to alter the list of bodies which a relevant authority must consult before making a civil application for a DBO.

Reason for taking power

31. Experience of situations which have arisen in practice in the context of DBO applications may suggest that the list of mandatory consultees should be altered, either to involve additional participants or to speed up the process by reducing the consultation requirements. The exercise of the power in section 29(3) could also suggest that an authority specified in such regulations ought to be added to the list.

Choice of Procedure

32. As the power involves modification of primary legislation, and could be used to dispense with existing consultation requirements (by removing a body from the list of consultees), the affirmative procedure has been chosen.

Section 33- Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure where modifying primary legislation; negative otherwise

Provision

33. Section 33 confers on the Scottish Ministers a power to make incidental, supplementary, consequential, transitional, transitory or saving provision for the purposes of, or in consequence of, or for giving full effect to, any provision of the Bill.

Reason for taking power

34. Without the power to make such provision it could prove necessary to return to the Parliament, through subsequent primary legislation, to make small changes necessary to give full effect to the provisions of the Bill. This would not be a good use of Parliamentary time. The power itself is circumscribed by being entirely ancillary to the provisions of the Bill and any such provision must be for the purposes of the Bill or in consequence of it or for giving full

effect to it. It is envisaged that transitional provision may be necessary in relation to a number of aspects of the Bill, including sections 5 (community involvement in licensing decisions) and 31 (offences involving alcohol: notification of offender's GP), and perhaps also the sections on DBOs. Such provision may for example be necessary to deal with licensing applications or criminal proceedings which are in progress at the time of commencement. It is considered preferable to give the Scottish Ministers the opportunity to consider whether and what transitional provision should be made, in the context of giving practical effect to the changes introduced by the Bill. Where significant transitional provision is made (rather than routine provision linked to commencement- see section 34 below) it is appropriate for this to be subject to Parliamentary procedure.

Choice of procedure

35. Section 33(3) of the Bill provides that any regulations made under section 33 will be subject to affirmative procedure if they contain provisions which make textual changes to an Act. Otherwise, they will be subject to negative procedure. This provides the appropriate level of Parliamentary scrutiny for the textual amendment of primary legislation while ensuring that other ancillary provision is still subject to appropriate scrutiny by Parliament.

Section 34- Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: No procedure

Provision

36. This section provides for certain provisions of the Bill to come into force on the day after Royal Assent (subsection (1)). The other provisions will automatically commence 12 months after Royal Assent, unless the Scottish Ministers bring any of them into force earlier by regulations (subsection(2)).

Reason for taking power

37. In a Member's Bill, the member lacks control of commencement and it is therefore necessary to make default provision which ensures that the Bill as enacted is commenced without undue delay. However, the member acknowledges that commencement of all the provisions not listed in section 34(1) at the same time may not be desirable, and it may be administratively more efficient to phase in commencement of the remaining provisions. There could also be policy reasons for preferring earlier commencement in some cases. Subsection (2) provides the Scottish Ministers with the necessary flexibility to accommodate these preferences, while ensuring reasonably speedy commencement of all provisions. Subsection (3) allows transitional, transitory and saving provisions to be made by commencement regulations and we consider that this is required to ensure that where appropriate such provision is made before aspects of the Bill come into effect. We would anticipate that any complex transitional provisions would be made using the powers contained in section 33 (see paragraph 34 above), with the use of the ancillary powers in section 34 being confined to situations where the relevant provision was subsidiary to commencement.

Choice of procedure

38. Section 34 does not provide for any Parliamentary procedure. This is standard for commencement provisions and reflects the administrative nature of commencement of provisions which have already been agreed to by the Parliament.

Schedule paragraph 8(4)- Review and adjustment of fixed penalty

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Provision

39. Paragraph 8 requires the Scottish Ministers to review the amount of the fixed penalty annually in light of changes in the value of money, and to adjust the amount of the penalty by regulations where appropriate to reflect such changes.

Reason for taking power

40. It is important that the penalty continues to act as a reasonable deterrent and reflects changes in the economic environment. The member is concerned to avoid the situation where lack of regular uprating leads to the fixed penalty amount being eroded by inflation. It will still be possible for the Scottish Ministers to decide against uprating in a particular year if inflation is low and the change produced by uprating would be minimal.

Choice of procedure

41. This is considered to be an uncontroversial power for which the negative procedure is sufficient. As it could only be used to uprate the fixed penalty amount in line with inflation, it does not warrant a compulsory debate.

Schedule paragraph 9(1) and (2)- method of payment and payment periods

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Provision

42. Paragraphs 9(1) and (2) enable the Scottish Ministers to make provision about method(s) of payment of the fixed penalty, and to alter the period for payment of the penalty and the period within which payment must be made to qualify for the discount under paragraph 4. The power in sub-paragraph (2) is restricted to provision which is considered desirable having regard to other provisions about fixed penalty notices. It would enable the Scottish Ministers to alter these periods in the light of changes being made elsewhere, perhaps to standardise periods for payment under different fixed penalty regimes.

Reason for taking power

43. The power in paragraph 1 relates to a matter of detail which is considered to be best dealt with in regulations. The power could be expected to be used to reflect current and future payment methods and technologies, and their availability to local authorities. The power in paragraph (2) enables the Scottish Ministers to adjust the payment periods in line with future changes to other fixed penalty regimes.

Choice of procedure

44. These are relatively minor matters in relation to which the negative procedure is considered sufficient given the balance between scrutiny and making best use of Parliamentary resources. Their use is unlikely to be controversial.

*This document relates to the Alcohol (Licensing, Public Health and Criminal Justice) (Scotland) Bill
(SP Bill 65) as introduced in the Scottish Parliament on 1 April 2015*

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