

**FALKIRK COUNCIL LICENSING BOARD**

**Subject:** AMENDMENTS TO THE LICENSING (SCOTLAND) ACT 2005 BY  
THE CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010  
**Meeting:** LICENSING BOARD  
**Date:** 26 OCTOBER, 2011  
**Author:** CLERK TO THE LICENSING BOARD

**1. INTRODUCTION**

- 1.1 The Criminal Justice and Licensing (Scotland) Act 2010 made a number of changes to the provisions of the Licensing (Scotland) Act 2005. The purpose of this report is to set out the changes to the law which Members will be most likely to encounter when sitting at Board meetings. The report does not claim to set out the whole changes made to the 2005 Act – no reference is made to changes in provisions for offences against the 2005 Act, for example, or to those provisions relating purely to the administration of licensing.
- 1.2 It was considered convenient to group the changes with which this report is concerned under the following headings:-
- (i) Representations/Objections by Chief Constable;
  - (ii) Determination of Premises Licence Applications;
  - (iii) Premises Licence Reviews;
  - (iv) Personal Licences;
  - (v) Powers of Licensing Standards Officers;
  - (vi) Occasional licences and extended hours applications.

**2. REPRESENTATIONS/OBJECTIONS BY CHIEF CONSTABLE**

- 2.1 In terms of Section 21 of the 2005 Act as now amended the Chief Constable, having been notified of a premises licence application, will no longer be required to respond to the notification by supplying an anti-social behaviour report. The Chief Constable will still be required to respond by supplying a notice stating if the applicant or any connected person has or has not been convicted of any relevant or foreign offence.
- 2.2 There are however compensatory amendments to the Act in respect of anti-social behaviour reports. A new subsection (2A) is added to Section 22 of the 2005 Act. This enables the Chief Constable to make representations concerning a premises licence application by way of an anti-social behaviour report. A new Section 24A empowers the Board, at any time before determining a premises licence application, to request the Chief Constable to give an anti-social behaviour report. Although the term “request” is used, the new Section states that the Chief Constable must give the report within 21 days of the request. The Board must suspend consideration of the application until it receives the report.

- 2.3 The repeal of Section 22(2) of the 2005 Act is noteworthy. That subsection restricted any objection by the Chief Constable to a premises licence application to the ground that the Chief Constable believed that the applicant or any connected person was involved in “serious organised crime” and that as a result the Chief Constable considered that it was necessary for the purposes of the crime prevention objective that the application be refused. Clearly there are difficulties in defining “serious organised crime” but that apart, there may be issues not amounting to “serious organised crime” which the Chief Constable, rightly, considers should be the subject of concern and should be brought to the attention of the Board. The amendment now gives the Chief Constable power, as with any other objector, to object on the grounds set out in Section 23(5) – inconsistency with one or more of the licensing objectives, unsuitability of premises etc.

### **3. DETERMINATION OF PREMISES LICENCE APPLICATIONS**

- 3.1 Members may recall that if the Board is minded to refuse a premises licence application “as made”, they could propose a modification to the operating plan such as would enable the application to be granted. If the applicant then accepted that proposed modification, the Board required to grant the application. Section 23 of the 2005 Act is now amended to enable the Board to propose a modification to take account of its concerns not only to the operating plan, but also to the layout plan (or to both layout and operating plans).
- 3.2 Section 23 is also amended to require the Board to take into account “in particular” any conviction of a relevant or foreign offence notified to them by the Chief Constable, and any anti-social behaviour report given by the Chief Constable pursuant to a Section 24A request (see paragraph 2.2 above). It is not clear why Parliament should have inserted the words “in particular”. Due to an amendment to Section 24 (duty of applicant for premises licence to notify Licensing Board of convictions) the Board is required to take into account any conviction confirmed by the Chief Constable by notice and any recommendation of the Chief Constable contained in that notice. Why “account” and “particular account” are used is unclear but it may be that if Boards do not attach weight to any relevant or foreign offences or anti-social behaviour report provided to them, then they should explain clearly why these matters, although forming part of their consideration of the application, do not influence them strongly in their deliberations.
- 3.3 In an amendment not yet in force (see Section 8 below) applications for premises licence will have to contain a disabled access and facilities statement. This will be a statement, in a form to be prescribed by the Scottish Ministers, containing information about provisions made for access to the premises by disabled persons, and facilities provided for disabled persons. Members have found in the past that layout and operating plans have not provided the information they would wish as regards assistance to disabled persons. The amendment to Section 20 set out in this paragraph will assist Members in their deliberations.

### **4. PREMISES LICENCE REVIEWS**

- 4.1 Members will recall on occasion being asked for a Statement of Reasons for a decision on a premises licence review application. The law to date has been that a Statement of Reasons could only be asked for where the Board declined to hear a premises licence review application on the grounds that it was vexatious or frivolous or disclosed no

matter relevant to a ground for review as set out in Section 36 of the 2005 Act. Now a premises licence holder will be able to seek a Statement of Reasons where the Board has taken one of the steps set out in Section 39(2) (suspension, variation, revocation etc); and the applicant for review will be able to seek a Statement of Reasons where the Board decides to take one of the steps under Section 39(2) or decides to take no action.

## 5. PERSONAL LICENCES

- 5.1 The 2010 Act amends Section 74 of the 2005 Act by inserting further requirements which must be satisfied before a personal licence can be granted. At present these requirements are that the applicant is 18 or over, possesses a licensing qualification, no personal licence previously held by the applicant has been revoked within the previous 5 years; and that the Board has received notice from the Chief Constable that the applicant has no convictions for a relevant or foreign offence. Under the amendment there are added the requirements that the applicant does not already hold a personal licence; that the notice from the Chief Constable does not include a recommendation that for the purposes of any of the licensing objectives the application should be refused; the applicant has signed the application; and that the provisions of a new subsection (8) to Section 74 do not apply.
- 5.2 Section 74(8) applies where:- the applicant is 18, possesses a licensing qualification, does not already hold a personal licence; has not suffered the revocation of a personal licence within the previous 5 years; the Board has received a notice from the Chief Constable that there are no convictions for a relevant or foreign offence; and that a personal licence held by the applicant has expired within the previous 3 years or been surrendered in terms of the Act within that period.
- 5.3 If the new Section 74(8) does apply, then the Board may hold a hearing to consider the application, in which hearing it must have regard to the circumstances in which the personal licence previously held expired or was surrendered.
- 5.4 The foregoing amendment does on the face of it appear to be extremely useful, as it allows the Board to make closer enquiry into the personal history of the applicant; but it may prove unjust to applicants as the Board is not required to hold a hearing under the new Section 74(8). A Board could lawfully take the view that if Section 74(8) applied then it is not required to grant the application, in terms of Section 74(2). Could it then refuse the application without a hearing? Section 74(5) requires a hearing to be held if *inter alia* the Board receives a notice from the Chief Constable with a recommendation that the application be refused (whether or not there is a conviction for a relevant or foreign offence). The situation which is concerning from a natural justice point of view is where the applicant has met all the requirements in paragraph 5.1 above with the exception that he/she has held a personal licence which has expired or been surrendered in the preceding 3 years. It is suggested that the requirements of natural justice are met by amendments which bring in new subsections (5A) and (5B) to Section 74.
- 5.5 Subsection (5A) provides for the situation where a Board is presented with a notice from the Chief Constable stating there are no relevant or foreign convictions and that the Chief Constable has no recommendation (for refusal) to make. The Board may hold a hearing on the application, but if it does not, subsection (5B) requires it to grant the application. Your officers believe that if an issue of an expired or surrendered licence does arise,

subsection (5B) will in effect compel Boards to hold a hearing under Section 74(5A) or 74(8) as otherwise they will be compelled to grant what might be an application which raises suspicions about the applicant's conduct under a previous personal licence.

- 5.6 The foregoing amendments, while decidedly complex, nevertheless remove many of the restrictions on Boards in refusing a personal licence application. Hitherto they have been restricted to refusal only where the applicant failed to meet age and licensing qualification requirements, had a previous licence revoked or the Chief Constable provided notification of a relevant or foreign offence.
- 5.7 A welcome amendment brought about by the 2010 Act is that the Chief Constable will in terms of a new Section 84A of the 2005 Act be able to report to the Board conduct of a personal licence holder which the Chief Constable considers is inconsistent with any of the licensing objectives. The Board must then hold a hearing. Members will recall that the Chief Constable's course of action previously was to make a premises licence review application and to ask the Board in the context of that application to make a finding that such misconduct had taken place. A further hearing then required to be held. There is now provision for the misconduct to be considered and dealt with more directly and expeditiously.

## **6. POWERS OF LICENSING STANDARDS OFFICERS**

- 6.1 Hitherto Licensing Standards Officers have only enjoyed powers of entry and inspection in respect of licensed premises. However amendments to Section 15 of the 2005 Act when brought into force will give LSOs power to take copies of any document (or of entries in that document) found on the premises; and power to seize and remove any substances, articles or documents found on the premises. Where an LSO seizes any substance, article or document, he or she must leave on the premises a notice stating what was seized and explaining why it was seized. The new powers are similar to those exercised by Environmental Health Officers in relation to matters of food safety.
- 6.2 The Scottish Ministers are given power to make regulations governing the treatment of substances, articles or documents seized, the retention, use, return, disposal or destruction of anything seized and compensation for anything seized.
- 6.3 The new statutory provisions do not require a document to be produced if it could be the subject of a claim for confidentiality in court proceedings; and no information, explanation or document need be produced if to do so would incriminate the person required to produce the information, explanation or document or would incriminate that person's spouse or civil partner. These provisions will obviously be used as defences to any prosecutions for intentional obstruction of an LSO or failure to comply with a requirement made by an LSO.

## **7. OCCASIONAL LICENCES AND EXTENDED HOURS APPLICATIONS**

- 7.1 At present the Chief Constable and our Licensing Standards Officers have 21 days to respond to a notification of an occasional licence application. In terms of amendments to Section 57 of the 2005 Act, where the Board is satisfied that the application requires to be

dealt with “quickly”, it may determine that the period of 21 days shall be reduced to a shorter period of not less than 24 hours.

- 7.2 Similar amendments in respect of extended hours applications are made to Section 69 of the 2005 Act. The Board may determine to reduce the period of 10 days for responses by the Chief Constable and our Licensing Standards officers to a shorter period of not less than 24 hours. A further amendment is that the LSO now no longer has a duty to submit a report setting out the LSO’s comments on an extended hours application – the LSO “may” submit such a report.
- 7.3 A new Section 70A of the 2005 Act will allow the Board, on granting an extended hours application, to vary the conditions to which the premises licence is subject as the Board considers “necessary or expedient” for the purposes of any of the licensing objectives. Any such variation may have effect only in relation to the actual extended hours granted and will cease to have effect at the end of the period in which the extended hours are allowed (which cannot exceed one month).

## 8. COMING INTO FORCE OF THE AMENDMENTS

- 8.1 The majority of the foregoing amendments came into force in respect of applications to Boards made after 13<sup>th</sup> December 2010. The provisions as regards occasional licences and extended hours came into force variously on 28<sup>th</sup> March and 1<sup>st</sup> October, 2011. The provisions relating to disabled access and facilities statements and the increase in powers of Licensing Standards officers have yet to come into force.

## 9. RECOMMENDATIONS

- 9.1 That Members note the terms of this report.
- 9.2 That Members receive a further report on the amendments brought in by the 2010 Act once they are all fully in force as detailed in paragraph 8.1.

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**Clerk to the Licensing Board**

**Date: 14 October, 2011**

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### LIST OF BACKGROUND PAPERS

NIL