



## **AFS RESPONSE TO CONSULTATION ON THE REVISED EAST AYRSHIRE STATEMENT OF LICENSING POLICY – AUGUST 2018**

Alcohol Focus Scotland (AFS) welcomes the opportunity to respond to the consultation on the terms of the revised East Ayrshire Statement of Licensing Policy. This response builds upon our pre-consultation response, submitted to the Board in December 2017. It provides an update on recent developments and suggestions regarding the sections of the draft policy that we believe may warrant particular scrutiny.

### **Overprovision**

As noted in our pre-consultation response, AFS would recommend that alcohol harm statistics are considered in conjunction with alcohol outlet density information to make an informed assessment of overprovision. Subsequently to responding to the Board's pre-consultation, AFS worked with the Centre for Research on Environment, Society and Health (CRESH) at the Universities of Edinburgh and Glasgow to publish further evidence of the links between alcohol availability and harm in Scotland.

Detailed updated local information on alcohol availability and harm at neighbourhood level can now be found using the [CRESH WebMap](#). In addition, profiles containing information about the levels of alcohol availability and related harm (at both a national level and for each local authority) can now be accessed via our website: [www.alcohol-focus-scotland.org.uk/campaigns-policy/availability-and-licensing/alcohol-outlet-availability](http://www.alcohol-focus-scotland.org.uk/campaigns-policy/availability-and-licensing/alcohol-outlet-availability). For ease, we have also sent a copy of the East Ayrshire profile to accompany this response.

The updated CRESH data shows that East Ayrshire is ranked 24th out of 30 local authority areas for alcohol outlet availability in Scotland (26th for on-sales and 16th for off-sales outlets). East Ayrshire has an alcohol outlet availability lower than Scotland as a whole; neighbourhoods had an average of 9.4 alcohol outlets within 800m of the population centre, compared to the Scottish average of 16.8 outlets. However, 14% of neighbourhoods have a total outlet availability higher than the Scottish average, and a significant 23% have off-sales outlet density higher than the Scottish average.

When considering links to harm, a statistically significant relationship was found in East Ayrshire between alcohol outlet availability and alcohol-related death rates, alcohol-related hospitalisation rates and crime rates. Specifically, alcohol-related death rates in the neighbourhoods with the most alcohol outlets were 4.8 times higher than in neighbourhoods with the least, hospitalisation rates 2.7 times higher, and crime rates 5.4 times higher. These links between alcohol outlet availability and harm were found even when other possible explanatory factors, such as age, sex, urban/rural status and levels of income deprivation, had been taken into account.

Decisions on overprovision should also be informed by evidence from the police, health authorities and other agencies. AFS is therefore pleased that the draft policy includes a link to where the data and consultation responses considered by the Board when assessing overprovision are available to view. This evidence shows that there are high levels of alcohol-related harm in East Ayrshire, with

some communities being particularly negatively impacted, and that the public in East Ayrshire are concerned that there are already enough or too many places selling alcohol in their local area. Aggregated statistics and data such as this point compellingly to the conclusion that there exists a state of overprovision in East Ayrshire.

AFS notes that the Board has determined that the locality for the purposes of overprovision is East Ayrshire as a whole and that there is an overprovision of off-sales premises only within the locality. Given that the majority of alcohol sold in Scotland is bought from off-sales premises (73% of all alcohol sold being purchased in off-sales<sup>1</sup>), and people now travel further to buy alcohol, AFS believes that an off-sales overprovision policy covering the whole Board area is likely to be the most effective in helping to reduce and prevent levels of alcohol consumption and harm. We welcome that the Board reached this determination on the basis of the information provided following an extensive consultation process, and the Board's own knowledge.

With regard specifically to on-sales premises, however, the Board may wish to give further consideration as to whether the evidence submitted by local partners and analysis using the CRESH webmap indicates areas/communities where levels of availability and/or harm are sufficiently high to cause concern, and which may indicate that overprovision would be an appropriate response. The webmap can be used to compare areas against the Scottish average for outlet density (also differentiating between on- and off-sales), compare alcohol outlet availability between neighbourhoods within the local authority, and also identify corresponding rates of harm (e.g. alcohol-related hospitalisations, crime rates, and alcohol mortality).

However, it is important to note that areas with the highest outlet density may not be those experiencing the highest levels of harm, and that different communities can be affected differently by alcohol, with some communities experiencing disproportionate levels of harm. The evidence submitted to the Board by the NHS indicates that the greatest harms can be seen in those communities in East Ayrshire which also experience the highest levels of income and employment deprivation, and so the Board may wish to give particular regard to these communities when considering on-sales overprovision.

### **Health benefits of employment**

With regards to exceptions to overprovision, AFS believes that overprovision statements should be flexible as there may sometimes be legitimate reasons why an application would be granted in overprovision areas. Carefully setting out - within the policy itself - what will and will not be considered in as an exception in such circumstances may help to avoid potential appeals.

However, the draft policy states that the Board recognises the positive health benefits associated with increased employment opportunities as a factor that applicants may use in support of their application, and that this may rebut the presumption against the grant of an application for an off-sales premise. AFS is aware that this approach has been adopted elsewhere and has carefully considered the case law in this area, including the 2017 case of *Martin McColl Limited v West Dunbartonshire Licensing Board*; where the Judge found that *"the potential health benefits to employees for whom jobs were to be created does... accord with the licensing object of protecting and improving public health"*.

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<sup>1</sup> Giles, L., & Robinson, M. (2017). *Monitoring and Evaluating Scotland's Alcohol Strategy: Monitoring Report 2017*. Edinburgh: NHS Health Scotland

AFS finds this policy position questionable and problematic for a number of reasons. Firstly, the courts have made clear that the objectives are licensing objectives and therefore the licensing objectives are closely connected to the sale of alcohol on the premises.<sup>2</sup> AFS believes it is highly questionable to restrict the effect of a policy by reference to the promotion of a function that is not a licensing function. A local authority may have a function to promote employment or to promote public health through employment, but (even assuming this to be true) that is not a licensing function and therefore it is not a function or factor that AFS believes should be included in a licensing policy.

Secondly, the method of assessing whether or not there is overprovision is set out in section 7 of the Licensing (Scotland) Act 2005. In considering overprovision, the board must have regard to “the number and capacity of licensed premises in the locality” and must consult the specified persons in reaching that conclusion. If the board finds that there is overprovision then the board is bound to refuse the application. There is nothing in section 7 to suggest that a determination of overprovision can be modified by a non-licensing objective; namely, “the positive health benefits associated with increased employment opportunities”.

There may be exceptional cases in which an applicant in an overprovision area is able to demonstrate that the grant of an application would not undermine the licensing objectives, but the Board should take care not to imply in the policy that (should an applicant be able to demonstrate that the licensing objectives would not be undermined) this would somehow reverse the rebuttable presumption. Overprovision is a grounds for refusal in its own right (as borne out in case law) i.e. in an overprovision case where there is no inconsistency with the objectives does not mean there is no overprovision as it is a separate issue.

AFS fully appreciates that this can be a particularly contentious and contested issue. In addition, we acknowledge that the dated guidance to the Licensing (Scotland) Act 2005 makes deliberations relating to overprovision even more challenging for all involved. However, we would nonetheless urge the Board to consider the points we have raised above.

### **Online sales and alcohol deliveries**

In our pre-consultation response, we highlighted emerging concerns regarding online sales and alcohol deliveries, and recommended that the Board set out within the policy its approach to online retailers. We are pleased that the draft policy reminds applicants that they and their staff must comply with all legislation relating to children and young persons, including by not delivering alcohol to a child or young person.

However, the policy could be strengthened further in this regard and we are now in a position to provide examples of measures being included within the draft policies of other Board areas. This includes requiring that when making an alcohol delivery certain checks should be carried out such as Challenge 25, that orders cannot be left in nominated safe places, and that staff delivering alcohol must be trained to the same level as staff who sell or supply alcohol in licensed premises. We believe it would be highly beneficial to include similar measures within the East Ayrshire policy.

### **Occasional licences**

Occasional licences are intended to allow for the sale of alcohol at events that do not occur on a regular basis. However, as commented in our pre-consultation response, there is concern that this as

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<sup>2</sup> E.g. as was said in *Brightcrew Ltd v City of Glasgow Licensing Board* 2012

an area where ‘loopholes’ in the legislation are being regularly exploited, and used to circumvent the requirement to have a premises licence. AFS would therefore recommend that the Board requires a hearing where it identifies that an applicant has made repeated occasional licence applications. The Board could also adopt a policy whereby a certain number of back-to-back occasional applications (exceeding a set threshold) be automatically referred to the Board for a decision.

Licensing Boards may wish to choose their own thresholds for referring decisions to the Board, based on local circumstances. For example, the proposed approach in the Perth and Kinross Licensing Board draft policy is that *“the Board considers it reasonable for occasional licences covering up to 30 days (including into the following mornings) to be granted in any one calendar year for a single premise. Where more than 30 days are sought, the Board expects a premises licence application to be submitted. Failure to do so may result in all further occasional licence applications being submitted to the Board for consideration rather than being dealt with under delegated powers.”*

In addition, in order to ensure that the sale of alcohol under occasional licences is appropriately conditioned to uphold the licensing objectives, the Board could also request that applicants complete an Occasional Licence Supplementary Information Form. This approach is already adopted in some Board areas, where occasional licence holders are asked to demonstrate how they will promote the five licensing objectives, and provide practical examples of how they plan to comply with each objective, with some also providing a pro forma for submission alongside the application.

### **Promoting the objectives**

In our pre-consultation response, we suggested that the Board request that applicants supply a written statement detailing how they will promote the objectives. Several board areas already do this but many more are now including this within their draft policies; with some providing a ‘Supplementary Information’ document (as an appendix to the policy) and requiring applicants to submit this alongside their application - asking them to set out exactly how they will comply with the objectives.

In addition, we would again recommend that the new policy sets out examples of the different types of conditions that could be applied by the Board, relevant to each of the objectives, and under what circumstances. AFS has produced a Licensing Resource Pack<sup>3</sup> that provides resources to support the collection of evidence on local alcohol-related harm, and provides examples of research which demonstrates the impact of particular licensing conditions on harms. This may particularly useful to the Board when developing its new policy: <http://www.alcohol-focus-scotland.org.uk/media/291077/afs-licensing-resource-pack.pdf>

### **Participation**

The new policy would greatly benefit from an increased focus on supporting public engagement and participation. The draft policy states that the Board will remain at all times mindful of the need to be accessible to all and assistance will be available on request to those who require any special arrangements made. This is welcomed but communities may not currently be aware of the various ways in which they can get involved or the types of information/supports available to enable them to participate.

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<sup>3</sup> Alcohol Focus Scotland (2017). *Licensing Resource Pack*. Glasgow: Alcohol Focus Scotland: <http://www.alcohol-focus-scotland.org.uk/media/291077/afs-licensing-resource-pack.pdf>

The new policy should clearly signpost the general public to where they can find guidance to support them to get involved, including by making objections and representations, or this could be included as an Appendix e.g. the [Alcohol Licensing in Your Community Toolkit](#).<sup>4</sup> The current section of the policy outlining the role of the Licensing Standards Officer could also be expanded to include more detail about the assistance they are able to offer to the public.

The new policy should also include a commitment that hearings will be conducted in as informal a manner as possible. This can be particularly important for many community members, who may feel intimidated by overly formal processes and environments. Public participation could be further supported by reassuring communities that the Board will endeavour to make any proceedings as user-friendly as possible, and outlining the procedure to be followed at hearings (this could be added as an Appendix).

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<sup>4</sup> Alcohol Focus Scotland (2015). *Alcohol Licensing in Your Community How You Can Get Involved*. Glasgow: Alcohol Focus Scotland: <https://www.alcohol-focus-scotland.org.uk/media/133477/Community-licensing-toolkit.pdf>