



## **AFS Response to Consultation on Licensing (Scotland) Act 2005 – Section 142 Draft Revised Guidance for Licensing Boards (June 2019)**

Alcohol Focus Scotland (AFS) welcomes the opportunity to provide detailed comment on the draft revised guidance. AFS, along with many other stakeholders, has been advocating for an update to the guidance for many years, to ensure it reflects current licensing practice and legislative change. We have a keen interest in ensuring that the public interest purpose of licensing is emphasised and appropriately supported, and in our experience, confusion over the guidance is frequently cited by stakeholders as inhibiting the licensing system from fulfilling its full potential to reduce alcohol-related harm.<sup>1</sup>

### **About us**

AFS is the national charity working to prevent and reduce alcohol harm. We aim to reduce the impact of alcohol in Scotland through the implementation of effective alcohol control policies and legislation. Our strategic priorities include ensuring the effective implementation of licensing legislation by supporting licensing boards and forums to promote the licensing objectives. We regularly engage and work with a wide range of licensing stakeholders, including licensing board members, licensing clerks, Licensing Standards Officers, NHS, police, Alcohol and Drug Partnerships, community and local licensing forums.

AFS also provides a range of training courses for people in the licensed trade and for those involved in the regulation of licensing to meet the requirements of the Licensing (Scotland) Act 2005; this includes the Scottish Certificate for Personal Licence Holders Training, Licensing Board Members Training, and Licensing Standards Officers Training.

### **About our response**

This response builds upon our previous input to the guidance revision process, including comments provided by AFS while working as a co-opted member of the Institute of Licensing Guidance Advisory Group. Our response has also been informed by recent work AFS has undertaken in order to identify areas of progress and ongoing challenge within the licensing system, including:

- A series of regional licensing seminars hosted by AFS across Scotland in 2016, involving over 170 local licensing stakeholders.<sup>2</sup>
- A review of the published licensing board Statements of Licensing Policy for 2018-2023.<sup>3</sup>

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<sup>1</sup> Alcohol Focus Scotland (2017). *Taking Stock: Views and experiences of alcohol licensing in Scotland in 2016/17*: <https://www.alcohol-focus-scotland.org.uk/media/287043/Taking-Stock-Report.pdf>

<sup>2</sup> Alcohol Focus Scotland (2017). *Taking Stock: Views and experiences of alcohol licensing in Scotland in 2016/17*: <https://www.alcohol-focus-scotland.org.uk/media/287043/Taking-Stock-Report.pdf>

<sup>3</sup> Due to be published in autumn 2019.

- A review of the published licensing board Annual Functions Reports for 2017-2018.<sup>4</sup>

AFS believes that this work, alongside our ongoing engagement with a breadth of licensing stakeholders, affords us a unique, national perspective on the licensing system in Scotland. We hope that this insight and the suggestions we have provided below will be helpful to inform the guidance revision.

As we have provided comment on the vast majority of the sections of the revised guidance - addressing numerous complex and often interconnected issues - it was not possible to meaningfully disaggregate our comments regarding those parts of the guidance which we found unclear from those regarding other issues to be taken into account. We have therefore organised our comments to correspond to the structure of the guidance itself, as opposed to the two questions contained in the consultation document. However, to aid reading and analysis, we have provided our comments under clear headers throughout, and specified paragraph numbers in order to indicate the areas of the revised guidance to which each comment relates.

In formulating our response, we have also taken cognisance of the assertion in the consultation document that the guidance cannot go beyond what the legislation provides for, and is focused on providing further explanation of the legislation. However, since the guidance was first issued there have been dramatic changes to patterns of alcohol sales and consumption, and areas of learning and progress within the licensing system. We have highlighted these developments in our response as we believe that it is essential that the guidance revision accounts for them. In addition, AFS believes that the guidance should incorporate recommended good practice, and provide a steer to licensing boards as to how the legislation should be interpreted, not simply reiterate the law. Through such an approach, we are hopeful that many of the problems encountered in the licensing system can be addressed through revisions to the guidance.

### **Suggested amendments – key points**

- **Give further consideration to the overall purpose of the guidance, and ensure that the contents of the document best serve to fulfil that purpose.** At present, it is stated that the purpose of the guidance is to give *‘guidance to Licensing Boards on the effect of the complex areas of, and interactions between, the legislative provisions’*. As such, the revised document has a particular focus on the law, with large sections containing legalistic language, and including references to case law and complex legal concepts. Although the guidance should certainly help explain the relevant legislative provisions, the purpose of the document extends far beyond this. For example, it provides a vital means to help promote good practice and consistency in the licensing system, and also encourage fairness and transparency. This is similar to the approach adopted in England and Wales where the licensing guidance states that *“it is a key medium for promoting best practice, ensuring consistent application of licensing powers across England and Wales and for promoting fairness, equal treatment and proportionality.”*<sup>5</sup> This type of approach does not place boards under any requirement to adopt the same positions, but rather it encourages more consistency in their procedural approaches. At present, the overall tone/emphasis of the revised Scottish guidance appears inconsistent in this regard; some sections focus exclusively on what the law demands of boards, rather than recommended good practice or how it is

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<sup>4</sup> Alcohol Focus Scotland (2019). *Review of Licensing Board Annual Functions Reports 2017-2018*: <https://www.alcohol-focus-scotland.org.uk/media/310853/afs-annual-functions-report.pdf>

<sup>5</sup> Home Office (2018): *Revised Guidance issued under section 182 of the Licensing Act 2003*

expected boards should actually fulfil their duties, while other sections provide more information about how the law can/should ideally be operationalised in practice. In addition, the consultation document states that *“Scottish Ministers wish Licensing Boards and their Clerks to be creative and innovative and to implement the Act in a way that best meets local needs and circumstances”*. In order to support this, it would be helpful if the guidance provided Boards/Clerks with some practical examples of the types of approaches and actions they might take.

- **Clarify the purpose of the licensing system.** AFS believes that one of the root causes of the current tensions with the operation of the licensing system is differing interpretations of the purpose of the Licensing (Scotland) Act 2005 and the licensing system. While AFS accepts that the purpose of the 2005 Act is *“to make provision for regulating the sale of alcohol, and for regulating licensed premises and other premises on which alcohol is sold; and for connected purposes,”*<sup>6</sup> AFS believes that the Act ultimately exists to serve the public interest; the licensing system exists to regulate the sale of alcohol for the primary purpose of minimising the risk of harm to individuals and society from the consumption of alcohol. Although this purpose is not explicitly stated in the Act, it is implicit in the fact that a system for licensing the sale of alcohol exists, and in the licensing objectives themselves. This purpose should guide all decision-making under the Act i.e. it ought to be highlighted in the licensing policy statements, and through those documents make its way into each licensing decision. The objectives serve to delineate the areas of public interest that licensing should and should not promote, and boards should take a considered view as to what the public interest in their area actually is. These objectives are the founding principles of the Act but AFS is aware that some stakeholders have frustrations that other considerations (e.g. economic development) often take precedence. As such, it is essential that the guidance makes clear the public interest purpose of licensing. Conversely, several aspects of the original guidance, relevant to the public interest purpose, appear to have been removed; for example, information pertaining to the importance that local communities are provided with a clear indication of licensing policy, and explanation that the Act complements the wider policies of the Scottish Government relevant to alcohol harm, has been removed. AFS would highlight the approach taken in England and Wales, where the licensing guidance<sup>7</sup> gives a strong steer that the public interest should be a key consideration under the Licensing Act 2003. In contrast, the revised Scottish guidance implies that the licensing system is intended to be narrowly administrative, existing only to regulate the sale of alcohol and premises on which alcohol is sold, without taking a wider view of the context within which alcohol is regulated.
- **Provide more detail on the meaning and interpretation of the licensing objectives.** The guidance should not only emphasise that the objectives are important, but also explain what exactly it is they seek to achieve i.e. the overall interest of the local community. Again, this is similar to the approach taken in England and Wales, which we have outlined in more detail in our specific comments below. Furthermore, the guidance should also emphasise that licensing boards need to consider how to give effect to the licensing objectives at both the individual premises level and population level. The objectives can be interpreted at the level of individual premises application so an applicant could be required to adopt a dispersal

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<sup>6</sup> Licensing (Scotland) Act 2005 Long Title

<sup>7</sup> Home Office (2018): *Revised Guidance issued under section 182 of the Licensing Act 2003*

policy for the prevention of public nuisance for example. However, the licensing objectives, together with the obligation to prepare a statement of licensing policy and an overprovision assessment, give a clear indication that decisions on licensing applications need to be considered in a wider population context and not solely on a case-by-case basis. This approach recognises that the sum of individual licensing decisions can have an aggregate effect on the operation of the alcohol market, and consequently on the amount of alcohol consumed and levels of harm. Making clear the obligations of boards at both the macro and micro level is essential to ensure that sum total of any board's individual licensing decisions do not end up by stimulating increased risky and harmful alcohol consumption and thereby frustrating the public interest purpose of licensing.

- **Clarify how 'causal link' applies in a licensing context.** One of the areas identified by stakeholders as needing urgent clarification has been the interpretation of overprovision, particularly in relation to the 'dependable causal link.' However, there are various explanations of causal link now contained in the revised guidance which seem contradictory, are open to interpretation, and are likely to have different implications for both the overprovision assessments and decisions at an application level. The AFS review of the published licensing board Statements of Licensing Policy has also identified that boards have approached their assessment of overprovision differently, and have applied very different standards of proof. While there is a need to take account of and reflect legal precedent, the guidance is now very confusing and the guidance alone may not be sufficient to deal with the complexity of this issue. This is also discussed in much more detail in our specific comments below.
- **Simplify the guidance:** The guidance should be written in a way appropriate to the intended audience; primarily licensing boards, but also other agencies such as local authorities, the Police, local licensing forums, Licensing Standards Officers, communities and the licensed trade, who rely on the guidance for understanding how licensing should operate in practice. In order for the guidance to be a meaningful document for lay people, potentially with no legal or technical expertise, it will be vital that it is as user-friendly and accessible as possible. However, AFS is concerned that the updated draft guidance may have become more complex and difficult to interpret and understand. Certainly, large sections appear to have been written in overly legalistic and bureaucratic language, and are poorly structured and difficult to navigate. Further drafting is required to ensure that the guidance is written using plain/accessible language, providing information in clear and concise terms wherever possible, and with a logical structure that can be easily followed. In addition, it is apparent that the guidance has had numerous authors and contributors, with contrasting tones, styles and terminologies being employed throughout. It would therefore benefit from further attention to the overall tone and style, in order to make it a more coherent and cohesive whole.
- **Keep the guidance under regular review to ensure that it is up to date.** It is of note that the guidance has not been updated for 10 years, during which time at least 4 new pieces of legislation were introduced. If a key purpose of the guidance is to help explain the law, it will be essential that it is kept up-to-date, particularly as Boards are under a legal duty to comply with relevant legislation, and could be subject to judicial review should they deviate from it.

## **Specific comments**

**Areas within the draft revised guidance which AFS found were unclear, and other issues which we believe should be taken into account within the draft revised guidance.**

### **Section 1: Introduction (page 7)**

A clear statement of the overall purpose of licensing legislation and the licensing system should be provided in the guidance, and this could most helpfully be included in the introductory section. At the regional licensing seminars, differing and often contradictory understandings of the purpose and intended outcomes of the licensing system were both discussed and demonstrated by stakeholders at each event. This very much continues to be the case, with significant impacts on the licensing system.

The lack of collective agreement on key aspects of the licensing system may in part be due to major reform of the system happening prior to the development of the Scottish alcohol strategy. In adopting a whole population approach the strategy recognised that availability is a key factor in driving consumption and harm, and identified the licensing system as a key contributor to reducing harm by controlling availability. It is apparent that many stakeholders involved in the licensing system have adopted this approach. However, this analysis is not universally accepted amongst licensing stakeholders. A significant number do not believe it possible or desirable for the licensing system to operate in a way which, for example, optimises public health.<sup>8</sup>

At our regional licensing seminars in 2016, licensing stakeholders on both sides of this argument recognised that this disagreement about the purpose of alcohol licensing is a key factor that creates inconsistency of approaches to policy and practice. It acts as a barrier to progress and collaborative working. As such, AFS believes that there is an urgent need for improved clarity over the intended outcomes of the licensing system in relation to availability, and the expectations of licensing stakeholders in this regard.

AFS would maintain that the Licensing (Scotland) Act 2005 ultimately exists to serve the public interest, and the licensing system exists to regulate the sale of alcohol for the primary purpose of minimising the risk of harm to individuals and society from the consumption of alcohol. This purpose was given prominence when the Nicolson Committee was established to “*review all aspects of liquor licensing law and practice... to recommend changes in the public interest*”.<sup>9</sup> It was these very recommendations which formed the basis of the Licensing (Scotland) Act 2005. Furthermore, this purpose was also articulated in the Policy Memorandum<sup>10</sup> of the Air Weapons and Licensing (Scotland) Bill, which stated at paragraph 11: *‘The purpose of licensing is to limit or control activities which, while legitimate and permitted, are considered to have the potential to be harmful or disruptive. Licensing protects the public interest...’* This purpose should guide all decision-making under the Act, and this should be highlighted within the guidance.

AFS is also aware of the counter-view that the guidance cannot import in the Act a purpose which cannot be found in the legislation itself. However, notwithstanding that this purpose is implicit in the

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<sup>8</sup> Alcohol Focus Scotland (2017). *Taking Stock: Views and experiences of alcohol licensing in Scotland in 2016/17*: <https://www.alcohol-focus-scotland.org.uk/media/287043/Taking-Stock-Report.pdf>

<sup>9</sup> The Nicholson Committee (2003). *Review of Liquor Licensing Law in Scotland*. Scottish Executive.

<sup>10</sup> Scottish Parliament (2014). *Air Weapons and Licensing (Scotland) Bill Policy Memorandum*

fact that a system for regulating the sale of alcohol exists, it is underpinned by the five licensing objectives, which set out clear areas of harm which licensing should seek to address.

In addition, AFS would also highlight the approach taken in England and Wales. The revised guidance issued under section 182 of the Licensing Act 2003 places the English/Welsh objectives within a wider context, with paragraph 1.5 stating that the Act: *“also supports a number of other key aims and purposes. These are vitally important and should be principal aims for everyone involved in licensing work. They include... providing a regulatory framework for alcohol which reflects the needs of local communities and empowers local authorities to make and enforce decisions about the most appropriate licensing strategies for their local area”*.<sup>11</sup> In addition, it makes clear that applications should be determined: *“With a view to promoting the licensing objectives in the overall interest of the local community”* (s 182 Guidance, para 9.38). This gives local authorities a strong steer that the public interest should be a key consideration under the 2003 Act. Including a statement to this effect within the Scottish guidance would be an extremely helpful clarification.

The introduction to the original Scottish guidance also explained that *“the Act complements the wider policies of the Scottish Executive. This includes measures to tackle antisocial behaviour, and the programme of work set out in the Plan for Action on Alcohol Abuse, which seeks to tackle underage drinking, binge drinking, and the wider problems associated with alcohol misuse.”* This text has been removed from the revised guidance, however this section could helpfully be updated to include reference to action on price, availability and marketing, and the Scottish Government’s Alcohol Framework. In particular, it would be beneficial to make clear the role of licensing boards in relation to controlling availability, with an explanation that this forms part of a package of measures that require to be progressed together in order to most effectively reduce alcohol-related harm.

Our review of Boards’ most recent Statements of Licensing Policy suggests that some boards may lack understanding of how different measures to tackle alcohol harm can be mutually reinforcing. For example, one board comments that it considers that the introduction of minimum unit pricing has the potential to be a more effective tool than overprovision in reducing harms caused by alcohol. This further underlines the importance the guidance clarifies how the licensing system is intended to complement the wider policies of the Scottish Government - which is ultimately responsible for regulating the powers of boards in relation to licensing the sale of alcohol.

It would also be useful at the start of the guidance to clearly set out some of the national and international evidence which shows that there is a direct correlation between the availability of alcohol and alcohol-related problems. It would be useful to have this in the guidance to avoid every licensing board having to continually quote evidence to substantiate the link between availability and alcohol-related harm.

## **Section 2: The licensing objectives (pages 8-10)**

The revised guidance (paragraph 2.2) states only that *“the purpose of “objectives”... is that these are goals to be achieved and continually worked towards”*. As commented above, the guidance should (similarly to the guidance issued under section 182 of the Licensing Act 2003) explain what exactly it is the licensing objectives seek to achieve and their overall direction/aim.

AFS believes that the licensing objectives should be promoted in the overall interest of the local community, and that the objectives serve to delineate the areas of public interest that licensing should and should not promote e.g. that considerations relevant to the objectives should take

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<sup>11</sup> Home Office (2018). *Revised Guidance issued under section 182 of the Licensing Act 2003*

precedence over other matters such as economic development or tourism. Conversely, although it is perhaps true that *“the objectives are licensing objectives and therefore should not be seen as being a wider set of all-purpose “public interest” objectives that can be used to address perceived harms that lie outside the sale and regulation of alcohol”*, the wording of this paragraph (2.3) would appear to imply that the licensing objectives have no public interest purpose.

Furthermore, while licensing is indeed about regulating the sale of alcohol and the premises on which alcohol is sold, the guidance should also make clear that is also about regulating the aggregate effect that a number of licensed premises may have on a community or area. As such, licensing boards need to consider how to give effect to the licensing objectives at both the individual premises level and population level, in order to ensure that sum total of any board’s individual licensing decisions do not end up by stimulating increased risky and harmful alcohol consumption. The guidance should make explicit that the sum of individual licensing decisions can have an aggregate effect on the operation of the alcohol market, and consequently on the amount of alcohol consumed and levels of harm.

The revised guidance (paragraph 2.2) states that *“the licensing objectives should be viewed as an ongoing aspiration as opposed to a fixed standard.”* It would therefore be helpful to clarify that this does not mean that boards do not have obligations in terms of the objectives until a certain level of is reached, but rather that there should be continual progress towards the achievement of the objectives, and therefore boards should take steps (immediately and in the future) towards their realisation. AFS would also expect there to be a strong presumption against taking any retrogressive measures in relation to the objectives, and that any retrogressive measures would have to be fully justified. However, this is not currently reflected in the wording of the guidance.

### **Preventing crime and disorder**

Specific to preventing crime and disorder, the revised guidance (paragraph 2.5) appears to focus on offences occurring in or near licensed premises. However, the review of the Statements of Licensing Policy has identified that new understandings of alcohol-related crime have developed, and that boards are increasingly undertaking activities in relation to crimes that occur in other types of setting. For example, one policy states that: *“Gender-based violence issues also have strong associations with alcohol consumption (domestic abuse, sexual violence, human trafficking, commercial sexual exploitation and exploitation of vulnerable persons). While licensing alone cannot directly address these they are nonetheless significant issues within the crime and disorder, health, community safety and child protection agendas. The Board, in partnership with Police Scotland and other local agencies, is committed to playing its part in helping to reduce alcohol-related crime”*.<sup>12</sup> As such, the revised guidance should highlight the importance of licensing for preventing crime and disorder in private spheres as well as the public e.g. boards could support work in this regard through partnership working or by supporting local initiatives relevant to issues such as domestic violence e.g. Ask for Angela. The proportion of alcohol now bought to consume at home or in other private dwellings (73% of all alcohol sold being purchased in off-sales<sup>13</sup>) further underlines the need for this to be taken into account in the revised guidance.

### **Protecting and improving public health**

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<sup>12</sup> West Lothian Licensing Board (2018): *Statement of Licensing Policy 2018 - 2023*

<sup>13</sup> Giles, L., & Robinson, M. (2018). *Monitoring and Evaluating Scotland’s Alcohol Strategy: Monitoring Report 2017*. Edinburgh: NHS Health Scotland

AFS believes that the guidance could (either within this section or in a later section) help to support new and innovative approaches to protecting and improving public health.

A long-standing difficulty in relation to this objective is the perception that legal principles make it difficult to draw upon the public health objective in relation to individual premises at the application stage. This difficulty has been articulated well in a number of the licensing policy statements, for example both Falkirk and Glasgow include a statement to the effect that: *“Existing licensing laws are such that there has to be a causal connection between a particular licensing application and a concern for the public health objective. The Board is not in a position to apply the Act more widely than through the powers it has been given.”*

When considering applications, it has to be established in relation to each particular application that a ground has been made out e.g. that the grant of the application would be inconsistent with one or more of the licensing objectives. This can be particularly challenging in relation to health, as damage to health through alcohol can often only be demonstrated at population level and not at the local level of each application.

However, when considering each application, boards must also have regard to their statement of licensing policy. The policy must consider the licensing objectives within the wider context, and the policy can determine issues in relation to wider areas in order to seek to promote the objectives. As such, in formulating their policies boards are able to look at alcohol and health issues at their board area level, and then make a policy that seeks to promote the public health objective. Provided the policy is founded on a proper basis, a board could then refuse a licence on the basis that it was contrary to the policy and inconsistent with the objectives. In this way, boards can properly consider wider issues affecting an area when making decisions about individual premises.

Indeed, some boards have already adopted this type of approach to the public health objective within their new policies. For example, one policy includes a section specifically addressing off-sales and the objective of protecting and improving public health. This was included as the Board was particularly concerned by a number of localities in its area that were suffering from high levels of alcohol related harm, but contained very few licensed premises. As such, the Board did not consider that it would be appropriate to declaring these areas as being overprovided for, but the policy makes clear that: *“Overprovision is only one ground for refusal, and the Licensing Board believes that in terms of the alcohol-related health data it has considered, it is important to clearly set out its concern regarding the granting of an off-sales licence and the Licensing Objective of Protecting and Improving Public Health... Even where there is little or no existing alcohol provision within the area, it may be inconsistent with the Licensing Objective of Protecting and Improving Public Health to grant a licence which would facilitate and allow easier access to alcohol, thereby having the potential to exacerbate existing alcohol-related health problems in the area.”*<sup>14</sup>

AFS believes that this type of approach has a strong potential to help address areas of ongoing and significant challenge within the licensing system; in particular, it allows for appropriate consideration of alcohol harm data and information at the assessment stage, without a requirement to then link that data directly to individual licensed premises at the application stage. It also prevents the need to continually evidence ‘causal link’ each and every time an application is submitted in localities suffering high levels of harm, as this link has been established within the policy itself. However, in order for this potential to be fully realised, it will important that the guidance reflects these developments and seeks to supports good practice in this regard.

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<sup>14</sup> City of Glasgow Licensing Board (2018): *Statement of Licensing Policy 2018 - 2023*



## Protecting children and young persons

Specific to protecting children and young persons (paragraph 2.9), there is now increased recognition that protecting children and young people from harm in licensing is not restricted to preventing people under the legal purchase age from being sold/supplied with alcohol. This is also reflected in the new Statements of Licensing Policy, for example one states that: *“Children and young people who frequently witness alcohol consumption as normal practice have an increased risk of consuming greater quantities of alcohol and at a younger age; and those affected are at a higher risk of developing hazardous drinking patterns and dependence in adult life”*.<sup>15</sup> It will be important that the guidance recognises that the objective to protect children and young people from harm should encapsulate this broadest interpretation of harm, in order to support approaches recognising that children can be impacted by the drinking behaviours they observe and by adults drinking.

Conversely, the only reference in this section of the revised guidance - alluding to how children may be effected by adults drinking - focuses on: *“ensuring that the environment or atmosphere of a premises where children or young people are to be admitted is a sensible, nonthreatening one where children and young persons can be in the company of adults who are consuming alcohol”*. AFS appreciates that some boards wish to encourage applications for licensed venues that are family friendly and safe for children. However it will be important that the wording of the guidance is better balanced to reflect the increasing evidence of the harms suffered by children exposed to regular alcohol consumption by adults, and that it makes clear that this should form a part of the children and young person’s objective.

## Licensing objectives within the Act

New information has been included in the revised guidance at paragraphs 2.10-2.11, explaining that the Act creates different relationships between the objectives and various matters, and that different tests create separate thresholds which require to be met before a licensing objective is engaged. However, no explanation is then given as to what this means in practice, or what is actually required in order to meet the various thresholds/tests. As such, these paragraphs appear confusing and it is unclear what practical information they are attempting to convey.

It would be helpful in this section to place more emphasis on the licensing policy statement as being the primary document which should set out how the licensing board will promote the objectives for the area, with signposting to the section of the guidance containing further information about how this can best be achieved i.e. ‘Section 4 - Statements of Licensing Policy’. In addition, this section of the guidance should also emphasise the preventative nature of the objectives more fully, and the role of boards to actively create environments where they are less likely to be undermined. This would help to highlight the difference between reactive decisions and decisions based on strategic thinking, and the importance of boards taking a strategic approach to the promotion of the objectives.

## **Section 3: Licensing Boards (pages 12-14)**

This section explains that the operation of the licensing system is the responsibility of licensing boards, and that boards are independent regulatory bodies. As such, information should also be included regarding the accountability of licensing boards. AFS would maintain that, to ensure that the licensing system serves the public interest, it needs to be accountable to local communities. This

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<sup>15</sup> East Dunbartonshire Licensing Board (2018): *Statement of Licensing Policy 2018 - 2023*

should be made explicitly clear within this section of the guidance and it should be recommended that boards take measures to support effective public participation.

A lack of public participation in the licensing process was a concern shared by stakeholders across the four regional seminars held by AFS in 2016. Barriers to participation identified related to the perceived poor accessibility of licensing processes, and inconsistencies in policy and practice. The guidance could therefore highlight some of the means by which boards' processes and procedures can provide for increased accessibility, transparency and accountability for communities e.g. by endeavouring to make any proceedings as user-friendly as possible, holding proceedings in public, and ensuring that agendas etc are published on time and easily assessable.

In addition, it would be helpful to include information in this section about the training obligations of licensing board members. Under the Licensing (Scotland) Act 2005, board members must attain a statutory qualification covering key areas of knowledge to support their role in aid of the Act. This qualification must be attained within three months of their appointment to the position, meet with the training specification agreed by Scottish Ministers, and also be accredited by the SQA. Similar information has been included in the guidance in relation to training for LSOs, and it would seem appropriate to include the equivalent information for boards.

#### **Duties of Licensing Boards to produce Annual Reports - Functions Report**

The new requirement for licensing boards to publish annual function reports, summarising how their actions have promoted the licensing objectives and therefore served the interests of the local community, provides an opportunity to increase accountability and transparency in the licensing system - which is key to building public trust and supporting stakeholder engagement.

AFS welcomes that this section of the guidance highlights that the reports should be drafted with a central focus on explaining the work of the board to local communities e.g. by using plain English and providing information in a clear and concise manner. Our review of the published annual functions reports identified that only one of the reports explicitly states it was compiled with the local community as a central focus. This emphasises the important role for the guidance in setting expectations around the importance of functions reports to local communities, and the need for these reports be written in an accessible way.

The guidance (in paragraphs 3.11-3.13) should therefore make clear that the functions reports provide a vital means for boards to set out their ongoing progress towards achieving the licensing objectives, and how they are adhering to and applying their policies in practice. They also provide a way for boards to inform local stakeholders of the actions and activities that have been undertaken locally, any expected outcomes, goals for the future, and how progress is being measured and tracked.

The review of the published annual functions reports found that boards in some areas have already adopted this approach, and the guidance should seek to support and encourage this good practice. In particular, boards should be encouraged to use the annual functions reports as a mechanism to help monitor the implementation of local licensing policies; utilising them to identify and consistently measure outcomes, progress, and assess and report on performance.

While there are examples of good practice, the review of the first functions reports also identified a wide variation between the reports. In particular, there was variation between the reports in the level of detail provided, and the way in which data is presented. A number of the reports contain only minimal information and are unlikely to enable communities/stakeholders to assess and

understand the operation of the licensing system in their local area. Furthermore, the wide variation between the reports suggests that the boards have differing interpretations of their legal reporting obligations, principally in relation to explaining how they have paid regard to the licensing objectives and their policies; in a number of cases, the reports appear to focus on the procedural approach to applying their policies rather than the practical application of these.

As such, the guidance should provide more detail about how boards should approach the production of reports and what types of information they should contain. In particular, it should emphasise the importance that the reports demonstrate on a practical level how the boards adhere to their policies and promote the licensing objectives; they should not simply reiterate the legal framework and the important role that policies/objectives play in the licensing system.

The guidance should also direct boards to ensure that the reports are made widely available for public scrutiny and proactively provided to and discussed with key stakeholders. The reports will be of particular relevance to local licensing forums, for example, which have a role in reviewing the operation of the licensing system in their local area. The publication of good quality annual functions reports is likely to assist them to provide informed comment and advice to licensing boards on current and future licensing strategy. However, the reports will also be relevant to a broad range of other stakeholders such as Community Councils, health boards, police, and Alcohol and Drug Partnerships amongst others, and should be circulated to them accordingly. Boards should therefore also be encouraged to consult with their local stakeholders regarding their approach to annual functions reports, in order to ensure that they are meaningful and useful to their audience, and contain an appropriate breadth and depth of information.

#### **Section 4: Statements of Licensing Policy (Pages 15-21)**

As an overarching and key concern, the overall tone and emphasis of this section appears to have been weakened e.g., reference to what boards ‘*should*’ include in their policy has now been changed to what they ‘*might*’ include. This revised wording makes extremely important matters for inclusion in the policies (e.g. information about hours) seem less important, and therefore less likely to be included in the future.

AFS fully appreciates that the guidance must avoid being overly prescriptive in order to afford licensing boards sufficient flexibility to deal with local circumstances and variations, nor to imply obligations that do not exist under the legislation. However, AFS maintains that it is wholly appropriate that the guidance should nonetheless highlight recommended good practice and the expectations of Scottish Ministers. If the guidance is not directive enough in this regard then it is much less likely to be followed, and ultimately to be effective – in such case, it would be questionable what purpose the guidance actually served beyond what is already provided for by the legislation.

#### **Background**

Paragraph 4.9 states that “*licensing Boards may wish to consider keeping the effectiveness and rationale of the licensing policy statement under review, and to make revisions as and when appropriate*”. However, it is incumbent on public bodies - including licensing boards - to do this as a matter of standard practice, and the wording of this section should be strengthened. Furthermore, the guidance should highlight some of the means by which this can best be achieved, such as through the publication of functions reports and local alcohol profiles. Several board areas have already adopted this type of approach, and this good practice should be encouraged and supported. For example, one of the licensing policy statements explains that: “*the Boards consider it to be*

*essential to monitor the effectiveness of their policy, particularly in relation to provision. To this end, the Boards intend to establish... an Alcohol Profile for each Board area in conjunction with partner agencies trends and to assist in the production of the Boards' Annual Function Reports."*<sup>16</sup>

## **Licensing Objectives**

Paragraph 4.12 pertains to the critically important information regarding how, in preparing a licensing policy statement, a licensing board must ensure that the policy stated seeks to promote the licensing objectives. This is one of the most important aspects of the policies but the review of the policy statements identified a wide disparity in how boards have approached this. For example, some policies focus almost exclusively on the range of factors licensed premises should take into account in the promotion of each of the licensing objectives, and control measures that can be implemented. Far fewer actually set out what actions the board will take in pursuance of the objectives, or provide the local context in relation to each objective e.g. relevant statistics or evidence of the current situation, identification of any issues that are a particular concern, measures which have had an impact.

For all objectives, AFS would suggest the guidance recommend the following format:

1. State the licensing objective.
2. Give a statement as to what the licensing board is trying to achieve with this objective.
3. List concerns in the area relating to this objective and trends since the last policy was published – identify what evidence was used to identify these concerns.
4. List what the licensing board intends to do. Note that this could include declaring overprovision, controlling licensed hours, or applying certain conditions – referring to the relevant section/s in the policy.
5. List any suggested actions the licensing board would like to see the licensed trade in the area undertake to meet this objective.

This section could also suggest that Boards consider setting out a clear expectation in their licensing policies that applicants address the objectives in their operating plan, and also supply a written statement detailing how they will promote the objectives. This approach has now been adopted in many board areas, with several providing a 'Supplementary Information' document for applicants to submit alongside their application (it could also be helpful to have an example of one of these documents included as an annex to the guidance). Having a statement of licensing objectives attached to their licence could help to focus applicants' attention on the objectives, and ensure that they are afforded proper consideration in any proceedings. In addition, application submissions can be insufficiently detailed as to provide a complete picture of what businesses propose to provide. As such, written statements could help support boards and all interested parties to appreciate and properly assess the merits of each application.

Paragraph 4.12 includes specific reference to case law, namely the comments made by Lord Weir in the case of *Elder v. Ross and Cromarty District Licensing Board* (1990). AFS has some concerns about inclusion of case law references within the guidance. While we recognise the importance of case law in clarifying interpretation of the legislation, case law is constantly evolving and time sensitive consideration, and is often closely linked to the specific facts and circumstances of the particular case. If it is felt to be necessary to refer to specific aspects of case law within the guidance, consideration should be given to whether it is the main points and principles that should be

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<sup>16</sup> Aberdeenshire Divisional Licensing Boards (2018): *Statement of Licensing Policy 2018 - 2023*

summarised within the guidance, as opposed to the document simply reiterating or directly quoting rulings and conclusions. In addition, it will again be essential that the guidance is kept under review and up-to-date to ensure it remains an accurate reflection of the current legal position.

With specific reference to the inclusion of *Elder v. Ross and Cromarty District Licensing Board* (1990) in paragraph 4.12, the points that the case law in this instance are intended to demonstrate are somewhat lost and hard to draw out of the revised draft. It would appear that this part of the guidance is attempting to convey that policy cannot be inconsistent with the licensing legislation, that each case must be considered on its own merits, and that boards are not compelled to adhere to their policy in every instance. If so, it would be more helpful, logical and user-friendly to simply state these points, and provide a reference to the case law in a footnote (if necessary).

The clarification that inconsistency with policy may be an indicator that the refusal of the application should follow (paragraph 4.12) is welcomed, however the explanation leading into this point could helpfully be shortened and simplified.

### **Preparation of policy statements**

In relation to the preparation of the policies, the wording of paragraph 4.15 should be strengthened where it states that: *“After the initial evidence gathering process Licensing Boards may wish to consider publishing their draft policy for comment and take cognisance of responses”*. In the most recent policy development process, the vast majority of boards published and consulted on their draft policies, recognising that this enables local stakeholders to provide informed and more specific comment about the board’s intended approach. The guidance should seek to encourage this as a matter of good practice.

Similarly, the wording of paragraph 4.16, which explains that boards *“may wish to consider clarifying the reasons for their decision-making in arriving at their licensing policy statement”*, should be strengthened. In the interests of transparency and accountability, it is essential that boards do this. Boards should be explicit and demonstrate within their policy how it has been informed, with the material considered being published and links to this material being included in the policy itself. Stating this in the policy helps demonstrate the reasoning for the Board’s agreed position and its responsive approach to consultation.

### **Provision of statistical or other information**

Specific to the provision of statistical or other information (paragraph 4.18), the guidance should recommend that boards seek to agree the most useful types and formats of information with relevant bodies in advance of the information being provided. This is important as discussions at the regional seminars pointed to conflict and confusion over the types of evidence that boards want or need, and their ability to utilise it, particularly in relation to health. AFS is aware that this continues to be an area of continued challenge - and point of contention - for many stakeholders contributing to the policy development process.

### **What must be included / What Licensing Boards might include in their licensing policy statement**

In relation to what must/might be included the policies, the previous guidance included a statement to explain that the policy statement should provide local communities with a clear indication of the licensing board’s policy; this was originally the opening sentence to the policy content section of the guidance with a number of bullet points then following on from it. The critical point about the policy providing a clear indication to local communities has been completely lost in the revised draft and this should be rectified as a priority.

AFS's recent review of Boards' Statements of Licensing Policy found an overall lack of information contained within the policies to support public engagement and participation. As such, there are a various ways that this section of the guidance could help to support increased community engagement going forward. For example, 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, and the guidance could therefore encourage boards to clearly signpost the general public to where they can find guidance and support to get involved, including by making objections and representations. In addition, many of the policies include a commitment to conduct any board hearings 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. This is an approach that the guidance should encourage by recommending that such commitments should be included as good practice.

The original guidance also recommended that the policies include a statement of the agreed procedures the board had developed for handling applications, objections, representations, delegation of functions and review hearings etc. for premises and personal licences. It is unclear why this recommendation has been removed as these remain important considerations, and it is remains appropriate that such procedures be included in the policies. As stated previously, the guidance should also suggest ways that Boards' processes and procedures can provide for increased accessibility, transparency and accountability for local communities.

Paragraph 4.20 contains essential information about what should be included in licensing policy statements. The revised wording of this part e.g. *"what Licensing Boards might include"* and *"considerations may include"* should be greatly strengthened, especially considering that this pertains to fundamental information such as *"a clear indication of the Licensing Board's policy and... general approach to the licensing process and the making of licensing decisions."* Furthermore, the guidance should provide more explanation of what is meant by the term 'general approach' in this context. AFS would maintain that it is boards' longer-term, strategic approaches which should be set out within their policies.

Furthermore, in addition to recommending that boards state clearly in the policies that licensing is about regulating the sale of alcohol and premises on which alcohol is sold, the guidance should be updated to indicate that the scope of licensing should include both individual premises effects and population level effects. Revised wording could be, for example: *'Statements of licensing policy should make clear that licensing is about regulating the sale of alcohol and the premises on which alcohol is sold, and also the aggregate effect that a number of licensed premises may have on a community or area.'*

### **Licensed Hours**

The revised guidance states (paragraph 4.20) that licensing hours should not unnecessarily inhibit the development of local licensing economies. Although AFS would agree that hours should not *"unnecessarily"* inhibit local licensing economies, there will also clearly be occasions where it will be necessary to inhibit licensing economies, and it is critical that economic considerations do not dissuade boards from taking appropriate measures to promote the objectives and implement their policies. As such, the wording of this aspect of the guidance should be revised to make this point more explicit, and also make clear that it is not a function under the Act to promote the local economy.

Important information relating to local communities has also been removed from paragraph 4.20 (included in paragraph 22 of the original guidance): *“it is important that in developing its policy on licensed hours the Board must take account of the views of the Local Licensing Forum so that any policy published has the backing and confidence of the local community. Further to this, following a review, reducing licensed hours can be one of the sanctions applicable against a licence holder.”*<sup>17</sup> It is entirely unclear why this has been removed and this information should be reinserted. Ultimately, Boards should take into account the views of local partners, the Forum, communities, and other strategies and plans that have relevance to alcohol when developing and implementing their policies. The guidance should inform the Boards’ approach to how this can best be achieved, for example by listening to forums, as indicated by the original guidance. Engaging local residents and stakeholders in this way is not only important on a democratic level, but is extremely useful in adding legitimacy and weight to boards’ actions.

In relation to off-sale hours, the guidance could helpfully highlight (within paragraph 4.20) that Boards might wish to consider shorter hours where they identify high levels of harm. Off-sales hours of 10am-10pm are now seen as the norm and so are applied as standard, as opposed to being regarded as the maximum possible intended hours.

### ***Relationship with other strategies***

Paragraph 4.20 of the revised guidance no longer indicates which local/national strategies relating to alcohol may be of the most relevance to Boards, for example reference to crime prevention, community safety, and health strategies has now been removed. This is a major omission which should be rectified, and this section should be updated/expanded to better reflect the policies and strategies that are of the most relevance now, particularly those with direct relevance to the licensing objectives.

Many of the boards’ policies now reference relevant locality plans e.g. Local Outcome Improvement Plans (LOIPs), ADP strategic plans, and strategic plans of the Health and Social Care Partnerships (HSCP). Several also make reference to national plans such as Scotland’s alcohol strategy. For example, one policy states that: *“As alcohol licensing is the responsibility of the Board, it is essential that the Board identifies where it shares similar objectives to Community Planning Partners, and how best they support each other. It is therefore important to the Board that this policy aligns with the Community Planning Local Outcome Improvement Plans.”*<sup>18</sup>

The guidance should seek to support and encourage such approaches, and provide a clearer steer to licensing boards regarding the priorities for the licensing policies. In particular, it is important that the policies recognise the value of linkages with other bodies interested in alcohol regulation such as Community Planning Partners (CPPs). In many respects, licensing boards and CPPs are already working towards shared goals and stand to benefit from more collaborative approaches. For example, several Community Planning Partnerships have identified alcohol as a priority issue, and have committed to reducing alcohol harm within their Single Outcome Agreements and Local Outcomes Improvement Plans (LOIPs).

As highlighted above, Boards in many areas have already adopted this type of collaborative approach, and have committed to work meaningfully with local partners where they share common objectives. Although boards are quasi-judicial and need to undertake their decision-making

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<sup>17</sup> Scottish Executive (2007). *Licensing (Scotland) Act 2005 Guidance for Licensing Boards and Local Authorities*

<sup>18</sup> East Lothian Licensing Board (2018): *Statement of Licensing Policy 2018 - 2023*

independently, AFS does not consider that this precludes boards from considering the development of their Statements of Licensing Policy in the broader context of identified local priorities etc. As such, AFS believes that it is essential that the revised guidance seeks to support and encourage good practice in this regard.

### ***Tourism, planning and building control***

In relation to tourism, planning and building control, this aspect of guidance seems somewhat confused. On the one hand boards are urged not to duplicate the role of other regulatory regimes. On the other hand they are asked to take into account documents which may be of limited relevance to the licensing objectives. For example, it is difficult to see the relevance of reports on the local tourist economy to the licensing objectives.

Furthermore, tensions can often exist between the planning and licensing regimes, but the guidance does not currently provide any indication of how boards might best manage such conflicts. For example, a local licensing policy may seek to control availability in an overprovision locality, while simultaneously a local development plan may identify the licensed retail environment as an area for future growth in the same location. This risks creating a conflict of interest for board members, and a confusing and complex landscape for stakeholders to navigate. The guidance revision provides an excellent opportunity to outline how this type of situation might be best approached. AFS would maintain that boards have a duty to act in the public interest to reduce alcohol-related harm in the face of competing views on licensing policy and decisions.

Stakeholders at the regional licensing seminars suggested that the independence of licensing boards has resulted in disconnect between their processes, outcomes and priorities, and those of local authorities and community planning partners. Therefore, rather than focusing exclusively on tourism, planning and building control, the guidance should instead make clear how the work of licensing boards can be aligned to a broad range of local partners to bring about improvements for individuals and communities, as outlined above.

### **Other comments on Statements of Licensing Policy**

There are numerous matters that many boards are now addressing within their policies that are not mentioned in this section of the guidance. For example, several boards have identified a growing trend for outside seating areas in licensed premises, with many setting out their specific policy with respect to outdoor drinking areas. As such, to promote consistency, the guidance could highlight outside areas as being something that boards may wish to include within their policies. Other examples of emerging issues that boards are now addressing within their policies include the suitability of take-away premises for the sale of alcohol for consumption off the premises, and the implications of the Agent of Change principle for the licensing system. As such, it should be considered whether the guidance can help support good practice in relation to these sorts of emerging concerns.

Finally, in addition to the Licensing (Scotland) Act 2005, boards also have legal obligations under other legislation such as the Equality Act 2010. Many of the policies now highlight how the relevant boards have fulfilled their equalities duties, and have hyperlinks to relevant reports (e.g. equalities outcomes reports) embedded within them. This allows for ease of reference and supports understanding, and AFS believes that the guidance should encourage this type of approach.

### **Section 5: The overprovision assessment (pages 22-30)**



AFS has spent several years supporting the wide range of licensing stakeholders to collate and analyse evidence to inform the development of a board's overprovision policy, such as through our licensing toolkit for licensing boards.<sup>19</sup> AFS has sought to provide support in this area because overprovision is undoubtedly one of the most complex and contentious areas of licensing, and particularly the requirement to evidence a 'dependable causal link'. It was clear from our regional licensing seminars in 2016 that a broad spectrum of licensing stakeholders have been looking to this guidance update to provide clarity around approaches to overprovision assessments and interpreting the causal link. Understanding these legal principles and precedents are important not only for licensing boards who are required to undertake these assessments, but also for stakeholders providing evidence to inform these policies.

However, while we recognise efforts have been made within the guidance update to provide further clarification in these areas, unfortunately this whole section of the revised guidance continues to be very confusing and needs to be made much clearer. In particular, as we discuss more fully below, multiple different definitions for what constitutes a dependable causal link are now provided within this section, which may lead to more, not less, confusion. In addition, we think it would also be highly beneficial to draw a greater distinction within the guidance between how boards should approach overprovision for the purposes of their assessment and when deciding upon individual applications. To aid understanding, AFS would recommend that the revised guidance provides clear, step-by-step guidelines on the required approach.

We have provided detailed comments relating to the overprovision assessment below - set out against the relevant sub-sections of the guidance. However, in summary our key points are:

When conducting overprovision assessments:

- Licensing boards should use alcohol-harm information (or potential alcohol-harm information) to identify localities and then proceed to consider the number, type and capacity of premises in those areas.
- It is the potential for undesirable consequences which has to be tackled via overprovision; the cumulative effect of more and more licences being granted in a locality will have an effect on life in that area even if one could not lay the blame on one single operator. If a Board considers there is at least potential for, or a reasonable basis for, concluding that there will be a risk of adverse impact on the objectives (should more premises licenses be granted) it can come to the view that there is a state of overprovision.
- Consideration should be given as to whether aggregate information and evidence from a number of sources demonstrates a link between the availability of alcohol in an area and alcohol-related harm.
- To demonstrate a "dependable causal link", the proof of the link must be on a balance of *probabilities* e.g. based on the evidence of harm in a locality it is *more likely than not* that alcohol availability is a cause, or that increasing the availability of alcohol in that area will increase that harm.
- There is no simple numerical formula for pinpointing the threshold between provision and overprovision. Determining overprovision involves the application of reason and judgement in the interests of the community.

When deciding on applications:

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<sup>19</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>

- Overprovision is a grounds for refusal in its own right.
- Licensing boards can come to decisions because they believe that, on the balance of probabilities, something is more likely than not to be the case. It is not necessary to put together a case to prove definitively that something will or will not happen as a result of a decision on an application.
- Licensing decisions involve an evaluative judgment, and do not require to be proved beyond reasonable doubt. Key to this evaluative judgment is the way in which the issues and the evidence are dealt with. Although licensing decisions are in a sense questions of fact, they involve an evaluation of what is to be regarded as reasonably acceptable in the particular location, and this is essentially a matter of judgment rather than a matter of pure fact.
- In an overprovision case where there is no inconsistency with the objectives does not mean there is no overprovision - it is a separate issue.

*a) In an area of overprovision*

- Except in exceptional circumstances, applications for new premises should be refused.
- *“Where a policy is rational, lawful and evidential then the policy itself can become the dependable causal link” i.e.* Where there is an evidence-based policy that there exists a state of overprovision, this in itself is likely to be a determinative factor in establishing the necessary ‘causal link’.

*b) Not in an area of overprovision*

- A board could still form a view at a hearing that a particular application would lead to overprovision e.g. as overprovision is a value judgment a board could find overprovision by having regard to local knowledge and experience, or to other relevant evidence.

### **Which licensed premises are to be included?**

Although licensing boards have discretion to decide how they wish to categorise premises, the original guidance provided some examples of the types of categories that might be used, including; vertical drinking establishments, nightclubs, "chameleon" premises, different types of hotels in different areas, restaurants, large supermarkets, and convenience stores. In our engagement with licensing boards we have sought to emphasise the flexibility afforded to licensing boards to respond to particular local needs, using illustrative examples of the approaches adopted in different local areas, both in terms of types of premises and approaches to localities. It may be that information on sub-categorisation is no longer required but current levels of understanding in this regard should be explored prior to a final decision being reached. Furthermore, the revised guidance now suggests that boards consider utilising the types of categories contained in the Town and Country Planning (Use Classes) (Scotland) Order 1997 (SI 1997 No. 3061). However, this legislation does not appear to differentiate between large supermarkets and convenience stores, for example, and may not be as relevant to alcohol licensing considerations as it is to planning.

### **Determining localities**

The wording in paragraph 5.14 should be strengthened where it states that the board: *“may wish to consider clarifying the reasons for their decision making in arriving at their locality choices”*. In the interests of transparency and accountability, boards should provide their reasoning as standard and this would very likely be the expectation of local stakeholders and communities. It is only through

such an approach that boards can demonstrate - and inspire confidence in others - that that their choices are rational and capable of justification.

It is helpful that the revised guidance (paragraph 5.16) expands on the information that may be obtained from a number of stakeholders to inform decisions on localities e.g. data on alcohol-related mortality and hospital admissions. However, the guidance also states at this point that: *“the chief constable may be able to identify problematic areas where it can be demonstrated that crime, disorder and nuisance are caused by customers of a particular concentration of licensed premises and/or suggest areas in which the number of licensed premises or premises of a particular description are potentially approaching overprovision.”* This seems to require a link between the harm and the premises to be established at this point. We suggest that this be reworded to state that *“the chief constable may be able to identify problematic areas where levels or types of crime, disorder and nuisance are of particular concern.”*

Furthermore, paragraph 5.18 goes on to state that *“the board may wish to consider making an initial assessment by closely scrutinising the premises across the whole of their area, then proceed to determine those localities it proposes to examine.”* As such, it is unclear whether to first determine localities boards should focus on levels of harm, the concentrations of premises, or on both of these factors and the potential links between them.

The determination of localities has caused licensing boards high profile difficulties in recent years (e.g. appeals in Dundee and Aberdeen), and AFS is aware that there is still confusion about the correct process. Our understanding is that licensing boards should use alcohol-harm information (or potential alcohol-harm information) to initially identify localities and only then consider the number, type and capacity of premises in those areas.

The starting point should be that the licensing board should get figures (likely based on data zones or intermediate zones) covering information such as alcohol-related hospital admissions, alcohol-related deaths, alcohol-related crimes, police-reported incidents, and noise and other related nuisances. Other data could include information relating to fires, the numbers of people arrested under the influence of alcohol, domestic abuse incidents where one party was under the influence of alcohol, and children’s social work, criminal justice and young people in care cases where addiction is involved etc. An attempt should then be made to compare this to average statistics, such as average statistics for the police force area, average statistics for the health board, average statistics across the local authority area, and Scotland or UK wide. Based on this information, localities should then be identified, and then boards should proceed to consider the premises in those areas.

It would also be helpful somewhere within this section to clarify that it would be legitimate for a board, when determining overprovision, to have cognisance of the fact premises in some “localities” may be visited by people from different areas or “localities” within the board area, and determine whether there is overprovision in that wider area.

It must also be remembered that “locality” in this section only applies to the ground of refusal for overprovision, but a different area or “locality” could be used by boards in the broader context of their policy when considering any of the other licensing objectives, if they are to be promoted by other means e.g. it might be decided that in order to protect and improve health that a larger locality would be appropriate in which to restrict opening hours, than the area used to determine whether or not there was overprovision in a smaller area for public nuisance reasons. This is an important point that should be clarified by the guidance, either here or within another relevant section (most likely the section on the licensing objectives).

## **Matters for the Licensing Board to have regard to when considering whether there is overprovision**

With regard to the capacity of licensed premises, the guidance correctly identifies that the definition of operating capacity for on-sales and off-sales is set out in section 147 of the Act. However, although contained in the legislation, this definition is insufficient to accurately capture the capacity of off-sales premises and modern modes of alcohol sale and supply. As such, it should be considered how the guidance might help to address areas of ambiguity and better reflect current patterns of sales and consumption.

For example, section 147 of the Act designates off-sales capacity to mean only those parts of premises given over to the display of alcohol for sale. AFS believes that it is questionable whether this definition of capacity is meaningful in any way. Most alcohol is now sold from off-sales, particularly supermarkets. The capacity of such off-sales when applying the above definition is largely irrelevant, since the volume of alcohol sold depends only on the ability of the shop to restock the shelves as soon as possible. Ideally, assessment of capacity should be based on actual or projected sales data, and the requirement for premises to provide boards with confidential sales data is supported by many licensing stakeholders.<sup>20</sup>

Similarly, the definition of capacity set out in section 147 of the Act does not appear to allow for an assessment of the capacity of premises connected with online alcohol sales - a continuously evolving and rapidly expanding area of retail. In order to provide this service, a premises licence is required for the premises from which alcohol is despatched to the purchaser e.g. a storage warehouse. These types of premises do not usually have any part of the premises given over to the display of alcohol for sale. As such, the guidance could provide clarity on how boards could or have approached this issue.

### ***Other matters as the Licensing Board thinks fit***

Paragraph 5.24 pertains to 'other matters as the licensing board thinks fit'. This is a highly ambiguous term and, as such, it would be appropriate for the guidance to provide an indication of what types of matters it is envisioned are more likely be taken into account. The revised guidance identifies only that 'other matters' may include the relevant circumstances in the area or the proximity of specific types of premises, such as facilities for vulnerable adults with alcohol addiction issues. While this is clearly an important consideration, additional examples of 'other matters' should be provided. AFS believes that, in particular, consideration of inequalities (which also has relevance to the board's functions under the Act) could usefully be included here.

Inequalities is a particularly important consideration in relation to overprovision. There is a stark inequalities gradient to alcohol harm, and a growing awareness that the impact of harmful drinking and alcohol dependence is much greater for those experiencing the highest levels of deprivation. For example, people living in our most deprived communities are eight times more likely to die or be admitted to hospital due to alcohol use than those in our most affluent communities.<sup>21</sup> Similarly, areas of high deprivation can have extremely high rates alcohol-related fires and crime rates. Research examining the association between the density of alcohol outlets and neighbourhood-level income deprivation in Scotland has also found that there are 40% more licensed premises in the

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<sup>20</sup> Alcohol Focus Scotland (2017). *Taking Stock: Views and experiences of alcohol licensing in Scotland in 2016/17*: <https://www.alcohol-focus-scotland.org.uk/media/287043/Taking-Stock-Report.pdf>

<sup>21</sup> Monitoring and Evaluating Scotland's Alcohol Strategy. Final Report. Beeston C et al: NHS Health Scotland, 201

most deprived areas of Scotland than the least.<sup>22</sup> By taking account of evidence of inequalities, boards are able to meaningfully consider how different communities are impacted differently by alcohol, and formulate an appropriate policy response.

### **Duty to consult and gather evidence**

Paragraph 37 of the original guidance clarified that *“the duty to consult is subject to the over-arching obligation set out in Section 6(3)(b) of the Act. This means that the Licensing Board is also required to consult the Local Licensing Forum”*. The revised guidance simply states that *“Licensing Boards should be aware that the consultees listed above differ slightly to those listed in their duty to consult on their licensing policy statement or supplementary licensing policy statement”*. In contrast to the original guidance, the revised guidance implies that forums do not require to be consulted regarding overprovision. We are unclear if an evolved interpretation regarding over-arching duties under s6(3)(b) has led to this change, but the very least, consulting with the local licensing forum (and by extension their full group of constituent members) would be good practice. As such, the original wording should be reinserted or a statement included encouraging boards to consult with their local licensing forum.

### **Assessing overprovision**

Paragraph 5.30 states that *“the results of all evidence gathering and the consultation should be evaluated to identify robust and reliable evidence which suggests that a saturation point has been reached or is close to being reached.”* However, it is questionable whether it is accurate for the guidance to concentrate on whether *“a saturation point has been reached”*, because this is not the only way in which overprovision can be judged.

AFS considers that overprovision could be judged against the licensing objectives; for example it might be said that there are too many licensing premises in a locality to seek to protect and improve public health, which could be a different number from the number relevant to preventing crime and disorder or preventing public nuisance. It is important that boards have regard to overprovision in different ways and for different purposes, and this is not currently reflected in the guidance.

The fundamental principle that underpins this entire section of the guidance is that there must be a sound basis for a policy, both in fact and from advice given by professionals. However, this would apply equally to any consultation about any other policy matter in relation, for example, to suitability of localities, policy on opening hours etc. AFS is concerned that, as this point is emphasised exclusively in relation to this section of the guidance, there is an implication that overprovision is subject to a stronger legal test than other aspects of boards' policies. In reality, all elements of boards' policies should have a sound basis for them, and this should be better reflected in the guidance.

Paragraph 5.31 outlines the various factors and types of evidence which the licensing board may take into account in their assessment. It would be beneficial to outline in more detail here the types of evidence that it is imagined would be applicable. For example, this paragraph could be expanded to include things like published alcohol data, qualitative information/evidence, research and

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<sup>22</sup> Shortt, N. K., Tisch, C., Pearce, J., Mitchell, R., Richardson, E. A., Hill, S., & Collin, J. (2015). *A cross-sectional analysis of the relationship between tobacco and alcohol outlet density and neighbourhood deprivation*. BMC Public Health, 15(1): 1014.

academic studies etc. Boards have taken this type of data into account when undertaking their most recent overprovision assessments. However, there appears to be a perception amongst stakeholders that certain types of data (e.g. academic studies) are seen as being of lesser evidential value. It would therefore be beneficial to outline in the guidance whether there is any lawful basis for holding certain types of evidence to be greater value, or whether it is solely for the board to attach appropriate weight to the evidence received based on their own judgement.

The wording should be strengthened within paragraph 5.36, where it states of the overprovision assessment that: *“A licensing Board may wish to express this in such a way that interested parties are left in no doubt as to the reasons for adoption of the policy, specifying the relevant locality, and including information on the evidence upon which the Licensing Board relied and the material considerations which were taken into account.”* In the interests of transparency this is essential. The original wording of the guidance was that this was something boards ‘should’ as opposed to ‘may wish to’ do, and the final version of the guidance should adopt the former approach.

During the guidance redrafting process, a sentence was inserted into in this section of the guidance which appears to have now been removed: *“The Board’s consideration of overprovision would not be confined to considering only numbers and capacity but could take account of other factors too”*. This text should be reinserted as it appeared to be one of the most important and helpful inclusions in the new draft, making explicit that overprovision is about much more than just numbers, types and capacity of premises. It also reflected the changes to the definition of overprovision introduced by the Air Weapons and Licensing (Scotland) Act 2015.

As commented above, overprovision can be applied in different ways and for different purposes. It could be used in order to shape the future development of the licenced trade within specific areas (e.g. by encouraging/discouraging particular types of premises). For example, in order to promote the objectives and reduce harm, a hotel may pose less risk than a large supermarket in an area already containing several off-sales. However, it could also be used as a means to control the overall availability of alcohol by creating a presumption against any increases in the numbers of licensed premises. For example, this could be appropriate where a community is experiencing extremely high levels of alcohol-related harm, even if there are relatively few or no licensed premises within that community. The guidance should account for this distinction and make clear that consideration of overprovision is not solely restricted to an assessment of the numbers/capacities of premises. Ultimately, boards have flexibility of approach to respond to particular local circumstances, and may wish to take different approaches depending on any particular problems identified in their area.

#### **- Causal link**

AFS fully recognises that the principle of causation is central to licensing law, as it is to the legal system in general. As detailed above, many stakeholders, particularly those without a legal background, have highlighted difficulties in understanding the complexities around establishing the evidential basis for demonstrating a ‘dependable causal link’ in the context of licensing. One issue stakeholders would seem to welcome clarification on is understanding how the concept of a causal link (when can seem to be interpreted that there must be definitive ‘proof’ that A causes or will cause B and therefore seems more in keeping with the criminal standard of proof) sits within in the broader civil law standard of proof of ‘balance of probabilities’ that applies in licensing.

Our analysis of the most recent statements of licensing policy has also identified that when using the existing guidance, boards have approached their most recent assessments of overprovision differently, and have applied very different standards of proof. In some areas, boards have

commented in their policies that they were unable to establish a causal link because, for example, they believed that: *“The harm caused by alcohol... is not a direct and sole consequence of the number of premises but is a result of a wider, complex set of factors”*. Another states that: *“Whilst there is evidence of the correlation that evidence falls short of establishing the causal link that is required by the regulatory framework to justify overprovision”*. This illustrates very high standards of proof are being applied. .

The perceived need to establish a causal link between identified harms and the premises within a locality has also proven to be problematic, with one policy stating that: *“due to the rise in online ordering and delivery of alcohol from premises distant from the customer’s address... it was not possible to find a causal link.”* It will be essential that the guidance revision accounts for this, and provides for an alternative approach.

One board (finding no overprovision) states in its policy that: *“The evidence provides no causal links to any specific licensed premises, but does corroborate that there is an overall link to problems associated with availability of alcohol via off-sale premises.”* This again raises the question of what constitutes evidence of a causal link, and highlights difficulties linking evidence of harms to specific premises.

Furthermore, in the absence of sales data, it is unknown how much alcohol is actually sold by each premises or in each locality. The lack of alcohol sales data has proven to be problematic in some areas, with one board stating in its policy that: *“in the absence of any requirement for retailers to collect and make available alcohol sales figures there can be no direct evidence of a correlation between capacity, sales and consumption.”*

{NB: AFS has not referenced the names of specific boards/policies in this part of our response; the policies quoted are intended to be illustrative of the difficulties that many boards have encountered across the country, and we are not making an assessment of the validity of any specific board’s approach.}

It will therefore be critically important that the revised guidance clarifies exactly how causal link applies in a licensing context, differentiates between the various types of situations where it may apply, and outlines how it might be evidenced and the standard of proof that applies.

However, it is of serious concern that there are now various explanations of causal link now contained in the revised guidance, which are inconsistent. These explanations appear contradictory, are open to interpretation, and are likely to have different implications for both the overprovision assessments and decisions at an application level. AFS is deeply concerned that consequently, as currently drafted, the revised guidance will only serve to cause further confusion and inconsistency.

- Paragraph 5.32 highlights that the overprovision assessment must be based on credible evidence of a causal link between the engagement of one or more of the licensing objectives and a concentration of licensed premises or of licensed premises of a particular description in a locality.
- Paragraph 5.36 states that if a licensing board comes to a conclusion that there is a causal link between the alleged cause and the alleged alcohol related harm in a locality to such an extent that it would be clearly inconsistent with any of the licensing objectives, the board should include details of this in their licensing policy statement.
- Paragraph 5.37 comments that *“for a licensing board to make a finding that a harm will arise because of or in consequence of the sale of alcohol, there must exist a causal link between the alleged cause and the alleged harm.”*

- Paragraph 5.50 refers to a “*dependable causal link between the operation of licensed premises in a locality or localities and relevant harms*”.

The explanations provided above are all likely to all pose issues we know boards struggle with, such as trying to relate harm to specific premises or how they can take account of fact people may buy alcohol in other areas. In relation to paragraph 5.37, which appears to provide what is intended to be the definitive definition of causal link, the terms ‘*alleged cause*’ and ‘*alleged harm*’ are too vague. For example, this could refer to alcohol in general, the availability and/or sale of alcohol, the concentration of premises, the operation of premises, or some combination of these. However, this paragraph also seems to directly link harm to the sale of alcohol. Given the potential for ‘sale’ to be interpreted literally as meaning alcohol sold only by those premises in that locality, ‘provision’ may be a more appropriate term.

Consideration must also be given as to what standard of proof applies to the overprovision assessment. Within licensing, causality needs to be seen within the context of it being an evaluative judgment, and not something that requires to be proved beyond reasonable doubt i.e. unlike a criminal court judgment, it is sufficient for a board to make a value judgement. As such, AFS welcomes that an explanation of the ‘balance of probabilities’ has been included within paragraph 5.37. As highlighted above, understanding when the balance of probabilities tips in favour of something being considered ‘causal’ is a clarification that is essential for supporting stakeholders.

In real life it is very difficult to establish clear cause and effect relationships in areas of social interaction due to the various mediating and confounding factors that cannot be completely controlled for. As such, the guidance should make clear that licensing boards have to proceed on the basis of what is likely, probable or reasonable based on the evidence. This is the appropriate standard of evidence for licensing decisions and is the test that has been applied by the courts to date.

In addition, there may be general reluctance to declare overprovision, even in areas experiencing extremely high levels of harm, if it is identified that the area has a relatively low number of licensed premises. The guidance should make clear where there is concern about areas experiencing high levels of harm, and that on the balance of probabilities a board considers that adding extra licensed premises or capacity is more likely than not to make that harm worse, that overprovision may be an appropriate response in such circumstances

The examples given above all serve to demonstrate the complexity of this issue, and why it is of the utmost importance that the guidance is absolutely clear about what exactly it is boards are required to evidence a causal link between; AFS believes that this should be a link between the availability of alcohol and the identified harm or potential harm.

Care should also be taken ensure that any references to the licensing objectives are consistent in this section of the guidance e.g. in the above examples, reference to “*the engagement of the licensing objectives*” is likely to mean something very different to “*clearly inconsistent with any of the licensing objectives*”. It will be important that the guidance makes clear that it is the potential for undesirable consequences which has to be tackled via overprovision; the cumulative effect of more and more licences being granted in a locality will have an effect on life in that area even if one could not lay the blame on one single operator. If a Board considers there is at least potential for, or a reasonable basis for, concluding that there will be a risk of adverse impact on the objectives (should more premises licences be granted) it can come to the view that there is a state of overprovision.



Put simply, boards do not have to wait for problems to arise before they have enough evidence to implement an overprovision policy.

AFS welcomes that paragraph 5.34 highlights that consideration should be given as to whether aggregate information and evidence from a number of sources points towards a particular conclusion. However, it will be essential that the guidance further clarifies how this point relates to 'causal link'.

### **The effect of the overprovision assessment - overprovision as a ground for refusal**

Where the licensing policy statement contains a statement that the board considers there is overprovision then that creates a rebuttable presumption against the grant of an application. The guidance should make explicit that in such circumstances, where a policy is rational, lawful and evidential then the policy itself can become the dependable causal link. This approach allows for appropriate consideration of alcohol harm data and information at the assessment stage, without a requirement to then link that data directly to individual licenced premises at the application stage. It also makes clear that once an overprovision policy is in place it is not necessary to have to continually evidence 'causal link' each and every time an application is submitted in the overprovision locality. However, the revised guidance does not adequately or clearly express this, and the text we have underlined above should be included.

The overall summary of this section (paragraph 5.53) explains that when licensing boards subsequently consider applications, they must consider the most recent licensing policy statement, and that each application is to be considered on its own merits. While individual applications must be judged on their own merits, this does not mean that each decision has to be taken in isolation without reference to the geographic area and local context. The guidance should make more explicit that each application must be considered on its own merits and in accordance with the board's statement of licensing policy, and with consideration to the local context and potential impact of granting an application.

AFS welcomes recognition, within paragraph 5.44, that if a licensing board has determined that there is no overprovision in any locality, it is still entitled to refuse an application based on overprovision. However, we would again question whether it is accurate for the guidance to focus on whether "*a saturation point has been reached*", as this is not the only way in which overprovision can be judged.

### ***Rebutting the presumption***

Paragraph 5.45 of the guidance states that there may be exceptional cases in which an applicant is able to demonstrate that the grant of the application would not undermine the licensing objectives, or the objectives would not be undermined if the applicant's operating plan were to be modified or the grant of the licence was made subject to appropriate conditions. The description given here is questionable as it appears to imply that should an applicant be able to demonstrate that the licensing objectives would not be undermined, that would somehow reverse the rebuttable presumption. However, overprovision is a grounds for refusal in its own right (as borne out in case law). For example, it might not be possible to say that the grant of an application would undermine the objectives but nevertheless the refusal of an application would, on grounds of overprovision, still promote the objectives. Furthermore, overprovision serves to exist as a safeguard against the grant of a licence which might not undermine the objectives at the time but which will, over time, impact negatively on the objectives.

The guidance does go on to state in paragraph 5.47 that *“it is important to note that upholding the objectives is not something which, in itself, rebuts the presumption against grant created by overprovision”*. This statement – although welcome - would appear to contradict the foregoing description in the guidance, and the points raised above should be incorporated into this section in order to provide further clarity on this issue.

## **Section 6. Local Licensing Forums (pages 31-37)**

The poor functioning of forums was a key topic of discussion at the regional licensing seminars. Participants believed that forums should play a critical role in keeping the operation of the licensing system under review by providing the mechanism for public engagement and scrutiny, and they were also identified as being a key mechanism for giving communities greater input to licensing.

However, there were many comments about forums lacking clarity and being unsure of their role and remit. It was reported that in some areas, competing interests represented on the forum resulted in difficulties reaching consensus on important issues. It was also reported that forums lacked any real powers and were therefore regarded as tokenistic. The most common area of concern identified was a lack of resources, support and training for forums. Additionally, a number of other problems were identified as preventing forums from fulfilling their role in the licensing system, including poor communication between forums/boards/communities, and difficulties attracting and retaining members. As such, the revised guidance should seek to support good practice in relation to the functioning of forums, and aim to address some of the issues outlined above.

### **Role of Local Licensing Forums**

Paragraph 6.5 of the revised guidance now helpfully highlights that local licensing forums may make suggestions as to the review of policy or procedural matters, and provide feedback on the various licensing board reporting functions. The review of the functions reports identified that twelve of the reports include information about the local licensing forum. Some describe the forum as functioning well and include information about activities undertaken by the forum (e.g. attending at licensing events), and the types of issues it had brought to the board’s attention (e.g. licensed hours). In particular, many of the reports highlight that the local forum had played an important role in providing recommendations and advice regarding the production of the board’s policy statement and overprovision assessment.

In order to support this good practice, the guidance should make more explicit mention of some key tasks for the forums, such as assisting the board with the preparation of the statement of licensing policy and overprovision assessment (e.g. by evidence gathering, analysis, consultation etc.). In addition, the guidance could suggest that forums review the annual finance and functions reports, and provide feedback to the board. This would help give forums more specific suggestions of work programmes and tasks. Where forums have undertaken these types of activities it has clearly been welcomed by boards, and it is appropriate that the guidance should seek to encourage this good practice.

AFS welcomes that the guidance (at paragraph 6.6) places a stronger emphasis on the need for ongoing and regular communication between the licensing board and the local licensing forum, and that the practical arrangements in support of this should be agreed between and board and the forum. It would be helpful for the guidance at this point to provide suggestions of the types of communication arrangements that could be put in place.

### **An inclusive approach to involvement**

The revised guidance highlights that an innovative approach should be taken to engaging local communities, and provides some suggestions as to how this might be achieved. AFS would recommend that feedback on this aspect of the guidance is sought from community development organisations, who would be well placed to offer up-to-date and practical advice regarding how community engagement and input might best be supported, including regarding the publicity tools that may be most effective. The publicity tools currently cited appear somewhat dated and do not, for example, include any reference to social media or online forums.

### **Achieving a culture of participation**

This section of the guidance has a particular focus on ensuring that forum meetings are managed in an effective way, but it should also provide practical suggestions of what forums may do if they experience difficulties attracting/attaining members.

Many of the functions reports describe challenges such as forums not achieving quorum and difficulties attracting new members. The membership of forums can also sometimes become skewed towards a particular type of stakeholder, and are not always representative of the local community. For example, one of the functions reports explains that despite attempts to encourage applications to join the forum, there is a heavy imbalance toward council and health officials, with little engagement from the trade or general public.

Potential actions to address these types of challenges could be helpfully incorporated into the guidance. Examples of remedial actions provided in the functions reports include amending the forum's constitution and making pro-active efforts to encourage applications. At the regional licensing seminars, it was frequently commented that it was difficult for forums to attract and retain members as meetings were often held during working hours, and the guidance could therefore suggest that forums alternate the times of meetings. In addition, it could be suggested that forums conduct regular surveys of their membership to assess whether people feel satisfied that they have had opportunities to participate and, if not, whether they have any suggestions of what could be improved.

The revised guidance should also provide advice regarding how conflicts within forums might best be managed, particularly where a forum experiences ongoing difficulties reaching consensus to the extent that it impacts on its ability to function effectively. This could include developing a procedure for how such situations will be handled which is agreed in advance by all members.

### **Section 7: Licensing Standards Officers (page 38-42)**

AFS believes that LSOs would be best placed to provide comment on this section of the guidance. However, we note that the main changes appear to be in relation to accountability. Specifically, information has been removed from the guidance pertaining to LSOs being accountable to their employers, the public, the trade, and the bodies to which they report. It is unclear why this information has been removed, and we would recommend that the guidance continues to outline lines of accountability.

### **Section 8: Premises Licence (page 43 – 69)**

As a general comment, this entire section of the guidance should be reviewed to ensure that it has appropriately accounted for changes such as the introduction of the 'fit and proper person test'. This introduces new grounds for refusal, revocation, and review. Boards can now consider a wider

range of information when assessing applicants for premises licenses, including any police intelligence and associations deemed unsuitable. The police and others can also submit any further information in relation to the applicant that they believe relevant to the application. It is a ground for refusal if the licensing board considers that the applicant is not a fit and proper person to be the holder of a licence, and similarly this is a new ground for seeking a review of a premises licence.

This section also appears to mark a change in the tone, style, and emphasis of the guidance which continues into subsequent sections; it has a very strong focus on legal considerations and contains many references to different pieces and parts of legislation. Many of the sub-sections are also written in ways that appear complex and are difficult to follow. It should be borne in mind that many people who will rely on the guidance, including most licensing board members, are lay readers without legal expertise, and it is essential that the guidance is not written in such a legalistic way as to prohibit understanding. This section (and subsequent sections) would greatly benefit from being simplified, put in plain English, and having a reduction in the number of references to legislation within the body of the text.

### **Operating plans and layout plans**

Within paragraph 8.2, the guidance should make clear that details of any planned alcohol delivery service (that will operate from the premises concerned) be specified in the operating plan. Similarly, the guidance could clarify that should a licence holder allow a BYOB event to take place on their licensed premises, they must state this in the 'activities' part of their 'operating plan'. This is an area of ambiguity that the guidance can help clarify.

### **Notification of application**

It is helpful that the guidance (paragraph 8.12) outlines who must be given notice of an application by the board. AFS is aware of the recent Scottish Government consultation on the Licensing (Procedure) (Scotland) Regulations 2007, and this may have implications for the public notifications section of the guidance. Nonetheless, the guidance should highlight that the applicant is also required to display a notice at or near the premises to which the application relates, in a place and at a height where the notice can conveniently be read by the public.

### **Period of effect of a premises licence**

The policy statement review has identified that many boards are setting out their approach to licences ceasing to have effect within their policies; as there is no statutory definition of "cease to have effect" it has been necessary for individual boards to give consideration to this issue.

In some areas, should a premises close for longer than a specified period (e.g. three months, six months etc.), the board will then expect the licence holder to advise it in writing, and if the premises is closed for a specified period without reasons being given then a review will be instigated. In other areas, if premises have been closed for over a certain period (e.g. 12 month, 18 months) the board will consider that the premises licence has ceased to have effect. In those circumstances, the premises would require a new premises licence to enable alcohol to be sold.

As boards are approaching this element of their policies in different ways, with some policies making no reference at all to licences ceasing to have effect, it would be helpful for the guidance to provide an outline of which approaches may be most appropriate. To promote consistency and transparency, it should also be recommended (either here or within Section 4 of the guidance) that policy statements detail the board's approach to 'ceasing to have effect.'

## Objections and representations

AFS welcomes that the guidance (paragraph 8.18) recognises that in practice many people who wish to object may find it difficult to present material that fits in with the given requirements, and that it may be useful for them to speak to their local Licensing Standards Officer beforehand. It would be helpful at this point for the guidance to suggest that licensing boards promote/signpost people to available supports and resources, as well consider providing materials themselves (e.g. pro formas for objections, with sections relative to each of the necessary requirements, have already been developed by several boards). The guidance could also emphasise that should a person decline to attend a hearing, it should not detract from the strength of written representations/objections, especially considering that attendance will not be practicable for some people, while others may not feel confident enough to attend in person.

## Local licence conditions

The policy statement review has identified that there are large variations in the extent to which licensing boards are setting out local licence conditions within their policies. There are clear benefits to including conditions within the policies, and the guidance should emphasise these benefits e.g. it provides a clear indication as to what conditions applicants could be subject to or could volunteer themselves; it provides people making representations/objections with suggestions of the kinds of conditions they can suggest; and it provides an important indication of the ways in which the board can/will promote the objectives.

The example conditions provided in the guidance should be updated to incorporate some of the new and more innovative conditions that boards have developed to better promote the objectives, or in response to emerging concerns. It is also of note that none of the conditions given currently relate directly to the public health objective. Some example of conditions from the new policies include:

- *“The licence holder must have in place a duty of care policy to ensure a standard approach is taken when any patron appears to be displaying signs of excessive intoxication.”*
- *“An ATM should not be located in any part of the premises where alcohol is available for purchase and consumption, so that a customer wishing to use the ATM must cease drinking in order to do so.”*
- *“All sales of alcohol must be entered through a till which has a facility to print itemised sales. Any such till receipt must specify the date, time, quantity and cost of any such sale. This facility must be in full working order at all times. Any such print out must be available when requested by Police or the Licensing Standards Officer.”*
- *“Children and young persons are not permitted to be present at or in the immediate vicinity of any bar or bar counter.”*
- *“A robust age verification policy requires to be in place for deliveries that include alcohol and must be strictly adhered to by all delivery staff, incorporating a Challenge 25 approach. Documentation presented as verification of age requires to be of a type prescribed in the Licensing (Scotland) Act 2005 or Regulations under that Act as suitable for that purpose.”*
- *“If the premises licence holder or their staff have such concerns about the level of intoxication of the accompanying adults [of children] they should not require the group to leave the premises. They should contact the police without delay to report the matter.”*

## Pricing of alcohol

### ***Minimum pricing of alcohol***

AFS would recommend that the text be simplified in this sub-section of the guidance. For example, where it states (paragraph 8.78) that *“the minimum price is to be calculated according to the formula set out in paragraph 6A(3) of schedule 3 of the Act (and paragraph 5A(3) of schedule 4 of the Act in respect of occasional licences),”* it may be more helpful and straightforward to simply include the formula, and if desired provide a reference to the appropriate section of the legislation within a footnote.

### ***Variation of pricing of alcoholic drinks***

As above, this section could be simplified, and in addition, reference to case law (Mitchells & Butlers Retail Ltd v Dundee City Licensing Board) should be amended to simply outline the principle that this case law conveys, with reference to the case law being included as a footnote if required.

### **Internet and mail order sales**

As previously commented, this is a continuously evolving and rapidly expanding area of retail. The guidance should, therefore, encourage boards to set out their approach to online retailers and deliveries within their policies, including by imposing relevant conditions.

The policy review shows that the majority of boards are starting to do this, including by requiring (with local conditions) that when making an alcohol delivery certain checks should be carried out such as Challenge 25. In addition, some policies require 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.

In addition, the guidance should clarify that where a premises wishes to provide deliveries, and this was not originally included in the operating plan, this should be regarded as a major variation meaning that the board should be notified.

## **Section 9: Occasional Licence (page 70 – 75)**

### **Repeated Occasional Licences**

The guidance (paragraph 9.8) helpfully highlights that boards may wish to consider utilising appropriate processes that are capable of identifying instances where it appears that there is an attempt to operate premises under a series of consecutive occasional licences. However, the guidance should also suggest what such ‘appropriate processes’ might consist of.

In the most recent policy statements, a number of boards have adopted an approach whereby a certain number of back-to-back occasional applications (exceeding a set threshold) will require subsequent applications to be automatically referred to the Board for a decision. In other areas, boards have adopted a slightly different approach, focusing instead on the duration of time that occasional licences have been in force: *“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.”*<sup>23</sup>

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<sup>23</sup> Perth and Kinross Licensing Board (2018): *Statement of Licensing Policy 2018 - 2023*

During the regional licensing seminars concerns were also expressed regarding occasional licences being granted for events mainly or exclusively targeted at families where children would be present. In their latest policies, a number of boards have adopted a presumption against granting occasional licences where the event predominantly involves children. As such, AFS would recommend that the guidance suggests boards adopt a presumption against granting occasional licences where the event predominantly involves children. Boards - of course - still maintain their full discretion and flexibility to grant a licence in these circumstances, if minded to do so based on the merits of a particular application.

### **Conditions of occasional licence**

In relation to the sub-section on the 'conditions of occasional licence', the guidance could helpfully provide some practical examples of conditions that boards have imposed within their new policies. For example:

- *"The premises must have staff present who have undertaken Advanced First Aid training."*
- *"The Board reserves the right to attach a condition on the grant of Occasional Licences which will require any person selling, pouring or delivering alcohol in terms of the Occasional Licence to either hold a training qualification, or alternatively to be trained to the standard prescribed in the Licensing (Training of Staff)(Scotland) Regulations 2007."*
- *"The premises must have a written staffing policy. A personal licence holder must be nominated as being in charge at all times and to be on the premises, each bar must be supervised by a personal licence holder."*

### **Section 10: Personal Licence (pages 76-89)**

AFS believes that personal licence holders may be best placed to provide detailed comment on this aspect of the guidance.

However, as a general comment, and as with the preceding section, this section could be greatly simplified; it is one of the more convoluted and hard-to-follow parts of the revised guidance, with frequent references to the Act e.g. *"a sale of alcohol by a non-qualified person (contrary to paragraph 6(1) of schedule 3 of the Act) may make a (non-present) licence holder responsible under section 1(3)(b) of the Act for allowing alcohol to be sold"* (paragraph 10.12). It would be more helpful for the guidance to simply clarify what this means in practice.

The sub-sections dealing with 'determination of personal licence application', 'renewal of personal licence', 'licensing qualifications/training', and 'review of the personal licence' are all particularly difficult to follow, and appear to contain a lot of unnecessary detail.

This entire section of the guidance should also be reviewed to ensure that it has appropriately accounted for changes such as the introduction of the 'fit and proper person test'.

### **Section 11: Control of Order (pages 90 -97)**

This part of the guidance used to make clear that it was intended to assist police officers and licensing boards in interpreting and implementing Part 7 of the Act. It also highlighted that good practice should involve an effective working liaison, and system of communication between the police, Licensing Standards Officers and managers of licensed premises. This information has now

been removed. However, AFS is aware that the police and other licensing stakeholders frequently refer to the importance of (and improvements in) relationships between the trade and police.<sup>24</sup> As such, we assume the information that has been removed remains relevant and this should be reinserted into the guidance.

### **Voluntary co-operation**

This sub-section of the guidance previously highlighted that the police should, whenever possible, seek the voluntary co-operation of licensees, premises users, and named premises managers in resolving incidents of disorder or potential disorder rather than move directly to a closure order. It is unclear whether this text has been removed from the revised guidance because it is no longer the preferred approach, or because this advice is no longer felt to be necessary. AFS would therefore suggest that input is sought from Police Scotland regarding this aspect of the guidance.

### **Section 12: Sale and supply of alcohol to children and young persons (pages 98 – 105)**

The new background to this section (paragraph 12.1 – 12.3) is welcome in that helps make clear that protecting children and young people from harm in licensing is not restricted to preventing people under the legal purchase age from being sold alcohol. However, the text could be shortened and simplified, in order to help make this point more apparent and clear.

In either this section or in a foregoing section, the guidance should also reiterate that boards set out their approach to children and young peoples' access to licensed premises. The review of the new policies found that many boards are setting out much more detail about their general expectations with regards to factors like when children normally be allowed entry, including the ages of children to be allowed entry, and the types, times and parts of premises to which children should have access.

In addition the guidance should provide some indication of the types of premises that may or may not be appropriate for children and young people e.g. AFS believes that premises that do not offer food of any description are highly unlikely to be a suitable environment for children. While boards would maintain full discretion to develop their own positions in this regard, having this information in the guidance could assist them with their deliberations and decision making.

### **Overview of offences**

Under the 'defences' sub-header, at paragraph 12.10, it is stated that it is important to recognise that the Act also creates a statutory requirement for all licensed premises to have an Age Verification policy – commonly referred to as a "Challenge 25" policy. AFS would recommend that this information is provided under its own or a different heading as this important information risks being overlooked if provided under the 'defences' sub-header.

### **Delivery of alcohol by or to a child or young person**

In relation to this aspect of the guidance, AFS would refer to our comments above relating to local conditions and online sales. Many boards now outline conditions specific to this issue in their policies, which could helpfully be included in the revised guidance e.g. *"a robust age verification policy requires to be in place for deliveries that include alcohol and must be strictly adhered to by all delivery staff, incorporating a Challenge 25 approach. Documentation presented as verification of*

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<sup>24</sup> Alcohol Focus Scotland (2017). *Taking Stock: Views and experiences of alcohol licensing in Scotland in 2016/17*: <https://www.alcohol-focus-scotland.org.uk/media/287043/Taking-Stock-Report.pdf>



*age requires to be of a type prescribed in the Licensing (Scotland) Act 2005 or Regulations under that Act as suitable for that purpose.”<sup>25</sup>*

### **Section 13: Other Offences (pages 106 – 110)**

With regards to the delivery of alcohol from vehicles (paragraphs 3.18-3.20), it should be highlighted that it is an offence to deliver alcohol to a person who is drunk (in addition to the sale of alcohol to a drunk person).

### **Section 14: Excluded and Exempt premises (pages 111 – 117)**

#### **Garages (Forecourt shops)**

In relation to garage forecourt shops (paragraphs 14.4 – 14.9), AFS is aware that this is an area of concern to stakeholders, but the information provided in this section is now extremely confusing.

Stakeholders have recently expressed frustration to AFS that licences are increasingly being granted for forecourts, even when there are multiple alternative retail outlets within a short walk of the premises. AFS is therefore concerned that this aspect of the legislation is not being implemented as intended, and believes that the guidance could help to address areas of ambiguity and promote consistency.

To help illustrate this point, in one recent case that was brought to our attention, a licence was granted for a garage premises which had a large superstore across the road, a smaller food retailer within 7 minutes walking distance, and another supermarket within a 10 minute walk. In such circumstances, it is very difficult to understand how one might conclude that local residents could become reliant to a significant extent on the garage as their principal source of petrol/groceries.

AFS is also aware of case law in this area, some of which has now been included in the guidance (BP Oil (UK) Ltd. v. the City of Glasgow Licensing Board and the City of Edinburgh Licensing Board). As stated previously, the case law points to how the legislation might best be interpreted (at this point in time), but it would be far clearer if the guidance outlined the key principles the case law conveys as opposed to simply quoting rulings and conclusions. The points that this aspect of the guidance is attempting to convey are not immediately apparent.

Nonetheless, it would appear that the crux of the case law cited is that a garage may be exempted if a number of persons see the premises in question as being their principal source for obtaining groceries or fuel, and would consider themselves materially disadvantaged were that shop not to provide those retail facilities. In addition, the case law indicates that the existence of alternative facilities within the locality does not in itself prevent a licence being granted.

This does not appear to convey much beyond what was included in the original guidance - namely that exemptions may apply if the local community is (or is likely to become) reliant on the premises as a principal source of either fuel or groceries. However, if it is held that this is no longer the case, then the guidance should seek simply to clarify what might constitute something as being the ‘principal source’ for obtaining groceries, and what might be considered as ‘materially disadvantaged’. It is also unclear whether this refers to fuel or groceries i.e. does this mean that if a garage is used as a principal source of fuel (but other groceries are available elsewhere) that this would be sufficient to meet the test?

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<sup>25</sup> Renfrewshire Licensing Board (2018): *Statement of Licensing Policy 2018 - 2023*

Furthermore, the guidance then goes on to reference different case law (Co-operative Group Ltd v Aberdeen City Licensing Board) but does not explain what the outcome of that decision was or how it aids interpretation of the legislative provisions.

The original guidance provided examples to illustrate how it was envisioned this aspect of the law may apply in practice, which seems like a more helpful approach e.g. in rural areas the garage may be a local community's only retail facilities, and in urban areas the garage may provide the only shop providing groceries for those who do not have access to transport. AFS believes that these examples serve well to illustrate the types of situation where it is envisioned this aspect of the legislation might apply, and appear to be more in keeping with the spirit of the legislation than the wording of the revised guidance. It is unclear whether they have been removed because the case law has moved the interpretation on and the guidance should seek to clarify this issue.