

Supplementary written submission from the Institute of Licensing

I refer to my attendance at the evidence session on 10 December 2014 in connection with the Air Weapons and Licensing (Scotland) Bill, on behalf of the Institute of Licensing. The Committee will recall that I was asked to present further written evidence in connection with the three technical areas I sought to discuss; namely:

The Licensing (Scotland) Act 2005 ("the 2005 Act")

- **Transfers of Licences**
- **The option to have a "site only" provisional licence**
- **The status of a surrendered licence**

Transfers of Licences

The provisions for transfers of licences are found in s.33 and s.34 of the 2005 Act. The provisions do not adequately deal with the reality of licensing practice and are in dire need of revision. As I said at the evidence session, if there was one aspect of the 2005 Act which every clerk and private practice solicitor and licensing practitioner would wish to see fixed it is this. The difficulties caused by the drafting in s.33 and s.34 are as follows:

The Act does not deal with dissolution of companies. As the Act is silent on this matter, the position of a licence held by a dissolved company is far from acceptable. In some areas this can involve having to seek a restoration of the company to the company register which requires a formal process in the sheriff court which can take many months and thus negate the business which may be trying to carry on at the premises. It may well be the case that company "A" holds the licence but company "B" is trading the venue. In such circumstances company B or the individual is left without a livelihood. A licence held by a dissolved company cannot, on the face of it, be transferred at all. Some licensing boards are willing to treat the licence as bona vacantia but this requires dealing with the QLTR who demand a significant payment to consent to allow the licence to be transferred. The Act should be amended to recognise dissolution, and provide a mechanism to deal with it such as allowing a person who has a right to occupy the premises transfer the licence absent any letter of consent.

The Act bears no relation to Scots property law or conveyancing: the purchase and sale or leasing of licensed premises is firmly embedded in Scots property law. The Act does not reflect common practice such as the completion of sales taking place dependent on the grant of a transfer of a licence. This can cause chaos when considering large corporate or commercial deals involving a large number of premises where transfer processing times vary across Scotland and it is impossible to agree on one "date" for the sale to complete, the "hive down" to occur, or whatever corporate/commercial transaction is being pursued. These difficulties are manifestly worse when the deal relates to properties in England as well as Scotland, such as a company buying pubs on both sides of the border. In many cases management companies or vehicles can be used and they end up being licence holders for a long period of time even though they do not operate the premises; this exposes them to liability and can jeopardise the commercial deal as a whole.

The Act does not provide for an interim or deemed grant: much of the issues over conveyancing could be fixed if the Act could allow a transfer to be "deemed granted" upon lodgement, pending final decision. This used to be the case under the Licensing (Scotland) Act 1976 where there was a two-stage "temporary" and "permanent" transfer; allowing the temporary transfer to take effect immediately whilst the permanent was considered. This is also the case in the English Licensing Act 2003 which provides for a transfer to take effect on lodgement of the application (s.43, Licensing Act 2003)

The Act is overly prescriptive in whom can apply: the Act lays down certain circumstances where only certain parties can make an application. This includes a simple case of where the "business" is to transfer (s.34(3)(d)). However, if the premises is not trading for whatever reason, is there in fact a "business" to transfer? Some licensing boards refuse to accept transfers where the business is not a "going concern". This is overly prescriptive and the Act does not explain what is meant by the "business" transferring. The answer to this is to allow ANY PERSON to make the application provided they can demonstrate they have a right to occupy the premises. Again we would draw your attention to the provisions of the English licensing system and sections 42 and 43 of the 2003 Act.

The 28 day deadline for lodgement is overly prescriptive: the Act imposes a 28 day deadline for the lodgement of transfers under certain circumstances ie when the licence holder dies, becomes mentally incapable or declared insolvent. This time period does not adequately reflect the reality of the timing particularly in relation to insolvencies. It is common for an insolvency practitioner to be appointed sometime well after the initial declaration of insolvency. The 28 days is already running at this point before the insolvency practitioner is even aware of it. 28 days might also be deemed to be too short notice for a family member dealing with a death or a person declared incapable. If the 28 days passes without an application being lodged, the licence "ceases to have effect" (see below re surrender). This quite often means a trading business and the jobs and livelihoods that the business represents is closed down because the licence is "lost".

The Act does not deal with certain types of insolvency: as mentioned above, the Act requires a transfer to be lodged within 28 days of the licence holder being declared insolvent. The only person who can apply for the licence is the appointed insolvency practitioner. But the Act does not cover every single type of insolvency.

The Act does not make it clear who is liable: who is liable for licensing offences where a transfer is pending? The Act does not deal with this. The outgoing owner may still be on the licence and therefore liable; yet he may no longer be involved in the premises. It is very common because of the issues noted above for a conveyancing transaction to settle meaning party A has no legal involvement in a premises at all; yet because the transfer of the licence to party B has not been approved, party A could still be liable for criminal offences, be cited to hearings and so on.

Provisional "Site Only" Applications

The 2005 Act does not allow a process which I referred to as a "site only" provisional licence. Provisional licences are sought where premises are yet to be built or under construction. Provisional licences must be accompanied by the same level of detail as full licences. This causes difficulties because having to lodge layout plans for a premises which may not even be built is not easy. It means that applicants are lodging fictitious plans just to get the application in the system. Applicants and developers need commercial certainty of knowing a licence will be granted before a multi-million pound investment crystallises and a premises is built. You cannot have a 5 story hotel, for example, being built without knowing the licence is secured. Applications therefore need to be lodged very early in the process. It is not easy for developers and applicants to secure funding from lenders or capital venture funds and so on unless the commercial certainty of the licence is secured. Yet the Act requires the same level of detail for a provisional licence as it does for a full licence.

The Institute of Licensing therefore suggests the Parliament should re-introduce the old "site only" provisional licence route. Under s.26(2) of the Licensing (Scotland) Act 1976 it was perfectly competent to have a new licence application lodged but without the full detail of layout. Planning would not be jeopardised because planning permission needs to be in place even where a provisional licence is lodged. A certificate from the planners must be lodged with any new licence application. The use of "site only" applications worked for 30 years under the 1976 Act without falling into disrepute. The licensing board would still see the general location of the premises, they would still see the operating plan detailing matters such as trading hours, activities, description of the premises, and so on. In our submission the "site only" provisional licence would be the exact same existing 2005 Act process but without having to lodge a detailed layout plan.

Surrendered Licences

Section 28 of the 2005 Act says that a licence which has been surrendered "ceases to have effect". But that Act does not state what that means. Is it irretrievably gone, or is it in the ether, capable of being brought back to life? Under the 1976 Act the licences could be brought back to life by way of a transfer application. It would be useful to have the 2005 Act allow this to occur. Licences can be surrendered out of spite. There are numerous examples of this across Scotland; where in a landlord/tenant relationship the tenant holds the licence and surrenders the licence to spite the landlord following a fall-out over unpaid rent or any other dispute they may be having. This leaves the landlord with a public house or other type of premises with no licence and the only way back is to apply for a new one. But that is no mean feat as grandfather rights would no longer apply meaning the premises would be subject to modern building regulations and in some cases might not be capable of getting a licence back due to the exorbitant cost of works. Take a Scottish castle or large country house which is licensed. If that licence were surrendered it may be very difficult for that premises to meet current regulations and therefore no new licence could be granted. In addition to this, the premises may be situated in an overprovision zone meaning they are faced with a rebuttable presumption against getting the licence back, and just because the premises held a licence before does

not mean a new one will be granted. And all this because the licence was surrendered out of spite.

Under the 1976 Act it was accepted that a surrendered licence could be re-activated via a transfer: see *Tong v Glasgow District Licensing Board* 1992 GWD 19-1125 Sh Ct. That is what the Institute would prefer to see occur under the 2005 Act.

In Summary

In respect of all three of these technical issues, the Institute is aware that the Law Society of Scotland Licensing Sub-committee has offered to draft provisions and submit these drafts to Parliament for consideration. The Sub-committee is a body representative of both local authority clerks and private practice solicitors. The Institute strongly suggests that Parliament invite the Sub-committee to provide the proposed drafting to cure the various defects which are noted above.

Can I offer my thanks again to the Local Government and Regeneration Committee for their willingness to allow me to raise these concerns on behalf of the Institute, and licensing practitioners generally. If further evidence is required either by way of written submission or in person at the Parliament I will be happy to make myself available.