

## APPENDIX 4 – LEGAL TEST

### Licensing (Scotland) Act 2005 Part 4 & Sections 56-61 and Schedule 4 Application for an Occasional Licence

#### LEGAL TEST

The legal test is set out in Section 59 of the Act.

- (1) An occasional licence application received by a Licensing Board is to be determined in accordance with this section
- (2) If the Board has not received any –
  - (a) ...<sup>1</sup>
  - (b) report from a Licensing Standards Officer under Section 57(3), or
  - (c) notice of objection or representation under Section 58(1),Relating to an application, the Board **MUST GRANT** the application unless the application must be refused under Section 56(6A)<sup>2</sup>, 64(2)<sup>3</sup> or 65(3)<sup>4</sup>.
- (3) In any other case, the Board **MUST** consider whether any of the grounds for refusal applies and,
  - (a) If none of them applies, the Board **MUST GRANT** the application, or
  - (b) If any of them applies, the Board **MUST REFUSE** the application.
- (4) The Board **MAY** hold a hearing for the purposes of determining any application which is to be determined in accordance with subsection (3).
- (5) Where the Board does not hold a hearing, the Board **MUST** ensure that, before determining the application, the applicant is given an opportunity to comment on any such notice or report as is referred to in subsection (2).
- (6) The grounds for refusal are –
  - (a) that the premises to which the application relates are excluded premises
  - (b) that the application **must** be refused under section 56(6A), 64(2) or 65(3),
  - (c) that the Licensing Board considers the granting of the application would be inconsistent with one or more of the licensing objectives,
  - (d) that, having regard to –
    - (i) the nature of the activities proposed to be carried on in the premises to which the application relates,
    - (ii) the location, character and condition of the premises, and
    - (iii) the persons likely to frequent the premises

<sup>1</sup> Repealed by the Criminal Justice and Licensing (Scotland) Act 2010

<sup>2</sup> Granting the application would result in the occasional licence limit being exceeded

<sup>3</sup> Granting the application would result in 24 hour opening

<sup>4</sup> Granting the application would exceed the maximum off sale core hours of 10am – 10pm

The Board considers that the premises are unsuitable for use for the sale of alcohol

(7) ...<sup>5</sup>

(8) In determining any application which is to be determined in accordance with subsection (3), the Board **MUST** take into account any report from a Licensing Standards Officer under section 57(3).

There are five licensing objectives which underpin the 2005 Act. These are:

- **Preventing crime and disorder**
- **Securing public safety**
- **Preventing public nuisance**
- **Protecting and improving public health, and**
- **Protecting children and young persons from harm.**

The Licensing Board's policy statement must promote these licensing objectives and sets out how the Board expects applicants to comply with and promote the objectives. The following parts of the policy are relevant to the consideration of applications for premises licences and provisional premises licences:

- Appendices 1 and 2 to the Main Policy Statement
  - Supplementary Policy 4 – Operating Hours
  - Supplementary Policy 6 – Licence Types and Board Procedures
  - Supplementary Policy 7 - private members clubs
1. A Licensing Board MAY, on the application of any of the persons mentioned in paragraph 2. below, made in relation to any premises (other than licensed premises) within the Board's area, issue to the applicant a licence (referred to as an "occasional licence") authorising the sale of alcohol on the premises.
  2. Those persons are –
    - (a) the holder of a premises licence,
    - (b) the holder of a personal licence, and
    - (c) a representative of any voluntary organisation.
  3. The Act and the Occasional Licence (Scotland) Regulations 2007 prescribe the format of the application for an occasional licence and the format of the licence itself.
  4. **An occasional Licence has effect for such period of NOT MORE THAN 14 days** as the Licensing Board may determine.
  5. A Licensing Board MAY issue an occasional licence in respect of any one voluntary organisation in any period of 12 months –

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<sup>5</sup> Repealed by the Criminal Justice and Licensing (Scotland) Act 2010

- (a) **not more than 4** occasional licences each having effect for a period of **4 days or more**, and
- (b) **not more than 12** occasional licences each having effect for a period of **less than 4 days**,

Provided that, in any period of 12 months, the total number of days on which occasional licences issued in respect of the organisation have effect **does not exceed 56**.

### **Private Members Clubs and Occasional Licences**

- 6. The Licensing (Clubs)(Scotland) Regulations 2007 provide that despite the fact that a premises licence is in effect in respect of premises used wholly or mainly for the purposes of a club which falls within the description of “licensed premises” it does not prevent an occasional licence being granted in respect of the premises.
- 7. The provisions set out for voluntary organisations at paragraph 5. above, also apply to Private Members Club in relation to occasional licences.
- 8. For any period during which an occasional licence has effect in respect of those premises, the conditions of any premises licence issued in respect of the premises are NOT to have effect.

### **Notification of Applications**

- 9. The Board **MUST** give notice of the application to the Chief Constable and any Licensing Standards Officer for the area. 21 days are allowed for responses.
- 10. The Board can waive the period of 21 days to such shorter period of not less than 24 hours as the Board may determine (This is normally done for Funeral Teas)
- 11. Applications for occasional licences **MUST** be advertised on the Board’s website. Members of the public have 7 days<sup>6</sup> in which to lodge a representation or objection (unless the circumstances in paragraph 10 above apply in which case no advert is required).
- 12. A Licensing Standards Officer may submit to the Board a report setting out the Officer’s comments on the application.
- 13. Any person may be notice to the Licensing Board –
  - (a) object to the application on any ground relevant to one of the grounds of refusal, or
  - (b) make representations to the Board concerning the application, including in particular, representations

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<sup>6</sup> Paragraph 18 The Licensing (Procedure)(Scotland) Regulations 2007

- (i) In support of the application, or
- (ii) As to conditions which the person considers should be imposed.

14. Where the Board receives notice of an objection or representation the Board **MUST**

- (a) give a copy of the notice to the applicant, and
- (b) have regard to the objection or representation in determining the application.

**Determination**

15. The Board’s current Scheme of Delegation make the following provisions for determination of applications for occasional licences:-

2.3	Occasional Licence or Extended Hours ("Fast Track")	S.57(4), S,69(4) and Schedule 1, Paragraph 10(1)	Determining whether an application for an occasional licence or occasional extension requires to be dealt with quickly. <b>Clerk in consultation with the Convenor</b>
2.4	Occasional Licence (Objection/Contrary to Policy)	S.59, and Schedule1, Paragraph 10(1)	Determining whether or not the Licensing Board will hold a hearing to determine an application for an occasional licence where an objection, representation or a notice recommending refusal from the Chief Constable or Licensing Standards Officer or where the application is contrary to the terms of the Board’s Policy <b>Clerk in consultation with the Convenor</b>
2.5	Occasional Licence (Objection)	S.59 and Schedule 1, Paragraph 10(1).	Where a decision has been taken by the Convenor and Clerk not to hold a hearing in terms of Section 59(4) of the Act, the determination of the application following an opportunity for the applicant to comment on the representation in terms of Section 59(5) <b>Clerk in consultation with the Convenor</b>
2.6	Occasional Licence or Extended Hours (Lodged Late or Contrary to Policy)	S.59, S.70 and Schedule 1, Paragraph 10(1).	Determining whether to accept an application for an occasional licence or occasional extension that has been lodged late in terms of Board’s Policy. <b>Clerk in consultation with the Convenor</b>
3.9	Occasional Licence (No Objection)	S.59 and Schedule 1, Paragraph 10(1).	Determining an application for an occasional licence – where no objections or representations have been received, nor a notice

			recommending refusal from the Chief Constable or any report from the Licensing Standards Officer recommending refusal including late applications which the Convenor has approved in terms of 2.5 above. <b>Delegated to the Clerk</b>
3.10	Occasional Licence or Extended Hours  (Funeral Teas)	Schedule 1, Paragraph 10(1).	Determining an application for an occasional Licence or occasional extension that has been lodged in respect of a funeral tea. <b>Delegated to the Clerk</b>
3.11	Occasional Licence Conditions	S.60 and Schedule 1, Paragraph 10(1).	To impose conditions under S60 in respect of an occasional licence as necessary or expedient for the purpose of any licensing objective. <b>Delegated to the Clerk</b>

Each application must be determined on its own merits.

### **Conditions of Licence**

16. There are mandatory conditions which must attach to every occasional licence granted. These are set out in Schedule 4 of the 2005 Act.
17. The Boards also have a pool of local licence conditions that may attach to an occasional licence. Only those that are appropriate to the event being licensed will be attached.

### **SCOTTISH GOVERNMENT GUIDANCE**

18. Chapter 9 of the Scottish Government's Statutory Guidance to Licensing Authorities relates to Occasional Licences. The Board should note that in terms of Section 142(4) of the Act, a Board deciding not to follow this guidance must give Ministers notice of that decision together with a statement of the reasons for it.

# EXTRACT FROM SCOTTISH GOVERNMENT GUIDANCE RELATING TO OCCASIONAL LICENCES

## 9. OCCASIONAL LICENCES

### Introduction

9.1 This Chapter provides guidance on occasional licences which are licences which authorise the sale of alcohol. Occasional licences can be granted by Licensing Boards on application from a premises licence holder, a personal licence holder and a representative of any voluntary organisation. For example, for a premises licence holder this would be to authorise the sale of alcohol in the course of catering for an event taking place out with their licensed premises. Voluntary organisations may also apply for an occasional licence authorising the sale of alcohol at an event connected with the organisation's activities.

9.2 An occasional licence may not exceed a period of 14 days. The Licensing (Fees) (Scotland) Regulations 2007 (SSI 2007/553) provides that the fee payable in respect of an occasional licence application is £10. Occasional licences are distinct from premises licences (see Chapter 8, for more information on a premises licence) and where an occasional licence has effect in relation to a premises, a premises licence is not necessary. Licensing Boards will wish to note that the Air Weapons and Licensing (Scotland) Act (section 75) amended the 2005 Act such that those in possession of an occasional licence issued under section 56 of the 2005 Act will no longer be exempt from public entertainment licensing requirements (set out in the Civic Government (Scotland) Act 1982).

### Procedure

#### *Notification of application*

9.3 Licensing Boards are required to consider applications for occasional licences in line with the provisions set out at Part 4 of the 2005 Act and the Licensing (Procedure) (Scotland) Regulations 2007 (SSI 2007/453). The regulations cover, amongst other matters, procedures and timescales in connection with the processing of applications for occasional licences.

9.4 The legislation requires that prior to determining an occasional licence application a Licensing Board must within 7 days of receiving it give notice of it, together with a copy of the application to the chief constable and the Licensing Standards Officer. On the day of notification, or as soon as reasonably practical thereafter, to these parties, a Licensing Board must publish details of the application on its website for a continuous period of 7 days. Inverclyde Licensing Board is an example of one Licensing Board which has a dedicated page on its website where interested parties can find information about occasional licence applications and objection forms can also be downloaded.

9.5 The Licensing Standards Officer may, within 21 days of receipt of notice of an application, prepare and submit a report setting out their comments on the application, which may include recommendations for additional conditions to be attached by the Licensing Board.

9.6 The Criminal Justice and Licensing (Scotland) Act 2010 amended the 2005 Act to enable the fast tracking of some occasional licences where there is very

limited notice of the need for such a licence e.g. a funeral. This amendment reduces the length of time a Licensing Board is required to wait for comments on an occasional licence application from the Licensing Standards Officer from 21 days to a period of not less than 24 hours. This applies where the Licensing Board is satisfied that the application *requires* to be dealt with quickly and the shortened time period is not being requested in order to pressurise the Licensing Board into granting a licence.

#### *Objections and representations*

9.7 Section 58 of the 2005 Act allows any person (including Police Scotland) to make objections and representations to Licensing Boards in connection with any application made to the Licensing Board for an occasional licence under section 56 of the 2005 Act. For example, Police Scotland may wish to raise objections due to concerns about the scale, location or timing of the event. Any notice of objection or representation must be made to the Licensing Board within the 7 day period the occasional licence application has been published on the Licensing Board website.

9.8 Any person, by giving notice to the Licensing Board, may object to an occasional licence application on any ground relevant to one of the grounds for refusal or make representations to the Licensing Board in support of the occasional licence application, or as to conditions which the persons considers should be imposed.

9.9 Licensing Boards are also required by section 58 to give the occasional licence applicant notice of any objections or representations and to take account of them in determining the application. Section 58 also permits Licensing Boards to reject any frivolous or vexatious objection or representation and sets out how a Licensing Board may recover from the person who gave the notice any expenses incurred by it in considering the notice.

9.10 Licensing Boards may wish to highlight to event organisers – perhaps through information on their websites - that due to the possibility of police intervention and/or public representations, that event organisers should not rely on giving the minimum amount of notice. Event organisers will wish to be aware of the importance of early engagement with for example local police licensing officers to discuss proposals for their event.

#### *Determination of occasional licence application*

9.11 The Criminal Justice and Licensing (Scotland) Act 2010 amended the 2005 Act in relation to the delegation of the functions of Licensing Boards to extend the ability to delegate approval of occasional licences applications to the Clerk of the Licensing Board or a member of support staff where no objections or representations are lodged.

9.12 Where no report from a Licensing Standards Officer, or notification of objection or representation under the relevant provisions of the 2005 Act have been received by a Licensing Board, then section 59 of the 2005 Act provides that an occasional licence application *must* be granted *unless* the application requires to be refused under:

- section 56(6A) of the 2005 Act – where the occasional licence application would result in the occasional licence limit being exceeded then the Licensing Board must refuse the application. For example, the occasional licence limit for voluntary organisations is set out at section 56(6) of the 2005 Act.
- section 64(2) of the 2005 Act - a Licensing Board must refuse any occasional licence application seeking a “24 hour licence” unless it is satisfied that there are exceptional circumstances which justify allowing the sale of alcohol on the premises during such a period.
- Section 65(3) of the 2005 Act – a Licensing Board must refuse an occasional licence application where the off sale hours proposed in the application are such that alcohol would be sold for consumption outside before 10am and/or after 10pm.

9.13 In any other case, for example where a representation has been received, section 59(3) of the 2005 Act provides that the Licensing Board must consider whether any of the grounds for refusal applies and:

- if none of them applies then the application *must* be granted; or
- if any of them applies, the application *must* be refused.

The Licensing Board may hold a hearing for the purposes of determining any application under section 59(3) of the 2005 Act. Where the Licensing Board does not hold a hearing for that purpose, it must ensure that, before determining the application, the applicant is given an opportunity to comment on any notice of objection, representation or the Licensing Standards Officer’s report.

9.14 The grounds for refusal are:

- that the premises to which the application relates are excluded premises
- that the application must be refused under section 56(6A), 64(2) or 65(3) of the Act;
- that the Licensing Board considers the granting of the application would be inconsistent with one or more of the licensing objectives;
- that, having regard to:
  - the nature of the activities proposed to be carried on in the premises to which the application relates;
  - the location, character and condition of the premises; and
  - the persons likely to frequent the premises;

the Licensing Board considers that the premises are unsuitable for use for the sale of alcohol.



9.15 In determining any application the Licensing Board must take into account any report from a Licensing Standards Officer under section 57(3) of the Act.

9.16 Whether the Licensing Board grants or refuses an occasional licence, they must give notice of the grant or refusal to the applicant, chief constable, any Licensing Standards Officer for the area and any person who may have given any notice of objection or representation in respect of the application. Any person who receives such notice may request, from the Clerk of the Licensing Board, a statement of reasons to be given to them by the Licensing Board.

#### *Conditions and occasional licences*

9.17 Schedule 4 to the 2005 Act establishes the national mandatory licence conditions for occasional licences issued under this statute, ensuring national consistency on those issues provided for. Licensing Boards may also impose other conditions – in addition to the mandatory conditions - as they consider necessary or expedient for the purposes of any of the licensing objectives. In particular, those are conditions requiring anything to be done, or prohibiting or restricting the doing of anything, in connection with either:

- the sale of alcohol on the premises in respect of which an occasional licence has effect; or
- any other activity carried on in such premises

9.18 For example, Clackmannanshire Licensing Board's statement of licensing policy 2018 comments that:

- “In the event that an applicant seeks a licence for an eighteenth birthday party, the Board if minded to grant the application will impose additional conditions regulating entry and the sale of alcohol to reduce the risk of harm caused to young persons in attendance through consumption of excess alcohol. It will generally be recommended that the Board impose a condition requiring the employment of SIA licensed stewards for these types of events. Applicants should have regard to these considerations when applying for occasional licences for such events and should ensure that the organisers are aware of the Board's likely requirements.”

9.19 South Ayrshire Licensing Board is one example of a Licensing Board's statement of licensing policy which sets out, at Appendix 4, thirteen conditions which may be attached to an occasional licence. For example, condition 2 is that no under eighteens to be allowed in the main Bar area. The licensing objectives being promoted here are “preventing crime and disorder” and “protecting children from harm”.

9.20 A Licensing Board may not impose a condition which:

- is inconsistent with any mandatory or prescribed condition;

- would have the effect of making any such condition more onerous or more restrictive; or
- relates to a matter (such as planning, building control or food hygiene) which is regulated under another enactment.

### **Repeated occasional licence applications**

9.21 The occasional licensing system is intended to provide flexibility in the system regulating the sale of alcohol that otherwise would result in more onerous requirements falling on those wishing to, on a temporary basis, sell alcohol. Occasional licences are not intended as a substitute for premises licences.

9.22 With this in mind, Licensing Boards will wish to consider utilising appropriate processes which are capable of identifying instances where it appears there is an attempt to operate premises under a series of consecutive occasional licences, rather than obtaining an appropriate premises licence. If such circumstances are identified, Licensing Boards may wish to consider it good practice to ask the applicant to explain why an application for a premises licence is not being made.

9.23 It is for the Licensing Board to determine what the process for this would be. For example one Licensing Board – South Lanarkshire Licensing Division Number 1 (Clydesdale area) – has set out in its statement of licensing policy 2018 the approach it will take:

- “Repeated applications for an Occasional Licences for the same unlicensed premises and which are:-
  - Not for detailed specific events; and/or
  - For activities that have been occurring (either in identical or largely similar terms) on the premises regularly for period of at least three months;

will not generally be considered to be suitable for the grant of an Occasional Licence and will not be granted by the Board under delegated authority but will require a hearing before the Board. The Board expects such premises to be operating under a premises licence.”

9.24 A Licensing Board may also look to the duration of occasional licences for a single premises over a 12 month period and suggest a policy whereby the Licensing Board becomes directly involved in the consideration of further occasional licences at that premises. For example, one Licensing Board – Perth & Kinross – has commented in its statement of licensing policy 2018 that:

- “The Board considers it reasonable for occasional licences covering up to 30 days (including into the following mornings) to be granted in any one calendar year for a single premise. Where more than 30 days are sought, the Board expects a premises licence application to be submitted. Failure to do so may result in all further occasional licence applications being submitted to the Board for consideration rather than being dealt with under delegated powers. This does not apply to places such as village halls where different organisations use the same premise”.

## **Extension of licensed hours**

9.25 The licensed hours for occasional licences require to be set out in the application for the licence and incorporated into the licence if granted. Section 67 of the 2005 Act provides Licensing Boards with a power to grant general extensions to licensed hours in connection with special events of local or national significance. However, licensed premises are not obliged to remain open for the period of any such extension. Section 68 of the 2005 Act which makes provision for extended hours applications does not apply to occasional licences.

## **Members' clubs**

9.26 By virtue of section 56(1) of the 2005 Act, the usual position is that an occasional licence may not be issued in respect of a premises which is already licenced. However, there is an exception to this in respect of a club falling within the description of regulation 2 of the Licensing (Clubs) (Scotland) Regulations 2007 (SSI 2007/76). The fact a premises licence is in effect in respect of such a club does not prevent an occasional licence being issued in respect of the club. This means, for example, that a members club which under its premises licence is normally only allowed to supply alcohol to its members and their guests, may during the period covered by the occasional licence admit members of the public and sell alcohol to them.

9.27 When an occasional licence has effect in terms of the premises, the conditions of the premises licence temporarily do not apply (see regulation 3(3) of SSI 2007/76) and the conditions of the occasional licence apply instead. This means that sales of alcohol are permitted on the club premises to persons who are not members or accompanied by a member. Such occasional licences could for example be used for community events. When the occasional licence ceases to have effect then the conditions attached to the premises licence once more come into effect.

9.28 Licensing Boards are restricted in the number of occasional licences they can issue in respect of a members' club. Regulation 3(2) of SSI 2007/76 provides that:

- a Licensing Board may issue in respect of those *premises* in any period of 12 months—
  - (a) not more than 4 occasional licenses each having effect for a period of 4 days or more, and
  - (b) not more than 12 occasional licences each having effect for a period of less than 4 days,provided that, in any period of 12 months, the total number of days on which occasional licences issued in respect of the premises have effect does not exceed 56.

## **Voluntary organisations**

9.29 An application for an occasional licence can also be made by a representative of a voluntary organisation. Paragraph 5 of schedule 4 (*occasional licences: mandatory conditions*) to the 2005 Act applies only to occasional licences

issued to voluntary organisations and ensures that alcohol may only be sold at events run in connection with the organisations' activities.

9.30 Licensing Boards are restricted in the number of occasional licences they can issue in respect of voluntary organisations. Section 56(6) of the 2005 Act provides that:

- a Licensing Board may issue in respect of that *organisation* in any period of 12 months—
  - (a) not more than 4 occasional licenses each having effect for a period of 4 days or more, and
  - (b) not more than 12 occasional licences each having effect for a period of less than 4 days,

provided that, in any period of 12 months, the total number of days on which occasional licences issued in respect of the organisation have effect does not exceed 56.

9.31 Many voluntary organisations will not have commercial backgrounds or ready access to legal advice. They will include, for example, individuals acting on behalf of charities, community and voluntary groups, schools, churches and hospitals all of which may stage public events at which the sale of alcohol may take place. It is critical that Licensing Boards ensure that local publicity about the system of occasional licences is clear and Licensing Boards should strive to keep the arrangements as manageable and user-friendly as possible for these groups.