Alcohol etc. (Scotland) Bill

Scottish Beer and Pub Association

The Scottish Beer and Pub Association (SBPA) was originally formed in 1906. Our members are Scotland’s brewing and large pub companies representing the licensed trade industry in Scotland. The main aim of the Association is to contribute to the economic and social well being of Scotland through employment, investment and training. Our members operate 1,500 of the 5,200 licensed public houses in Scotland.

The SBPA has been closely involved with the process of licensing reform and the policy aspects of tackling alcohol misuse in Scotland and SBPA’s former Chief Executive Gordon Millar served on the Nicholson Committee, which was established in May 2001 and which made recommendations as to the content of the Licensing (Scotland) Act 2005. SBPA served on the Expert Reference Group (ERG), which was created by the Scottish Executive to advise it on the procedural aspects of the licensing reform and on the National Training Forum. SBPA has welcomed the opportunity to play an active and constructive role in the Scottish Government’s consultations on licensing reform and continued that involvement through the Scottish Parliament’s deliberations on the Licensing (Scotland) Act 2005, and now in relation to the Alcohol Etc. (Scotland) Bill.

The SBPA is a member of the Scottish Government and Alcohol Industry Partnership.

Scotland’s Beer and Pub Industry

Scotland’s pubs are right at the heart of every community in the country. They are a much loved part of our national culture, celebrated at home and abroad, and attract many visitors to Scotland. Every week, over a million people socialise in the nation’s pubs. Most are small businesses, run by tenants, lessees and owners, with each pub contributing an average of £80,000 to its local economy. Together Scotland’s pubs employ nearly 46,000 people, including individual landlords. Today's pub is as much about selling food as it is selling alcohol.

218,000 people are employed in the hospitality industry in Scotland and in the manufacture of alcohol products, including beer. 10,500 people are employed specifically in manufacturing alcoholic beverages in Scotland.

The licensed industry across the UK contributes an estimated £26 billion annually in local and national taxation, business rates, employment taxes and excise duties. The licensed trade and wider hospitality industries in Scotland contribute an estimated £2 billion to the UK Exchequer, which funds the Scottish Government’s expenditure and that of Scotland’s 32 local authorities.
Association Response

The Association has considered the content of the Alcohol Etc. (Scotland) Bill and would submit the following comments. These comments draw heavily on the content of our submission of September 2008 in response to the Scottish Government’s consultation on its “Changing Scotland’s Relationship with Alcohol” strategy document. We are content for our views to be made public.

Pricing of alcohol – Section 1 Minimum price of alcohol; and Section 2 Minimum price of packages containing more than one alcoholic product

We would offer our observations on the general principle of minimum pricing of alcohol.

We would suggest the calls for Government to use tax to control alcohol misuse are based on a false premise – there is no correlation between high tax rates and low alcohol misuse rates.

It is a matter of fact that the UK and Scotland already have some of the highest taxes and prices in Europe. Any comparison between the drinking cultures of low cost Spain and France and high cost Britain and Sweden offers clear evidence of that, high taxes and prices don’t solve misuse.

SBPA believes that Government interventions on tax and price are blunt and poorly targeted. Policy should target problem drinkers, not penalise the whole population.

We note that the Scottish Government has itself accepted that “the Scottish Parliament presently has no locus in relation to alcohol duty and taxation” (Policy Memorandum Section 22). SBPA would therefore question the Scottish Government’s ability to deliver its proposals for the minimum pricing of alcohol using the powers available to the Scottish Parliament under the Scotland Act 1998. Even if this is an option, we would highlight that there may be significant adverse consequences for the competitiveness of the Scottish pub and hospitality industries of having differential governmental policies on the fundamental issue of product pricing between Scotland and the rest of the UK. We do not believe this would be to the benefit of the industry or our customers.

We believe administrative intervention on the price of alcohol under European law can only be used as a final resort having attempted other public policy solutions, and only on the basis of clear evidence that such intervention will reduce alcohol misuse and harm. We believe it is therefore for the Scottish Government to proactively and conclusively demonstrate this in justifying the appropriateness of its proposals to the relevant competition authorities.

SBPA however is not yet convinced that the Scottish Government has exhausted other policy solutions on this issue, particularly in light of the fact that the Licensing (Scotland) Act 2005 only came into effect in September 2009, let alone its full impact on tackling alcohol abuse fully assessed. We
would highlight that in delivering the Scottish Government’s proposed pricing scheme industry will necessarily be excluded by competition law from any consultation on what prices should be. This is also the view of the Scottish Government itself (Policy Memorandum Section 23). From a practical perspective, we do not believe Government or other groups outside of the industry have the necessary competence to set the price of a pint of beer. On that basis we are unable, as will other industry bodies, to offer any comment on one of the questions posed by the Committee as part of its consultation, namely “The level at which such a proposed minimum price should be set and the justification for that level.”

More fundamentally, we believe that this blanket approach on pricing will prove detrimental to the majority of Scots who consume alcohol sensibly and responsibly, in attempting to tackle a problem relating to a minority.

Drinks promotions - Section 3 Off-sales: restriction on supply of alcoholic drinks free of charge or at reduced price; and Section 4 Off-sales: location of drinks promotions

SBPA notes that under the Licensing (Scotland) Act 2005, on sales licensed premises, including pubs, have been banned from operating a range of “irresponsible promotions” since 1st September 2009. We would highlight that off sales licensed premises have not been prohibited from operating a number of these same types of promotion, including, for example, so called “buy one get one free” offers. Whilst the Scottish Parliament was considering the Licensing Act in 2005 we highlighted this, which we viewed then as an anomaly given the very large and growing proportion of alcohol sold in Scotland from off sales licensed premises.

SBPA still views the current legal position in the Licensing (Scotland) Act 2005 as anomalous and as such we would support the restoration of a level playing field between the on and off sales sectors as regards the types of promotional activity involving alcohol which can be undertaken. We therefore fully support the policy intentions in Section 3 of the Bill. However, we must question the specific wording of Sections 3 (1) and 3 (2) of the Bill, “(premises licences: restriction on certain irresponsible drinks promotions to apply to on-sales only), for “(b) to (d)” substitute “(c) to (e).”

Since 1st September 2009 all licensed premises, both on and off sales, have been subject to the provisions of Schedule 3 Part 8 (3) (e) of the Licensing (Scotland) Act 2005 which includes as an “irresponsible” any promotion that, “encourages, or seeks to encourage, a person to buy or consume a larger measure of alcohol than the person had otherwise intended to buy or consume.”

The effect of Sections 3 (1) and 3 (2) would be going forward to exclude off sales licensed premises from this provision, which they have been subject to since 1st September 2009. We are not aware of any reasonable policy justification having been given by the Scottish Government for this change and we would argue that the current provisions of Part 8 (3) (e) are as
relevant, if not more so, to the off trade as they are to the on trade, and as such we would oppose this legislative change. We would therefore ask the Committee to amend Sections 3 (1) and 3 (2) of the Alcohol Etc. Bill to read:

(2) In paragraph 8(3) of schedule 3 (premises licences: restriction on certain irresponsible drinks promotions to apply to on-sales only), for “(b) to (d)” substitute “(c) to (d)”.
(3) In paragraph 7(3) of schedule 4 (occasional licences: restriction on certain irresponsible drinks promotions to apply to on-sales only), for “(b) to (d)” substitute “(c) to (d)”.

In relation to the proposals in Section 4 we would make no comment other than to highlight that those providing off sales facilities are already subject to restrictions under the Licensing (Scotland) Act 2005 in respect of the areas in which they are allowed to display alcohol.

More generally, SBPA and our members have been consistently opposed to highly aggressive promotional activity around alcoholic products, which individual pub companies and producers have been voluntarily addressing by restricting these in Scotland and through the development of best practice on promotions across the UK. Indeed, this best practice is reflected in the wording of the Licensing (Scotland) Act 2005 itself, and our members had already acted to restrict the types of promotions they operated in advance of this legislation even being passed by the Scottish Parliament in 2005.

Age verification policy - Section 5 Requirement for age verification policy

In 2006, the licensed industry across the United Kingdom launched proof of age signage for the on-trade based around signage implemented by supermarkets and off-licences. The “Challenge 21” initiative highlights that “if you are lucky enough to look under 21 you will be asked to prove that you are over 18 when you buy alcohol”. The poster campaign clearly demonstrates that the trade takes the issue of underage sales very seriously. It highlights to those under 18 that they will not be sold alcohol.

Survey results suggested that ninety one per cent of young adults knew about the pub sector’s Challenge 21 scheme, according to a YouGov poll among 18-24 year olds for the British Beer & Pub Association (BBPA). Therefore Challenge 21 has been very widely adopted by the industry and is accepted by younger customers. However, we must question what the practical benefit would be of making these provisions mandatory by amending the Licensing (Scotland) Act 2005.

Section 102 (3) of the Licensing (Scotland) Act 2005, has placed for the first time a statutory “no proof, no sale” obligation on licensees and their staff to ensure that a customer is eighteen before they can be sold alcohol. We do not see what practical benefit extending this to everyone under the age of twenty-one will bring. The law is already crystal clear and enforceable. Our concern would be that enforcement authorities would expect delivery of a “no
proof, no sale” policy in relation to under twenty-one year olds rather than accepting the legal obligations in relation to “no proof, no sale” in respect of eighteen year olds. This would clearly be well beyond the scope and intent of the Licensing (Scotland) Act 2005.

Modification of mandatory conditions - Section 6 Premises licences: modification of mandatory conditions; and Section 7 Occasional licences: modification of mandatory conditions

We have no comment to make on the provisions of Sections 6 and 7.

Sale of alcohol to under 21s etc. - Section 8 Off-sales: sale of alcohol to under 21s etc.

In our response to the Scottish Government’s consultation on its Alcohol Misuse Strategy in September 2009 we opposed the original Government proposal to ban under twenty-one year olds from being able to buy alcohol from off-sales licensed premises.

We commented: “SBPA must question whether the proposal to change current law and effectively ban eighteen to twenty-one year olds from being able to buy alcohol from off sales would be sensible or indeed appropriate. SBPA would not support this measure and we believe that the emphasis in tackling anti-social behaviour should be on enforcing the law as it will stand under the Licensing (Scotland) Act rather than changing it before it has even come into effect, let alone its impact assessed. It seems wholly inconsistent for the Government to consider Scotland’s young people responsible enough that they want to lower the voting age for them to 16, but so irresponsible they want to prevent them buying a beer from an off sales until they are 21.”

We are even more opposed to the proposals contained in Section 8 of the Alcohol Etc. (Scotland) Bill and would highlight that most pubs as a result of the recent process of licensing transition to the new Licensing (Scotland) Act 2005 are now licensed for “off sales” of alcohol meaning they would come under the scope of the provisions of Section 8 of the Bill. We do not believe this was or is the Scottish Government’s intention.

This impact is reinforced by the wording of the Section which defines “off-sales” as “the sale of alcohol on licensed premises for consumption off those premises,” not as “the sale of alcohol from a licensed premises only licensed to make sales of alcohol for consumption off those premises.”

In many areas of Scotland, pubs with beer gardens make off sales of alcohol to customers so that they can go outside to consume their drink. This would mean that pubs could be faced with refusing service to an eighteen-year-old customer if they wished to drink in a beer garden, but would be allowed to make a sale of alcohol to them if they were drinking inside the pub. This we would suggest would be patent nonsense.
More problematically, allowing Licensing Boards to ban off sales of alcohol in certain parts of their areas, could lead to tension in pubs between licensees, their staff and under twenty-one year old customers whom they would be able to serve alcohol to whilst they were in the pub, but to whom they would have to refuse an off sale of alcohol at the end of an evening if the customer were going on to another event, like for example, a party.

Allowing differential age limits across Scotland for the sale of alcohol, even if these were only related to off sales, we believe would be a recipe for confusion and would inevitably lead to tension in on sales licensed premises. We therefore would repeat our long-held opposition to these provisions in Section 8 and would ask the Committee and Parliament to reject them.

**Variation of licence conditions - Section 9 Premises licences: variation of conditions**

We note the intent of this Section to give Licensing Boards very wide ranging powers to apply additional conditions on a “blanket basis” to all or some licensed premises within their areas. We have a very major concern about this provision which seems to run counter to the fundamental principles of the Licensing (Scotland) Act 2005 that each and every licence application made to a Licensing Board or the consideration of issues relating to a licence should be considered on its “own merits.” Giving a Licensing Board the power to change the conditions relating to a licence without, for example having to hold an individual hearing in respect of the premises at which a licensee or applicant would be able to present their side of the case, would we suggest run counter to the interests of natural justice and would place too much power in the hands of Licensing Boards.

The fact there would be no hearing nor any right of appeal other than by way of Judicial Review is quite simply wrong and we believe contrary to European law.

We would highlight that this change is being made now and as such this provision was not included in the original the Licensing (Scotland) Act 2005. This suggests this process was not viewed as necessary at the time the Licensing (Scotland) Act was drafted and passed, as such we would question why it needs to be included now. No reasonable explanation has been given as to why the change is now warranted or appropriate. We believe the Committee should question why this is the case and why the change is now merited.

We note the suggestion from the Scottish Government that these provisions could only be used in relation to specific Regulations. However, there appears to be a lack of clarity as to what the nature of these Regulations will be and when they will be tabled. The change seems to owe more to the needs of administrative expediency rather than administrative fairness.

We would highlight that Scottish Government Ministers have very wide ranging powers under the terms of the Licensing (Scotland) Act 2005 to
amend the Mandatory Conditions which apply to all licensed premises, indeed they are using these provisions as part of the Alcohol Etc. (Scotland) Bill, we would therefore question the need for this Section and would ask the Committee and Parliament to reject it.

**Licence Holders: Social Responsibility Levy - Section 10 Licence holders: social responsibility levy; and Section 11 Regulations under section 10(1): further provision**

In opposing this possible provision in our response to the Scottish Government’s Alcohol Misuse Strategy in September 2008, SBPA highlighted that During Stage 2 of the consideration of the Licensing (Scotland) Bill in the Scottish Parliament, Paul Martin MSP successfully moved an amendment which would have given local authorities the powers to “recoup costs” from licensed premises, including cleaning and policing costs. However, at Stage 3 of the Parliament’s deliberations on the Bill, Parliament agreed to an amendment proposed by the now Scottish Government’s Minister for Public Safety, Fergus Ewing MSP, removing this measure. The points the now Minister made at the time in opposing the measure are still arguments we would hold to and as such we would highlight Mr Ewing’s comment as follows in the Scottish Parliament:

http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-05/sor1116-02.htm#Col20753

“There are two reasons why I opposed the amendment in committee and continue to oppose the measure now.

“First, the measure is unenforceable, because it is impossible to interpret and implement. I understand Paul Martin’s motivation in lodging the amendment and I do not criticise him for doing so, but the scheme that he has devised would not work. How would one calculate the increase in the cost of providing public services? For example, on policing in the city centre, how would one calculate the increased police provision that was required? With regard to the ambulance service, how would one calculate the increased number of ambulances or ambulance staff required? On refuse collection, would one have to compute the additional volume of garbage that was left as a result of antisocial behaviour? After doing that calculation, one would have to decide whether it related to one particular pub or to more than one and where the behaviour occurred, because the bill states "in the vicinity of"—[Interruption.] I hear a member’s watch going off—one would have to set one’s watch accordingly to do that computation. One would have to apply the total extra cost across an unspecified number of public houses or clubs in an area. A finance department that performed that task would require hundreds of staff, and there would have to be such a department for each licensing board. I submit that the measure is unenforceable. I know that Paul Martin received the same letter that I received from the Law Society of Scotland, in which it states views broadly to that effect.
“Secondly, I argue against the measure because it is punitive, as public house premises and clubs pay the Exchequer substantial amounts of money through general taxation and, in particular, through non-domestic rates. Licensed premises pay high levels of non-domestic rates, and it is right that they should make that contribution, but if this extra cost is levied, premises will have to pay an extra tax—a Martin tax—which is a tax too far.”

The industry fully supports the more rigorous enforcement of existing laws to tackle problems of drunkenness and anti-social behaviour. SBPA believes the more rigorous and visible application of laws on drunkenness would signal that such behaviour is neither accepted nor condoned by society and would deal with many of the problems caused. Under the new Licensing (Scotland) Act 2005, Licensing Boards have far more extensive powers to address problems caused by the operation of licensed premises and Boards should use these powers to deal with problems and certainly not tolerate ongoing problems in return for financial contributions to cover the cost of such problems. Until such time as the new Act has had time to “bed in” and Boards the opportunity to use the powers they have, this proposal is premature.

SBPA estimates that Scotland’s 17,000 licensed premises already pay two billion of pounds each year to the government through local business rates, excise duties, VAT and other forms of business taxation. This year licensed premises in Scotland will pay around £150 million to Scotland’s 32 local councils in non-domestic rates. This will be further added to by contributions from the licensed industry in respect of future successful proposals for the creation of Business Improvement Districts (BIDS) in Scotland and by the estimated ten million pounds which we believe the industry will pay in licensing fees to Licensing Boards across Scotland. SBPA believes that Scotland’s licensed and hospitality industries already pay their way in meeting the costs associated with the operation of their businesses.

If the Scottish Parliament were to proceed with this proposal for blanket “social responsibility levies” then it will be penalising licensed operators who obey the law and do not sell alcohol to those who go on to cause anti-social behaviour, rather than targeting individuals who act in an anti-social manner and those rogue operators who break the law by selling them alcohol. SBPA believes this is tantamount to holding the innocent financially responsible for the actions of the guilty, which does not seem to be in any way consistent with the principle the Scottish Government is seeking to deliver.

More generally, we must question the approach being used by the Scottish Government in taking enabling powers to deliver these proposals at some point as yet undefined in the future. Whilst there are parliamentary precedents for adopting this approach, given the scale and possible significant impact of these provisions we would suggest they should be the subject of detailed scrutiny as part of a piece of primary legislation on criminal justice rather than being subject to simple affirmative resolution by the Scottish Parliament at some point in the future.
The industry has been in discussions with the Scottish Government about how “social responsibility levies” could work. These discussions have been without prejudice to the principle of whether or not the industry could support them. The discussions have lead to a suggestion that levies could only be made to work if they were targeted at specific licensed premises that had proven to have broken the law or could be proven to be causing particular problems. Licensing Boards would then have the power to levy fees or “fines” against these specific premises. We believe only if this measure were targeted on specific problem premises in this manner could it ever be acceptable to the industry, or indeed be fair, reasonable and proportionate. Similarly, we believe any proposal would have to apply to all types of licensed premises that could be shown to be causing a problem, not least in light of the trend of younger customers “pre-loading” with alcohol bought from off sales licensed premises before they even leave their own homes let alone enter on sales licensed premises.

On a point of detail, we must question the wording of this Section, specifically Section 10 3 (b) when it states, “which the authority considers necessary or desirable with a view to remedying or mitigating any adverse impact on those objectives attributable (directly or indirectly) to the operation of the businesses of relevant licence-holders in the authority's area.” We would seek clarification as to when an “adverse impact” can possibly be “attributable” “indirectly”? We would suggest that an “adverse impact” should only be “attributable” “directly,” and as such we would suggest that this part of the Section perhaps requires to be amended for the sake of clarity.

Conclusion

In conclusion, we would note that in the Policy Memorandum accompanying the Bill, that the Scottish Government appears to endorse the concept of a unitary taxation system in relation to alcohol which it believes would benefit the scotch whisky industry (Policy Memorandum Section 22).

We would strongly refute the proposition that there should be any further move towards unitary taxation (tax based solely on alcohol content) regardless of whether or not minimum pricing were introduced. The costs of producing and delivering alcohol to the consumer in the form of a low-strength dilute beverage such as beer are considerably higher than for high-strength distilled spirit. Under the current tax regime, spirits producers are already able to enjoy considerably higher margins than brewers and tax based solely on alcohol content would widen this gap further. It is vital excise duty is considered on a product-by-product basis. If products were competing solely on the basis of alcohol content then beer would not be produced.

Our Association welcomes the opportunity to comment on the proposals in the Alcohol Etc. (Scotland) Bill. It is likely that there will be a number of other issues that arise during the Committee’s deliberations on the content of the Alcohol Etc. Bill, and indeed likely further amendments. We would of course be more than willing to supply further detailed information in response to these as required by the Committee.
As a generality we would like to see all the proposed changes, as finally approved, consolidated into one document so that the relevant law can be read together.

I trust our comments are of use and we look forward to the Committee’s deliberations on the Alcohol Etc. (Scotland) Bill.

Patrick Browne
Chief Executive
Scottish Beer and Pub Association (SBPA)
19 January 2010