



FACULTY OF ADVOCATES

RESPONSE

FROM

THE FACULTY OF ADVOCATES

TO

CONSULTATION ON THE

FIREWORKS AND PYROTECHNIC ARTICLES (SCOTLAND) BILL

Introduction

1.0 The Faculty is grateful for this opportunity offered by the Criminal Justice Committee to respond to this Bill.

1.1 We have been helpfully provided with the Bill, Explanatory Notes, Policy Memorandum, Delegated Powers Memorandum, Financial Memorandum and the Statement on Legislative Competence.

1.2 Although we have considered the whole Bill, the Faculty only provides comment where it feels that this would be helpful.

1.3 The Faculty does not hold a position on the policy or evidence which underlies the Bill. It notes that Scottish Government has expressed certain policy objectives in the Policy Memorandum and that it has secured evidence which it considers demonstrates, on ground of public safety, the need for greater control over the sale and use of fireworks and pyrotechnic articles.

1.4 It is noted that a public consultation held in 2019 and related opinion poll showed strong support for measures. It is noted that a review of the international scene was undertaken and that while the level of control was variable, it is evident that when viewed internationally, current law and practice in Scotland may have areas which require to be addressed.

1.5 In addition the Faculty notes and agrees with the general tenor of the review of existing specific controls as reflected in the exploration in the Policy Memorandum of the Pyrotechnic Articles (Safety) Regulations 2015; the Fireworks Regulations 2004, the Fireworks (Scotland) Regulations 2004; Regulation 9 of the Explosives Regulations 2014; the Explosives Act 1875, Fireworks Act 2003 and existing licensing control as regards public entertainment in section 41 of the Civic Government (Scotland) Act 1982. The Faculty notes the possible use of general statutory nuisance powers under the Environmental Protection Act 1990.



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1.6 The Faculty notes the “spike” in injury attendant on certain events and that in general, most injuries occur at events which are not organised. Noise, gas and particles can create pollution. There is evidence of an adverse impact on animals, with most research relating to dogs, albeit harm is not confined to dogs.

1.7 The Faculty notes the overall policy objectives of the Bill as being to-

- reduce the burden on emergency services in preparing for and responding to firework related incidents;
- reduce firework related harm and injury;
- ensure fireworks are used safely by the general public; and
- reduce the volume of fireworks being set off outside of organised firework displays, and their associated noise and disturbance.

1.8 The Faculty notes the scope of clause 4. The concept of needing a licence to buy something, as opposed to selling it (as with knife dealing) may be seen as something of an innovation in licensing law. For that reason, the Faculty considers that Scottish Government will need to ensure that the public are properly informed as to the scope of the Bill, if it is indeed enacted in its current form, so as to ensure that the public are fully aware of this material change to what has been hitherto, an activity which many members of the public would regard as unremarkable.

1.9 The same might be said as to the need to have a training qualification before one can purchase an F2 or F3 type firework. Hitherto members of the public have never required training and an introduction of a training requirement before one can apply for a licence is a radical change alongside the licensing system itself. Faculty assumes that the Bill, if enacted, will be supported by adequate publicity surrounding the new requirements.

1.10 The Faculty would also suggest that the public are informed as to the types of Firework by reference to the categories F1 to F4 so that they are aware of when they may need a licence if they intend to purchase such items. The public may not fully understand the categorisation that exists. Faculty assumes, for example, that Scottish Government may seek to provide information to the public so as to allay any concerns that they may require a licence for fireworks which fall within the range of such items as sparklers or party poppers.

1.11 With these general comments in view, the Faculty would like to offer the following observations on the Bill as drafted, taking each Part in turn.

Part 1

2.0 The Faculty considers that the definitions of “firework” and “pyrotechnic article” are clearly set out; being capable of objective definition under reference to the well-established British Standards system. The use of the system of categorisation as used in existing British Standards is a sensible



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approach as any definitions should be accessible and understandable to the public and those who trade in such items or organise displays. The Faculty considers that Clause 1 of the Bill is a helpful definition of what fireworks or pyrotechnic articles are, in the general sense, and Clause 2 provides further clarity on the types (F1 to F4) of firework referred to in the Bill.

2.1 In relation to both Clauses 1 and 2, the Faculty also notes and supports the need to give Scottish Ministers power to extend the scope of what may be caught by the legislation by way of modifying regulations. Given the scope of human ingenuity, it is inevitable that devices may come on to the market which are to all intents and purposes “fireworks” but do not fall within the legislation because they are not yet referable to any (then existing) British Standard – and so do not constitute a “firework” for the purposes of the Act. The Faculty agrees that any Regulations seeking to include a new device are appropriately subject to affirmative resolution procedure. The Faculty would note though that the legislation will only be as good as the monitoring of new devices coming on to the market. The Faculty assumes that Scottish Government will deploy resources to monitor developments.

Part 2

3.0 Clause 3 makes general provision for a new form of licence (the “fireworks licence”) as regards F2 and F3 types of firework (as defined by Clause 2(1) (a) and (b).) The Faculty agrees that F1 types need not be licensed given their low risk and that as F4 types are not available for sale to the public, they are likely to fall within the exemptions in Schedule 1, as being devices that only professional organisers will have access to. It is noted that Clause 5 makes provision for a new criminal offence of supply of such a firework to an unlicensed person.

3.1 As a general observation the Faculty notes that the general framework proposed in Part 3 is familiar to other areas of licensing law which have generally proven effective and well understood including an application system by persons over eighteen years of age; application on payment of a fee; clear criteria to be applied to the decision on whether a licence should be issued, including evidence of attendance at an approved safety course ; a licence being time limited and capable of revocation and the bolstering of a civil licensing system with new criminal offence provisions. As a matter of general structure this approach reflects generally accepted and established approaches to the licensing of an activity.

3.2 The Faculty also notes the use of a mandatory conditions framework in Clause 10 and would observe that the precedent established by the Licensing (Scotland) Act 2005 in the use of mandatory conditions appears to have been effective. It supports a conditions framework in this Bill. Mandatory conditions provide clarity to those who hold a licence as to what may or may not be permitted under a licence. They also provide a clear benchmark for civil and criminal enforcement.



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3.3 The Faculty also supports a system of a Public Register of those so licenced as provided for in Clause 11. That must be capable of giving confidence to the public that those attending an event have a means to check that the person providing a display has the relevant licence. It should also serve to discourage displays by persons who are not registered. Such a public registration system, used for licences issued in other areas, has proven useful in terms of enforcement. Unlicensed activity is more readily identifiable if a public register exists.

3.4 The Faculty would offer some specific observations.

Clause 5(3)

It might be suggested that the seller of a firework be placed under an obligation to check the Public Register of those who hold a fireworks licence. This would heighten compliance with the general duty of not selling to unlicensed persons. It would also serve to heighten awareness in the trade of the Register. This may be bolstered by a duty to keep a record of such a check.

Clauses 6 and 7

3.5 The Faculty observes that there does not appear to be any advertising requirement in relation to the making of an application for a licence. This may seem anomalous as in other areas of licensing law such requirements are standard. They may include advertisement in a newspaper circulating in the area where the activity will take place. Faculty is conscious that firework activity may take place under a licence throughout Scotland and while noting that applications must be recorded in the Public Register, it may be arguable that there should be additional advertising of applications perhaps on a dedicated website. The Faculty does not hold a strong view on this.

Clause 9

3.6 This deals with the grant of fireworks licences. While evidence of training course attendance under Clause 8 may prima facie establish that the test in Clause 9(c) is met, it may be arguable that such should be only one factor in the overall assessment of whether someone should be afforded a licence.

3.7 The Faculty notes Clause 7(1) (c). While such training could be passed by an applicant, it does not follow that is a sufficient guarantee of the character and attitude of an applicant. Those with a poor attitude may do enough to pass a training course but nevertheless there may remain questions about their overall character. Character can of course extend to the known or suspected associations of someone seeking to hold a licence and of course other areas of licensing law allow an authority to “look behind” the applicant to establish if their application is really a “front” for someone who would not be granted a licence.



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3.8 In other areas of licensing law, evidence of training or qualification is a factor in the assessment of the overall suitability of an applicant and where there also exists a fit and proper test. In that regard the Faculty is mindful of premises and personal licence applications under the Licensing (Scotland) Act 2005.

3.9 The Faculty suggests that consideration might be given to-

- a further test of an applicant “otherwise being a fit and proper person to hold a licence”; and
- a refusal, if the Ministers are satisfied that the activity would be carried on to benefit someone other than the applicant, being a person who would have been refused a licence if they had made the application.

Rights of Objection and Representation

3.10 The Faculty also notes that there does not appear to be any public right of objection or representation, something which is typically found in licensing regimes. The creation of a Public Register (or advertising) but with no right of objection or representation may be seen to be anomalous. The public may well have information on an applicant which could usefully inform a decision to grant or refuse a licence. The Faculty suggests that such a right of objection or representation be considered.

Reasons for Grants and Refusals of Applications

3.11 There is no provision that reasons be provided as to why a licence was granted or refused. The Faculty would suggest, consistent with other well-established areas of licensing law, that a decision be supported by reasons which could be provided on the request of the applicant (or any objector if provision was made for such-see Clause 14). Reasons provide transparency and would allow a disappointed applicant to know if an appeal is likely to have merit and the prospects of success. They would also assist the appellate Court in determining an appeal by providing it with the view of the expert regulator, the Scottish Ministers.

Clause 12

3.12 The Faculty notes the power of revocation. The Faculty supports this but would suggest that a lesser power of suspension be available. Such is familiar in licensing law and co-exists with revocation in other fields such as liquor and civic. Suspension could be linked to situations which are capable of being resolved and are not so serious as to warrant revocation. Someone subject to suspension could be put on notice that unless matters were resolved to the satisfaction of Scottish Ministers, the licence may be revoked. The Faculty invites further clarity on one point. It would appear that the Clause 12(6)



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offence only carries a fine to Level 5 but that there are other offences, for example that in Clause 4(1), that also carry the penalty of imprisonment.

Clause 13

3.13 The Faculty raises the question of whether even if the Court does not cancel the fireworks licence, the Court should notify the Scottish Ministers that there has been a relevant offence. It would then be open to the Ministers to consider whether to take action. This might include use of a power of suspension. The Faculty would suggest, for consistency of language, that instead of “cancel”, “revoke” is used.

Clause 14

3.14 The Faculty supports a right of appeal. Although holding no strong view, it would raise the issue of the appeal being an appeal on the merits in Clause 14(3) or one by way of review. Classically, licensing appeals have been viewed as appeals by way of review, even where no grounds of appeal are stated. It is not immediately obvious why a more generous approach to appeal has been extended to fireworks licences when rather more restrictive provisions apply to liquor licence appeals or taxi licence appeals, areas which might be thought to have greater economic value.

3.15 This may have particular traction where, as here, it is for Scottish Ministers, in the first instance, to be satisfied as to matters of fact such as, for example the test in Clause 9(c).

3.16 The Faculty notes that there is no provision in relation to the award of expenses in an appeal. While this may be implied, it is more often stated in licensing appeals as an express power so as to avoid any dubiety as to whether the Sheriff is acting in administrative or judicial capacity. See, for example, Schedule 1, paragraph 18(11) of the Civic Government (Scotland) Act 1982.

Part 3

4.0 In relation to Clause 21, the Faculty considers that it is entirely sensible to aim to prohibit the provision of fireworks or pyrotechnic articles to children. It notes that the commercial supply to those under 18 is already an offence, as is possession by a person under 18 of a firework in a public place (Regulation 31 Pyrotechnic Articles (Safety) Regulations 2015 and Regulation 4 of the Fireworks Regulations 2004).

4.1 It would agree that the current inability to address proxy purchase is likely to be a major gap in the current protection of children. The Licensing (Scotland) Act already makes it an offence for someone to proxy purchase alcohol for a child or young person (section 105) and those provisions can be seen to be well understood and effective. The introduction of the new offence of proxy purchase of fireworks or pyrotechnic articles is readily capable of addressing the current gap in protection.

Part 4



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5.0 It considers that the use of a consultation process is desirable as it would allow both operators and the wider community to have proper involvement in decisions which could have a major impact on their area. It can be seen as a means by which the national licensing system can be rendered sensitive to local needs and issues. A Zone established and overseen by the local authority is plainly a sensible means to allow that balance to be struck.

Part 5

6.0 The Faculty has no comment.

Part 6

7.0 The Faculty notes the provision for exemption and enforcement. Both appear to flow from the policy objectives of the Act and the Faculty does not propose to offer any comment on them or the related provisions in Schedule 1 on Exemptions or Schedule 2 on Investigatory Powers. The provisions on enforcement are of a type found in other established areas of licensing and regulatory control.

Part 7

8.0 The Faculty has no comment.