Submission

The Law Society of Western Australia
The voice of the legal profession in Western Australia

Review of Liquor Control Act 1988

To
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Summary

The Law Society submission has considered various aspects of the Terms of Reference and makes the following recommendations:

Review of Director's decisions: Section 25(2c) of the Act should be repealed to permit the Liquor Commission to consider fresh evidence when conducting a review of a decision made by the Director of Liquor Licensing.

Review of Conditions: The Act should be amended so that a successful applicant can simply review a condition that has been imposed by the Director of Liquor Licensing, as opposed to being required to review the entire decision.

Hearings: The Act should be amended to enable parties to elect to have a hearing before the Director of Liquor Licensing, rather than such election being at the sole discretion of the Licensing Authority.

Disciplinary proceedings: The Act should be amended to afford respondents to disciplinary proceedings an unimpeded right to challenge the evidence in support of the grounds for complaint, including the right to cross examine. In addition, section 95(11) should be removed from the Act.

Appearances by non-legally qualified persons: Section 17(1)(e) of the Act should be repealed, or failing that, there Licensing authority should provide written rules or a policy document outlining the circumstances where leave may be granted to a person to represent a party pursuant to section 17(1)(e) of the Act. This should be limited to exceptional situations.

The public interest criteria for low risk venues versus high risk venues: It is appropriate for a distinction to be drawn between high risk and low risk licences. Low risk applications for licences should be required to address a less onerous "public interest test".

Section 38(5) of the Act: With respect to the restrictions imposed by section 38(5) of the Act, a distinction should be drawn between applications which are refused upon the grounds that the evidence demonstrates that the grant of the application would have an adverse consequence as opposed to those applications which fail due to a lack of evidence. In addition, clarification of the term "of a kind sufficiently different" is required in respect of the issuance of certificates by the Director of Liquor Licensing under this section.

The definition of "drunk": The definition of "drunk" for the purposes of the Act is problematic because it is essentially a subjective judgement, albeit one which must be objectively reasonable. Consideration could be given to require a person to give a sample of breath, blood or oral fluid for analysis, in order to determine a person's level of intoxication.

The appropriateness of penalties contained within the Act: Specific penalties should be applied for bodies corporate to reduce the effect of consequence of the Sentencing Act increasing penalties for bodies corporate which are five fold.

Term of Reference

1. **The review committee is to review and consider matters relevant to the operation and effectiveness of the *Liquor Control Act 1988*, having regard to the changing community needs and attitudes relating to the accessibility of liquor and related services.**

1.1 Review of Director's decisions

Section 25 of the *Liquor Control Act 1988* (Act) provides that where a party to proceedings before the Director is dissatisfied with a decision made by the Director in respect of those proceedings, the person may apply to the Commission for a review of that decision.

Section 25(2c) provides that when conducting a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.

It is submitted that Section 25(2c) of the Act should be amended to permit the Commission to consider fresh evidence.

The operation of Section 25(2c), since its inclusion in 2006, has adversely impacted upon applicants in predominantly the following two circumstances:

1. Unrepresented applicants who, when preparing their application at first instance, have misunderstood the requirements of the Act with respect to new licence applications.

2. Applicants who are found to have been denied natural justice when their application was first determined by the Director.

The vast majority of reviews which have failed before the Liquor Commission have done so because the applicant at first instance failed to lodge sufficient evidence in support of their application rather than because the proposal lacked merit in the public interest. The most common error has been the failure to lodge evidence of consumer requirements.

Upon reviewing the application to the Liquor Commission, the application must necessarily be refused due to this defect in the preparation of the application. In the majority of applications this defect could easily be remedied if there was the option of introducing fresh evidence before the Liquor Commission. Before the 2006 amendment there was no embargo on producing fresh evidence.

Due to the prohibition contained within Section 38(5), unsuccessful applicants are prevented from lodging a fresh application on the same land for a period of 3 years. As a result, simple oversights in the preparation of an application (generally by unrepresented applicants) have very serious consequences.

Alternatively, there have been a number of reviews before the Liquor Commission that have been successful upon the ground that the applicant was denied natural justice at first instance before the Director.

Upon a finding being made by the Liquor Commission that an applicant has been denied natural justice, the only option available to the Commission is to return the matter to the Director for determination.

This has resulted in lengthy delays with respect to the determination of applications, as in many instances:

(a) the Director has required the application to be re-advertised, resulting in further objections or interventions being received; and

(b) due to the delays currently being experienced with applications being processed by the Licensing Authority, it is not uncommon for determination of the application to be delayed for anywhere between 6-12 months.

In many instances when questions of natural justice are successfully raised, the matter could more efficiently be dealt with before the Liquor Commission in circumstances where the applicant could adduce further evidence.

1.2 Review of Conditions

Pursuant to the powers granted to the Director by Sections 64 and 65 of the Act, the Director may grant an application for a liquor licence, with conditions being attached to the grant.

The Act at present, however, does not permit a successful applicant to solely review the imposition of a condition upon the grant of the licence. In the event that an application is dissatisfied with a condition that has been imposed, the applicant is required to review the whole decision before the Liquor Commission.

This results in the unsatisfactory situation where an applicant is required to place a successful grant of a licence at risk, simply to address a condition that has been imposed.

The Act should be amended so that a successful applicant can simply review a condition that has been imposed by the Director, as opposed to being required to review the entire decision.

1.3 Hearings

Section 16(3) permits the Director to conduct hearings.

Section 13(5) of the Act, however, provides that the Director may determine any application or matter without conducting a hearing.

Section 16(5) of the Act provides that the procedure of the Licensing Authority shall be determined by the Director with the exception of any application or matter that is before the Commission (in which case such procedure is determined by the Commission).

Since the 2006 amendment the process of holding hearings has ceased. All applications and matters before the Director have been determined on the papers.

This practice of the Director is unsatisfactory given that a significant number of matters being determined by him involve considerations of credibility and/or evidence which cannot be tested without the opportunity for the parties to cross-examine. Examples include:

1. Section 117 complaints whereby residents complain about noise and disturbance originating from licensed premises.

2. Section 64 complaints during the course of which allegations are made by parties that are disputed by the licensee, such as that a person has been intoxicated upon licensed premises and the licensee disputes that this has occurred.

3. Applications for new licences that an applicant alleges is required by the public, which the objector denies is the case.

Many of the contested applications must be determined by weighing and balancing the competing evidence. The evaluation of conflicting evidence and the determination of issues of credibility are often incapable of proper resolution on the papers alone, without first conducting a hearing and providing the parties the opportunity of cross examination.

Evidence upon which a case is determined, cannot be properly tested without a hearing. Inconsistencies in the evidence or disputes as to the evidence between the parties cannot be resolved properly on the papers alone.

Section 16(11) provides that the Licensing Authority shall ensure that each party to a proceeding before it is given a reasonable opportunity to present its case.

In the circumstances, however, whereby a party is unable to elect for a hearing, parties are currently being disadvantaged in circumstances whereby the Licensing Authority determines that a matter should be determined upon the papers.

As a consequence of the lack of hearings, the operation and effectiveness of the Act in some cases is seriously inhibited. The failure to hold hearings in an appropriate case leads not only to the perception of unfairness but can amount to a breach of the rules of natural justice.

The Act should be amended to enable parties to elect to have a hearing, rather than such election being the sole discretion of the Licensing Authority.

1.4 Disciplinary proceedings

Although the licensing authority has established a procedure for hearings "on the papers" to determine applications and objections at first instance and review hearings before the Commission, disciplinary hearings are applications of a different nature and have at least the flavour of quasi-criminal proceedings which carry sanctions of cancellation, disqualification and significant monetary penalties.

Section 95 proceedings will traditionally involve disputes between the parties with respect to questions of fact that involve considerations of credibility and the testing of evidence by way of cross-examination. There has only been one instance whereby limited cross-examination has been permitted before the Liquor Commission with respect to a Section 95 complaint.

Section 95(11) of the Act prevents a licensee from providing a defence to a complaint where a licensee:

(a) did not know, or could not reasonably have been aware of or have prevented the act or omission which gave rise to the complaint; or

(b) had taken reasonable steps to prevent that act or omission from taking place.

A party defending a disciplinary complaint should be entitled to the presumption of innocence (unless cause for disciplinary action is admitted) requiring the complainant to prove the complaint.

Disciplinary proceedings are adversarial in nature and, particularly where a party disputes the factual basis for the disciplinary action, the circumstances require a decision maker to permit cross-examination in order to discharge the duty to act fairly or extend procedural fairness.

The potential to adversely affect a person's interests means that when the grounds for a complaint are denied by a person subject to section 95 complaint, the appropriate procedure is to convene a fact finding hearing to determine whether the grounds which are asserted have been proved to the required standard.

In many cases, the grounds will include assertions that the respondent to the complaint has committed an offence under the provisions of the Act.

Where a respondent denies that there is proper cause for disciplinary action, the complainant is put to proof and the first issue for determination is whether on the evidence the tribunal of fact, properly directed, is satisfied on the balance of probabilities that the ground or grounds upon which the complaint was made have been made out.

The procedure should ensure that a respondent to disciplinary proceedings has an unimpeded right to challenge the evidence in support of the grounds for complaint, including the right to cross examine.

The Commission has taken the stance that cross examination of witnesses in disciplinary proceedings is not a right and must be obtained by a grant of leave.

That stance is inimical to the presumption of innocence and a party subject to disciplinary sanctions should be entitled to an unfettered right to defend itself by the insistence on proof to the Briginshaw standard.

Examples abound where alleged contraventions have been shown to be groundless when subjected to the full rigour of challenge by cross examination and resistance to the “inconvenience” of allowing cross examination should not be permitted to erode the presumption of innocence in contested disciplinary proceedings.

A successful appeal against the order of a single Commission member refusing a licensee’s request to cross examine witnesses resulted in a limited right to cross examine witnesses. The right to cross examine should be the default position and any fetter on that right should be rejected as unjust.

It is submitted that the operation of Section 95(11) unjustly penalises licensees in circumstances where they could not have prevented the act or omission which gave rise to the complaint or in circumstances where they had taken every necessary step to prevent such act or omission from occurring.

It is submitted that Section 95(11) should be removed from the Act.

1.5 Appearances by non-legally qualified persons

Sections 16 and 17 of the Act and in particular section 17(1)(e) provide that a party to proceedings may appear personally, by counsel, or "by any other person approved by the licensing authority."

Permission granted by the Commissioner for a lay person to appear in proceedings before the Liquor Commission is not subject to any Practice Direction or guidelines. The Society notes the Director's policy that is published on the Department of Racing, Gaming and Liquor's website:

> *"As* [17] *(e) requires an administrative decision to be made, the following criteria will be adopted to determine whether a person will be allowed to represent another party during hearings conducted by the Director:*
>
> - *The Executive Officer must be advised at least seven (7) days prior to the hearing, of the name of the representative and whether that representative is charging a fee for services rendered.*
>
> - *Depending upon the complexity of the application or matter to be determined and depending on whether the opposing party is legally represented, the Executive Officer may also ask that person to provide a resume to determine the suitability of the representative concerned. The experience of that person as an advocate, and their knowledge of the procedural requirements of matters before the licensing authority or a similar administrative tribunal, will be relevant considerations. Further, the knowledge of the representative in terms of processing liquor licensing applications and the understanding of that representative in terms of the provisions of the Act will also be relevant.*
>
> - *The decision to allow or refuse that representative will be given as early as practicable prior to the commencement of the hearing. Each case will be determined on its merits."*

All applications at first instance are dealt with by the Director of Liquor Licensing, or his or her Delegate. Applications only come before the Commission if an application for review of a decision of the Director is lodged pursuant to Section 25 of the Act, or applications are referred by the Director, pursuant to Section 24 of the Act. All complaints pursuant to Section 95 of the Act are heard by the Commission.

Since the Act was amended in 2006 at least four businesses have been providing services to applicants for various liquor licences to assist them in the preparation of such applications and in particular, in the drafting of Public Interest Assessment documents in support of their applications.

From the information the Society has received, none of these businesses employ people who are legally qualified persons, or meet the definitions of a legal practitioner under the *Legal Profession Act 2008.*

The Society has become aware that not only are these businesses and employees of these businesses giving advice that could be considered legal advice, such as interpretation of the various sections of the Act, on some occasions they are also appearing as advocates for parties, in particular applicants, before the Commission. This practice raises a serious concern for the Society.

Legal practitioners and their professional behaviour are governed by the requirements of the *Legal Profession Act 2008* and the associated Rules and Regulations. Both solicitors and barristers in Western Australia are subject to statutory Professional Conduct Rules.

As part of the requirements to practice as a legal practitioner under the *Legal Profession Act 2008*, legal practitioners are required to update their legal knowledge each year by participating in a minimum period of time of Continuing Professional Development seminars and have professional indemnity insurance requirements.

The Society is not aware of any requirements that apply to the various businesses and individuals who are providing advice and representation to persons in relation to liquor licence applications.

In relation to the practice where persons who are not legal practitioners appear before the Commission representing a party, the Society has previously raised its concern with that practice with the Chairman of the Commission.

The Society is aware of two occasions where a representative of a business providing services to applicants has sought leave and been granted leave to appear at the Commission, pursuant to Section 17(1)(e) of the Act.

The Society is of the view that Section 17(1)(e) of the Act should be repealed.

In the event Section 17(1)(e) of the Act is not repealed, there should be written rules or a policy document provider by the Director of Liquor Licensing and the Commission as to the circumstances where leave may be granted for a person to represent a party pursuant to Section 17(1)(e) of the Act. These circumstances should be exceptional.

The Society makes this submission not on the basis that the Society is trying to protect the interests of the legal profession, but in order that parties who seek the services of a person to act as their advocate or adviser who is not legal practitioner defined under the *Legal Profession Act 2008* are protected and the advocate or adviser is subject to proper scrutiny.

Term of Reference

2. The public interests criteria for low risk venues versus high risk venues.

Section 38(2) of the Act, when read in conjunction with Section 38(1) of the Act, requires an applicant seeking the grant of a licence to satisfy the Licensing Authority that the grant of the application is in the public interest.

The Licensing Authority has long recognised that applications for certain licences, such as a tavern or nightclub licence, are "high risk", i.e. they have a real prospect of adversely impacting upon the locality within which they are located. Other categories of licences, such as a wholesalers, producers, club or restaurant licence, are considered low risk as experience shows they are much less likely to adversely impact upon the locality within which they are located. By way of example, a wholesaler's licence generally operates out of an office within a commercial district.

The Act however does not currently distinguish between applications for high risk and low risk licences.

For the purpose of considering whether the grant of an application is in the public interest, Section 38(4) of the Act provides:

"*Without limiting subsection (2), the matters the Licensing Authority may have regard to in determining whether granting an application is in the public interest include:*

(a) the harm or ill health that might be caused to people or any group of people due to the use of liquor; and

(b) the impact on the amenity of the locality in which the licensed premises or proposed licensed premises are, or are to be, situated; and

(c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and

(d) any other prescribed matter."

At present there are no other "prescribed" matters for the purposes of Section 38(4)(d).

When considering whether an application is in the public interest, the Licensing Authority is also required to have regard to the objects of the Act (*Palace Securities Pty Ltd v. Director of Liquor Licensing* (1992) 7 WAR 241 at 249).

For the purpose of an application for a new licence, the primary relevant objects of the Act are:

(a) To minimise harm or ill health caused to people or any group of people due to the use of liquor (Section 5(1)(b) of the Act); and

(b) to cater for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the state (Section 5(1)(c) of the Act).

The approach that has been adopted by the Licensing Authority (whether constituted by the Director of Liquor Licensing or the Liquor Commission) is to require an applicant for a new licence to address both those matters contained within Section 38(4) and the above-mentioned primary objects of the Act.

In practice, this has resulted in a requirement that each applicant lodge a public interest assessment submission, addressing Section 38(4) and the primary objects contained within Section 5, with each assertion contained within the public interest assessment submission being supported by appropriate evidence.

By way of example, when demonstrating that that grant of an application will satisfy the requirements of consumers, evidence that is routinely relied upon by applicants includes:

(a) market surveys conducted by market researchers;

(b) surveys and petitions drafted and administered by the applicant; and

(c) witness statements and letters of support.

Due to the lack of distinction drawn between high risk and low risk licences, this can create unnecessary challenges for applicants for low risk licences. By way of example, wine producers entering the industry are required to lodge evidence of a requirement by consumers for wines produced by the vineyard in circumstances where the wine has not yet been produced.

To assist applicants in preparing a public interest assessment submission, the Director of Liquor Licensing has issued a policy titled "*Public Interest Assessment*". The Public Interest Assessment Guide targets those matters contained within Section 38(4) of the Act.

Within the Public Interest Assessment Guide, a distinction is drawn between:

(a) complex applications, being applications for hotels, nightclubs, liquor stores, taverns and some special facility licences ("complex applications"); and

(b) applications for a small bar licence, restaurant licence, club licence, producer's licence, wholesaler's licence and bed and breakfast facilities or work canteens ("simple applications").

The distinction that has been drawn by the Licensing Authority substantially reproduces the system of licence classification which formerly existed within the Act.

The Act previously defined licences as either category "A" licences or category "B" licence.

Category “A” licences were:

(a) hotel licences;

(b) cabaret licences;

(c) liquor store licences;

(d) special facility licences;

Category “B” licences were:

(a) club or club restricted licences;

(b) restaurant licences;

(c) wholesalers’ licences; and

(d) producers’ licences.

The distinction between an application for a category “A” licence, as opposed to an application for a category “B” licence was that:

(a) both applicants for a category “A” and category “B” licence were required to satisfy the Licensing Authority that the grant of the licence was in the public interest; however

(b) an applicant for a category “A” licence was also required to satisfy the Licensing Authority that the grant of a licence was necessary in order to meet the reasonable requirements of the public for liquor and related services for accommodation in that area.

Under the current provisions of Section 38 of the Act, however, no distinction is drawn between the matters required to be addressed in a simple application as opposed to a complex application.

While the Director had attempted to draw a distinction within his Public Interest Assessment Guide, this distinction has been drawn in the following terms:

(a) Applications for a simple application are required to address public interest matters (unless otherwise directed by the Licensing Authority) by lodging:

(i) a risk assessment with the harm or ill health that might be caused to people, or groups of people within the locality due to the use of liquor;

(ii) a descriptive report on the amenity of the locality of the proposed premises – including who lives and works in the locality and assessing the impact (if any);

(iii) a report on the location – listing existing licensed premises within 500m of the premises, highlighting the diversity of the current services;

(iv) a description of the proposed business – what facilities and services will be provided, including other information, for example on any theme or décor; and

(v) a description of the manner of proposed trade and target client base, why it is in the public interest and how it might benefit the community.

(b) Applications for a complex application, however, must address each of the matters required to be addressed by an application for a simple licence application, however, is greater detail.

With respect to both simple and complex applications, the submissions made must be supported by appropriate evidence.

While the Director's policy implies that an application for a complex licence requires a greater level of evidence than an application for a "simple" licence, applicants are aware that, in the event they fail to lodge sufficient evidence, they will be barred from lodging a fresh application for a period of 3 years due to the prohibition which is contained within Section 38(5) of the Act.

Due to the prohibition contained within Section 38(5) simple applications are often supported by detailed submissions and supporting evidence as would be expected with more complex applications. This results in an unnecessary expenditure of both time and money on the part of applicants and possibly superfluous processing by the licensing authority.

The alternative is to rely upon the Director's Policy which indicates that applicants may rely upon less evidence and provide less detail with respect to simple applications.

Compliance with the Director's policy however does not ensure that an application will meet the requirements of the public interest test contained within Section 38 of the Act.

The danger of relying upon the policy of the Director was highlighted in the decision of *Shallcross Investments Pty Ltd. v. Director of Licensing* LC26/2010 ("the Shallcross decision"). The Shallcross decision considered an application for a liquor store licence which was ultimately refused.

At the conclusion of the decision the Liquor Commission stated:

"*In hearing this application, and other recent applications, it is apparent to the Commission that this applicant, like many others, has quite reasonably and sensibly relied heavily on the policy document of the Director of Liquor Licensing in the preparation of their submissions and Public Interest Assessments submitted in support of their application. Pursuant to Section 38(2) of the Act, applicants must satisfy the Licensing Authority that the grant of the application is in the public interest. In this context, the Licensing Authority needs to consider both the positive and negative social, economic and health impacts that the grant of the application will have on the community. Consequently, the Commission is of the view that it would be helpful to the applicant if the Director's policy in respect of the PIA could perhaps highlight more clearly the requirement for applicants to adequately demonstrate the positive aspects of their application and provide evidence to support their claims.*"

The Commission's comments were motivated by a series of applications which were refused in circumstances whereby the applicants complied with the Director's policy with respect to public interest assessment submissions. At that time, however, the policy made no reference to applicants producing evidence from consumers that they required the services proposed to be provided by the applicant. Due to this failure, the applications were refused. Following the Decision in Shallcross, however, the Director's Policy was amended.

The distinction which currently appears within the Director's Policy distinguishing between complex and simple applications is a recent addition to the Policy.

It is submitted, however that:

(a) it is appropriate for a distinction to be drawn between high risk and low risk licences and applicants within the Act;

(b) low risk applications should be required to address a less onerous public interest "test".

Term of Reference

3. The continuation of the section 38(5) restriction of three years on re-applying for a liquor licence that is refused in the public interests.

3.1 Section 38(5) of the Act

Section 38(5) of the Act provides:

> "*If an application referred to in subsection (1)(a) is not granted because the Licensing Authority is not satisfied that granting the application is in the public interest, an application for the grant or removal of a licence in respect of the same premises or land cannot be made within 3 years after the Licensing Authority's Decision, unless the Director certifies that the proposed application is of a kind sufficiently different from the application that was not granted.*"

The applications to which Section 38(5) apply are:

(c) an application for the grant or removal of a licence; or

(d) an application for an extended trading permit ("ETP") authorising the licensee of a restaurant to sell liquor for consumption on the premises, whether or not ancillary to a meal, during permitted hours under a hotel licence; or

(e) an application for an ETP seeking extended trading hours for a period exceeding 3 weeks;

(f) any other application to which the Director decides it is appropriate for Section 38(2) to apply.

3.2 Trigger

As presently drafted, the operation of Section 38(5) is triggered if an application of the prescribed class is refused because the Licensing Authority is satisfied that granting the application is not in the public interest.

Section 33(1) of the Act, however, provides that the discretion vested in the Licensing Authority to grant or refuse an application under the Act is an absolute discretion which may be exercised on any ground or for any reason that the Licensing Authority considers in the public interest.

Accordingly, the Licensing Authority may only refuse an application if it believes that it is not in the public interest.

The difficulty with the operation of Section 38(5) as presently drafted is that it does not distinguish between applications which are refused because:

- the Licensing Authority makes a positive finding that the grant of the application would not be in the public interest – i.e. by way of example, that the grant of the application would result in an undue level of harm or ill health being caused to persons due to the use of liquor, as opposed to

- the application is not supported by a sufficient level of evidence to enable the Licensing Authority to find that it is in the public interest.

This distinction is illustrated by the following two cases:

> *Equanimity Investments Pty Limited v the Commissioner of Police* LC 11/2001 ("Empyrean Function Decision"); and
>
> *Shallcross Investments Pty Limited v the Director of Liquor Licensing* LC26/2010.

The Empyrean Function Decision involved an application to vary the trading conditions of a special facility licence to extend the permitted hours of trade. The Director determined that the applicant should comply with Section 38 of the Act. The application was unsuccessful because the Liquor Commission found that:

- evidence submitted by the intervener indicated that high levels of alcohol-related harm were occurring in the vicinity of the licensed premises; and

- the additional likely real and potential harm that would be caused by extended trading hours outweighed the consideration of meeting the demands of patrons or students who utilised the function centre.

Accordingly, the application was found not to be in the public interest due to existing levels of harm or ill health within the locality and the likely increase of such levels if the application was granted.

As the Director had determined that Section 38 should apply, the applicant was prevented by the provisions of Section 38(5) of the Act from lodging a similar application for a period of 3 years.

In the context of the Empyrean Function Decision, such a restriction is logical, given the findings made of the existing high levels of harm or ill health. With the passage of time, such levels of harm or ill health may fall to a level that it is appropriate for a fresh application to be considered.

The Shallcross Decision involved an application for a liquor store licence which was refused. In considering the application, the Commission was satisfied that the grant of the application would not negatively impact upon the local community. However, it was the view of the Commission that the applicant had not adduced sufficient evidence demonstrating the positive impacts that the grant of the application would have.

In simple terms, the applicant had failed to lodge evidence demonstrating that consumers had a requirement for the services proposed to be provided by him. The failure to adduce such evidence occurred simply because the applicant was not aware that it was required to satisfy the Licensing Authority that the grant of the application would positively impact upon consumers. In no insignificant part, the Commission found that this failure was due to reliance by the applicant upon the Director's policy with respect to addressing the public interest test. At the conclusion of the Shallcross Decision, the Commission urged the Director to amend his policy to ensure that applicants were aware of this requirement.

Accordingly, the applicant in the Shallcross Decision failed to properly prepare his application due to a misunderstanding in relation to the test that he would be required to meet. Due to the restriction contained within Section 38(5) of the Act, however, the applicant, or indeed any other person, would be prohibited from lodging a similar application at that site for a period of 3 years.

The Shallcross Decision is not an isolated incident. There have been a significant number of applications refused due to ignorance on the part of the applicant rather than some positive finding by the Liquor Commission that the grant of the application would have some adverse consequence.

It is submitted that a distinction needs to be drawn between applications which are refused upon the grounds that the evidence demonstrates that the grant of the application would have an adverse consequence as opposed to those applications which fail due to a lack of evidence.

This difficulty associated with the operation of Section 38(5) could be remedied either by amending the terms of Section 38(5) or, alternatively, amending Section 33 of the Act, thereby permitting the Licensing Authority to refuse an application due to lack of evidence

(as opposed to the present operation, which requires a finding that the application is either in the public interest or not in the public interest).

3.3 Director's Certificate

In the event that Section 38(5) is triggered, an applicant is required to obtain a certificate from the Director that the proposed application is of a kind sufficiently different from the application that was not granted.

The present drafting of Section 38(5) is causing considerable confusion amongst applicants as no guidance is provided within Section 38(5) with respect to the interpretation of the phrase "of a kind sufficiently different".

The phrase "of a kind sufficiently different" raises the following questions:

(a) is it sufficient if the fresh application is for a different kind or category of licence, or alternatively a different sub-category of licence (i.e. the original application that was refused was for a tavern licence, however the fresh application is for a small bar licence)?

(b) In the event that the application is for a different kind or category of licence, whether the services proposed to be provided are required to be of a different kind. By way of example, the original application may have been for a small bar licence, with the proposed manner of trade analogous to a licensed café (i.e. a focus both on the provision of food and liquor). In these circumstances would a restaurant with an ETP permitting it to serve liquor which is not consumed ancillary to a meal be a sufficiently different kind of applicants given that the types of services proposed to be provided are similar;

(c) Whether an application could be made for the same kind or category of licence if the services proposed to be provided are distinctly different. By way of example, if the original unsuccessful application was for a tavern licence which proposed to primarily focus upon the provision of live entertainment, would a subsequent application for a tavern licence be viewed as of a sufficiently different kind in circumstances where the new applicant proposed to focus upon Spanish wines and tapas food.

It is submitted that clarification needs to be provided in relation to the matters which can be taken into account by the Director when determining whether or not an application is "of a kind sufficiently different".

Term of Reference

4. **The definition of "drunk".**

The definition of "drunk" appears in section 3A of the Act:

> *3A. Term used: drunk*
>
> *(1) A person is drunk for the purposes of this Act if —*
>
> *(a) the person is on licensed premises or regulated premises; and*
>
> *(b) the person's speech, balance, co-ordination or behaviour appears to be noticeably impaired; and*
>
> *(c) it is reasonable in the circumstances to believe that that impairment results from the consumption of liquor.*
>
> *(2) If an authorised officer or a person on whom a duty is imposed under section 115 decides, in accordance with subsection (1), that a person is drunk at a particular time, then, in the absence of proof to the contrary, that person is to be taken to be drunk at that time.*

Liquor legislation in other jurisdictions in Australia (New South Wales, South Australia, Victoria, Northern Territory and Tasmania) has equivalent prohibitions on the supply of liquor to intoxicated persons.

With the exception of Tasmania which provides that liquor shall not be sold or supplied to a person who appears to be drunk, all of the jurisdictions provide equivalent definitions of drunk (or intoxicated) to the Western Australian definition of "drunk".

The concept of "drunk" is relevant to both prosecution and defence.

The prosecution may rely on the view formed by an authorised officer who decides, in accordance with subsection (1), that a person is drunk at a particular time. In the absence of proof to the contrary, that person is taken to be drunk at that time.

Therefore, the prosecution is presented with a forensic advantage in that an authorised officer's opinion that the person is drunk is taken to be proved, in the absence of proof to the contrary.

A licensee and its staff may also rely on the definition in section 3A to form a view that a person is "drunk".

This provision is slightly different to the provision which it replaced when section 3A was inserted by amending act number 73 of 2006.

The previous provision appeared in sections 115(3) and (3a) of the Act and provided that:

> *“s115(3) a person is drunken for the purposes of this Act the person's speech, balance, coordination, or behaviour is noticeably affected by liquor.*
>
> *s115(3a) if an authorised officer or a person on whom a duty is imposed under this section decides, in accordance with subsection (3), that a person is drunken at a particular time, then, in the absence of proof to the contrary, that person is to be taken to be drunken at that time."*

Accordingly, under the previous provision, subsection (3) deemed a person to be "drunk" when an authorised person/officer decides that any of the persons "speech, balance, coordination, or behaviour is noticeably affected by liquor".

In the case of *Starkie v Van Tobruk [2007] WASC 51* at [49], Judge Blaxell said:

> *"these are objective manifestations of intoxication which as a matter of common experience are usually present in person who is drunk. However, it is not enough for a person to be "drunken" for the purposes of the Act that he or she is simply intoxicated by alcohol, even if intoxicated to a substantial degree. What is necessary is that the person's speech, balance, coordination, or behaviour the "noticeably affected" by such intoxication."*
>
> At [50] *"it would also seem that for the person to be "drunken" one or more of these manifestations must be noticeable to the person supplying the liquor. In this regard subsection (3a) contemplates that the person selling or supplying the liquor should make a decision whether or not the person to be supplied is "drunken". If a decision is made "in accordance with subsection (3) "that a person is drunken at a particular time, then, in the absence of proof to the contrary, that person is to be taken to be drunken at that time."*

Blaxell J recognised that under section 108 of the Act, a licensee could not without reasonable cause refuse to sell liquor to any person and that it imposed a penalty on the licensee for so doing.

Subsection 102 (3) provided under the former Act that:

> *"(3) a licensee has reasonable cause to refuse… to sell liquor to a person… if-*

(a) *the person appears to be drunken or otherwise appears to be a person whose presence, or the provision of service to whom, on the licensed premises will occasion the licensee to commit an offence under this Act."*

At [52] Blaxell J said:

> *"it follows that the question whether or not a person being supplied with liquor on licensed premises is drunk or drunken is doubly important. If the person is "drunken" an offence will be committed by supplying the liquor. If on the other hand, the person is not drunk, an offence of equal gravity will be committed by refusing to supply the liquor. It is consistent with the burden thereby placed upon the licensee, that the decision whether or not a person is "drunken" should be determined by reference to objectively observable criteria."*

At [55] Blaxell J said:

> *"in all these situations, the test to be applied under subsection 115 (3) is whether a hypothetical reasonable observer in the position of the licensee or employee would have observed that the speech, balance, coordination or behaviour of the customer was "noticeably affected by liquor".*

There is a subtle but significant difference under the provisions of the current Act in section 3A (1) which requires that the authorised officer or the person on whom a duty is imposed under section 115 decides, in accordance with subsection (1), that the person's speech, balance, coordination or behaviour appears to be noticeably impaired. Subparagraph (c) requires additionally that it is reasonable in the circumstances to believe that that impairment results from the consumption of liquor.

The importation of the requirement that it be reasonable in the circumstances to believe that the impairment results from the consumption of liquor overlays an objective test on the subjective interpretation of a person's appearance.

In other words, the subjective judgement of an authorised officer or bar staff that a person is drunk must be objectively reasonable in the circumstances.

Proving allegation that a person is "drunk" accordingly requires that it be objectively reasonable in the circumstances to believe that the impairment of the person's speech, balance, coordination or behaviour is the result of the consumption of liquor.

This provision was amended to take into account the possibility that speech, balance, coordination or behaviour may be impaired because of reasons unrelated to the consumption of liquor, such as a neurological condition like multiple sclerosis.

It is difficult to articulate an improvement to the definition of "drunk" but the definition is open to misuse by police and it remains a very difficult allegation for a licensee to negate.

The current penalty for permitting drunkenness is a fine of $10,000 for the licensee or manager and a fine of $4,000 for an employee or agent.

The current penalty for selling or supplying liquor, or causing or permitting liquor to be sold or supplied, to a drunken person or allowing or permitting a drunken person to consume liquor on licensed premises is a fine of $10,000 for a licensee or a manager and a fine of $4000 for an employee or agent, and for anyone else, a fine of $2,000.

The definition of "drunk" for the purposes of the Act is problematic because it is essentially a subjective judgement, albeit one which must be objectively reasonable.

Proof that someone is "drunk" does not require proof that their blood alcohol content is of any particular level and does not even require proof of intoxication to a substantial degree. All that is necessary is the formation of the view that a person's speech, balance, coordination or behaviour appears to be noticeably impaired from the consumption of liquor. In those circumstances the onus of proof is reversed and the evidentiary burden to disprove that a person is drunken at a particular time falls upon the person against whom the allegation is made.

There is no obligation on police to inform a licensee or the licensee's staff at the time that the police officer has decided that a person is drunk, or even that a prosecution might be initiated.

A prosecution for an offence under the Act may be instituted at any time within 4 years after the date on which the offence is alleged to have been committed. There is no time limit on the making of a complaint for disciplinary action under section 95 of the Act.

Under the Liquor Control Act of the Northern Territory, section 124B provides that in proceedings for an offence against that Act in which the question of whether a person was or was not drunk is in issue, the result of a breath analysis, by the use of a breath analysis instrument prescribed for the purposes of the Traffic Act, is admissible and is prima facie evidence of the person having, at the time the sample of breath to be analysed was taken, a

concentration of alcohol in his or her breath not less than the concentration assessed by the analysis.

There is no similar provision in the Act, but section 70 of the *Road Traffic Act 1974 (WA)* provides that in any proceedings for an offence under the *Road Traffic Act* or any other Act in which the question of whether a person was or was not, or the extent to which he was, under the influence of alcohol at any material time is relevant, evidence may be given of the analysis of a sample of breath/blood or oral fluid obtained pursuant to the *Road Traffic Act* provisions.

However, unless the preconditions in section 66 of the *Road Traffic Act* are satisfied there is no power to require a person to provide a sample of breath, blood or oral fluid for analysis.

Expert scientific evidence on the issue is always admissible if it is relevant. In *Starkie v Van Tobruk*, a post-mortem sample of blood was analysed and revealed a blood alcohol content of 0.032% which would have been "very close" to the concentration at the time of Ms Dix's death.

See also *Hartill v Vivian [2000] WASCA 263* where a patron had been involved in a traffic accident some hours after his ejection from licensed premises. A sample of his blood was taken and was found to contain a blood alcohol content of 0.026% which was calculated back to 0.195% at the time of the accident.

Scott J held that it was common ground that while such analysis was relevant for the purposes of the *Road Traffic Act*, it had no statutory significance in relation to the Act. In addition, there was no evidence as to whether the patron had consumed alcohol, and if so what quantity, between the time he was asked to leave the hotel and the time of the accident.

At present, there is no power under the Act to require a person to give a sample of breath, blood or oral fluid for analysis, in order to determine a person's level of intoxication.

In any case, manifestations of alcohol intoxication vary according to the tolerance of the individual and the introduction of a prescribed blood alcohol level as the determinant of whether someone is "drunk" for the purposes of the Act is as arbitrary as the current subjective determination of "drunk" and is just as likely to produce injustice.

Term of reference

5. The appropriateness of penalties contained within the Act.

Penalties can be found in numerous locations in the Act for offences under the Act and also in the disciplinary action which the Commission is empowered to take in section 95 proceedings.

The Act also provides for a general penalty in section 166 where a person commits an offence against the Act for which no penalty is specifically provided. In those circumstances the penalty is a fine not exceeding $2000.

The penalty regime also includes penalties where no prosecution is initiated but an infringement notice is issued in respect of certain prescribed offences and a modified penalty is paid.

Pursuant to the infringement notice provisions, a modified penalty is payable in respect of an offence to which the infringement notice relates and is specified in the infringement notice as the modified penalty for that offence.

If the modified penalty is paid within 28 days after the giving of the notice, the payment of the penalty shall not be taken to be an admission in any proceedings whether criminal or civil and no proceedings shall be brought (other than proceedings or a penalty under sections 95 and 96 of the Act) and no other penalty imposed, other than proceedings which might have been brought or a penalty which might have been imposed even if a charge of the alleged offence had been heard and determined by a court.

The modified penalty specified in an infringement notice shall be 10% of the maximum fine for that offence under the Act, as at the time the alleged offence is believed to have been committed.

The infringement notice regime and the payment of a modified penalty in respect of an offence to which the infringement notice relates can confer significant savings for an offender who has no defence, because the modified penalty is not calculated on the maximum penalty increased fivefold for a corporate body.

However, the payment of the modified penalty under an infringement notice does give rise to cause for disciplinary action under section 95 of the Act which, in turn, can give rise to further penalties being imposed under those provisions.

Probably the most fundamental offence under the Act is the offence in section 109 of the sale of liquor by a person, whether personally or by an employee or agent, where the person is not the holder of a liquor licence or permit which authorises the sale.

For that offence, the prescribed penalty is a fine of up to $20,000 and imprisonment for 2 years, but the minimum penalty is a fine of $2,000.

The Act generally equates licensees with managers for the purposes of fines and provides for a lesser penalty for an employee or an agent.

It appears that the maximum penalty available is the fine of $20,000 and imprisonment for up to 2 years pursuant to section 109 of the Act for the unauthorised sale of liquor. All other offences under the Act carry lesser penalties.

By comparison however, the maximum monetary penalty which can be imposed under the disciplinary provisions is $60,000.

Pursuant to section 164 of the Act, where an offence under the Act is found to have been committed by a body corporate, and the offence is found to have been committed with the consent or connivance of, or to be attributable to any failure to take reasonable steps to secure compliance with the Act on the part of any officer or other person concerned in the management of the body corporate, that person as well as the body corporate shall be deemed to have committed an offence and each shall be liable to the same penalty as is prescribed for the principal offence.

Pursuant to section 165 of the Act, a licensee is made liable to the penalty prescribed for the principal offence where an employee or agent of the licensee commits an offence for which the licensee would have been liable had it been committed by the licensee.

Maximum penalties prescribed by the Act are liable to be increased fivefold where the party who is subject to the penalty is a body corporate, because of the provisions of section 40 of the *Sentencing Act 1995.* Subsection (5) provides:

> *"except where a statutory penalty is expressly provided for a body corporate, a body corporate that is convicted of an offence the statutory penalty for which is, or includes, a fine is liable to a fine of 5 times the maximum fine that could be imposed on a natural person convicted of the same offence."*

Subsection (5a) provides:

> *"except where a statutory penalty is expressly provided for a body corporate, a body corporate that is convicted of an offence the statutory penalty for which is or includes a minimum fine is liable to a fine of at least 5 times that minimum fine."*

The Act does not contain any statutory penalty which is expressly provided for a body corporate. Therefore, the effect of section 40 of the *Sentencing Act* is to make a body corporate that is convicted of an offence liable to a fine of 5 times the minimum or maximum (as the case may be) fine that could be imposed for that offence.

In the case of the maximum fine available for selling liquor without being the holder of a licence or permit, section 40 of the *Sentencing Act* increase the maximum fine from $20,000 to $100,000 in the case of a body corporate offender.

Many liquor licences are held by body corporate licensees. Examples include sporting clubs where the licence is held by an incorporated association; sole director/shareholder Pty Ltd companies; husband and wife director companies and large public companies.

The *Sentencing Act 1995* consolidated the laws with respect to sentencing to provide uniformity and consistency of approach, regardless of the source of the liability or penalty.

The only exception to the effect of section 40 (5) of the *Sentencing Act* is where "a statutory penalty is expressly provided for a body corporate". The *Sentencing Act* is an Act of general application and its object is clearly to render bodies corporate which commit an offence liable to a greater maximum penalty by way of fine than other offenders, even though the same offence may be committed.

It does not follow that, in every case, the penalty imposed on a corporate offender will be 5 times that which would be imposed on a natural offender for the same offence.

There will be circumstances, in particular, where the degree of criminality will be such that the maximum fine provided in respect of a natural offender would be adequate to reflect the criminality involved in the offence. In cases, however, where the maximum fine prescribed in respect of a natural offender appears inadequate to reflect adequately the degree of criminality involved in the offence, a court is enabled by section 40 (5) to more adequately reflect the full measure of the criminality when dealing with a corporate offender.

Section 53 of the *Sentencing Act* also provides that if the court decides to fine an offender then, in deciding the amount of the fine the court must, as far as practicable, take into account the means of the offender and the extent to which payment of the fine will burden the offender.

In the circumstances there is a check and balance which works against the imposition of excessively high fines in the case of a body corporate which is liable to 5 times the penalty of a natural person.

However, a targeted penalty regime for bodies corporate could be achieved by expressly providing for the specific penalty to be applied to a body corporate, thus avoiding the arbitrariness of section 40 (5) of the *Sentencing Act* and recognising that offences under the Act can vary significantly in their circumstances, ranging from minor unapproved works to significant and wilful contraventions of the Act.

The size of the maximum penalties in the current legislation accommodates the broad spectrum of offences which can be committed.

The potential for additional penalty under the disciplinary provisions means that there is adequate scope for appropriate penalties in the current penalty provisions and there is no demonstrated need to increase the penalties.

Conclusion

Society representatives would welcome the opportunity to meet, at the invitation of the Review Committee, to clarify or amplify any of the comments in this submission.

Craig Slater
President