



Preparing an Evidence-Based Overprovision Policy Step-By-Step Guidance

Notes by West Dunbartonshire Licensing Board Clerk

Introduction

In 2010, West Dunbartonshire Licensing Forum asked their local Alcohol and Drug Partnership (ADP) to prepare and present evidence to inform their response to the Licensing Board's planned consultation on overprovision. This can be considered a sensible approach to take for a number of reasons. Firstly, it is difficult to carry out a proper assessment without the appropriate evidence and analysis of your local area, which the ADP was well placed to do. Secondly, there was widespread interest from all partners involved to find out what the data said about our local area.

The data that were collected were very clear about the challenges that alcohol presented to our area, challenges which are common to many parts of Scotland. The evidence 'spoke for itself' and produced consensus from the Forum, Board, local licensed trade, Community Planning partners and consultees. It also produced a robust policy which has been applied consistently by the Licensing Board and remains unchallenged.

Licensing Boards face a number of differing pressures. Increasingly there is widespread recognition that the difficult problems facing an area (e.g. gap in life expectancy) cannot be solved by any single agency. Instead there is a need for a co-ordinated multi-agency approach to deal with community issues, and licensing needs to be part of that. Secondly, cases such as Brightcrew make it increasingly difficult for Boards to determine applications in the absence of a robust policy framework. Meanwhile, the licensing system requires to remain quasi-judicial and fair and its decisions need to be justified and robust. We found that the development of an evidence-based Licensing Policy Statement provided the answers to many of these pressures.

The gathering of data for our overprovision policy and its subsequent inclusion in policy produced a number of unexpected hurdles. Inevitably this meant that the process was longer than it might have been. This step-by-step guide is intended to point out some of the issues in the process and potential solutions in the hope that it will help Licensing Boards, Licensing Forums, Alcohol and Drugs Partnerships etc with a road map.

While West Dunbartonshire's data and analysis eventually resulted in an overprovision policy covering most of the local authority's area, I would not necessarily urge other Boards to adopt the same policy. The important fact is that you are aware of the extent of the alcohol related issues facing your area and are able to make fully informed decisions which reflect the licensing needs of your community.

Best of luck.

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1. An evidence-based policy or not?

Consider to what extent you need to collect evidence to support a policy.

On the one hand it might be perceived that an evidence-based policy ties the Board's hands. Thus there is an attraction in having wider policies, perhaps stressing the importance of local knowledge and potentially giving something on which to hang any decision.

On the other hand, the arguments for an evidence based policy are:-

- Section 3 of the Licensing (Scotland) Act 2005 provides that the Board must ensure the policy seeks to promote the licensing objectives. At least one Senior Counsel has given the opinion that 'a Board cannot ensure without gathering evidence'. Arguably the evidence should underlie all of the policy, not just the overprovision section of it;
- In determining individual applications, the onus is on the Board to demonstrate that any issue flows from the sale of alcohol in the particular premises. This may be very difficult to do. For example, it is very difficult to show that alcohol-related deaths and other health problems are linked to one particular premises. By way of contrast, the development of a policy can result in such wider issues being fully considered, then reversing the onus onto the applicant to demonstrate why the policy should not be followed;
- There is an increasing focus from the Scottish Government and others on changing Scotland's relationship with alcohol. Liquor licensing, being the sole means of controlling the availability of alcohol, is increasingly being viewed as a key part of this. The joined up thinking arising out of the Community Planning agenda will increasingly put pressure on Board members to look at the wider issues arising through the use of alcohol in their communities;
- A vague 'catch all' policy still needs to be clearly linked to the decision in question – *Watson v Western Isles LB* 18 January 2011. In that case the Board's refusal of an application for Sunday opening on the basis of the health objective was described by the Sheriff as 'an arbitrary application of a general policy'.
- Decisions made 'on the hoof' using local knowledge are more likely to attract challenge than those made on the basis of an evidence based policy. Different Sheriffs can easily come to different decisions on the use of local knowledge – contrast the two recent cases of *Tesco v Glasgow LB* 15 October 2012, and *Sabti v North Ayrshire LB* 24 August 2012.
- Decisions based on robust evidence-led policies are likely to withstand subsequent court challenge. There are two reasons for this. Firstly, the 2005 Act is predicated on the principle that Board policies should give fair notice of what Boards expect. This is particularly the case for overprovision. Secondly, Boards may face an insurmountable onus to demonstrate grounds of refusal in the absence of a clear and robust policy.

2. When to start?

Start the gathering of information process at least nine months before the policy is due to be finalised.

3. Advance work

Speak to contacts in the local Alcohol and Drugs Partnership (ADP), local authority and Police to ascertain that they are both willing and able to provide the required statistics. If the ADP is not in a position to co-ordinate the gathering of health data, speak to contacts in the Health Board.

4. Power to require information

If resistance is encountered, note that Section 6(5) allows the Licensing Board to request the Chief Constable, Council and Health Board to provide the Board with such statistical or other information as the Board may reasonably require for the purposes of preparing a Licensing Policy Statement.

5. Who leads in gathering information?

It is recommended that the local Alcohol and Drugs Partnership (ADP) takes the lead in co-ordinating the gathering of statistical evidence. While the ADP takes the lead, it is likely that preparation and analysis of the data will need to be done by the Health Board and Police.

6. Who gets the information?

The initial consideration of statistical evidence can either be done by the Board or by the Licensing Forum. While the Forum has Police and Health membership, the route to be chosen will probably depend on the capacity and the willingness of the Forum to undertake this role.

7. What areas should be used?

While the areas chosen for analysis need to reflect local communities, they also need to be areas for which statistics can be gathered. Thus avoid using more ad-hoc areas (e.g town centres). Scottish Neighbourhood Statistics are gathered for individual datazones which have been amalgamated into intermediate data zones which represent existing communities. These are approximately two to six thousand in population, depending on whether an area is rural or urban. Such intermediate datazones are probably the best areas to use.

8. Choosing a comparator

It is important that an appropriate comparator is obtained. The obvious comparator is to compare health data with the Scottish average and Police data with the Force average. However, it should be noted that if Scotland is the sick man of Europe for

alcohol problems, then such a comparator may not be particularly meaningful. Nevertheless, for 2013 the Scottish average might have to be used by most Boards. If seeking to use a UK wide comparison, it is advised that you contact Alcohol Focus Scotland to ascertain whether comparable UK data is available and, if so, from where. It is also important to compare trends within your area over time.

9. Standardising the data for comparison

For ease of analysis it is recommended that the data is standardised (e.g. the local data is converted into the same basis as the national data to enable direct comparison). This might be to normalise the number of cases to a figure representing the number per 100,000 of the population.

10. What is the minimum information to get?

The minimum statistical evidence which should be gathered is:-

- Alcohol-related deaths;
- Alcohol-related hospital admissions/or emergency admissions;
- Alcohol-related crimes;
- Alcohol-related Police incidents.

11. Other useful data

Useful sources of other data are mentioned in the Alcohol Focus Scotland Toolkit at <http://www.alcohol-focus-scotland.org.uk/licensing-toolkit> and other core indicators are covered in <http://www.scotland.gov.uk/Resource/0039/00391796.pdf>. Such other data might include:-

- Environmental Health – noise and other nuisance cases involving licensed premises;
- Fires – there is a clear link between alcohol and fires and details of the number of fire related fatalities and fire-raising can be obtained from the Firemaster;
- Addiction rates;
- Figures from Police on sobriety of arrestees (noting that these will be an under estimate as warrants are normally exercised in the morning when persons are most likely to be found sober);
- Percentage of children and families social work cases involving addiction;
- Percentage of Criminal Justice cases involving addiction;
- Percentage of Accommodated Children and Young People cases involving addiction;
- Percentage of domestic violence cases involving alcohol;
- Local Alcohol-related deaths – these are recorded across 408 local authority areas in the UK for both males and females and a figure can be obtained as to where your Authority ranks;

- Local surveys and community consultations – these might include surveys on where alcohol was bought, analysis of test purchase failures etc;
- National data on the volume of alcohol sold in Scotland, the trends in sales relating to the On-Sales and Off-Sales sector – MESAS (Monitoring the Effectiveness of Scotland’s Alcohol Strategy). Data was prepared by the NHS in 2011 and 2012. This is freely available on the internet;
- Studies showing the link between alcohol related problems, the availability of alcohol and the number of licence premises – Alcohol Focus Scotland have done work on consolidating the information available and this can be found in their fact sheet 1 at www.alcohol-focus-scotland.org.uk/licensing-toolkit;
- Trend analysis is also useful to obtain. In other words, it is useful to ascertain whether the problem is getting better or worse. For example, this trend analysis might include a graph showing hospital admissions attributable to alcohol misuse for successive years;
- Local Police surveys taken during inspections of the number of patrons in on sales premises, comparing this to capacity to measure the extent to which premises were trading to their capacity;
- In September 2012 Alcohol Focus Scotland published details of the cost of alcohol to each local authority area, available at <http://www.alcohol-focus-scotland.org.uk/cost-of-alcohol-harm-profiles>;
- Mapping of the location of different types of premises can also be helpful in showing what percentage of the local population live within walking distance (500m) of a licensed premises. This gives an indication of the provision a local population has in terms of access to licensed premises.

Not all of this information may be available, check with the ADP, Police, Health Board and Social Work to see what they can provide.

12. Categories of licensed premises

Determine the categories of licensed premises which are to be examined. Use of the categories detailed in the Statutory Guidance is not recommended for an Overprovision Policy. It is essential to be able to clearly determine whether a particular application fits within the relevant category. The Statutory Guidance classifications are not sufficiently clear. For example, its use of ‘vertical drinking establishment’ might imply that an application with a 51% seated area was outwith this, but not within any other category. The use of the ‘hybrid premises’ category is also problematic. For this reason it is recommended that the categories used are tied to the Planning Use Classes. This could result in the following categories being looked at:-

- sui generis use as a public house – paragraph 3(5)(h) of the Town and Country Planning (Use Classes) (Scotland) Order 1997. This also includes use as a hotel or hostel licence for the sale of alcoholic liquor to persons other than residents or persons other than consuming meals on the premises (exclusion from Class 7, Use Classes Order);
- restaurants – Class 3, Use Classes Order;

- nightclubs – Class 11(d), Use Classes Order;
- town hotel – Class 7, Use Classes Order;
- supermarkets – these are mainly Class 1, Use Classes Order, but may contain other uses in addition;
- off-sales and local convenience stores - Class 1, Use Classes Order.

13. The number of licensed premises

Count up the number of licensed premises per category in each of the intermediate data zones.

14. Capacity

Count up the on-trade and off-sales capacity in each of the intermediate data zones. While the 2005 Act requires the capacity to be obtained this is unlikely to be of much help in determining if there is overprovision, particularly for on-sales. Many on-sales trade at massively below their capacity. A Police survey of capacity showed that different on-sales areas in West Dunbartonshire were trading at between 3% and 12% of capacity. Capacity does provide a benchmark for the future once an Overprovision Policy has been made.

15. Advance consultation

Informal consultation with Licensing Forum, Health Board and Police – in advance of a formal consultation process it would be worthwhile to hold an informal consultation to check that all relevant data had been gathered and to inform the preparation of an Issues paper for full consultation.

16. Public consultation

At this stage the issue is whether to consult on a draft proposal or to put out an ‘issues paper’ summarising the evidence and the issues on which views are sought. The local Citizens’ Panel could be used for consultation, an example being Aberdeen City’s work which can be viewed at <http://www.alcohol-focus-scotland.org.uk/public-health-and-licensing> Licensing Forum members should also be encouraged to get as full a consultation as possible from the groups that they represent.

17. How to determine if there is overprovision?

For the purpose of determining overprovision the key areas of data are probably:-

- alcohol-related deaths per intermediate data zone;
- alcohol-related hospital admissions/or emergency admissions per intermediate data zone;
- alcohol-related crimes per intermediate data zone;
- alcohol-related Police incidents per intermediate data zone.

If the figures show that an area is above the Scottish average for alcohol-related deaths and hospital admissions, then this substantiates a finding that there is overprovision of licensed premises within that area and a policy is necessary to protect and improve public health. If the figures for alcohol-related crimes for an intermediate data zone are above the average, (Scottish or Police Force area) this will support an Overprovision Policy based on preventing crime and disorder, and securing public safety. If the figures for alcohol-related Police incidents in an intermediate data zone are above the comparator, then this would support an overprovision area based on securing public safety and preventing nuisance.

There are two different ways on which an Overprovision Policy might be framed:-

1. The West Dunbartonshire approach was that if an intermediate data zone was above average for three out of the four statistics then there was overprovision in that area.
2. Another approach might be to hold that there may be overprovision for different reasons across different areas. For example:-
 - an area which was above average for all four characteristics might have overprovision for the crime and disorder, public safety, nuisance, protecting children from harm and public health objectives;
 - an area which had above average health figures but below average crime and disorder figures might be an overprovision area purely for the health objective.

This would result in layers of overprovision. It would, however, mean that when dealing with a particular application, the applicant would know the exact reason for the overprovision and would be able to focus on the figures for this particular objective.

Arguably the number or capacity of premises in a locality is not a key factor in deciding whether there is overprovision. Instead the determining factor is the extent to which there are alcohol related health, crime etc problems in an area.

18. Direct causal link between premises and overprovision

The Statutory Guidance is unhelpful as it refers to there being a direct causal link between the problems in an area and the number of premises in that area. It is thought this goes further than the Act and it is hoped that this will be removed prior to October 2013 when new Guidance is introduced. It may apply to traditional town centre type problems of a town centre reaching a limit for crime and disorder problems on a Friday and Saturday night. However, when 69% of all alcohol is sold by off-sales (75% of this from the four main supermarket chains) it is increasingly difficult to make a link between individual premises and the problems in a locality. Indeed some areas of deprivation can have significant alcohol-related problems but few licensed premises. Surveys such as the one in Whitecreek, Clydebank demonstrated that most persons bought alcohol outwith the area in the local Asda, meaning that there was little causal link between the problems occurring in Whitecreek and the number of premises in that area. Even in densely populated urban

areas customers are likely to travel up to two miles to buy alcohol from supermarkets. The way that West Dunbartonshire Licensing Board got round the ‘causal link’ problem was to have one overprovision area which encompassed 15 out of their 18 intermediate data zones. Thus it did not matter if the person bought alcohol in one intermediate data zone and drank it another. The 18 intermediate data zones were, however, retained as sub zones for statistical purposes.

19. Mapping the overprovision area

Maps will be available showing each intermediate data zone and these can be obtained through the ADP/Health Board. Sometimes the names given to an intermediate data zone might not truly reflect the local naming of the area and the Board can change the name of any intermediate data zone.

20. The importance of fully exploring the pros and cons of overprovision

When recommending policy to the Board it is important that the Board is fully aware of the implications of the recommendation. For example, an Overprovision Policy might, in the long term, improve the area’s health and economic development. However, in the short term, it might stop a new supermarket which might bring new employment and be seen as a key component of a regeneration proposal. Alternatively, it might make it more difficult to open up a local shop providing accessible groceries in areas of deprivation. All this information should be put to a Board to enable it to fully weigh up the pros and cons of making an Overprovision Policy. This ensures that if the Board makes such a policy they are fully bought into it and are more likely to consistently apply it in full knowledge of its impact.

21. Include in policy the evidence required to overcome the Policy

A policy creates a presumption and the onus will be on an applicant to overcome the presumption that the policy will be followed. It is helpful for Boards to give guidance to applicants on the evidence it would expect from them when seeking to persuade the Board to disapply the policy. The West Dunbartonshire policy indicates that it expects applicants to give robust and factual evidence against each licensing objective to demonstrate why the benefits in granting the application outweigh the Board’s Overprovision Policy.

22. Using the evidence for other increases in alcohol sales, outwith overprovision

Overprovision is a ground of refusal of a premises licence under Section 23(5)(e) and a ground of refusal of a major variation application under s.30(5) (d). These sections refer to the Board ‘having regard to the number and capacity’ of licensed premises. This implies that an application which neither increases the number or capacity of premises cannot be refused under overprovision. However other applications might

increase the supply of alcohol or be likely to have detrimental impacts on the health, crime etc figures. Examples might include an application to change the type of premises, to increases in hours and to applications for home deliveries etc. Such applications could be refused under 23(5)(c) or 30(5)(b) that granting the application would be inconsistent with one or more of the licensing objectives. A Licensing Policy Statement could provide that the same evidence underlying its overprovision assessment creates a presumption that any application which increases the availability of alcohol will be refused under Section 23(5)(c) or 30(5)(b) as inconsistent with one or more of the licensing objectives, on the basis of the evidence obtained for the overprovision assessment. This should be detailed in the policy.

23. Overprovision across the whole of a board's area?

The health statistics in particular may give reasons for having an Overprovision Policy covering the entire Board area. Section 7 does however refer to the Board making a statement “as to the extent to which there is overprovision in any locality within the Board's area”. The word “within” might suggest that the overprovision area is smaller than the entire Board area. This was the view taken by Sir Crispin Agnew QC. To be safe, any Board wanting to make such a policy should try to exclude some small part of their area.

24. Subsequent reduction in premises - deal with this scenario in your policy

Overprovision provides a snap shot of the problems in a locality at that time. At present there is no statistical evidence available to demonstrate the level to which the number of premises would have to be reduced to remove overprovision. What happens if you have lost one or two premises? Does that automatically mean that there is room for these to be replaced by others? The West Dunbartonshire approach was to provide that if this occurred then the Board reserved the right to reconsider the overprovision situation, taking into account the capacity being replaced and the location of the new premises. Only if the figures had improved to an acceptable level would such an application find favour.

25. Applications outwith the overprovision area which draw trade from it – cover this in policy

To get round an Overprovision Policy it is likely that new applications will be made in areas outwith the overprovision area. Some of these applications may well have a trade draw from within the overprovision area. For example, an off-sales or supermarket just outside an overprovision area will almost certainly attract custom from the overprovision area. Similarly a nightclub may attract trade from the entire local authority area and wider. On the other hand, a local community pub may not attract significant trade from outwith its immediate locality. The West Dunbartonshire approach was to provide that if new applications outwith the overprovision area have significant trade draw from an overprovision area then the Board reserved the right to consider these against overprovision. How trade draw is established is as follows:

Firstly, for a new supermarket these inevitably have to provide a retail impact assessment as part of the planning process which defines the extent of trade draw and the impact on nearby towns. This retail impact assessment could be used by a Board (or the Board asks for its own retail impact assessment from the applicant) to ascertain trade draw. For an off-sales, a comparison of the walking or driving distances to other nearby off-sales will provide a measure of trade draw. As regards pubs and nightclubs this is largely determined on the basis of local knowledge.

26. Update the information regularly

Once a policy is in place, continue to provide updated statistical information to the Board.

27. Considering applications against an overprovision policy

When applications are received contrary to policy, it is helpful to applicants (and to avoid future challenge) if the applicants are directed to the publicly available evidence which underlies the Board's Licensing Policy Statement. They can then be in no doubt as to the hurdles they need to overcome.

28. Normal legal hoops for a policy

Finally, the Licensing Policy Statement will need to comply with normal legal hoops. These include:-

- Elder v Ross & Cromarty District Licensing Board 1990 SLT307 – the policy must be based on grounds which relate to and are not inconsistent with or destructive of the purposes of the Statutory Provisions under which the discretion is operated;
- Brightcrew v Glasgow City Licensing Board 2011 SC1846 – the function of the Act is the licensing of the sale of alcohol and the Board's policy must be based on these purposes;
- Brightcrew – the Board cannot, through a policy, impose a condition that could not be imposed under Section 27(7) e.g. relates to a matter such as planning, building control or food hygiene which is regulated under another enactment;
- The policy must have a proper basis, in fact - Cinderella Rockerfellas Limited v Glasgow DLB1994 SCLR591;
- Note, however, that the weight to be given to factors is for the Board to determine – Hughes v Hamilton District Council 1991 SLT628. This applies as much to development of policy as to determining applications.

29. Further reading

Alcohol Focus Scotland – Licensing Resource Toolkit – Factsheet 1 – using evidence to support policy and decision making

Alcohol Focus Scotland – Licensing Resource Toolkit – Factsheet 2 – Statements of licensing policy: Using policy to guide licensing decisions