

STATES OF JERSEY



DRAFT LIQUOR LICENSING (JERSEY) LAW 201- (P.103/2017): AMENDMENT

Lodged au Greffe on 9th January 2018
by Senator Sir P.M. Bailhache

STATES GREFFE

1 PAGE 30, ARTICLE 1 –

Delete the definition “initial decision”.

2 PAGES 32 -35, ARTICLE 4 –

For Article 4 substitute the following Article –

“4 Establishment, composition, functions and procedures of Licensing Authority

- (1) There shall be established a body, to be known as the Licensing Authority, for the purpose of regulating the sale of intoxicating liquor.
- (2) The Licensing Authority shall comprise the following members –
 - (a) a legally qualified person who shall be the chairperson of the Licensing Authority; and
 - (b) subject to paragraph (3), 5 lay members –
 - (i) who are not members of the States, and
 - (ii) who do not have direct or immediate family connections to the liquor trade.
- (3) The members of the Authority shall be appointed –
 - (a) by the Minister on the recommendation of the Alcohol and Licensing Policy Group and following a recruitment process overseen by the Jersey Appointments Commission; and
 - (b) for a maximum of 2 four-year terms of office.
- (4) The Licensing Authority shall have the following functions –
 - (a) to determine applications for licences or special permits; and
 - (b) such other functions as are conferred on it by this Law or any other enactment.
- (5) Subject to the other provisions of this Law, the Licensing Authority may regulate its own procedures.
- (6) The Licensing Authority shall meet at least 8 times per year for the purpose of carrying out its functions under paragraph (4) and shall, before the end of each calendar year, publish, in such a manner as it deems appropriate, a schedule of its meeting dates for the subsequent year.
- (7) Notwithstanding paragraph (6), the Licensing Authority may convene extraordinary meetings as it deems necessary to deal with matters arising in respect of its functions.
- (8) The quorum for a meeting of the Licensing Authority shall be 3 members including the chairperson.

- (9) Notwithstanding any other provision of this Law, the Licensing Authority may, in writing, delegate to a States' employee any of the Licensing Authority's functions.
- (10) Where a member of the Licensing Authority has any direct or indirect personal interest in the outcome of the deliberations of the Licensing Authority in relation to any matter –
 - (a) the member shall disclose the nature of his or her interest at a meeting of the Licensing Authority in person or by means of a notice in writing brought to the attention of the Licensing Authority;
 - (b) the disclosure shall be recorded in the minutes of the Licensing Authority; and
 - (c) the member shall withdraw from any deliberations of the Licensing Authority in relation to that matter and not vote on it.
- (11) For the purposes of paragraph (10), a general notice given by a member of the Authority that he or she is a member or director of a particular entity and is to be regarded as interested in any matter concerning that entity is sufficient disclosure in relation to any such matter.
- (12) At a meeting of the Licensing Authority –
 - (a) the chairperson shall preside;
 - (b) each member shall have one vote on each matter for deliberation;
 - (c) in the event of an equality in the votes, the chairperson shall have a casting vote; and
 - (d) a member shall be treated as being present in a meeting of the Licensing Authority if, during the meeting, by way of a telephone, live television link, video link or otherwise, the member is able to hear all the other members in the meeting and to be heard by all the other members in the meeting.
- (13) A decision is a valid decision of the Licensing Authority, even though it was not passed at a meeting of the Licensing Authority, if –
 - (a) notice of the proposed decision was given to all members; and
 - (b) it is signed or assented to by a majority of members.
- (14) The Licensing Authority shall keep accurate minutes of its proceedings, including minutes of any business transacted in accordance with paragraph (13).
- (15) The Minister shall pay to the members of the Licensing Authority –
 - (a) such remuneration as the Minister may determine; and
 - (b) reasonable out of pocket or other expenses occasioned in the course of carrying out their duties.
- (16) In paragraph (2), “legally qualified person” means –
 - (a) an advocate of the Royal Court;

- (b) a solicitor of the Royal Court;
- (c) a person called to the Bar in England and Wales by one of the Inns of Court in England;
- (d) a member of the Faculty of Advocates in Scotland;
- (e) a solicitor of the Supreme Court of England and Wales; or
- (f) a person admitted as a solicitor in Scotland.”.

3 PAGE 39, ARTICLE 9 –

In paragraph (5), for the words “a redetermination” substitute the word “appeal”.

4 PAGES 41 AND 42, ARTICLE 14 –

In Article 14 –

- (a) in paragraph (5), for the words “convening a panel under Article 4(10) for the review of” substitute the word “reviewing”;
- (b) in paragraph (9), for the words “a redetermination” substitute the word “appeal”.

5 PAGE 43, ARTICLE 15 –

In paragraph (6)(b), for the words “a redetermination” substitute the word “appeal”.

6 PAGE 54, ARTICLE 40 –

In paragraph (6), for the words “a redetermination” substitute the word “appeal”.

7 PAGES 54 - 55, ARTICLE 42 –

Delete Article 42 and renumber the subsequent Articles accordingly.

8 PAGE 55, ARTICLE 43 (RENUMBERED ARTICLE 42) –

For paragraph (1)(b) substitute –

- “(b) any decision of the Licensing Authority,”.

9 PAGE 58, SCHEDULE –

In the sub-heading for the words “(Article 51)” substitute the words “(Article 50)”.

SENATOR SIR P.M. BAILHACHE

REPORT

1. A considerable amount of valuable work has been done by the cross-Ministerial Shadow Alcohol Licensing Policy Group (“the Shadow ALPG”) in terms of core objectives and setting the detail of a liquor licensing policy, and this amendment does not detract from that work. In one respect, however, this work is seriously deficient, and that deficiency relates to the composition and operation of the proposed new Licensing Authority.
2. The Report of the Minister for Economic Development, Tourism, Sport and Culture does not suggest that the existing Licensing Assembly is falling short in the performance of its functions in any way. It is an experienced, competent, independent and impartial tribunal which complies with the Human Rights (Jersey) Law 2000. The first question, therefore, is why it has been thought necessary or appropriate to replace the Licensing Assembly with an Authority which is untested and which does not comply with the Human Rights Law. When I put this question to officials, I was told that there were 2 principal reasons. The first was that the Licensing Assembly met only 4 times a year, and that the trade would welcome an Authority which met more frequently. The second was that the Shadow ALPG had been told by the Bailiff that the Licensing Assembly could not accept political direction in the exercise of its functions, and that conflicted with the desire of the Shadow ALPG to formulate a statement of licensing policy by which the Assembly/Authority would be bound.
3. As to the first reason, it is true that the Assembly has only 4 ordinary sittings in a year. However, it can and does sit in extraordinary session when requested to do so. I have made enquiries of the Bailiff’s Chambers as to the number of times that the Assembly has sat in extraordinary session during the last 5 years. I have been informed that the figures (excluding sittings to hear a reference from H.M. Attorney General under Article 9 of the Licensing (Jersey) Law 1974) are as follows –

2012 – 3 (+ 4 ordinary sessions) = 7
2013 – 3 (+ 4 ordinary sessions) = 7
2014 – 3 (+ 4 ordinary sessions) = 7
2015 – 4 (+ 4 ordinary sessions) = 8
2016 – 6 (+ 4 ordinary sessions) = 10.

Those figures do not reveal any significant difference from the proposed 8 sittings a year of the new Licensing Authority. Indeed, the figures show that in 2016, the Licensing Assembly sat on 10 separate occasions to hear applications from the trade, and on one further occasion to hear a reference from the Attorney General. The Bailiff’s Chambers have not refused any request for an Extraordinary Licensing Assembly during the last 5 years.
4. As to the second reason, it seems from what I have been told by officials that there has been a misunderstanding somewhere along the line. At one stage there was a proposal for political supervision to an extent which might have made it difficult for the Licensing Assembly (or indeed any Authority) to exercise its functions independently. The current proposal contained in Article 5 poses no such difficulty. The Statement of Licensing Policy will be approved by the States, and the Law Officers have confirmed that there is no reason in law why

the Licensing Assembly as currently constituted could not have regard to any such Statement in considering an application for a licence.

5. There are, however, other practical reasons why the current arrangements might be considered not to be ideal. Decisions of the Licensing Assembly are not subject to appeal, but they are amenable to judicial review. Depending upon how many Jurats were sitting on the Licensing Assembly, it might possibly be difficult or inconvenient (although retired Jurats can now be called in to assist if necessary) to find enough Jurats to sit with the presiding judge in the Royal Court on a judicial review of a decision of the Licensing Assembly. Furthermore, it is unusual to have a Chief Justice and members of a superior court sitting to determine liquor licensing applications. It could be argued that this was inappropriate. The Minister's Report does not reveal whether these issues have been discussed with the Bailiff or the members of the Licensing Assembly.
6. I am not convinced that there is any pressing need to replace the Licensing Assembly with another Authority. However, my amendment is based upon the assumption that for the reasons given above, or for other undisclosed reasons, it is desirable to replace the Licensing Assembly with some other Authority.
7. On that assumption, it seems to me important that the new Authority should be constituted in such a way as to be human rights compliant. The Human Rights Notes of the Attorney General make it clear that the Licensing Authority which would be constituted under Article 4 of the *Projet de Loi* is not so compliant. The Attorney General states –

“Notwithstanding the provision for the redetermination of decisions in Articles 4(11) and 42 of the draft Law, the Authority's decision-making processes in respect of licences and approvals do not afford the procedural guarantees required by Article 6 ECHR of an independent and impartial tribunal.”

The draft Law itself is compatible with Article 6 ECHR only because there is ultimately a right of appeal to the Royal Court.

8. This seems to me profoundly unsatisfactory. To replace an experienced and human rights compliant Licensing Assembly with an untested Licensing Authority which is not so compliant would be a significant step backwards. The licensing trade is entitled to know that applications for licences will be determined by a body which is independent and impartial. States Members are of course capable of acting independently and impartially. But a tribunal must not only be free from bias, but also from the appearance of bias. It is the function of politicians to respond to political pressures from their constituents. When a licensee is threatened with the removal of his licence because the conduct of the licence is disturbing the neighbourhood, the issues for determination are highly controversial. Neighbours (and perhaps even the licensee) will wish to make their views known to their political representatives. Such representatives cannot be seen to be independent and impartial if sitting on a licensing authority. Even apparently straightforward applications for a licence can involve controversial political issues and give the appearance of bias.

9. The resolution to these difficulties proposed by the *Projet de Loi* is twofold. If the first decision of the Licensing Authority is challenged by the applicant, it can be subject to review by a differently constituted Authority under Article 42 of the *Projet*. That differently constituted Authority will, however, also not be human rights compliant for the same reasons. The applicant may then appeal to the Royal Court. An applicant must, therefore, present his case 3 times before he can be assured of a hearing before an independent and impartial tribunal. That is not in my view satisfactory.
10. The amendment would substitute a differently constituted Licensing Authority composed of a legally qualified person (an advocate or solicitor) as chairperson, and 2 or more independent lay members, all to be appointed by the Minister on the recommendation of the Alcohol and Licensing Policy Group for a maximum of 2 four-year terms of office. The advice of the Law Officers is that such an Authority would be human rights compliant. It would have a legally qualified chairperson competent to deal with the legal issues arising, and independent lay members who were not subject to political pressures and influences. It would be an independent and impartial tribunal as required by Article 6 of the ECHR. The redetermination of decisions under Article 42 would become unnecessary and the amendment would remove that provision. The appeal to the Royal Court would remain, as would most of the other provisions in Article 4 of the *Projet de Loi*.
11. Administrative support for the new Authority would be provided by a new administration based in the Economic Development, Tourism, Sport and Culture Department, as envisaged by the Assistant Minister.

Financial and manpower implications

12. The financial and manpower implications of this amendment would be similar to those envisaged in the *Projet de Loi*. There would be additional costs for the fees of the legally qualified chairperson, but against that there would be savings in avoiding the need for 2 or more hearings and the likelihood, given the appointment of a legally qualified chairperson, that appeals to the Royal Court would be fewer in number.
13. Most importantly, however, the arrangements proposed in the amendment would be compliant with Article 6 of the European Convention on Human Rights.