

STATES OF JERSEY



DRINKS PROMOTIONS (P.105/2020) – COMMENTS

**Presented to the States on 21st September 2020
by the Minister for Economic Development, Tourism, Sport and Culture**

STATES GREFFE

COMMENTS

Note: -

In July 2018, the Minister for Economic Development, Tourism, Sport and Culture delegated to his Assistant Minister, Senator S.W. Pallett, political oversight responsibility for liquor licensing legislation and associated legislative development (R.97/2018 refers).

This proposition has 3 objectives. Part (a) pursues a temporary setting aside of part of the [Attorney General's Guidance on Drinks Pricing and Promotions](#), as endorsed by the Licensing Assembly of Governor, Bailiff and Jurats. Part (b) proposes a review of the alcohol market to investigate alcohol pricing and to assess whether the market is being impacted by anti-competitive practices. Part (c) aims to give the States Assembly broad control of alcohol licensing policy over the longer term.

I am opposed to parts (a) and (b) of this proposition. While I am sympathetic to the general aim of part (c), I am concerned that it may restrict Government the scope to deliver change by requiring that amendments be made to the existing 46 year old Licensing Law. I am also mindful that stakeholders may find it challenging to devote time to regulatory reform of the licensed trade at a time when businesses are concentrating so hard on remaining viable and keeping customers safe in the middle of the Covid-19 pandemic.

Background

Government alcohol policy has been relatively settled for over 15 years.¹ The primary goal has been to pursue sustained reductions in per capita consumption. That goal has been pursued because while many people have a responsible and enjoyable relationship with alcohol, the product generates significant health costs, other social costs and economic costs that are borne by the community as a whole.

Liquor licensing policy and regulation forms a key part of broader alcohol policy. The [Licensing \(Jersey\) Law 1974](#) ('the 1974 Law') largely prohibits the selling of alcohol by persons other than those that hold one or more of the 7 categories of liquor licence provided for in the 1974 Law. Persons wishing to secure a liquor licence are required to make an application to the long-standing Licensing Assembly of Governor, Bailiff and Jurats ('the Licensing Assembly').

The relative stability of liquor licensing policy is demonstrated by the fact that the 1974 Law has been in force largely unchanged for almost half a century. It is nevertheless the case that the Law has been criticised in the States Assembly and elsewhere from time to time. Criticisms have tended to focus on the relative complexity of the Law, its inflexible licence category system and the basis on which different fees are charged to different types of licensed premises. In addition, the 1974 Law has been criticised for the limited policy guidance it offers regarding the determination of licensing applications and the circumstances in which licences might be suspended or withdrawn. Regarding the latter criticism, Article 6(9) of the 1974 Law requires that the Licensing Assembly determines liquor licence applications with regard –

- (a) to the interests of the public in general; and

¹ E.g. see [R.139/2014](#), which superseded [P.110/2003](#)

- (b) to the nature of the business conducted or to be conducted on the premises sought to be licensed and the suitability of those premises for the conduct of that business. Articles 12 and 66 then set out certain general conditions that are applied by default to on and off-licensed premises respectively. There is also a requirement to have regard to relevant recommendations made by a Parish Assembly.

With respect to the regulation of premises that have been granted a licence, Article 9 provides the Attorney General with an ability to refer to the Licensing Assembly matters concerning licensed premises that are deemed by the Attorney General to warrant the Assembly's attention. It further empowers the Licensing Assembly, having regard to all the circumstances of the referred case, to suspend, or revoke a liquor licence or to attach new or revised conditions.

The 1974 Law offers limited further policy guidance to steer the determination and subsequent regulation of liquor licences. In effect, the Law relies on the Licensing Assembly to determine various aspects of liquor licensing policy.

The fact that the 1974 Law is designed this way is perhaps not surprising. It dates back to a time when judicial determination of liquor licence applications was the norm across the British Isles. That the Law has remained serviceable in 2020 is in no small part due to the fact that Members of the Licensing Assembly remain eminently qualified to determine matters of law and fact with reference to the public interest and because the Licensing Assembly has carefully developed policy in a number of areas.

One example of policy development was the 2007 decision of the Assembly that relaxed a broad restriction on petrol station forecourt shops selling alcohol.² Another has been the incremental development of policy on drinks pricing and promotions.

The latter policy on pricing and promotions is relevant to part (a) of this proposition.

Part (a)

I consider that Part (a) would require me to write to the Licensing Assembly and the Attorney General and request that the existing policy on drinks pricing and promotions be modified for a period of approximately 15 months. For the avoidance of doubt, the 1974 Law does not provide for the Licensing Assembly to be instructed.

Perhaps my first issue concerning part (a) is the limited argument made in support of such a request.

In his accompanying report, the proposer hints that he is looking to help the hospitality industry *'to try and make a come-back after the shut-down of businesses during the pandemic.'* Government has already been providing practical support through the range of business support schemes that have been in operation, including the Co-Funded Payroll Scheme and GST and Social Security deferral schemes.

There is little indication that the hospitality sector believes discount pricing would generate additional benefit for their businesses. On the contrary, the Jersey Hospitality Association advises that its focus is on helping members remain sustainable and to

² See [https://www.jerseylaw.je/judgments/unreported/Pages/\[2007\]JRC224.aspx](https://www.jerseylaw.je/judgments/unreported/Pages/[2007]JRC224.aspx)

support them in providing as safe an environment as possible for their customers in the wake of Covid-19. The Association considers that dispensing with the current Guidance now would risk sending a socially counterintuitive and economically counter-productive message to both businesses and customers.

The UK media has, on a number of occasions, reported on physical distancing issues that have apparently resulted from consumption of alcohol in, or around, busier licensed premises.³ Responsible licensees in Jersey have worked hard to avoid such scenes at their premises. Inviting a step-change in consumer demand through raised expectations of on-licensed discounting should, nevertheless, be expected to make it harder for responsible licensees to maintain that good record.

My second issue is that the proposer appears to be mistaken in his belief that the origin of, and responsibility for, the existing drinks pricing and promotions policy is unclear. In fact, the proposer at least partially answered his own question: *'Whose policy was it and how did it come about?'* in the accompanying report to his earlier related proposition P.86/2020 (now withdrawn), when he cited and included a link to the Attorney General's published Guidance on Drinks Pricing and Promotions.

It is a matter of public record that the Attorney General's Guidance, and the policy to which the Guidance refers, developed from a finding of the Licensing Assembly back in 1987. The Licensing Assembly found that price promotion schemes such as 'happy hours' and free drink giveaways at on-licensed premises were encouraging irresponsible drinking. Such practices were, therefore, deemed to be inconsistent with the standards expected of responsible licensees.

The policy was further developed in response to the February 1999 referral to the Licensing Assembly of a company known as Overend Holdings (1982) Limited, which operated the former 'Quids Inn' licensed premises in James Street, St Helier.⁴ Quids Inn priced its drinks at a flat rate of £1 (or £1.50 on an upper floor). This was lower than prices charged at that location previously and significantly lower than those charged by other comparable premises in St. Helier at that time. Police reports indicated that the number of customers at the premises escalated dramatically through 1998 and that incidences of drunkenness and public disorder in the immediate vicinity of the licensee's premises had risen by some 500% over the previous year. On that occasion, the Licensing Assembly suspended the liquor licence for those premises and invited the relevant States Committee of the day to consider amending the Licensing Law to introduce a general condition that would regulate drinks promotions.

It is notable that the Quids Inn premises became problematic in a shorter period than the 15 month window envisaged in part (a) of this proposition.

Successive guidance statements were published by the Attorney General in 2002, 2004 and in 2010. In each case, these statements clarified the practices that might be expected to result in a referral to the Licensing Assembly in accordance with Article 9 of the 1974 Law.

³ E.g. see <https://www.theguardian.com/world/2020/jul/05/crystal-clear-drunk-people-cant-socially-distance-say-police-in-england> and <https://www.bbc.co.uk/news/av/uk-england-stoke-staffordshire-53586133/coronavirus-packed-beer-garden-at-stone-outbreak-pub>

⁴ [https://www.jerseylaw.je/judgments/unreported/Pages/\[1999\]30.aspx](https://www.jerseylaw.je/judgments/unreported/Pages/[1999]30.aspx)

The current guidance makes it clear that the following practices are likely to prompt referral of an on-licensed business –

- Any promotion, pricing policy or other act that results in one or more alcoholic drinks being offered for sale at a price below the relevant stated price on the tariff displayed at the licensed premises as required by Law;
- If the stated prices on the tariff are significantly below that generally charged in other premises. The starting point is that a difference of 10% or more is likely to be considered ‘significant’;
- Any advertisements for premises holding seventh category licenses which concentrate exclusively or substantially on the sale of alcohol and which make little or no mention of the provisions of entertainment.

The very latest [Attorney General’s Guidance](#) was endorsed by the Licensing Assembly in December 2019 and came into force with effect from 14th April 2020. This maintained the 2010 position for on-licensed premises, but introduced new guidance for off-licences for the first time in response to an allegation by one business that an off-licensed retailer was engaging in loss-leading pricing of certain spirits. As of April 2020, off-licensed businesses could expect to be referred to the Licensing Assembly if the price of any alcoholic drink sold to members of the public (other than by a duty free retailer) dropped below 50 pence per unit of alcohol.

A third issue to consider in respect of part (a) is the fact that it seeks to set aside the existing policy so far as it applies to *‘bars, pubs and restaurants’* only. The 1974 Law makes provision for 6 categories of on-licence. Restaurants are specifically recognised in the Law and tend to be awarded a 3rd category licence. While many premises that are commonly described as pubs hold a 1st category (‘Taverners’) licence, there are a range of entertainment venues and other licensed premises that include some form of bar but which operate under other categories of on-licence. The impact of this proposition on these other premises is less than clear.

My fourth and final issue with part (a) is that it creates potential for constitutional difficulty. It would have the States pressure the Licensing Assembly to revisit a policy that the latter considers is not only justified but which has been arrived at entirely in accordance with the 1974 Law the States themselves approved.

Part (b)

Part (b) is problematic in-so-far as it implies the Minister has the power to give a specific instruction to the Jersey Competition Regulatory Authority (JCRA) on this matter. In fact, there is no such power.

Under Article 6(4) of the [Competition Regulatory Authority \(Jersey\) Law 2001](#), the Minister has the ability to request that the JCRA provide reports, advice, assistance and information in respect of certain matters. This mechanism might be used to ask for assistance.

This proposition, nevertheless, introduces the risk that resources available to the newly demerged JCRA will move from a higher priority area to one that should have a lower priority. The Authority is already gathering its own evidence base regarding the status of a broad range of markets in Jersey. It is doing so in conjunction with a broad range

of consumer and industry stakeholders. That work will lead to an independently and professionally prioritised programme of work, which may or may not include a study of the alcohol market.

If I was to consider making a request for assistance from the JCRA, I would prefer to prioritise requests using an evidence-based assessment. In this regard, I would need to be mindful that our recent development of a new Anti-Inflation Strategy resulted in the identification potential competition issues affecting food markets, household services and building supply costs. In terms of their scope for impact on the Island population, these markets are perhaps more significant than the alcohol market.

It may be helpful for the States to note that possible changes to the Competition (Jersey) Law are being considered with a view to further enhancing the ability of the JCRA to supervise the conditions of competition. Scrutiny will be briefed in due course and public consultation is envisaged later this year once legal and economic advice has been obtained on proposals.

Part (c)

This final part of the proposition seeks the development of an amendment to the 1974 Law to give the States control of licensing policy decisions.

The proposer intimates in his accompanying report that the introduction of minimum unit pricing and perhaps other aspects of licensing policy are political matters that should be determined by elected States Members. I have some sympathy with this view. Some Members may recall that in 2017 my Assistant Minister, Senator Pallett, lodged a new draft Liquor Licensing Law. This had been developed by the Shadow Alcohol Licensing Policy Group of Ministers, Assistant Ministers and Connétables ([P.103/2017](#) refers). Amongst other things, this draft Law would have set 5 statutory licensing policy objectives and empowered the States to set a detailed statement of alcohol licensing policy to advance those objectives.

In the event, P.103/2017 was withdrawn without debate following a difficult and delayed passage through Scrutiny. Concerns were expressed regarding the inclusion of a statutory public health objective, the establishment (and cost) of a proposed new licensing authority, uncertainty regarding licence fees and certain other issues. I nevertheless believe that the Scrutiny Panel supported the general concept of a new Law that would provide for a States-approved statement of alcohol licensing policy.

To be clear, I support the concept of a States-approved statement of licensing policy.

In adopting that position, I make no criticism of the Licensing Assembly. On the contrary, I believe the Licensing Assembly carries out its duties in a very considered and professional way. Our view is instead based on our democratic belief that the electorate should be able to pass judgement on licensing policy at the ballot box.

Members may wish to note that the Council of Ministers has already agreed to establish a task and finish group with the following members –

Senator S. Pallett, Assistant Minister for EDTSC (Chair)
Connétable L. Norman, Minister for Home Affairs
Deputy R. Renouf, Minister for Health and Social Services

Deputy L. Ash, Assistant Minister for Treasury and Resources

The Group will be charged with developing a draft statement of alcohol licensing policy and proposing either new legislation or amendments to the existing 1974 Law as appropriate to achieve the necessary reform. It will aim to lodge an in-principle policy proposition for debate by the States Assembly in Q1 2021, with detailed policy and legislative proposals to be lodged as soon as possible thereafter and no later than December 2021.

In summary, the Council has already agreed to pursue the reforms that part (c) aims to deliver. The only potential difference in methodology is that whereas P.105 specifically calls for amendments to the 1974 Law, the Council-endorsed group will reserve the right to propose entirely new legislation. On that basis, I am not opposed to part (c).