

## **2 DUNDEE CITY LICENSING BOARD - SUPPLEMENT TO STATEMENT OF LICENSING POLICY 2025 (AN26- 2025)**

The Licensing Board is periodically obliged to publish a Statement of Licensing Policy in terms of Section 6 of the Licensing (Scotland) Act 2005 ("the 2005 Act"). The current Policy was adopted in January 2024. The Board had considered, inter alia, including revised provisions concerning the issue of music noise from licensed premises in the Policy but decided to await the outcome of an appeal involving another Board which was due to be heard at that time and which involved the consideration of the extent of the public nuisance licensing objective in this context. That appeal has since been heard and a judgment issued so the Board may wish to look at putting forward proposals concerning music noise nuisance as a supplement to the Policy.

The Board is obliged to consult with a number of categories of persons before making a final decision on the contents of such a supplementary statement. The persons who are to be consulted for this purpose under Section 6 of the 2005 Act are:-

- The Local Licensing Forum;
- Representatives of persons listed in Paragraph 2 (6) of Schedule 2 to the 2005 Act whose interests the Board considers are not represented on the Local Licensing Forum;
- The Local Health Board;
- Such other persons as the Board thinks appropriate.

### **Music noise from licensed premises**

Currently, the Board generally attaches a condition to licences where live music is to be provided which requires all amplified music to be inaudible in the nearest residential accommodation. The Board may wish to explore whether this is an appropriate condition to maintain and the following approach is suggested for consultation.

The relevant licensing objective is the prevention of public nuisance (emphasis added). A question arises as to whether noise caused by music within licensed premises can be regarded as "public" in that sense. Case law from England had suggested that, to be a "public nuisance", the effect of the noise should be "sufficiently widespread and sufficiently indiscriminate to amount to something more than private nuisance."

Scots Law does not recognize the same distinction between public and private nuisance. The 2005 Act has therefore innovated on the common law by creating this concept. Public nuisance under the 2005 Act is not the same as statutory nuisance under the Environmental Protection Act 1990. That does not mean to say that Board might, or should, leave matters to action under the 1990 Act or for complainants to raise an action in the civil courts. Public nuisance and what might be done about it is now a matter for the Licensing Board to consider.

In the context of that particular licensing objective, especially when taken in conjunction with the references in the statutory 2005 Act Guidance to the effect upon "local residents" and "communities", this tends to support an argument that the objective will only be engaged when the noise has that wider level of impact and that where that public character of the nuisance is lacking, then an individual complainant would have to seek a remedy either via the statutory nuisance route (by complaining to the local authority noise control section) or a private law action for nuisance in the civil courts.

However, there is a qualification to this approach where the nature of the noise nuisance (such as the duration, frequency, quality, time of day, etc.) would support a conclusion that the nuisance has gone beyond the mere discomfort of one person and has reached a level such that it can be considered to be likely to be a public nuisance in the sense above referred to. Where there was evidence before the Board that could allow that inference to be drawn, then a public nuisance might still arise. Whatever view a Board takes, it can only act if there is a proper basis in fact to find, directly or by inference, that a nuisance is public.

This issue was discussed in the case of *Bengal Dish v. Aberdeenshire Licensing Board*<sup>1</sup>. In that case, Sheriff Principal Pyle agreed with the proposition that a complaint from one person will generally be insufficient to engage the public nuisance objective and that there would be a need to show that a nuisance was affecting an identifiable class of persons before the Licensing Board could consider taking any action on the basis of that objective. In that case the only complaint came from the owner of an adjacent flat and there was no evidence to show that the alleged noise was capable of being heard outside of the flat.

In terms of Board policy, the Board could include a statement which indicates that the Board is concerned with public nuisance which has a reasonable link to the provision of alcohol on the premises. In such a statement, the Board may generally consider that such a nuisance might exist where there is evidence that what is complained of impacts on a sufficiently large number of members of the public by reference to one act or a series of acts, or, where the effect was sufficiently widespread or indiscriminate.

There would generally need to be evidence from more than one source to support the matter being a public nuisance, but in cases where even one source of evidence existed, that might, if the evidence was sufficiently strong, allow the Board to draw the inference that the nuisance was likely to be a public one. In considering whether there is a public nuisance, this could involve, amongst other considerations, the matter complained of, duration, frequency, quality (shrillness, grating, impulsivity, sporadic, repeated) and the hour of it.

Therefore, as part of any such supplementary Policy statement, the Board might stress that it can only consider public nuisance and that may mean that in many cases involving noise complaints only affecting adjacent property, that the appropriate recourse might be through the environmental health department or through the common law of nuisance.

There are also other issues with an inaudibility condition. The idea of nuisance includes a threshold for a nuisance to arise. Noise in itself, is not a nuisance, but can become so having regard to the whole circumstances of a case, including the competing claims of licenced premises to operate and provide music and those of neighbours and the wider public to enjoy their own space or situation without noise becoming a problem for them. The law has recognised the need for a threshold.