ITEM No …3……..

DUNDEE CITY LICENSING BOARD – 15 JANUARY 2026

SUPPLEMENT TO STATEMENT OF LICENSING POLICY

MUSIC NOISE FROM LICENSED PREMISES - RESULTS OF CONSULTATION & RECOMMENDATIONS

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 now wish to consider proposals concerning music noise nuisance as a possible 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 inaudibility condition"). The Board decided to explore whether this is an appropriate approach to maintain and to consult on a possible change to its Statement of Licensing Policy to reflect this. The background to this consultation is set out more fully below.

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 the Board might, or should, leave matters to action under the 1990 Act or indeed recognising that an aggrieved person may have a remedy by interdict for common law nuisance, the civil courts. Public nuisance and what might be done about it is 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 tended 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 complainer 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*[1]. 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 proposed the inclusion of a statement which indicates that the Board is concerned with nuisance which has a reasonable link to the provision of alcohol on the premises. In such a statement, the Board may consider that such a nuisance might exist where there is evidence that what is being complained about is the impact 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.

The Board could stress that it would generally need evidence from more than one source to support the matter being a public nuisance, but that 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. Even if the evidence is from one source, provided that test is met, the Board might infer that the nuisance is still "public" even if there is only one source of evidence.

A possible scenario might involve evidence (e.g., from the local Environmental Health department) as to the likely wider impact of noise felt not just by one complainer, but more generally, and so make an evidential finding of public nuisance open to the Board, if the Board accepted that evidence. Typically, though the Board is often asked to consider alleged nuisance which relates to one adjoining or nearby property where there is little evidence to show that other persons are affected.

[1] 2024 SLT (Sh Ct) 7.

In considering whether there is a (public) nuisance, this would involve, amongst other considerations, a consideration of the nature of the matter complained of, duration, frequency, quality (shrillness, grating, impulsivity, sporadic, repeated) and the hour of it.

As part of any such statement, the Board would require to emphasise 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.

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 licensed 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.

As to what is a nuisance, in ***Watt v Jamieson***[2], Lord President Cooper said that :- *"The critical question is whether what he was exposed to was plus quam tolerabile when due weight has been given to all the surrounding circumstances of the offensive conduct and its effects. If that test is satisfied, I do not consider that our law accepts as a defence that the nature of the user complained of was usual, familiar and normal.* ***Any type of use which in the sense indicated above subjects adjoining proprietors to substantial annoyance, or causes material damage to their property, in prima facie not a " reasonable " use."*** The emphasis is on substantial annoyance.

This approach was followed by the Sheriff in ***Anderson v Dundee City Council***[3] where he said :- *"In my opinion the authorities to which I have referred make it clear that in order to be a nuisance something must be substantial and it must be intolerable to the ordinary person. Something which causes mere discomfort is not enough."*

The Board also wished to consider whether the retention of the inaudibility condition would be appropriate, particularly as it would not be enforceable in a case where there is only one complainer, which tends to be the most common situation for cases presented to the Board in this context. By contrast if the Board in any specific case put before it was satisfied that the test in the ***Bengal Dish*** case was met, then this can open the route to potential action by the Board without the need for any condition (s) to be attached to premises licences.

Responses to the Consultation and Recommendations

Two responses were received and are attached to this note as Appendices One and Two. There does not appear to be any dissent from the suggestion that the Board make it clear the limitations of the

[2] 1954 SC 56.
[3] 2000 SLT (Sh Ct) 134 ; 1999 SCLR 518.

public nuisance licensing objective, especially considering the recent appeal judgment. This would mean that generally it will not be sufficient for a complaint from one person or household to trigger this licensing objective. However, there was disagreement over whether to retain the inaudibility condition. The response from the noise control team in the Council's Environmental Health Department (EHD) argues for the retention of this condition whereas the Licensing Standards Officers wish to dispense with it.

In light of this difference of views regarding the inaudibility condition, further advice was sought from Counsel as to the legality of such a condition. The advice received in this respect is that, despite the arguments put forward by EHD for its retention, it is likely that such a condition would be unlawful. The principal reasons for this are as follows.

1. A condition, to be lawful, must not only be technically enforceable as being certain, but also must be proportionate, taking into account the risk associated with the premises and the size and scale of their operation. It must also not relate to areas regulated under another enactment. This would unlawfully duplicate another area of regulatory control because of section 27 (7) (c) of the 2005 Act.
2. Licensing conditions must be certain and clear. The case referred to by EHD (**Adam (Scotland) Ltd. v Bearsden and Milngavie District Council**) was not a licensing case and the lawfulness of a condition has to be assessed in light of the specific legislation which is the basis for the condition.
3. In another sheriff court case (**Morayshire District Council v. D. Littlewood**), the court said that an inaudibility condition was too one sided and not supportable since it sided too much with those who are complaining. Audibility is not always indicative of annoyance.
4. In that regard it should be recalled that the 2005 Act is focussed on *"the prevention of public nuisance"* and where conditions can only be attached to a premises licence if they are *"necessary or expedient for the purposes of any of the licensing objectives"*-see section 27(6) of the 2005 Act.
5. The Statutory Guidance under section 142 of the 2005 Act says so far as relevant- *2.13 Whilst the operation of a licensed premise does not of itself inherently create public nuisance, the 2005 Act recognises that nuisance from a licensed premise can be a concern for local residents and communities and this objective therefore seeks to provide comfort that nuisance (e.g. noise, littering) and anti-social behaviour can be addressed where relevant….; 2.14 It should be noted that not all noise emanating from a licensed premise should be treated as a public nuisance for the purposes of this licensing objective……."*
6. This reflects the view that noise from licensed premises does not in itself amount to a public nuisance. The overall circumstances need to be considered. Those circumstances have to be taken into account. A general or blanket condition based on inaudibility is not consistent with that approach.
7. There is a duplication issue quite apart from the lawfulness of inaudibility and the question of proportionality. Unlike the powers contained in the 2005 Act, statutory nuisance legislation places specific duties on the local authority to investigate and react to nuisances. Accordingly, even where EHD has chosen to use the 2005 Act to prevent or respond to noise issues through seeking a standard condition as here or in an application for a premises licence review under section 36 of the 2005 Act, EHD is still bound by the duties to

investigate nuisances and serve notices under EPA1990 *despite* involvement of the Licensing Board.

8. There is therefore a clearly arguable duplication of enforcement effort. This is also illustrated by the judgment in the case of ***R (On the application of Bristol Council) v Bristol Magistrates Court*** which considered the issue of duplication. There it was held that the conditions that were imposed by the Licensing Authority were judged not to be necessary to promote the licensing objectives as they were adequately covered by other legislation. One of the conditions that was considered was - *"Noise from any ventilation, refrigeration or air conditioning plant or equipment shall not cause nuisance to the occupants of any properties in the vicinity."*
9. In that regard it is difficult to think of a situation under the 1990 Act where it would not be able to be used to address noise emitted from premises if the noise emitted was a nuisance. Accordingly, there is a clear basis for challenge based on duplication. A condition of the type sought by reference to inaudibility would achieve the same end which is said by EHD itself as being available to it under the 1990 Act. That is not consistent with section 27 (7) (c) of the 2005 Act.

In light of the foregoing, it is recommended that the Board adopt the revised approach upon which the consultation was based (the text highlighted in yellow above) and that the Board also discontinue to apply the inaudibility condition.

Brian Woodcock

From: Craig Somers
Sent: 21 August 2025 09:47
To: Lisa Archibald
Cc: Brian Woodcock; Barry Rodger; Paul Hogan; Simon Goulding
Subject: FW: Licensing Board - Noise Condition Consultation Document
Attachments: noise condition consultation document draft SB revisions (1) (1).docx

Good morning, Lisa,
Reference the attached consultation document.
Please see response below.
Craig

Supplement to Statement of Licensing Policy 2025
Music Noise from Licensed Premises
Consultation Document

Response on behalf of Licensing Standards to the three questions contained in the document.

Answer to Q1.

The local licensing condition of 'inaudibility' is not practicable to achieve and should be dispensed with. If the licensing board removes musical entertainment from an alcohol licensed premises based on a failure to comply with the 'inaudibility' condition. An appeal against the decision by the licence holder will be lost based on recent stated cases in law.

Answer to Q2.

Yes, primary legislation should be used as per the requirement of the Licensing (Scotland) Act 2005, Section 27.
Examples of primary legislation that could be considered include of Environmental Protection Act 1990 and Civic Government (Scotland) Act 1982.
Applying primary legislation would move Dundee City Council towards a more balanced approach that takes account of both the needs of licensed premises and the rights of nearby residents.
This means that instead of requiring music to be completely inaudible at the nearest residential property, the focus would shift to whether the noise is unreasonably disruptive to the complainer. A more subjective but arguably fairer standard.

Answer to Q3.

If it is considered that a change is necessary, then there should be a review of the local licensing conditions relating to musical entertainment. This should include conditions applying to a licensed premises under 'grandfather' rights. Also, Dundee City Council should take cognisance of conditions relating to the use of premises. In terms that a licence will only be processed and put before the Licensing Board if the applicant can demonstrate that they have complied with such conditions.

Craig Somers
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From: licensing.board <licensing.board@dundeecity.gov.uk>
Sent: 16 July 2025 16:19
Subject: Licensing Board - Noise Condition Consultation Document

Hi,

Please find attached the Noise Condition Consultation Document for the Licensing Board. The closing date for replies is 31st August 2025.

Thanks Lisa

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Licensing Department,
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Tel : 01382 434444

Dundee City Council www.dundeecity.gov.uk CHANGING FOR THE FUTURE

Memorandum

To	Licensing Office
From	Environment / Public Health Manager, Regulatory Services (City Development)
Our Ref	
Your Ref	
Date	29th August 2025

Subject **Dundee City Licensing Board**
Supplement To Statement Of Licensing Policy 2025
Music Noise From Licensed Premises
Consultation Document

I refer to the invitation received to respond to the consultation document on proposals concerning music noise from licensed premises. The following is feedback from Environmental Health Officers from within the Public Health / Pollution Control team within Regulatory Services:

1. Do you think that the inaudibility condition should be dispensed with? (Please give reasons). If not, why not? Either way please give the Board reasons for your views.

The inaudibility condition should be retained.

The definition of inaudible means "unable to be heard". In other words, someone with a normal hearing range can hear or "detect" the music that is "audible". Adopting a literal understanding of the word not only provides clarity but also enables any person to assess this. English case law has been referenced in the consultation document but a common phrase that is used and not mentioned is the "man on the Clapham omnibus" i.e. it is people with a "normal" range of hearing and hypersensitivity to noise is not included.

It is not a vague condition such as "so as not to cause annoyance to nearby residents" which gives the operator little idea of what is expected of them.

It is not appropriate to set a decibel level, as this would be the total measurable noise level at a particular location. The background environment could change. Also, generally, a quantitative assessment, based on the simple change in noise level is not adequate in addressing the noise impact on all the amenities associated with a noise sensitive receptor (e.g. the ability to relax, ability to concentrate i.e. reading, listening to radio/TV, ability to converse etc). While an actual decibel level may appear more precise, this is not the case.

The bass beat from music cannot be described as steady noise and at levels of e.g. 30dB(A) the lyrics may be clearly discernible to the affected party. Indeed, because music contains coherent information in the beat, the melody and the words/vocals, it may be impossible to ignore intrusive music even at very low levels.

In many cases if music can be heard, it follows that it can often be disturbing, even atlevels below the volume of the complainant's TV or the passing traffic. A noise meter would be of no use in

Cont/..

these circumstances as it would measure the prevalent noises.Indeed, it is perfectly conceivable that music could be greatly disturbing even atlevels well below the World Health Organisation night time noise levels of 35 dB(A), internal. This would be due to the coherent info aspect in the beat and vocals.

Generally, if music can be heard, it annoys and disturbs. That is why most people turn up their own stereo/TV in an effort to mask the disturbance.

Numerical inaudibility clauses (e.g. Noise Rating(NR) 15) are also very difficult to monitor in terms of compliance unless one has access to expertise. Monitoring such conditions become impractical for the operator and almost an impossibility for those without sufficient knowledge of acoustics. (These are more suited to a new noise sensitive development coming into an existing music source).

Depending on background noise, the bass may be heard at NR15. Low frequency noise can be disturbing or fatiguing to occupants but might have little effect on the dB(A) or NR value.

While it is accepted that "inaudibility" is a subjective criterion, a set dB(A) or NR level will not adequately reflect annoyance – the term used in the Civic Government (Scotland) Act, 1982 (and still subjective) – see below. The problem stems from the dB(A) descriptor and NR curves in that they are designed to take less account of the low frequency sound. Since the frequency spectrum of the background noise and the music will be different, and as the music has high tonal content and a strong rhythmic structure, music is easily discernible even when it is played at a level below the background noise.

Inaudibility is the only criteria which takes full account of the subjective human response to noise and the perception of annoyance and hence nuisance. It has been proven to be a positive proactive approach. Inaudibility is used to prevent harm to the amenity of the area.

Requiring amplified music from licensed premises to be inaudible in neighbouring residential premises has been a long established position accepted in many Board areas in Scotland. The arguments have been put forward re the lawfulness of the inaudibility condition but this is with reference to the determination of statutory nuisance under the Environmental Protection Act (EPA).

From Adam (Scotland) Ltd vs Bearsden District Council, it is stated that audibility denotes discernible sound, over and above background noise and "I do not consider that "audibility" is objectionable as subjective. It doesn't mean causing annoyance, which clearly is subjective, but rather that it should not be discernible. Any person with normal hearing should be able to apply the test. It has the advantage of simplicity."

It is not known why it is stated that the "efficacy" of the condition cannot be measured and the licence holder cannot know when they have complied – if there are no complaints – they are complying. As stated above, the phrase "so as to not cause annoyance" is much more subjective.

2. Would you support the alternative approach as outlined above based upon the wider interpretation of the public nuisance objective? (Please give reasons).

This would not be supported.

First and foremost, there is a clear statutory duty upon the police under s.54 of the Civic Government (Scotland) Act, 1982, to act where there is "reasonable cause for annoyance" - (again subjective) associated with playing a musical instrument, singing and performing or operating radios and TVs/amplified music.

Section 54 Playing instruments, singing, playing radios, etc.

(1)Any person who—

(a) sounds or plays any musical instrument;

(b) sings or performs; or

(c) operates any radio or television receiver, record player, tape-recorder or other sound producing device

so as to give any other person reasonable cause for annoyance and fails to desist on being required to do so by a constable in uniform, shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding £50.

(2)This section is without prejudice to any offence under section 62 of the Control of Pollution Act 1974 (operation of loudspeakers in streets).

[(2A)Where a constable reasonably suspects that an offence under subsection (1) above has been committed in relation to a musical instrument or in relation to such a device as is mentioned in paragraph (c) of that subsection, he may enter any premises on which he reasonably suspects that instrument or device to be and seize any such instrument or device he finds there.

(2B)A constable may use reasonable force in the exercise of the power conferred by subsection (2A) above.

(2C)Schedule 2A to this Act (which makes provision in relation to the retention and disposal of property seized under subsection (2A) above) shall have effect.**]**

The burden of proof upon the police, above, is far less than any proof required in determining statutory noise nuisance and their powers are immediate.

Environmental Health enforces the Statutory Nuisance provisions of the Environmental Protection Act, 1990, as amended (EPA). In undertaking these duties, it is not inaudibility that is enforced, rather it would be along the lines of the other criteria below. Account also has to be taken of:

1. Impact
2. Locality
3. Time
4. Frequency
5. Duration
6. Convention
7. Importance, and
8. Avoidability.

This means that whilst noise arising from licensed premises may on occasion be intense enough to cause interference with enjoyment of domestic property, if it were happening on a relatively infrequent basis, it could not be considered a Statutory Nuisance.

The EPA does not define a set decibel level which would constitute a Statutory Nuisance and as such other legislation and guidance has to be referred to when carrying out investigations.

It is established in Scots law that in determining noise nuisance we must use objective criteria. To do this we measure the sound using sound level meters and compare it against established criteria e.g. WHO guidelines and British Standards. We also consider many other aspects, time of day, loudness, frequency, type of area etc etc.

Music noise does not fit neatly into the type of noise that lends itself to being monitored using a sound level meter. As stated above, music can be very disturbing even at levels which could

never be considered to be a statutory nuisance. A noise meter would be of no use in these circumstances as it would measure the prevalent sound. Generally, if music can be heard it has the potential to be annoying and disturbing. Unfortunately, there is difference between a noise which disturbs and a noise which is a statutory noise nuisance. The council's duty is to require that statutory noise nuisances are removed. This means, that part of the noise which constitutes a nuisance, and this may not be the entire noise itself.

The assessment for statutory nuisance can be very subjective and ultimately comes down to officer opinion. Investigations can take a considerable length of time and resources.

The test of statutory nuisance under the EPA is often unlikely to be met, as it is often the case that bass in amplified music can be heard, and be disturbing to residents, particularly late at night, but the noise measured by a sound level meter would not show a significant difference above the background level.

The Environmental Protection Act, 1990, as amended, does not provide Local Authorities (Environmental Health) with adequate powers to protect people from music noise. As stated previously, music can be very disturbing at levels that could never be considered to be a statutory nuisance.

Therefore, in the absence of other controls e.g. licensing regimes, any issues would be dealt with by the Police. The use of a Licensing Condition allows the Local Authority to pro-actively deal with applications/complaints to try to prevent the need for Police involvement and to deal with any issues from music noise. It is the most appropriate mechanism to provide environmental protection or improvement and would lie with the Licensing Standards Officers.

The LSO has an in depth knowledge of the licensed premises and can also highlight other issues ensuring a more holistic approach to enforcement. The LSO can mediate between a complainer and the premises licence holder in an effort to reach a satisfactory level without formal measurements having to be taken.

In our experience licensees have considerably more respect for the Licensing regime rather than the Statutory Nuisance regime as it could directly affect their business operations.

3. Do you have any additional observations/comments on how the Board should deal with the issue of music noise from licensed premises? (Please give reasons).

It would be better if references to case law are linked to allow the context of the case to be examined as the text recognises that Scots Law does not recognise the same distinction between public and private nuisance. In addition, the context of the Bengal Dish v Aberdeenshire Licensing Board case is that, contrary to advice from Environmental Health, planning permission was granted and identified noise mitigation works/sound insulation works were not undertaken.

While the argument has been put forward that one person being affected does not constitute a public nuisance – how many people would have to reside in the flat for the Board to give this consideration?

Furthermore, grounds for refusal of licence refer not only to the 5 objectives, but also Section 23 of the 2005 Act, which is headed “Determination of Premises Licence Application provides inter alia :

(5) The grounds for refusal are:

(c) that the Licensing Board considers that the granting of the application would otherwise be inconsistent with one or more of the licensing objectives,

(d) that, having regard to :-

(i) the nature of the activities proposed to be carried on in the subject premises,

(ii) the location, character and condition of the premises, and

(iii) the persons likely to frequent the premises

the Board considers that the premises are unsuitable for use for the sale of alcohol.

Therefore, if a premises intends to introduce live music/karaoke/DJs into their operating plan or propose to extend their opening hours – and hence intend to provide a significant level of entertainment, this may cause an issue with regard to the breakout of music noise where previously there may have been no issue. With regard to recorded music, it is more easily controlled – all music systems are provided with a volume control. It may be that the location and construction is not suitable and this should be considered.