



**Draft Liquor Amendment Bill
DA Position**

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1. Introduction

The World Health Organisation (WHO) ranks South Africa as the country with the highest per capita alcohol consumption in Africa. The average consumption of pure alcohol per drinker, excluding abstainers in the population, is estimated at 27.1 litres per year. This also places South African drinkers at the upper end of global consumption.

According to The Foundation for Alcohol Related Research (FARR), Foetal Alcohol Syndrome (FAS) affects at least three million people in South Africa, with more than six million affected by Foetal Alcohol Syndrome Disease (FASD). This means that 20 percent of the population is affected by alcohol exposure during pregnancy which should make it a national priority.

The financial cost of alcohol abuse to South Africa's economy is estimated as a net loss of approximately 7-10% of GDP, or R165-236 billion, which diverts huge amounts of money away from critical service delivery. However, it must be stated that from the outset the Democratic Alliance (DA) recognises the important job driver and contributor to GDP that the industry plays, particularly in areas like the Western Cape and so an "all or nothing" approach is simply not possible.

It is therefore quite obvious that current legislation has been inadequate in dealing with alcohol related challenges that affect South Africa and this is largely because the focus of legislation is that of regulation and compliance of the registration of manufacturers and distributors of liquor; the production and composition for sale of certain liquor products; and the granting of licences to retailers to sell or the setting of trading times in respect of licensed premises.

The Draft Liquor Amendment Bill (DLAB), gazetted on the 30th September 2016 (No. 40319), does not go far enough in addressing these shortcomings. Nor does the current and envisaged legislation adequately take into consideration the impact of alcohol-related harms on society, the costs born to the State and the ability to enforce practical legislation through empowered enforcement.

What is needed in the proposed amended legislation is the ability to address fragmented legislation across the provinces, bringing together resources that currently exist, simplifying the process to prove alcohol-related offences while increasing the sanctions, especially on outlets that continue to violate licensing conditions and increasing the number of liquor law enforcement officials to allow the law to be effectively implemented to protect society. Coupled with this, an amendment Bill must lessen the financial burden on cities and provinces to carry the financial costs associated with alcohol related harms.

It was this in mind, that the DA has worked closely with our Governments, particularly the Western Cape Government and The City of Cape Town where we face the realities and challenges of enforcement and the social and financial costs

related to liquor. We have also conducted public meetings in the Western Cape and Kwa-Zulu Natal during 2015 to interact with communities on the Liquor Policy published by the Department of Trade and Industry to take on board their responses, which have fed into our positions as set out below.

Out of that process, the following issues have been identified by the DA with the DLAB. These will be addressed by theme, rather than section. The respective sections will, however, be referenced.

2. Constitutionality of the proposed standardisation of licensing

Section 7 (1) & (2), 27 A (iii)

The DA opposes the proposed standardisation of licensing. Schedule 4 and 5 of the Constitution deal with National and Provincial spheres of legislative competence. In terms of Schedule 4, there is concurrent legislative competence between National and Provincial spheres for "trade" and "industrial promotion". However, Schedule 5A of the Constitution states that Provinces have exclusive legislative powers in regard liquor licences.

Accepting a broad view of "trade" and "industrial promotion," issues relating to broad-based black economic empowerment (B-BBEE) and age limits could arguably fall under Schedule 4.

It is questionable that this competence could be used to place limitations on liquor licensing, which is the exclusive mandate of local authorities. Indeed, a Constitutional Court decision in November 1999¹ made it clear that the version of the Liquor Bill under review was unconstitutional in that the National government had not succeeded in justifying its intervention in the field of retail liquor sales, nor in the case of micro-manufacturing of liquor, whose operations are essentially provincial.

It should be noted that an exception to the above exists in section 44(2) of the Constitution. This provision allows the national government to "intervene" into the area of exclusive provincial legislative competence when this is necessary for certain purposes, which include the maintenance of "economic unity".

It is doubtful that the Department of Trade and Industry's proposals on standardising liquor licensing would satisfy the "economic unity" exception. If the Constitutional Court's judgement is maintained, the following proposals are by definition excluded from national competency as they deal directly with licensing:

¹ Ex parte the President of the Republic of South Africa In RE: Constitutionality of the Liquor Bill, CCT 12/99. Available online [here](#).

- No liquor licenses to be issued to petrol service stations; premises near public transport; and areas not classified for entertainment or zoned by municipalities for purposes of trading in liquor (section 7 (1));
- Liquor premises be located at least 500 meters away from schools, places of worship, recreation facilities, rehabilitation or treatment centres, residential areas and public institutions (section 7 (2));
- Business zoning and other issues relating to liquor licensing such as trading hours (section 27 A(ii)); and Pre-inspections and zoning certificates (section 4.3.9.3 and 2.5 of the Liquor Policy Paper)

More importantly, it would seem that excluding new licenses within 500 meters of residential areas would be hugely problematic for the restaurant trade which has a high turnover of new establishments entering the market. One could use the V&A Waterfront as a good example which is frequented by many foreign tourists. If the new amendments are taken into account, no new restaurants would be able to open in the centre if the Bill is passed.

We therefore will be making substantive changes in this respect as well as requesting a legal opinion from the Parliamentary Legal Advisor.

3. Extension of liability for harm and damages

Section 22, 1.6.4 and 4.1.1.24.7 of the Liquor Policy

The DA supports legislation which reasonably extends strict and vicarious liability for harm and/or damages resulting from the abuse of alcohol, as already provided for in common law, to liquor retailers. The DA does not support extending liability to manufacturers where liquor is found in an illegal or unlicensed establishment. Shebeens do not necessarily acquire liquor directly from manufacturers and stock could be procured through wholesalers and retailers. However, the DA supports expanding this liability to include retailers which supply alcohol to already intoxicated persons.

The DLAB's current recommendations in terms of liability are problematic from a legal standpoint for the following reasons:

- An important principle of South African delictual law is that an objective nexus between the action and the harm must be present in order to reasonably infer that the action caused the result, i.e. the harm. By extending the liability to the manufacturer and/or distributor, it is not clear how this nexus will be established. Enforcement of a legislative provision for this recommendation will be difficult.
- Section 22 of the DLAB retains various aspects of this extension of liability. For example, a manufacturer or distributor who distributes to a retailer who is

unlicensed shall be liable for all consequential harm or damage, irrespective of whether the harm resulted from negligence on the part of the manufacturer or distributor. This concept is known as 'strict liability', and it is not alien to South Africa's law of delict. However, it is relied upon in very few cases.

- Where strict liability is relied upon, it is done in respect of defective goods, not in respect of improper provision. This is because improper provision is subjective – and so the fault element of liability is relied upon to ensure that manufacturers are not punished for otherwise reasonable behaviour. By relying on this standard here, the DLAB seeks to eliminate reasonable defences (such as that the manufacturers were lied to by their customers and induced into the sale). Aside from the legal flaws herein, there are great practical concerns regarding enforcement.
- Section 22 also states that manufacturers and distributors will be liable merely when the liquor product found in an unlicensed premises is linked to the manufacturer or distributor. This is so patently unfair that it need not even be dissected.
- Another practical weakness would be how to authoritatively ascertain who supplied the liquor to the person that caused harm, especially in cases where liquor was acquired from several retailers in the course of said individual becoming intoxicated.

When these matters were previously raised with the DTI after the Liquor Policy was released, it was stated that they would simply test these in a court of law. This is no way to develop a policy or Amendment Bill. There must be concrete legal opinions that such will be accepted by the Justice System.

The DA will therefore seek a legal opinion from the Parliamentary Legal Advisor when the Bill is brought before the committee.

4. Compliance with B-BBEE codes

Section 25 and section 6

The DA shares the DLAB's concerns over the lack of transformation in the South African liquor industry. The Liquor Policy rightly notes that the extent of vertical integration between production and distribution has contributed to high levels of concentration and thus low levels of competition in the distribution sector, specifically, despite a significant increase in distribution licenses.

In section 6 of the DLAB, it indicates that the Minister will set the relevant B-BBEE level that will need to be met by registrants to encourage participation and transformation. It goes on to state that failure to comply with the above codes will result in a suspension or revocation of liquor licenses by the National Liquor Regulator.

Although amending the Bill to include transformation requirements is not undesirable, in principle, it is difficult to understand why the liquor industry should be singled out in this regard. In addition, the punitive measures proposed, notably the suspension or revocation of licenses, is inconsistent with current B-BBEE legislation which prescribes fines for non-compliance. Current legislation only designates misrepresentation of information (false disclosure) as a criminal offence.

It is unclear why enterprises in the liquor industry should effectively be shuttered (via the suspension or revocation of their licenses) for non-compliance. Such a provision will require the current Broad-Based Black Economic Empowerment Act and B-BBEE Codes of Practice to be amended.

The DA does not support these provisions in the Bill and believes it will pose constitutional problems in relations to B-BBEE legislation and codes. We will therefore be moving for amendments to the Bill during the committee process to ensure that new legislation is not passed that is at odds with existing legislation.

5. Age limits

Section 3

The DA opposes the DLAB's proposal regarding the raising of the national minimum legal age at which alcohol can be purchased and consumed from eighteen (18) to twenty-one (21) years.

The DA's primary concerns with raising the age limit are that (a) it will not prove to be an effective deterrent and (b) it will only increase the size and scope of the illicit trade in liquor driving it underground. It will also criminalise what many would contend is socially acceptable behaviour.

It should be noted that international experience shows and studies prove that increasing the age limit results in the reduction of harm caused by alcohol abuse, notably in the targeted age group. However, the reduction is often found to be disappointingly minor and short term in nature, even in countries where enforcement capacity far exceeds that which exists in South Africa. As such, the DA contends that efforts to boost current enforcement capacity, within the existing legislative context, should remain the primary objective.

In an effort to limit the exposure of minors to drinking behaviour, the DA proposes that all persons under the age of 18 should be prohibited from entering drinking establishments, such as bars, taverns and nightclubs, as well as bottle stores. As such, persons over the age of 18 will be required to produce an identity document (ID) proving their age prior to gaining entry to said premises, and not only in order to procure alcohol products. This will further limit minors' access to alcohol, as well as limit their exposure to drinking behaviour and alcohol-related marketing.

We believe the provisions for enforcement of an increase in drinking age in the Bill to be vague, unenforceable and it delegitimises the law in limiting minors from accessing liquor. Greater focus on retailers who sell liquor to those who are under the drinking age should be made and thus we will be making substantive changes to this section in the Bill.

6. Sponsorship and advertising

Section 2

The DA does not support an outright ban on all sponsorship and advertising by the liquor industry, but believes that advertising of alcoholic products on broadcast media should only be permitted during watershed periods to limit the exposure to minors. The DA does, however, support a prohibition on alcohol advertising on billboards, in print and electronic media, primarily as these forms of media are readily accessible by minors and difficult to regulate effectively.

We thus advocate a limitation on advertising of alcohol products rather than an outright ban.

7. Cost recovery

The DA's primary concern with the DLAB is that it does not sufficiently address the issue of cost recovery. The cost, both financial and social, of alcohol abuse in South Africa is well documented. Studies attempting to quantify this burden estimate the tangible cost of alcohol abuse as a net loss of approximately 7-10% of GDP, or R165-236 billion. The intangible cost of alcohol abuse is deemed exponentially higher. As such, it is clear that the current contribution of the liquor industry, both through economic activity and revenues generated by the State, does not come close to matching the harm resulting from alcohol abuse.

It is also proposed that provincial governments are empowered to determine and impose levies on alcohol sales. The revenues generated by this Provincial Levy will be deposited into a dedicated fund, managed by provincial authorities. This levy can be ring-fenced for: hospital trauma centres, emergency response services, alcohol abuse treatment and recovery facilities, alcohol law enforcement and harm reduction programmes.

To this extent, we will be making amendments to the Bill to give provinces the ability to raise levies on alcohol sales to be ring-fenced.

8. Enforcement

The DA contends that the draft bill should explicitly empower all Peace Officers² to attend to alcohol-related problems, thereby easing the burden on law enforcement agencies. The DA conducted a roadshow in 2015 in both the Western Cape and Kwa-Zulu Natal and discovered limited enforcement of the current legislation on alcohol sales by SAPS, hence the dire need for the Peace Officers. What was worse, is that very few SAPS officers knew how to enforce the current Liquor Act.

Currently, local and provincial authorities bear a disproportionate burden with respect to the enforcement of alcohol laws and regulations. Enforcement can be significantly boosted by empowering the largest number of persons to fulfil this function. However, appropriate authorities currently do not have the legislative mandate to participate in enforcement, despite often being ideally placed to do so. The DLAB should include appropriate provisions.

We, as the DA, suggest that Peace Officers be empowered to enforce alcohol related laws. The DLAB empowers the National Liquor Authority by designating it as a regulatory body, replacing the Minister in various areas. This does not go far enough in combatting alcohol-related issues in our society. Our concerns in terms of this issue remain prevalent in the DLAB.

The policy amendment process should also be seen as an opportunity to resolve all of the legal impediments to the use of breathalyser testing and mobile blood testing that have rendered these modes of enforcement useless in the past. The end goal of the amendment process should be a situation in which enforcement officers are empowered to make use of all methods of on-the-spot alcohol testing, and that such tests should be admissible as evidence in a court of law. This would need to be done in conjunction with the Department of Transport.

We therefore will be proposing amendments to the Bill to widen the scope for law enforcement as well defining the tools for enforcement including breath testing devices.

9. Additional controls relating to liquor wholesalers

In addition to existing measures to curb the illicit distribution of licensed alcohol products, the DA proposes that liquor wholesalers be obliged to maintain a database of its clients. To this end, any person purchasing alcohol products from

² In accordance with the Criminal Procedure Act 51 of 1977, 'peace officer' includes any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334 (1), any person who is a peace officer under that section. Available online [here](#).

a liquor wholesaler will be required to produce an ID and/or business license. The wholesaler will be obligated to make and retain a copy of the document(s) and will be required to input client information into a centralised database, created and maintained by either the provincial liquor boards or Metropolitan Police. This database will allow authorities to track, identify and trace suspicious purchasing behaviour. Similar proposals have been put forward to regulate the scrap metal industry where the sheer number of scrap metal dealers allows the sellers of illegally obtained scrap metal from transacting without detection.

During the Liquor Policy process, the DA made these submission however they have not been included in the Amendment Bill. We therefore will be making these submissions during the committee process as the DA believes it will have a significant effect in the fight against the sale of liquor to unlicensed operators.

10. Revocation of liquor licenses for repeat offences

In order to address the habitual flaunting of regulations by enterprises selling liquor products, notably in those cases where offenders simply pay fines levied by the appropriate authorities but without desisting from the penalisable behaviour, the DA proposes that liquor licenses be automatically suspended after three offences. Such a “three-strike” provision will also prohibit the offending proprietor from applying for a new liquor license for a period of five years. The DA contends that liquor licensees are more likely to adhere to prescribed regulations, particularly related to selling liquor to minors, should they face the real prospect of having their licenses revoked.

The DA believes that this could be a game changer in the enforcement of the Bill and will be making these amendments during the committee process.

11. Conclusion

The DA welcomes the timely review of South Africa’s current Liquor Bill. The DA believes that much work still needs to be done with respect to the Bill. It is deficient in a number of ways and much consultation with Provinces and stakeholders still needs to take place.

We trust that our submission will be given careful consideration by the Portfolio Committee on Trade and Industry if we are to have a Bill that is enforceable not only in law but has the respect of the public at large.

We sincerely hope that the next draft of the Liquor Bill incorporates our recommendations and addresses the omissions detailed above. We also call on

South African's to treat the public participation process with the seriousness it deserves and to participate at every opportunity.

It is of vital importance that the Bill is not rushed, all voices are heard and the views of society, NGO's and political parties are seriously considered in order that we may present a Bill that South Africans can take seriously, is enforceable and protects South Africans from the harms associated with liquor.