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Foreword

Jon Collins
Chairman, Institute of Licensing

The role of the Institute is growing in importance

The role of the local authority has become ever more central to our nation's various strategies for tackling alcohol related crime and disorder. Since the Labour administration made its decision at the turn of the millennium to transfer authority for licensing from the magistrates to councils, there has been a steady flow of additional legislation as successive governments have sought to equip agencies with the necessary powers to deliver locally on their stated aim to reduce alcohol related crime and disorder. It is a widely held belief in political circles that, wherever possible, action to tackle alcohol related harm, crime and disorder should be taken at the local level. That this trend is likely to continue is made clear by the appearance in the Government's recently published Alcohol Strategy of the word local (or locally) on no fewer than 122 occasions. Given the strategy is just 32 pages in total (including both covers), that is an impressive run rate of 3.8 mentions per page.

The Prime Minister sets the tone in his foreword, noting that a key element of the strategy is to give "more powers to local areas to restrict opening and closing times, control the density of licensed premises and charge a late night levy to support policing". Chapter Three really ratchets up the expectation levels as local authorities and the police are lined up to take the right action locally.

"We are giving local areas powers to take firm action to address the harms from alcohol and, if necessary, close down problem premises. From 25 April 2012, licensing authorities and local health bodies will formally become 'responsible authorities' under the Licensing Act 2003, ensuring that they are automatically notified of an application or review, and can more easily instigate a review of a licence themselves. At the same time, new powers will make it easier to refuse, revoke or impose conditions on a licence by reducing the evidential threshold from 'necessary' to 'appropriate', thereby making it easier to challenge irresponsible businesses." *3.5, Government Alcohol Strategy, March 2012*

Local authorities are clearly expected to be more interventionist, with the strategy setting out their ability to exert more control over opening and closing hours, shut down problem premises, instigate reviews, refuse, revoke or impose conditions and reflect the needs of their local area by using measures such as fixed closing times, staggered closing times and zoning where they consider them to be appropriate.

Having prepared the way for local authorities and the police with this suite of new powers, the Government is clear in its expectation:

"We expect the police and local authorities to take quick and firm action to tackle and punish those premises and individuals that are acting irresponsibly and to protect the most vulnerable in our communities." *3.10, Government Alcohol Strategy*, March 2012

Given the increased responsibilities and even greater scrutiny of local authority action by central government (all at a time of significant budgetary pressure), there is a clear need for the Institute of Licensing to be effective in its role as an educational and advisory body. The Board and Executive recognised this to be the case some time ago. As a result, we have been working hard to ensure that:

- The Institute's voice is increasingly heard in the policy debate;
- Our regions are well supported and able to deliver relevant training and briefings;
- The national training programme (culminating in the National Training Event) is comprehensive, current and credible; and
- Our communications, from Licensing Flash to the Journal of Licensing, provide our members with the latest news and information to inform their day-to-day decision-making.

The dedication, expertise and experience of Sue, Jim and the team mean we are making great strides towards all these objectives. For example, we are leading and participating in a range of working groups on policy matters. In addition, Jim's recent delivery, supported by many colleagues, of the Home Office's programme of intensive support visits (ISVs) has been very well received. And we have no intention of resting on our laurels. A comprehensive action plan is in place and is continuously reviewed and revised. With licensing and the role of those bodies involved in the licensing process taking on greater significance, the Institute will work ever harder to ensure that practitioners are equipped with the advice and training they need to excel in the role.

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Editorial

Leo Charalambides

Editor, Journal of Licensing

With the publication of the third edition of the *Journal of Licensing*, the re-balancing of the Licensing Act 2003 is well underway, and naturally the concerns that arise from this exercise dominate our contributions in this issue. The clearly trumpeted aim of the re-balancing exercise has been to empower individuals, families and local communities to shape and determine local licensing. This aims strikes at the heart of what has hitherto been a central feature of the regime: *Partnership Working*.

In her foreword to the first edition of the section 182 Guidance (July 2004), the then Secretary of State, Tessa Jowell, wrote: "Our intention is to encourage and improve good operating practice, promote partnership and to drive out unjustified inconsistencies and poor practice". In that first edition, Chapter 2 introduced and set out the purpose of the section 182 Guidance: following on the heels of the licensing objectives were four paragraphs (2.7 – 2.10) devoted to *Partnership Working*. The courts recognised that the new statutory scheme challenged our traditional adversarial approach to decision-making and litigation. In *Chief Constable of Nottinghamshire Police v Nottinghamshire Magistrates' Court* [2009] 3182 (Admin) Lord Justice Moses states (at paragraph 38) that: "Magistrates have to bear in mind that the decision in relation to the appeal as to the licence, or as to conditions in the licence, is not a decision similar to that which he would be accustomed to resolving in the course of ordinary litigation. There is no controversy between parties, no decision in favour of one or other of them, but the decision is made for the public benefit one way or the other in order to achieve the statutory objectives".

This view has been recently endorsed and followed by Foskett J in *Tower Hamlets v Ashburton Estates Ltd* [2011] EWHC 3504 (Admin) where in the context of last-minute offers to settle an appeal a "licensing authority in the proper execution of its functions, was hampered from engaging in useful negotiations with all the parties and all the relevant interests and ... the wider community interests that ordinarily the licensing authority will take into account when considering its position in relation to any offer of this kind".

It is thus no surprise that in subsequent editions of the section 182 Guidance *Partnership Working* continued to find its way into the opening introductory sections of the Guidance as one of the General Principles of the regime under the Licensing Act 2003. What is surprising is that in the current edition of the section 182 Guidance (April 2012) *Partnership Working* is absent from the Introductory and General Principles sections that have hitherto opened and framed the Guidance. It is not until paragraph 8.41 that we read that: "All parties are expected to work together in partnership to ensure that the licensing objectives are promoted collectively". The Secretary of State has also set out the importance of co-operation, which the local licensing authority may wish to encourage: "Co-operation at a local level in promoting the licensing objectives should be encouraged and reviews should not be used to undermine this co-operation" (para 11.11 see also para 8.39).

Clearly *Partnership Working* remains an important means of promoting the licensing objectives and of achieving the aims of the Licensing Act 2003; it is perhaps regrettable that it is no longer clearly championed and highlighted as such. It seems to me that one of the risks of the recent re-balancing exercise is the potential to polarise stake-holders and encourage a far more adversarial approach. This ought to be avoided and discouraged. In the current edition of the Journal we have an examination, by Jon Collins, of the Pub Watch scheme promoted by operators, responsible authorities and the local licensing authorities and of the much admired community generated Street Pastor movement, by Cain Ormondroyd.

We have all been keen to prepare for and understand the impact of the measures that propose to re-balance the Licensing Act 2003. As ever, the Institute of Licensing has been at the forefront of presenting and organising seminars and lectures for its members (these are discussed in the *Iol News Pages* where forth coming events are also listed). I have been fortunate enough to be involved in some of these. For me, one of the striking features of these events has been the range and level of local partnership working and local partnership schemes that operate around the country. The importance of such, either business-led best practice schemes (for example; Best Bar None, Pub Watch or local best-practice schemes, will become that much greater once the measures concerning the proposed Late Night Levy become operative, on the current timetable, in October 2012 (see paras 6.07 – 6.10 of the Home Office Consultation for Late Night Levy and Early Morning Restriction Orders).

For example, in the London Borough of Hackney operators have contributed to a voluntary fund administered by the local authority to provide for night-time street marshals in areas identified by local residents as being in need of such attention. Surely this type of scheme represents the type of partnership and co-operation that meets the promotion of the Licensing Objectives and truly engages with all the affected parties under the regime?

Leading Article

Dancer welfare at sexual entertainment venues

An in-depth research project into the UK's strip-tease industry finds evidence of some poor management practices and suggests more could be done by licensing authorities to safeguard the welfare and safety of dancers. Its authors, **Dr Teela Sanders, Rosie Campbell** and **Dr Phil Hadfield** report their main conclusions, and urge Government to act swiftly upon them

This article reports on the findings of a research and dissemination project into the UK's striptease industry. The research included a survey of 197 dancers from across the UK, as well as data from documentary research, focus groups, interviews and video diaries.

The research found evidence of good practice amongst the industry, However, concerns remain regarding the limited attention to dancer welfare and safety in the licensing process.

"With recent changes to the licensing laws many dancers feel strongly about the current situation in the industry in the UK. I have never come across women who do this business in this country who are 'exploited', but the new licensing laws have done nothing to change the way the dancers are charged fees, fined and (poorly) treated by some club owners. In fact, they will now probably charge the dancers more to cover the licensing costs." *(Jenny, British, 28, dancing for five years)*

The Regulatory Dance

The Regulatory Dance is the largest study to date of the strip industry in the UK night-time economy[1]. Funded by the Economic and Social Research Council (ESRC) and conducted during 2010-2011, it is the key study illustrating dancers' experiences and working conditions. This article summarises the findings and also draws on information gathered during further consultation with local authority licensing officials, club owners/managers and dancers in the first phase of a follow-up project entitled *Sexual Entertainment Venues: Regulating Working Conditions*. This project focuses on the impact of the research, through disseminating and making use of the findings.

The project design was scrutinised by the ESRC peer review process, the University of Leeds Ethical Review Committee and complied according to the professional standards of the British Sociological Association. Specifically, these bodies are extremely cautious about the use of covert methods and the team felt that the ethical and safety management implications associated with covert research were not necessary in this study, as the focus was upon the operation of a licensed and regulated industry.

However, given that the project needed to be conducted within tight resource constraints (a 12-month study on a small scale budget of £100k), there were inevitably limitations to the scope and breadth of locations that could be included.

Structured observational research took place in 20 clubs across two main cities and some rural towns for comparison. These locations, together with the names of participants in the study, must remain anonymous in our published outputs in accordance with the assurances of confidentiality promoted in guidelines on ethical social research practice.

To date, there are no large scale national surveys conducted with dancers. Our sample is robust, representative and significant in that it portrays accurate coverage of conditions for dancers and regulatory practice within the areas under scrutiny.

The initial research project consisted of an interviewer-administered survey conducted with 197 dancers regarding their experiences. This sample is representative of activities across the UK as dancers had worked in 45 towns and cities in the UK and 16 other locations worldwide. To cross-

1 Sanders, T. and Hardy, K. (2011) *The Regulatory Dance: Investigating the Structural Integration of Sexual Consumption in the Night-Time Economy.* ESRC / University of Leeds. http://www.sociology.leeds.ac.uk/research/projects/regulatory-dance.php

check and interrogate the statistical findings in the survey, interviews were conducted with 40 dancers and 20 other people involved in the industry (including bar staff, security, "house mums", managers and owners).

Fifteen regulators (including licensing and enforcement officers, health and safety inspectors and police) were also interviewed about their experiences with the industry. A photographic visual methods element was incorporated to allow dancers to demonstrate their working conditions and provide an account of their work expressed in their own words.

To briefly outline the socio-demographics of the sample, 60% were aged between 22 and 29, with an age range of 18-53 years. Of these, 74% started dancing when they were under 25 years old. Only 14% of dancers surveyed had children, suggesting stripping is not the domain of mothers.

British nationals constituted over half the dancers surveyed (61%); EU nationals 29% (largest group being Romanians); 9% non-EU nationals (mainly Brazilian).

All of the dancers had some education and had finished school with some qualifications. Of them, 73% had completed at least further education, while 23% had completed an undergraduate degree. One third of dancers were currently students. Of these, 60% were in full time education, 25% in part time education and the remainder taking evening classes. Increasingly, it appeared that students were using dancing as a flexible job that was one of very few to provide cash-in-hand:

"I first started dancing when I was 22 and that was to fund my degree from university, which was make-up artistry. It was expensive to do and I didn't know how to fund it, and a couple of my friends were dancing so I started." (Pixie, 26, British, dancing four years)

One "house mum" of a large London club commented how students were a core part of their workforce, and that the club tries to take into account their studying demands:

"You get lots of students ....If they're training – like we've got a couple of trainee accountants, we've got a couple of girls that are training to be nurses, and they're doing it to buy their books and studies, things like that... we let them because, you know, our starting time is 9pm. If they're a student, we're pretty good: we'll say, look, we know you're studying for exams, why don't you come in a bit later? We don't restrict them."

We found out that, significantly, dancers were using stripping as a strategy to further other plans and career paths. A minority (40.2%) were solely dancing. All others were in education (14.2%), another form of work (32.6%) or both other forms of work and education (10.6%).

Background: the licensing of sexual entertainment venues

Following a concerted political campaign by feminist groups and residents' associations, Section 27 of the Policing and Crime Act 2009, which came into force in April 2010, introduced new powers allowing local councils to exercise more control over strip clubs, regulating them as Sexual Entertainment Venues (SEVs) under Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 (alongside sex shops and adult cinemas). This change also allowed local people a greater say in the licensing of strip venues. The controls are, however, optional and councils must first pass a resolution to adopt the powers having consulted the local community. In the absence of such a resolution the venues continue to be regulated under the Licensing Act 2003.

Where the additional powers have been adopted, license holders must obtain a Sexual Entertainment Licence. With regard to those SEVs within its jurisdiction, a licensing authority may:

- Prescribe the maximum number of strip clubs that can be established in a particular area. That number can be set at zero.
- Set the cost of obtaining and renewing a Sexual Entertainment Licence.
- Consider a wider range of factors when deciding whether or not to grant or renew a licence for a strip club. We consider that these factors can include:
  - The conditions for dancers performing in the clubs.
  - The likelihood of financial and/or sexual exploitation taking place in the clubs.
  - The impact of strip clubs on women living and working in the area.
  - Factors unique and specific to the locality in which a strip club operates/proposes to operate.

Councils may decide what, if any, restrictions to impose on the ways in which the performances are conducted; for example, local rules may differ as to whether there is to be a ban on full nudity, or whether there should be a minimum distance between the customer and the performer.

As Sanders and Hardy (op cit.) note, this localisation of licensing decision-making has produced an uneven geography of strip clubs, with some towns and cities having several venues, and others none.

Our research took place at a pivotal time in which local authorities were re-writing their policies on licensing striptease as a result of these legislative changes. Local authorities had received extended powers to control the number of clubs, by using quotas or introducing "nil policies" to remove existing clubs or prohibit new licenses. Of particular interest in the context of our project, the new powers also mean that licensing committees now have the ability to impose certain conditions on licenses to dictate how striptease premises are operated.

Dancers, owners and managers in our study felt that the legal changes introduced under SEV licensing did not go far enough in ensuring adequate safety and security management, would not help the industry and would not guarantee improved working environments for dancers.

"The industry requires regulation in order to prevent unfair and unpredictable rules being aimed at workers. There needs to be some form of uniform guidelines with regards to the way in which these places are run. For example: my club does not have a first aid box. As it currently stands, I feel that management ultimately have complete control over workers, and it is this which is actually exploitative, not the actual strip work." *(Emily, Romanian, 26, dancing for three years.)*

There was overall concern amongst dancers that their welfare and working conditions were not being taken seriously by the new legislation, but rather that assumptions were being made about exploitation and the community's views were favoured against those of dancers.

"There needs to be more regulations within the industry. We as dancers have for too long allowed others to dictate to us how we are to perform and interact. What we do is not illegal yet is still seen as a fringe job lacking in respectability and a gateway to prostitution. The industry is now being scapegoated because the real issues that affect vulnerable women like sex trafficking, arranged marriage and forced prostitution are unpopular politically." *(Viki, 27, British, dancing for three years.)*

Licensing practitioners generally considered that the new law would be more restrictive for the industry, and that there would likely be considerable variation according to local council policy. One fear was that increased restriction might create incentives for the development of an underground market of illegal and unregulated venues. There was concern that these venues would lack the necessary safeguards for dancers and customers, as well as the wider community. Customers may migrate to areas where these clubs were operating, having a negative impact on the licensed night-time economy.

As one dancer explained:

"Councils and any other people who are going to pass legislation need to understand that we do need things to change...but what they're doing at the minute is changing it for the worse, because it's just going to push it underground, because there are more illegal clubs opening where they're run by people that we don't want them to be run by."

Summary of findings

- The vast majority of dancers had made a decision to do dancing/stripping as a flexible, relatively high earning (although unpredictable), cash-in-hand form of work. Nearly 75% of dancers rated their job satisfaction between 7 and 10. No dancers rated their job satisfaction at a ranking of 0-2.
- Most women (80%) felt safe in their workplace owing to security and door personnel, and felt supported by managers when there was a dispute with a customer. However, there was a spectrum of persistent unwanted touching and harassment from customers reported. Of 133 dancers who responded, 52% had received verbal harassment or unwanted touching, 10% lots of times, 42% a few times, 27% not very much & 17% hardly ever.
- There was no evidence of organised prostitution or trafficking/forced involvement, although some migrant workers were paying a lot for accommodation and organisation of their work.
- Most dancers were concerned about the high house fees, commissions and fines they were paying to the management, especially on occasions when they were taking relatively little money home. Seventy per cent of respondents said they had left a shift without earning any money (because of the high overheads they had to pay out).

Managers/owners' reflections

Most managers/owners reported substantial drops in income and profits in recent years, up to 50% in some instances. Some reported that the number of customers had remained steady, but that they had less money to spend. The number of women seeking employment in strip-based entertainment was perceived as having increased significantly. Managers/owners often linked this with increasing social acceptability of stripping.

We found that the majority of clubs operated formal record- keeping systems. Files are kept on the dancers, with details stored including things like national insurance numbers, home address, contact numbers, photographs. There were "codes of conduct" documents or "house rules" (signed by dancers), which seemed to function as a working contract, as they were seen to be binding. However, managers understood that no contract was in place because the dancers are self-employed. Anecdotes of disorder tended to relate to customers trying to touch the dancers or behaving inappropriately towards them, trying to avoid payment, or breaching standard club etiquette after consuming a lot of alcohol.

Licensing practitioners' concerns

The main concerns regulators had with clubs were: incomplete staff registers, sub-standard operation of CCTV, complaints related to the issue of bills not being paid by customers, the practice of the door staff (being too aggressive with customers, or too "friendly" with the dancers), incidents of problematic noise-levels creating public nuisance, sexual services being sold on the premises, that the dancers were being exploited in some way, drug use on the premises, external signage and advertising being too explicit and vehicles being driven through city-centres advertising the clubs and touting for customers who were then taken from the streets to the clubs (this was a source of complaint in a particular city where members of the public felt harassed by promotions staff encouraging them to visit the clubs).

Licensing practitioners and the police reported that they received few complaints about strip clubs and they had fewer incidents of alcohol-related crime and disorder associated with them in comparison with other clubs.

"Normally the only reason they are called is because of disputes over the cost of champagne." *(Licensing officer.)*

"In 12 months there have only been two incidents at lap dancing clubs – both surrounded the issue of bills being paid and neither resulted in any arrests." *(Senior licensing officer.)*

"Every now and then you'll get the odd assault inside. You'll get allegations possibly that door staff are being heavy-handed in removing people from premises when they've had too much to drink or they've been too friendly with the girls." *(Police licensing officer.)*

Bad practice, in terms of environmental impacts, was not

found to be common but was, rather, associated with certain venues. Examples of this were issues such as: resistance to resolving issues, allowing touching in the clubs, noise escape, poor risk management, health and safety, slips and trips on the dance floor, poor backstage areas and poor practice associated with welfare of dancers and club staff.

Dancer welfare, safety and licensing

The research found that working conditions and welfare facilities for dancers differed across clubs and larger clubs were not necessarily better. Risks to dancers' safety and health were seen as: assaults (which were noted as occurring, but infrequently), harassment in the booth areas of the clubs, safety in getting home after shifts, the risk of slipping and tripping on the dance floor and pole safety, frequency of breaks and club temperature.

The role and conduct of the doorstaff in response to harassment and assaults was seen as very important. The priority for enforcement agencies tended to be related to compliance with licence conditions, which did not include scope for scrutiny of dancer safety except where serious incidents of crime and disorder occurred. There had been a focus on the touch/contact restrictions rather than wider safety matters. Dancers perceived that the licensing process gave little consideration to their welfare, or working conditions: for example, no regulatory checks were done in terms of the facilities for workers. Dancers' safety and wellbeing were not considered in the routine scrutiny process by licensing officials, as it was not related to licensing issues.

Some licensing practitioners did think standards for dancers could be improved. Suggestions included: safe and secure changing areas, washing facilities, lockers for valuables, somewhere to rest between dances and facilities for making food and drinks. Some practitioners felt more rigorous inspection processes would perhaps improve standards, (more covert operations and CCTV surveillance) but also noted this would require more public resources and it was not considered a priority.

Regulators generally held the view that a code of practice document with specific enforcement guidance indicating good practice, rather than being another burdensome regulatory imposition, would be extremely helpful. Practitioners noted there was a split in enforcement responsibilities, which leaves dancers' general safety and well-being potentially falling into the area which belongs to no particular agency. The Local Authority Health and Safety department has responsibility to make the building safe for public accessibility and basic trip and slip issues that are considered in any place of work. The specific health and safety issues in the clubs from a dancer's perspective (such as a private space for changing; safety on the pole; access to decent bathroom facilities; being able to make food) fell outside these basic checks.

Conclusions

We hope the dissemination of our findings can provide practical information about dancers' working conditions and raise awareness among local authorities of the views dancers expressed regarding their experiences in the workplace.

In other areas of licensing, the Home Office provides detailed guidance as to how the statutory licensing objectives might best be achieved through mechanisms such as the conditions attached to individual premises licenses and special policies that may be applied to premises within designated geographical areas. This codification is useful, both in its review of accumulated knowledge and best practice, as well as in encouraging a uniformity of approach that provides a level of transparency and fair procedure for licence applicants, as well as assurances for the general public.

This central steer from Government remains flexible enough to allow for greater or lesser degrees of local flexibility and interpretation. The main advantages lie in raising awareness of how many factors interlink in the planning and management of licensed premises and the wider night-time economy. This attention to the understanding and manipulation of complex social processes in the effective regulation of nightlife emerges strongly from the international evidence base[2].

We believe that the development of licensing in respect of strip venues in the UK lags some way behind the degrees of sophistication and effectiveness achieved with respect to other areas of licensing, particularly those addressing the alcohol-crime nexus.

The consultation phase of the dissemination project found that the majority of licensing authorities had addressed dancer safety and welfare in their SEV policies only narrowly in relation to CCTV and security staff requirements, plus touch/contact restrictions. Yet significantly, a number had begun to consider dancer safety and welfare more widely and some had added licensing conditions specifically. The consultation identified a number of ways licensing mechanisms could be used to support dancer safety and welfare more holistically. These included:

- Requiring clubs to clearly display council rules in a number of places in the club; for example, toilets, changing rooms and so on.
- Requiring licence holders to provide a range of information to dancers on their engagement, including information about house rules and insurance.
- Requiring clubs to provide access to adequate changing and kitchen facilities.
- Setting limits on the number of dancers related to the capacity of clubs.
- Tighter regulation on the location and design of private booths to achieve a balance between privacy and security. Requiring clubs to fit panic buttons in booths.
- Requiring owners to submit their codes of conduct, policies on house fees, commission and fining.
- Requiring receipts to be provided for fines, fees and commission.

2 Hadfield, P. (2009) (ed.) *Nightlife and Crime: Social Order and Governance in International Perspective*. Oxford: Oxford University Press.

Examples of good practice

The following section highlights some good practice examples from local authorities we have worked with.

Leeds City Council: requires licence holders to provide a welfare pack to new dancers and in the changing rooms. This pack must include: a copy of the Sex Establishment Licence, including the conditions applied by the licensing committee, details of any other conditions applied by management of the premises, details of how to report crime to the relevant authority, details of insurance (public liability/personal), details of trade unions, professional organisations or other bodies that represent the interests of dancers/entertainers, a copy of the code of practice for entertainers, a copy of the code of conduct for customers, fining policy and pricing policy.

Blackpool Council: has set a maximum on the number of dancers employed on any one night; this is calculated on no more than 10% of the total club occupancy. One of the criterion for assessing the suitability of licence applicants is that they have clear policies to support the welfare of dancers (including a policy to ensure dancer safety when leaving the clubs), and details of these must be provided. Another criterion is that licence holders can be "relied upon to act in the interests of the performers: for example, how they are renumerated, the facilities provided and how and by whom their physical and psychological wellbeing is protected". Secure private changing facilities, a means to secure personal property and a smoking area separate to customers must be provided for dancers. Clubs are required to display all charges and fees for dancers in changing rooms. Details of arrangements for dancers' breaks and stewarding and dance supervisors must be provided. They must list procedures for ensuring under-18s do not work at the premises. In relation to fines, Blackpool SEV policy requires a club's codes of conduct not only to detail any disciplinary procedures but also to include a system to ensure that performers who are sick or have a domestic emergency "are not made subject to unfair punitive financial penalties". In the application process for SEVs for 2012/2013, Blackpool considered a number of applications. In the case of one application, the committee's decision was that the licence would be granted following the club making major improvements, including to the changing rooms and heating/air conditioning system.

Manchester City Council: includes criteria for assessing suitability linked to performer welfare concerns and also requires a written policy to ensure the safety of performers leaving the club. All private booths must be fitted with panic buttons or a security alarm. Booths cannot be fully enclosed and a minimum of one member of security staff has to be present on any floor where a performance is taking place. Secure and private changing must be provided and there must be a smoking area for dancers separate to that provided for other staff and for customers. There are detailed requirements for CCTV systems and a trained CCTV operator is required.

London Borough of Camden: includes a detailed code of conduct for dancers and customers that cannot be changed without written consent from the council and the Metropolitan Police. What we consider a major achievement is the banning of fining as a form of discipline: "No disciplinary procedure shall include provision to fine dancers or otherwise impose pecuniary penalties. Any action to be taken shall only include verbal or written warnings, suspension of the dancer's right to perform at the premises or revocation of the dancer's right to perform at the premises" (condition 55). Venues are also required to have a dancer welfare policy in place.

Working towards gold standards

We want to promote best practice and gold standards in the SEV sector. The research and follow-on project has found that all key stakeholders including many owners and managers in the SEV sector want to continue to improve standards in the industry. Hence there is opportunity to work to identify and implement such standards as:

- A professional management style and structure.
- Fair, reasonable and transparent management practices.
- Respect for dancers and other club staff: treat all as part of a team.
- Consideration of dancer welfare and provision of fair working conditions.
- Limit / apply fines fairly and transparently; or if not, get rid of altogether.
- Provision of high quality interior conditions and facilities in public and staff areas including dancer changing facilities.
- Good health and safety standards.
- High quality security standards.
- Fair treatment of customers in terms of pricing and also the promotion of responsible customer behaviour.
- Partnership work with local authorities, trade unions and police to improve the sector and wider night time economy.

Equally, we want to leave some form of legacy for dancers in the UK and beyond. Throughout the follow-on project we have consulted with dancers and are now in a position to offer two resources: an I-phone application (Dancers Information) and a website (www.dancersinfo.co.uk). These resources provide information about self employment rights, safety in the workplace and tax awareness. The self employment rights information (written in conjunction with an employment law firm) aims to shed some clarity on the status of dancers as self employed even where strict rules and disciplinary measures are in place. We discuss codes of conduct, what can be challenged in terms of conditions, and information about joining appropriate and friendly trade unions (the GMB and Equity). The guidance on tax awareness education (written in association with HMRC) provides an official step by step guide regarding how to pay tax, how to collect evidence and what materials and equipment used for the job can be exempt from tax. Various links are included which give up-to-date details on how to get a national insurance number, for instance.

Finally, drawing on some generic advice and also tailor-made specific tips from dancers to other dancers, we have written about the strip club as a workplace in relation to personal and professional safety (developed in partnership with the Suzy Lamplugh Trust). Here we cover all aspects of the work such as choosing a club, leaving work, relationships with managers, selling dances safely, and working safely with customers.

Conclusions

We hope these examples demonstrate that, with a small change in perspective, licensing authorities can make a significant difference to working conditions and safety and security management in strip-based entertainment venues. Such changes are likely to have an important and positive impact on dancers' workplace experiences, as well as helping to raise operating standards within the industry more generally. We hope that our work adds to the demand for central Government action in the form of official guidance to licensing authorities on SEV licensing with respect to the safety and welfare of dancers through the creation of model conditions.

Dr Teela Sanders
Senior Lecturer in the Sociology of Crime and Deviance at Leeds University

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Dr Phil Hadfield
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The Law Commission's "Extraordinary Achievement"

The retention of a two tier licensing regime for taxis is a proposal from the Law Commission's impressive taxi Review that has caught the eye of **James Button**, as have also some recent rulings on when test purchasing is acceptable

At last, new taxi law is on the horizon, but what form will it take? On 10 May 2012 the Law Commission launched its Consultation *Reforming the Law of Taxi and Private Hire Services* (see http://lawcommission.justice.gov.uk/consultations/1804.htm with a closing date for responses of 10 August 2012).

This is a truly astonishing document. The work that has gone into it, and the way in which the Law Commission has grasped not only the complexities of the legislation but the practical problems that it presents, is extraordinary and it needs to be congratulated on that achievement.

Turning to the consultation itself, 73 questions are asked based upon the proposals. The Executive Summary gives an idea of those proposals but to be able to answer the questions it is essential that the full document is studied in detail.

Probably the most eye-catching element of the proposals is the suggestion that the two tier licensing regime should remain. Apart from a change in the statutory terminology from "hackney carriage" to "taxi", the current system (which has existed outside London since 1976 and within London since 1998) will be perpetuated, although one statutory system is being proposed to cover the whole of England and Wales, with no distinction for London (or Plymouth!). Taxi licensing would remain the responsibility of local authorities in England and Wales and of Transport for London Taxi and Private Hire (TLTPH) in London.

Within that framework, small changes would be made. These include:

- the abolition of limits on hackney carriage numbers;
- minimum standards for private hire vehicles (with no local variation apart from local badging);
- minimum standards for hackney carriage vehicles (which would be the same as the private hire equivalent) but with the ability for local authorities to require higher standards;
- a statutory definition of plying for hire;
- wedding and funeral cars being brought within the private hire regime;
- allowing local authorities to combine for taxi licensing purposes (although this is already possible under the Local Government Act 1972);
- allowing local authorities to create and alter hackney carriage zones; and

James Button

- allowing private hire operators to subcontract across local authority boundaries, and use vehicles and drivers licensed by any other authority;

There are many other suggestions contained within the 241 pages, and readers will undoubtedly find areas of interest and controversy as they study the document.

It does seem unfortunate that what appears to be the first real opportunity for new law for 36 years has not been grasped with more vigour. Bold reform can work, and has done so within the last decade. The Licensing Act 2003 was a courageous and far-sighted piece of legislation (and although I regularly criticise its execution and implementation, I do not doubt both the vision that led to it, and the elegance and effectiveness of the structure that it created). A similar approach was taken in relation to gambling under the Gambling Act 2005, with similar success.

I feel that it will be regarded as a wasted opportunity if as a result of this investigation, the existing law is simply modified around the edges, leaving the public confused by two types of vehicle, providing extremely similar services, being governed by separate requirements.

Whatever your view of any or all of the proposals may be, I would urge you to respond to the consultation. Whether you are responding as an individual, an organisation, a licensee or a user of taxi services, your contribution to the future legislation

is vital. To facilitate this, the Institute has an online survey which enables members to give a view on every question (http://www.instituteoflicensing.org/taxireform.html).

The results of this will feed in to the work being undertaken by the Taxi Consultative Panel (the "TCP"), which will formulate a final response on behalf of the Institute. Please do not think that this is a substitute for your own personal response directed to the Law Commission.

When consultation results are published it is often depressing to realise how few people actually responded. This is often true in the case of local authorities, who seem to rely on an individual officer to respond. However, it is important that the view of the authority as well as the view of those individual officers is expressed. The same is true of the licensed trades, where individual licensees need to make their voice heard just as much as their representative associations.

Private hire motorbikes

In November the Institute was asked to comment on proposed guidance from the Department of Transport ("DoT") on the licensing of motorbikes as private hire vehicles. This was a very short response period (four weeks) and the TCP did respond, expressing serious concerns over the safety aspects of this proposal. In April, draft guidance was received for comments and once again significant safety concerns were raised by the Institute. Those of you who are motorcyclists will know how personal many safety matters are - your helmet needs to fit (and you need to be confident that it has been looked after); your jacket, trousers, gloves all need to fit; and above all, as a rider you need to have confidence that your pillion passenger will act responsibly. For these and many other reasons the Institute felt that this proposal was flawed (the consultations and responses are available at http://www.instituteoflicensing.org/consultations.html#-1_g-CONSULTATIONS_idMain(3)).

In addition, it does seem a strange idea to introduce detailed guidance on what must be regarded as a very small area of the private hire trade when there is both new legislation being discussed and the existing Best Practice Guidance is deficient in many areas.

Over-eager test purchasers

On 13 February 2012 the High Court handed down its judgment in an appeal by way of case stated concerning a test purchase for unlawful plying for hire by a private hire vehicle.

In *Gateshead Council v Henderson* [2012] EWHC 807 (Admin) an enforcement officer spotted a potential offence when a private hire vehicle was seen outside a public house. At that time, the existing passenger was still in the vehicle, paying her fare and preparing to exit the vehicle. She was disabled and it was well known to the driver that it would take some time for her to get out of the vehicle.

On the evidence it was accepted that the enforcement officer knocked on the driver's window and when the window was opened, asked to be taken to a local hotel. The driver asked to be given a moment and then wound the window back up. The enforcement officer knocked on the window again and then tried to get into the front passenger seat, which he did as the existing passenger left the rear passenger seat.

The magistrates dismissed the prosecution on the basis that as there was still a transaction taking place with the existing passenger they could "not be sure that the [driver] had either expressly or by inference, invited or encouraged a member of the public to use his vehicle".

The council appealed and relied on the decisions in *Ogwr Borough Council v Baker* [1989] COD 489 and *Nottingham City Council v Woodings* [1994] RTR 72 to support its case.

The judge, Supperstone J, the distinguished *Ogwr* from the present case (at para 18):

"The facts of the present case can in my view be distinguished from those in *Ogwr* in two material respects. First, the vehicle was stationary but not parked, the transaction with Mrs Hunter [the existing passenger] still being in progress when the vehicle was first sighted by the enforcement officers and approached by Mr Lines [the enforcement officer]; second, the respondent's vehicle was not near a taxi rank."

In relation to *Woodings*, again the facts were distinguished (at para 20):

"Again, . . . the facts of the present case can be distinguished from those in the *Woodings* case. The respondent had not parked his vehicle and Mrs Hunter, his passenger, was still in the vehicle completing her transaction when Mr Lines [the enforcement officer] approached and made his request."

For those reasons the conclusion was that the decision of the magistrates to acquit was not an unreasonable one and as they had given themselves proper directions, they were perfectly entitled to come to that finding. The appeal was dismissed.

This case is a salutary reminder that it is all too easy to "jump the gun" when a suspected crime is spotted. We will never know whether the defendant would have committed an offence once the passenger had left the vehicle, or whether he would have legitimately waited for the next booking through his operator. He was acquitted, and that is the end of the matter. In my view, the Council were lucky not to have costs awarded against them.

Acceptable test purchasing

In *East Riding of Yorkshire Council v Dearlove* [2012] All ER (D) 163 (Jan) test purchasing was used in relation to an unlicensed private hire service. This was advertised initially for executive hire. Following discussions with the Council the defendant maintained that the service was only used for weddings and funerals (which are exempt from private hire licensing), but the suspicion remains that it was an unlicensed private hire service. It was also suspected that alcohol was being sold from the vehicle.

In order to prove this, a booking was made, a price agreed and it was confirmed that sparkling wine would be available. The journey took place and alcohol was provided. The defendant was prosecuted for driving an unlicensed private hire vehicle and supplying alcohol without a licence.

At the magistrates' court, it was argued that this was excessive action on the part of the authority and the proceedings were stayed. The council appealed by way of case stated.

Referring to both *Attorney General's Reference (No 3) of 2002 R v Loosely* [2001] 4 All ER 897 HL and *Nottingham City Council v Amin* [2000] 2 All ER 946, the High Court concluded that the investigating officer had not done anything that a member of the public might not have reasonably done, and not in any way gone beyond simply providing opportunity for a crime to be committed.

The House of Lords case of *Loosely* remains the leading case on entrapment but this is a useful indication of how the law can be applied (an indicator that the magistrates misapplied) in similar circumstances.

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Article

What are the licensing objectives? The Scottish perspective

There is a considerable amount of crossover between the Licensing Act 2003 and the Licensing (Scotland) Act 2005. A number of cases in Scotland have analysed the status and role of "licensing objectives", including the controversial "public health" objective. Scottish licensing solicitor **Stephen McGowan**, of Lindsays, and **James Findlay QC** of Terra Firma Chambers and Cornerstone Barristers assess the position

Watching English (and Welsh) licensing reform from north of the border is an interesting pastime. It has been put to me that Scotland has oft been used as a "testing ground" for licensing legislation, but in fact it was the other way around in relation to two new licensing regimes we have. The Licensing Act 2003 very heavily influenced the Licensing (Scotland) Act 2005 – but, since that time, Scotland has somewhat led the way and now the English are looking to us for new licensing "ideas" such as minimum pricing and so on. For example, in Scotland licensing authorities have always been considered, at least in terms of the legislation, "responsible" (authorities) but England is just coming to grips with that idea although the concept of "over provision" remains solely Scottish and distinct from the English notion of cumulative impact.

Much of the new Alcohol Strategy announced by the Coalition in March 2012 was familiar to Scottish practitioners. One area of particular interest to English colleagues is the use, or abuse, of the "public health objective" north of the border – so let us dive straight in to that pausing only briefly to note that the difference in the ambits of the licensing regimes under these two Acts: the English Act covers much more than just alcohol licensing as it includes music and dancing; the Scottish Act is only concerned with alcohol licensing – a point to which we will return to later

The public health objective

The so-called "fifth" objective (it actually appears fourth in section 4 of the 2005 Act) is that of Protecting and Improving Public Health. The health objective has always been controversial. How can it be that a purveyor of alcohol has a legal duty not only to protect the public's health, but also improve it? When the idea of this objective was picked up by the Scottish press, Glasgow's *Evening Times* ran with a front page headline which screamed "The death of the pie and a pint!". The truth is that publicans have not, alas, been forced to sell salad with chips and the fifth objective has been a much more difficult concept to pin down. It is arguably the least used and most misunderstood of the five licensing objectives.

It is important to realise that the original impetus for the 2005 Act was not health, but modernisation of the licensing laws in Scotland, which at that time were to be found in the Licensing (Scotland) Act 1976. It was licensing boards themselves which first called upon then Scottish Secretary Henry McLeish to ask Westminster to review the efficacy of what was seen as outdated legislation. This was around 1997 and as devolution occurred, so a new licensing system was something the infant Scottish Parliament could really sink its teeth into. By that time, the mainstream press was alive with "Binge Britain" and "24 hour drinking epidemics" as a result of the new English licensing laws, so the health issue was very much at the forefront of politicians' minds.

The 2005 Act then was passed, but only after very successful lobbying from the health sector throughout. It was quite clear that licensing was used as a vehicle so as to "be seen" to tackle Scotland's actual and presumed difficulties with alcohol. The scenes at Holyrood when off sales hours were cut from 8am to 10pm to 10am to 10pm were far from its finest hour, with last minute amendments apparently flying around the debating chamber like confetti. Other partially thought-through amendments emanating from similar quarters include the provisions relating to off-sales at petrol stations. Licensing practitioners have subsequently had to engage with the resulting legislation and the consequences thereof.

Early objections from the NHS

The 2005 Act came into force on 1 September 2009. It was in mid-2010 that the health sector began to dip its

toes into the magic waters of licensing, as NHS Glasgow started objecting to applications before the Glasgow Licensing Board but without any apparent proper strategy. One infamous objection was to a variation of an off sale display area for a Somerfield store, in which the application actually sought to reduce the alcohol display. The NHS objected on the basis of national health statistics. They were, as you might expect, sent packing by the chairman of the board itself. In one case co-author Stephen McGowan was involved with at the time, one of Glasgow's largest nightclub premises, which was undergoing a £1million refurbishment and he was dealing with a variation application which for all intents and purposes amounted to the internal reconfiguration of the premises. Again the NHS objected, this time on the grounds of overprovision – too many licences in Glasgow, they said. Of course, this was a variation for an existing licensed premises, so the NHS comments were dismissed as being entirely irrelevant.

It was clear that boards were unhappy about the level of information before them as to how to use the public health objective. The Glasgow Board Chairman, Labour Councillor Stephen Dornan, said in June 2010:

"Unlike the other licensing objectives where the board is able to consult with the police and licensing standards officers, there is no similar consultation process in relation to public health and therefore the board can only act on its own local knowledge. Unfortunately, in terms of the legislation, that local knowledge, however well informed, is unlikely to satisfy the courts. While the board feels that its decisions were entirely justified, it has to accept that it could be a battle it is unlikely to win. The board believes that these cases highlight yet another major flaw in the new licensing legislation in terms of its failure to back up what was intended to be the most robust power given to boards to properly tackle widespread problems associated with alcohol misuse. The Act has not lived up to expectation and today we are calling on the Government to urgently address this and give effective powers to boards."

So at least there was some sort of suggestion that boards would also quite like to use the public health objective, if only they knew how and in what circumstances.

The impact of the Alcohol etc (Scotland) Act 2010

Fast forward to the Alcohol etc (Scotland) Act 2010. This was the Act that was supposed to deliver minimum pricing, but ended up as another Christmas tree on which various licensing baubles were hung – with the notable exception, of course, of minimum pricing, which did not attract enough cross-party support (it's a different story now of course, with the SNP majority having just passed the necessary measures). The 2010 Act made various changes to the 2005 Act, such as introducing new mandatory conditions like "Challenge 25" and provisions concerning irresponsible drinks promotions. But it also placed, for the first time, the NHS on a statutory footing within the licensing system. This is completely new and we are now in unchartered waters. The NHS has been given a status somewhat akin to a "responsible authority" for liquor licensing, placing it alongside the police, firemaster and so on. It therefore has an "elevated" status in licensing terms and licensing boards are now obligated to "consult" with it on licensing policy as well as license applications and variations.

In some board areas, a representative from the NHS is now actually sitting next to the police officer, building standards and so on. If the medics' early forays into licensing in Glasgow were examples of a lack of knowledge, they are learning. They are most certainly learning! Objections are now more tightly framed. The number of objections from the NHS has begun to steadily rise in certain areas, and in the Highlands in particular the medical practitioners seem fairly active. The NHS here is, in fact, the local health board so of course some will be more proactive than others. In any event, the job of a licensing solicitor now involves dealing with the statistical analysis of alcohol health harms.

This then leads on to how such statistics should be handled and the *Galloway* case.

Galloway v Western Isles Licensing Board 2011 GWD 4-134

As it happens, we do have one appeal case in Scotland which looks specifically at the public health objective and how it should be dealt with. It is a very interesting case which owes as much to local politics and religion as it does to licensing law. It concerns the Stornoway Golf Club. Stornoway is a staunchly Presbyterian area with very particular views of alcohol consumption on the Sabbath. It was in this climate that the Stornoway Golf Club sought to vary its alcohol licence to allow Sunday drinking, primarily for lunches and so on offered at the 19th hole. The application attracted an objection from the Lords' Day Observation Society which argued that allowing drink sales on a Sunday was an increase in the period in which alcohol could be sold and was therefore against the public health objective. The argument here was very simple. Longer trading hours, more time in which alcohol could be bought and higher consumption would lead to health problems.

Mr Galloway, the golf club secretary, tried twice to get his Sunday hours and was knocked back twice by the Board. On the second refusal he appealed to the Sheriff Court and due to the geographical situation,that meant Inverness. On appeal, Acting Sheriff Principal Charles Stoddart overturned the refusal. One of the key passages is:

"The Board did not focus (as it should have done) on the Club itself, its members and guests and its activities; and it failed to explain how granting the application would be detrimental to public health. Now I accept that a part of the Board's Licensing Policy is to protect and improve the health and welfare of patrons of licensed premises; and of course such a policy is laudable. But to apply that general policy to a particular application without examining its specific merits (or demerits) amounts to an arbitrary application" (Para 17).

What this cases indicates is that, leaving aside policy for the moment, in order for health statistics to provide a valid consideration for a licensing board, it has to be shown how health detriment may occur as a result of the particular application premises, *and* the particular application (in this case a variation). It is not good enough to simply throw out

the general proposition that alcohol consumption is bad, nor is it good enough to rely on national health statistics.

Another recent case is of interest here, although not specifically related to the health objective, and that is *Bapu Properties*.

Bapu Properties Ltd v City of Glasgow Licensing Board 2012 GWD 11-214

Bapu concerned an application for variation to licence on part of the pedestrian footpath adjoining a Glasgow city centre Indian restaurant called The Dhabba.

The Dhabba had an external area with tables and chairs, and wished that to be part of the ambit of the licence in order to allow alcohol to be consumed there. The Glasgow Board refused the application saying that it may add to the congestion on the pavement. In doing so it had relied on its "local knowledge" following a site visit to look at the place for itself.

In upholding the appeal and specifically on the reliance of "local knowledge", Sheriff Reid said:

"In explaining its reasoning, the knowledge or experience which is relied upon by the Board must be identified, just as any other material evidence founded upon would have to be identified" (Para 38).

He goes on a bit later on to discuss the Brightcrew judgement (which we will look at shortly), saying:

"[w]hen the Division speaks of an inconsistency "flowing from" the permitting of the sale of alcohol, that inconsistency must have, at least, a material and direct link, or connection, or relationship to the licensing of the sale of alcohol...It cannot be enough for a Board to identify a tenuous, incidental, ancillary, indirect, or immaterial connection with a perceived mischief, or licensing objective, to justify the refusal of a variation application by reference to Section 30(5)(b) (or, as in *Brightcrew*, by reference to Section 23(5)(c)). The supposed "link" must be subject to a qualitative assessment" (Para 48).

Now, tie that to the public health objective and the *Galloway* case and we think there is an emerging ethos here. If a board seeks to rely on information which purports to show detriment to the public health objective, it must be satisfied that there is a material and direct link between the application premises, the application, and the perceived detriment. Further, if there is such a link, a board can rely on it only where it is subject to a qualitative assessment. In other words, there must be demonstrable evidence. Mere speculation is not enough.

There is brief mention of *Brightcrew* here. We must pause to discuss that decision as it is certainly the most important Scottish licensing decision we have had under the 2005 Act to date, and speaks to the heart of this paper – namely, what are the extent and limits of the licensing objectives?

"Duplication" and the impact of *Brightcrew Ltd v City of Glasgow Board* [2011] CSIH 46

The *Brightcrew* case revolves around a Glasgow lapdancing bar, which was then known as Platinum Lace and is now operated by Spearmint Rhino. The case speaks to the very heart of what a licensing board can and cannot do, and also to the very concept of "licensing objectives". Essentially, the case is very simply about *vires* (lawfulness). *Brightcrew* states that licensing boards should not step outwith their "essential function" of the control of the sale of alcohol[1] when attaching licence conditions, and that where a board has regard to the five key licensing objectives, it should only do so as the objectives are influenced by the sale of alcohol – and not as freestanding, general public interest objectives.

This is all very interesting because of the extent to which licensing boards have been, and are, controlling aspects of businesses unrelated to the sale of alcohol merely because there happens to be an alcohol licence in place.

Should a licensing board involve itself with matters such as whether there is a kettle available for lapdancers, or if the dancers' changing rooms are kept to an ambient temperature of 20 degrees? Should the licensing board intervene in building control matters or for that matter any other matter which is unconnected to the sale of alcohol?

Brightcrew confirms that they must keep their noses out of all that and stick to regulating the sale of alcohol. The case has been the most important of the new Scottish licensing regime and has resulted in various proceedings being abandoned across Scotland as wily private practitioners wield the "Brightcrew defence".

Review hearings instigated by the UK Border Agency based on the presence of illegal immigrants; or review proceedings instigated by utility companies having found the electricity meter fiddled – these are all affected by *Brightcrew*. What has the presence of an illegal immigrant or a dodgy electricity meter got to do with the sale of alcohol? Stephen McGowan has used *Brightcrew* in both of these circumstances for several clients, with mixed results.

But is *Brightcrew* really such a quantum leap? It seems to us to be a reminder of long-established principles about how far licensing authorities can go in the exercise of their powers. This all came up under the old Licensing (Scotland) Act 1976 in the form of *Applegate Inns v North Lanarkshire Licensing Board* (1997) 7 SLLP 10, in which the vires of what a licensing board could control beyond the sale of alcohol was debated (in that case, it was forms of entertainment).

In the celebrated case of *Gerry Cottle's Circus v City of Edinburgh District Council* 1990 SLT 25, Edinburgh Council had refused an application for a temporary public entertainment licence on the ethical and moralistic grounds that it would lead to unfair treatment of the animals. The court held that the council was acting outwith its powers by refusing an application based solely on a view that the concept of performing animals was wrong. The decision is now considered to be the classic example of one of the grounds of judicial review, namely "improper purpose" – where an authority uses a power to support a purpose other than that for which it was intended.

1 As noted above, the English 2003 Act has wider functions but the general principles within the case may still applicable south of the border provided this difference is born in mind.

There is also authority from down south. Most recently in *Peck v Amber Valley Borough Council and Allured (Miles from Nowhere)* 2008 (Derby Magistrates Court, unreported), and *Developing Retail Ltd v South East Hampshire Magistrates Court and Usher and Portsmouth City Council* [2011] EWHC 618 (Admin), the question was the extent of the power to impose conditions. The result seems to be that if the activities occur as a direct result of the licensable activities, then conditions may be appropriate even if, for instance, they relate to actions required outside of the premises to be licensed, or control parts of the premises not included within the licence or may overlap with other regimes, such as may be the case with noise nuisance.

Finally, in the case of *R (on the application of Bristol City Council) v Bristol Magistrates Court and Somerfield Stores* [2009] EWHC 625 (Admin), Somerfield appealed the imposition of certain conditions attached to its premises licence. These conditions related to general health and safety matters. Again the court found that conditions should not duplicate other legislation. There is a concurrent theme here, which chimes with *Brightcrew*.

The *Bapu Properties* case mentioned above is another example of a board straying into territories outwith its remit. Another case which supports this view is *Kell (Scotland) Limited v City of Glasgow Licensing Board* 2010 SLT (Sh Ct) 197 which relates to yet another Glasgow lapdancing club. In that case Sheriff Principal Taylor states (Para 8):

"In any event it is my opinion that the respondents were not entitled to impose any conditions regarding the provision of sanitary conveniences. Section 27(6) of the Act empowers a licensing board to impose a condition which the board considers is "necessary or expedient for the purposes of any of the licensing objectives". Section 27(7) of the Act provides that a licensing board may not impose a condition under subs (6) which "relates to a matter ... which is regulated under another enactment". The Workplace (Health, Safety and Welfare) Regulations 1992 deals with the provision of sanitary conveniences in the workplace. Thus the provision of sanitary conveniences is regulated under another enactment. By virtue of s 27(7) the respondents had no power to require the appellants to provide sanitary conveniences dedicated for the use of dancers."

And the list goes on. In an extremely recent case in which Stephen McGowan acted, the courts once again found that licensing boards were going beyond what was required of them by assessing applications with regards to matters regulated elsewhere. In the case of *Northset Limited v City of Glasgow Licensing Board*, 19 March 2012, Sheriff Principal Bowen castigates the board for refusing a licence for an external area due to the steepness of the stairs which led to the area in question. He said (Para 7):

"[t]he first ground of refusal as stated appears to reflect a view on the part of the Board that the stairs leading to and from the external drinking area were too steep having regard to the fact that they might be used by persons who had consumed alcohol. This seems to suggest that, albeit the stairs are good enough to comply with the relevant building regulations, they do not comply with some other standard. That standard is unascertainable. If the stairs comply, in all respects, with detailed building regulations it cannot be correct for a Licensing Board to regard them as inadequate as a matter of general impression.

The decision also follows the principles enunciated in *Brightcrew*.

A final point to note is that the Scottish Act has a specific anti-duplication provision in section 27(7) which prevents licensing boards from attaching conditions relating to matters regulated under another enactment. This is also backed up in the Scottish Government guidance to licensing boards.

Conclusion

Taking all of this together, the *Brightcrew* principle is not a foray into uncharted waters at all – far from it (even though in practice many boards will simply ignore it, because they know the licence holder cannot afford to mount any appeal). It is a timely reminder that the *raison d'être* of licensing law, and in turn of licensing objectives, in Scotland is the regulation of the sale of alcohol, and that licensing law should not be used as a panacea for general public interest concerns which are regulated elsewhere.

We would add a note of caution, however, and suggest there must be some kind of "sliding scale" as to how closely connected a matter can be in order to be deemed to "flow" from the sale of alcohol. Noise disturbance resulting from patrons leaving a premises under the influence of alcohol can, in our view, be seen to "flow" from the sale of alcohol. Dodgy electricity meters? We're not so sure.

As to use of the fifth objective and the new position of health boards, the law and practice is still developing. However, it is to be hoped that the courts will still require a causal link between the particular application and any potential adverse health outcome. If and when boards seek to advance the health objective via their policy, matters may become more difficult.

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Fire safety: are we doing enough at the design stage?

Extensive regulations govern fire safety in buildings used for entertainment and we have learnt much from numerous tragedies over the years, as this article illustrates. But with today's cutbacks in licensing resource, **Julia Sawyer** asks if every aspect of fire safety is being looked at as closely as it should

"In the news video, the viewer can see the lights dim as the band takes the stage and begins the first song. As the pyrotechnic devices activate the sparks emanating from the gerbs ignite the material on the walls around the platform, flames begin to expand slowly at first. Within 20 seconds the flames have spread rapidly, and within 30 seconds the crowds begin to react. The fire alarm sounds at approximately 40 seconds from the time of ignition. The cameraman leaves the building approximately 70 seconds after ignition and the video shows the fire growing rapidly on the walls and the smoke layer growing thicker through the building.

Within seconds, escaping patrons begin to pile up at the front door, as those behind them struggle to escape. Those who have escaped attempt to free those trapped in the pile, as heavy smoke pours out over their heads. Within four minutes and 30 seconds, thick black smoke is within 12 inches of the floor and bright orange flames are seen deep within the building.

In less than six minutes the black smoke has turned to flame at the front entrance and at the open windows along the front of the building. The fire service stretch a hose-line to the front of the entrance and aim water at the front corridor in an effort to save those trapped in the entrance corridor.

Ninety-six people died on the day of the fire and this rose to 100 in the days following"[1].

This is a description of the tragedy that unfolded at the Station Nightclub in Rhode Island, USA on 21 February 2003. Investigations after this fire confirmed that the gerbs (a pyrotechnic) had ignited flammable sound insulation foam in the walls and ceilings around the stage. When looking at other historic fires in places of entertainment, one of the common factors among them is the presence of combustible interior finishes, contents and furnishings. This article details the standard/class of finishes you would expect to see at a place of entertainment.

Julia Sawyer

As will be outlined, there are many regulations governing fire safety. But nevertheless, many recent changes prompt the question as to whether every aspect of fire safety is adequately covered. As we all know, there is more and more deregulation occurring these days. Our licensing officer/fire officer teams with specialist knowledge are being squeezed. The constant challenge with the designer and/or artist who wants something aesthetically pleasing, which coupled with the increase in security measures, can sometimes be in conflict with safety. In the face of all these pressures, can we be confident that the necessary checks are always being fully carried out every time? And are fire risk assessments detailed enough to capture this information?

Building regulations (fire safety)

Building Regulations Approved Document B (Fire Safety) apply to applications for any new building works that are carried out, which captures and regulates new builds that fall within the scope of these Regulations. But any changes to wall or ceiling finishes due to redecoration or refurbishment may not be captured by these Regulations[2].

1 Extract from *NFPA Case Study: Nightclub Fires* by Robert F. Duval

2 Publication title: *Approved Document B (Fire safety) – Volume 2 - Buildings other than dwelling houses* (2006 Edition)

The Regulatory (Fire Safety) Reform Order 2005 requires a responsible person to carry out a fire risk assessment of a workplace or premises are that are used by members of the public. Part of this assessment should include an assessment of the finishes used within a building and the use of the building to ensure the correct class of wall of ceiling finish is in place. Guidance is given in *Fire Safety - Risk Assessment Small and Medium Places of Assembly and Large Places of Assembly*, which states[3,4]:

Class 0: Materials suitable for circulation spaces and escape routes
Such materials include brickwork, blockwork, concrete, ceramic tiles, plaster finishes (including rendering on wood or metal lathes), wood-wool cement slabs and mineral fibre tiles or sheets with cement or resin binding
Class 1: Materials suitable for use in all rooms but not on escape routes
Such materials include all the Class 0 materials referred to above. Additionally, timber, hardboard, blockboard, particle board, heavy flock wallpapers and thermosetting plastics will be suitable if flame-retardant treated to achieve a Class 1 standard
Class 3: Materials suitable for use in rooms of less than 30m²
Such materials include all those referred to in Class 1, including those that have not been flame-retardant treated and certain dense timber or plywood and standard glass-reinforced polyesters

The BS9999:2008 Code of Practice for fire safety in the design, management and use of buildings gives very detailed guidance on the specifications of linings for buildings with different uses. It is expected that the surface flame spread and heat release rate characteristics of a lining material, such as a wall or ceiling finish, should be of a high class in circulation spaces (public venues) because the speed of fire spread could affect the means of escape significantly. This British Standard gives the following specifications[5].

Classification of linings:

Location	National Class	European Class
Small room of area not exceeding 4 m² in a residential building and 30 m2 in a non-residential building and domestic garages not exceeding 40 m²	3	D-s3, d2
Other rooms (including garages)	1	C-s3, d2
Circulation spaces within dwellings	1	C-s3, d2
Other circulation spaces including the common areas of flats	0	B-s3, d2

From the guidance given above, it is clear that unless the space is less than 30m² (where it would be a short travel distance and quick to exit) the linings for walls or ceilings should be constructed to a Class 0 standard.

There are different test methods used to assess the effectiveness of flame retardant products and BS 476-7 is used to classify a material in terms of "spread of flame". Class 1 is a low surface spread of flame, the highest achievable with the test method used, and is a performance normally required for walls or ceilings. In high-risk areas such as escape routes, Class 0, limited combustibility, is required. To comply, materials must have a Class 1 surface spread of flame and a low propagation to BS 476-6.

Further guidance on the specifications of lining materials can be found in:

1 BS 476-6: *Fire propagation test to determine a surface spread of flame.* British Standards Institution.
2 BS 476-7: *Fire tests on building materials and structures. Method of test to determine the classification of the surface spread of flame of products.* British Standards Institution.
3 BS EN 13501-1: *Fire classification of construction products and building elements. Classification using test data from reaction to fire tests.* British Standards Institution.
4 *Guidelines for the construction of fire-resisting structural 4 elements,* BRE 128. Building Research Establishment, 1988.
5 BS476-22: *Fire tests on building materials and structures. Methods for determinationof the fire resistance of non-loadbearing elements of construction.* British Standards Institution.

Julia Sawyer
Director, JSL Safety Consultancy Ltd

Nightclub fire tragedies over the years

1. The Club Cinq-Sept (SE France), 1st November 1970. Fire started by disgarded match setting fire to highly flammable and combustible material. 146 people killed.
2. The Stardust Nightclub (Dublin), 1981. Toilet sign mistaken for emergency exit, people trapped inside. 48 people killed.
3. The República Cromañón Nightclub (Buenos Aires), 30th December 2004. Pyrotechnics ignited highly flammable construction and decorating materials. 194 killed 714 injured.
4. Wuwang Clubin (Shenzhen, China), 21st September 2008. Pyrotechnics ignited starting fire. 43 killed 88 injured.
5. Lame Horse Nightclub (Perm, Russia), 5th December 2009. Pyrotechnics ignited a low ceiling, the main entrance was partially sealed. 153 people killed.
6. The Santika Nightclub (Thailand). New Year's Eve, 2009. Pyrotechnis ignited soundproofing and insulating materials on the ceiling. 66 people killed and 229 injurued.

3 Fire Safety - Risk Assessment Small and Medium Places of Assembly Department for Communities and Local Government (DCLG)
4 Fire Safety - Risk Assessment Large Places of Assembly Department for Communities and Local Government (DCLG)
5 BS9999:2008 Code of Practice for fire safety in the design, management and use of buildings

Just what was the hurry?

Well, 25th April came and went. It followed the 24th and was followed by the 26th! Oh, and there was the little matter of the changes to the Licensing Act 2003 introduced by the Police Reform & Social Responsibility Act 2011 coming into force on that day. Much has been written about the effect of the changes and much more will no doubt be written.

But why the haste (as if we did not know)?! The usual dates for the introduction of changes to legislation are by convention 6 April and 1 October in any year. It was clear that the Home Office was struggling with the deadline of 6 April and the (apparently) rushed launch of the Alcohol Strategy document was a convenient opportunity to slip in that the relevant changes would come into force on 25 April.

Oh – but we need to produce the Guidance. Guidance notes were to be produced to assist licensing authorities and practitioners alike to prepare for the changes with the full Guidance to follow.

In the final analysis, just two such sets of notes were provided – on 24 April – with the caveat in each that "there should be no reliance on its contents... for any purpose"!

The full Guidance itself was published on 25 April and what a document this may prove to be. Edited from the previous Department of Culture, Media and Sport-crafted version into the new Home Office version, much is carried across but it is those changes in substance, and indeed the changes of tone, which are most striking.

The constraints of this article do not permit a detailed analysis but I pick up on a number of (to me) significant points:

- **Role of the police (paragraph 9.12)** – states that "the licensing authority should accept all reasonable and proportionate representations made by the police unless the authority has evidence that to do so would not be appropriate for the promotion of the licensing objectives. However, it remains incumbent on the police to ensure that their representations can withstand the scrutiny to which they would be subject at a hearing." It was always anticipated that any representations received from the police might be accorded enhanced status; something at which a number of forces have previously indicated disquiet. It remains to be seen how licensing authorities will apply this in practice. But it is our experience that, on occasion, the substance of such representations do not bear close scrutiny and as such, the fact that the Guidance emphasises the possibility of such scrutiny, is welcome.
- **Relationship between planning and licensing (9.41)** - "...licensing committees and officers should consider discussion with their planning counterparts prior to determination with the aim of agreeing mutually acceptable operating hours and scheme designs." Previous Guidance has always sought to emphasise the separation between the planning and licensing regimes. The above represents a significant and indeed worrying change. Not only are the two regimes brought closer together but the Guidance actually advocates co-operation between departments with a view to agreeing constraints on the determination of an application before the application has even been heard and tested at a hearing. We will watch with caution as to how this plays out going forward.
- **Alcohol delivery services (3.10)** – just where did this come from? "Persons who run premises providing 'alcohol delivery services' should notify the relevant licensing authority that they are operating such a service in their operating schedule. This ensures that the licensing authority can properly consider what conditions are appropriate. Premises with an existing premises licence, which choose to operate such a service in addition to their existing licensable activities, should therefore apply to vary their licence to add this activity to their existing licensable activities." I am not sure what existing home delivery operators will make of this or indeed where any statutory authority to govern such properly arises?
- **Determining actions that are appropriate (9.39)** – When coming to a decision a sub-committee's "determination should be evidence-based, justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve." The word "appropriate" has now become the test in place of "necessary" but when you consider the Human Rights Act "appropriate" is defined as being something which is "necessary"! Is the change even justifiable?
- **The tap water issue (10.64)** - "The responsible person must ensure that free portable tap water is provided on request ...". Well I am sure the reference is intended to be to potable water!

Everything will hopefully settle down but (and with some sympathy for the officials who were labouring under intense political pressure,) in the terms of my old school report – "Could possibly have done better"!

John Gaunt
Partner, John Gaunt & Partners

Institute of Licensing

Benefits of membership

The Institute of Licensing

The Institute of Licensing's main aims and objectives are to increase knowledge and professionalism in licensing practitioners. Being a charity we do not operate as a business and we do not seek to make a profit. We aim to provide a service on a cost neutral basis.

We have a board of non-paid directors consisting of representatives from all of our membership base, council and police officers, lawyers, licensing consultants and the licensed trade. We have 11 regions covering England, Wales and Northern Ireland. We employ a small number of staff and we have a small team of contractors.

As an organisation the IoL are continuing to strive for even better service and value to our members. The subscription rate has stayed the same for a number of years whilst the services and benefits to members has risen considerably both in terms of what the organisation from the Centre delivers and the Regions deliver.

Benefits of Membership

As an organisation the IoL are continuing to strive for even better service and value to our members. The subscription rate has stayed the same for a number of years whilst the services and benefits to members has risen considerably both in terms of what the organisation from the Centre delivers and the Regions deliver. Some of the benefits are details below, for full details visit our member benefits pages of our website www.instituteoflicensing.org.

Discounts for Members

The IoL are not resting on their laurels we are continuing to look at more and more ways to improve the benefits of membership and now we have teamed up with the organisations listed below that will offer an even greater service to IoL individual or organisational members. Each organisation is offering members a discount of their normal fees/book prices ranging from 10% to 20%, (see specific discount as offered by each company on our website www.instituteoflicensing.org). The companies that are offering the discount are all very highly valued for the services/products that they provide but now if you are an IoL member they are even better value.

These benefits are currently being reviewed see our website for full details see our Member Benefits pages at www.instituteoflicensing.org

Training Courses

The Institute continues to increase the number and frequency of training courses delivered across all our 11 regions. In 2011 for example we delivered over 30 training courses across the country, all of which were available at significantly reduced costs to Institute members.

Our signature event, the National Training Event was substantially changed this year following feedback from Institute members against a background of a difficult financial climate. The result was an improved and extended programme with more choice for delegates at less cost for our members. In addition, key programmes were repeated within the event programme which enabled delegates more opportunity to tailor the programme to their individual preferences without having to miss other preferred sessions.

See our website for sample training courses that the IoL can deliver at your location you can also email training@instituteoflicensing.org for a quote on your training requirements. Most IoL training courses can be delivered at your preferred location for the training fee of £1000 plus VAT (including expenses) for a one day course and in many cases delegate numbers are not restricted allowing the training to be opened up to neighbours which in turn can allow for the cost of the course to be fully recovered.

Article

Street pastors: faith in action

Jesus was notable for the fact that he associated with tax collectors, prostitutes and other social outcasts, so it should come as no surprise that his present day followers are mixing with some of the less socially acceptable customers of the night time economy. The results are striking and offer a cost effective way of addressing the licensing objectives of the prevention of public nuisance and the prevention of crime and disorder.

How it works

The concept is simple. Volunteers drawn from local churches patrol the streets late on Friday and Saturday nights, wearing jackets emblazoned with the words "Street Pastor". They are there not to proselytise or condemn, but to provide practical help (bottles of water, flip-flops, blankets, night bus timetables) and a listening ear.

The concept was first devised in Lewisham and Hackney as a response to gang- related knife and gun crime. There are now some 9,000 trained volunteers working in 250 teams in locations nationwide. The focus of the scheme has also shifted so as to provide a response not only to gang violence but also to anti-social behaviour more generally.

Each of the regional groups operates as an independent charity, licensed to use the name "Street Pastors" by the Ascension Trust, which pioneered the scheme. Volunteers are provided with extensive training. Each local group is self-organising and responsible for securing its own funding.

Positive reactions

The first reaction of many licensing practitioners and police officers to the idea of unleashing Christians onto the streets late at night was sceptical. It was thought that the pastors might create more work for the police if they themselves became the targets of violence or anti-social behaviour and were forced to call for assistance.

Far from making things worse, however, the near universal experience seems to be that pastors make a positive difference to the late night economy. First, they provide practical assistance to individuals in a vulnerable position. Second, they free up police time by doing so. Third, the very presence of caring, respectable, sober people seems to exert a calming influence. Anecdotal evidence suggests that the presence of street pastors can therefore have a real impact on the prevalence of crime, disorder and public nuisance.

The scheme has many high-profile supporters. David Cameron is on record as describing the job the street pastors are doing as "absolutely fantastic". He went on to say: "What we need is more people out in the community supporting the police, who can't do the job of beating antisocial behaviour on their own[1]." Chief Superintendent Andy Bickley of Plymouth Police is one of many police officers to have voiced his support for the scheme, commenting: "By any measure the street pastors have been a tremendous success. They have boundless energy and share a passion to make the city a safer and stronger environment. Their dedication and commitment to making a difference to community life is commendable[2]".

Measuring success

Objective studies seem to support the fact that the presence of street pastors secures a real and significant drop in levels of crime and anti-social behaviour. An analysis of the relevant crime and anti-social behaviour figures was conducted by Devon and Cornwall Constabulary in 2010. It compared figures for 22.00 to 04.00 on a Saturday night relating to periods of months and years before and after the pastors began operating in seven town centres. Periods were compared on a like-for-like basis to avoid any statistical anomalies due to seasonal variation.

The results of the study are quite striking. In terms of anti-social behaviour, six of the seven towns had figures sufficiently large to bear statistical analysis. In all six there was a significant reduction in reported incidents of anti-social behaviour, ranging between a 19.7% reduction in Ilfracombe and a 41% reduction in Exeter. Interestingly, the effect is not confined to big cities but extends to smaller communities like Barnstaple and Ilfracombe.

The effect on crime figures was less consistent but generally positive. Of the seven towns considered, five had figures sufficiently large to bear statistical analysis. Of these three (Bideford, Torquay and Ilfracombe) showed a consistent reduction in total crime and in violent crime and criminal damage specifically. The reductions were significant, between 27.3 and 60.7%, and far outpaced the average reductions for the force.

Conclusions

Local authorities are directed by the Secretary of State's guidance to use partnership working in order to advance the licensing objectives[3]. They also have a statutory responsibility to have due regard when exercising their functions to the need to do all that they reasonably can to prevent crime and disorder, including anti-social behaviour[4].

Anecdotal and statistical evidence so far available suggests that street pastors present a highly effective and value for money response to the problems of crime, disorder and nuisance caused by the late night economy. Local authorities may therefore wish to encourage the development of street pastor schemes in their local areas and do what they can to support and work in partnership with those schemes already in existence.

Cain Ormondroyd
Barrister, Francis Taylor Building

1 The Telegraph, 1 Jun 2008.

2 As quoted by the Ascension Trust.

3 See paragraphs 8.41.

4 Crime and Disorder Act 1998, s 17.

Institute of Licensing *Training*

Institute of Licensing

An important element of the Institute is training, and in addition to the National Training Event we organise residential and non-residential training courses throughout the year on different subjects including licensing fees (2011/12), licensing hearings for all parties (2011) and outdoor events (2011/12) to provide timely and relevant training opportunities to our members, including basic training aimed at new entrants, and advanced training for established practitioners.

One of the IoL's main member benefits is the low cost good quality training courses that are available to members in each of the 11 regions and on a National level.

Training Courses

The Institute continues to increase the number and frequency of training delivered across all our 11 regions. In 2011 for example we delivered over 30 training courses across the country, all of which were available at significantly reduced costs to Institute members.

Our signature event, the National Training Event was substantially changed for 2011 following feedback from Institute members against a background of a difficult financial climate. The result was an improved and extended programme with more choice for delegates at less cost for our members. In addition, key programmes were repeated within the event programme which enabled delegates more opportunity to tailor the programme to their individual preferences without having to miss other preferred sessions.

Date for your diary – National Training Event 2012 – 14th, 15th & 16th November 2012

The Training courses currently available for delivery in any of the 11 regions include:

- How to Inspect Licensed Premises
- Caravan Site Licensing
- PACE & Investigation Courses
- Taxi Licensing
- Street Trading and Pedlars
- Licensing Act 2003
- Gambling Act 2005
- Basic Licensing Principles
- Councillor Training
- Licensing Hearings for All Parties
- Sex Establishment Licensing

The IoL will be running a series of seminars in relation to the taxi legislation review currently being conducted by the Law Commission. For dates, locations and other details to be announced: see the IoL website.

The IoL will also be running a series of seminars in relation to the DCMS Proposals to deregulate Schedule One of the Licensing Act 2003. The seminars will start in spring 2012: see the IoL website for more details.

The IoL will be organising a series of training courses and seminars to examine the changes to the Licensing Act 2003 brought about by the Police Reform and Social Responsibility Act 2011. The seminars will start in spring 2012: see the IoL website for more details.

The IoL can deliver at your location; you can also email **training@instituteoflicensing.org** for a quote on your training requirements. Most IoL training courses can be delivered at your preferred location for the training fee of £1000 plus VAT (including expenses) for a one day course and in many cases delegate numbers are not restricted allowing the training to be opened up to neighbours which in turn can allow for the cost of the course to be fully recovered.

Institute of Licensing News

Home Office Intensive Support Visits

Sue Nelson
Executive Officer, IoL

The Institute of Licensing was delighted to deliver the Intensive Support Visits project for the Home Office during February and March this year.

The training project promoted a partnership approach to achieving compliance with licensing requirements. It comprised 12 one and two-day Intensive Support Visit events and 10 one-day training sessions, together with e-learning modules and fact sheets to provide ongoing learning facilities.

Jim Hunter, the IoL's Training and Qualification Officer, was on the road throughout March delivering the training alongside other members of the IoL project team. Delegates included police officers, licensing officers, councillors, industry operators, lawyers and local residents. The training focused on achieving compliance through partnership, information and support, with a stepped approach to enforcement where necessary and proportionate.

Jim Hunter
Training & Qualification Officer, IoL

Initial feedback, both from delegates and from Home Office representatives, has been extremely positive. Pleasingly, the work was in tune with the IoL's charity objectives in increasing professionalism, knowledge and expertise, and promoting mutual understanding between all parties.

National Training Event 2012

Natasha Mounce
Co-ordinator, IoL

It is with much excitement that we can look forward to the forthcoming National Training Event in Birmingham from 14-16 November this year. After the success of the 2011 event we are expecting places to go fast, so if you haven't already booked your place make sure that you do. The 2011 event was fully booked months before the event, which led to many delegates booking late having to stay at an overflow hotel. Please make sure you book your place early to ensure you are booked into the main hotel.

After last year's event, one of the attendees, Nigel Connor of JD Wetherspoon, said: "JD Wetherspoon was one of the first trade operators to join the Institute. To us it was an ideal opportunity to share best practice with the whole range of those involved in the licensing process as well as an opportunity to put forward the industry's perspective on the key issues of the day. We are very pleased that the Institute has embraced the idea of being a broad church body of licensing stakeholders and the Annual Training Event in Birmingham was an embodiment of that. Not only was it a chance to listen to speakers at the cutting edge of licensing, such as lawyers, police, government representatives or licensing authorities, but it was also an opportunity to meet informally a lot of those people you only talk to on the end of a telephone line. The building of those individual relationships certainly assists in trying to iron out problems and is much more effective than an adversarial approach. I and colleagues from JD Wetherspoon will certainly be attending next year and hope to see more industry representatives join us."

This year's event will continue with the more flexible format introduced last year at the request of members. It allows attendees to be more selective in picking and choosing which sessions they wish to attend.

As always, there will be the opportunity to attend the whole event or book as a day delegate. We have kept the

prices the same as they were in 2011: if you book early, you can book the whole event for £495 + VAT for members and £565 + VAT for non-members. For more information on the event and pricing, please visit our website www.instituteoflicensing.org

As a flavour of the types of sessions that will be covered see the list below. For more information and a copy of the proposed programme visit our events pages of the website.

- Case law update
- New Code of Practice for enforcement of age-related products (BRDO)
- How to inspect licensed premises
- Taxis updates
- Member training
- DCMS on deregulation of Schedule 1 LA03 - DCMS
- Live Music Act
- Policing the night time economy - The police approach
- Proxy Watch Scheme
- Use of Summary Reviews - case studies
- Achieving compliance (including ISV update)
- How to inspect taxis
- Law Commission Taxi Review update
- PRSA - implementation and effect (including a trade perspective)
- Action Planning v Reviews
- Statutory Guidance Review, minimum pricing, Alcohol Strategy
- EMROS and the Late Night Levy Licence Fees
- A partnership approach to managing the night time economy
- How to plan a safe event
- Revised Purple Guide
- Licensing Hearings training
- Licence conditions - enforceable and appropriate
- Sex establishments
- Gambling Act
- Gambling Act - Gambling Commission update
- Data Protection and CCTV
- Northern Ireland, Scotland and Wales - licensing differences
- Lidl v Glasgow Licensing Board - re Alcohol Sales revocation (Scotland)
- The public safety objective - the Scottish Experience
- Use of Summary Reviews - case studies
- Noise conditions
- Caravan Site licensing
- Topical and current issues

Online payments

The IoL was delighted to announce in April that members can now make online payments for membership renewals and new membership applications.

If you have received your renewal invoice and you wish to pay your renewal online, either from an existing PayPal account or by credit/debit card, you can now do so via the website.

Membership renewals

For renewals you will need to log in to access the member area of your account. Select "Renew your membership", which will take you to a checkout page. Once you are happy with the amount showing, select "Checkout" and you will then be taken to the PayPal site where you can pay either by credit/debit card or through an existing PayPal account if you have one.

New membership applications

If you are making a new membership application you will be given the option to pay online as part of the application process, or you can request an invoice, which will be emailed to you on receipt of your online application.

Any Questions?

If you have any queries on how to pay your renewal online or how to make a new application you can email membership@instituteoflicensing.org.

Events

We are currently working on online payment for events which should be available in the coming weeks if it is not already in place.

Recognition and Awards

The Jeremy Allen Award

The IoL is delighted to confirm that the Jeremy Allen Award will continue as an annual award, jointly provided by the IoL and Poppleston Allen Solicitors.

The award remains an ongoing tribute to the life and professional career of Jeremy Allen, whose dedication to partnership working and best practice in licensing made him one of the most respected and popular figures in the industry.

Details of the criteria and how to nominate an individual for the award are included on the IoL website "Awards and Nominations" page (under membership).

Fellowship

Do you know a licensing practitioner who deserves recognition for exceptional excellence in licensing? If you would like to nominate someone for Fellowship of the IoL, you can do so at any time. Details of the criteria and how to nominate are included on the website "Awards and Nominations" page (under membership).

Consultations – recent and current

Consultations, background documents (such as Impact Assessments) and IoL responses can be found in the website library section in the "Consultations" folder. In

addition, details on recent and current consultations can be found on the consultations page (access via the drop down menu under "News").

Home Office Consultation on "Dealing with the problems of late night drinking" (Jan 2012)

A Home Office consultation launched on 17 January this year sought views about two measures in the Police Reform and Social Responsibility Act 2011 that will be implemented through regulations: Early Morning Restriction Orders (EMROs) and the late night levy.

The Institute's membership represents over 2,500 licensing practitioners across the country. Following the announcement of the consultation on *Dealing with the problems of late night drinking*, the Institute consulted members by way of an online survey to gather views.

Only 25 responses were received. This could indicate a lack of interest, or simply reflect a position where members have not fully formed their views on the proposals.

Within the responses received there were some areas with a strong consensus (65% +) as follows:

- 76% agree that EMROS should not apply on New Year's Eve;
- 68% agree that the categories of premises identified in section 4.05 should be exempt from EMROs;
- 72% felt that local residents should not be able to suggest implementation of a late night levy in their area;
- 81% support local discretion to exempt premises (as set out in section 6) from the late night levy;
- 75% felt that club premises should not be exempt premises for the purposes of the late night levy;
- 75% agreed that local authorities should have discretion to reduce the late night levy for certain premises; and
- 81% say no to further exemptions/reductions.

Comments within the responses also showed some concern that the proposals had not been publicised enough, particularly to the licensed industry, with one responder advising that none of his clients knew about it at all, and still do not understand the implications of the proposals.

DFT Consultation on draft guidance for the licensing of motorcycles for private hire (April 2012)

Following an initial contact by the IoL with Norman Baker, Under Secretary of State for Transport on 17 November 2011 (as reported in Issue 2), the Department for Transport consulted the IoL again in April seeking views on a draft guidance document for licensing authorities regarding the licensing of motorcycles as private hire vehicles.

As previously, the timescales for responses did not give sufficient time for IoL members to be consulted, and the draft guidance was therefore considered by the IoL's Taxi Working Party (TWP).

The TWP considered the draft guidance, and agreed that the main areas of concern are:

- The fact that motorcycles do not (and cannot) offer basic accident protection to passengers (or riders);
- The need for fitted safety clothing and equipment, the benefit of which is greatly reduced (if not completely lost) where the clothing / equipment does not properly fit the user;
- Hygiene and effectiveness of used clothing/ equipment; and
- The impact of the passenger's individual expertise (or lack of) on the overall safety of the journey. TWP members simply did not agree that this can be overcome by a short and basic briefing as suggested in the draft guidance.

TWP members were concerned that different styles of motorcycle have different considerations. For example, many sports models require a near-horizontal riding position while other models have a more upright position. The group questioned the likelihood that a brief verbal induction for an inexperienced passenger would be sufficient to ensure that the passenger adopts a safe riding position.

There were further questions over the identification of a licensed motorcycle. Will there be a new specification for the plate size and where should it be mounted? Also, many local authorities require additional signage on their licensed vehicles, a good example (in the case of private hire vehicles, "PHV") being a warning to potential passengers that the vehicle must be pre-booked. How would this work in practice? Should the guidance assist in this or would it be left to licensing authorities to address this without guidance?

The draft guidance contains some generic suggestions which apply equally to all Hackney Carriages and PHVs, and includes reference to existing legal requirements, which would be an unnecessary duplication. In some cases, different standards are recommended in the draft guidance for motorcycles to those currently recommended for motorcars, but there is no additional information or rationale to explain or support the change.

In conclusion, TWP members remained concerned at the proposals, and a detailed response was sent to the DFT. The Department responded by saying IoL members had not been consulted due to the restrictive timescales, but it offered to conduct a full consultation if time permitted.

The full Institute response to both of the above consultations, together with the consultation documents and supporting information, can be accessed via the IoL's website library or on the consultation page (under "News").

Gambling Commission Consultation on Revised Guidance to Licensing Authorities (April 2012)

The Gambling Commission published its consultation on the new edition of the Guidance to Licensing Authorities (4th edition) in April 2012.

This is statutory guidance on the functions of licensing authorities required under the Gambling Act 2005. The guidance was last published in May 2009 and this new edition provides updates as well as incorporating material published in other formats since then. The proposed revisions do not represent a change of policy or approach by the Commission, but incorporate new

material on topics that have already been communicated to licensing authorities by other methods. Some sections have been re-ordered and relevant material from publications such as "quick guides" has been incorporated in order to make the Guidance more accessible.

The most significant changes include more information about:

- Information sharing (part 13) and the data requirements for licensing authorities to provide to the Commission;
- Gambling in clubs and clearer definitions on types of clubs;
- Exempting gambling in alcohol licensed premises and the licensing authority's ability to remove exemptions;
- Non-commercial and private gaming and betting;
- Poker in pubs (Part 29 has been significantly edited);
- Small society lotteries; and
- Compliance and enforcement and the respective roles of the Commission and licensing authorities.

Members were invited to feed into the IoL response by way of an online survey, and the IoL response will be submitted before the closing date (6 July).

Law Commission Consultation provisional proposals for reform of the legal framework relating to taxis and private hire vehicles (May 2012)

The Law Commission released its provisional proposals on Taxi and Private Hire reforms in its extensive and detailed consultation (with 73 consultation questions) on 10 May this year. With its implications and scope, not to mention the very different views within the taxi and private hire industries and the regulators, this is without doubt one of the big consultation news stories for 2012.

Proposals include:

- Retaining the existing two-tier position with both hackney carriage (which will be referred to as "taxis" if the term hackney carriage is removed as suggested) and private hire vehicles within the licensing framework (with a maximum capacity of eight passengers);
- Abolishing the ability of local authorities to have a limitation policy for taxis;
- Provision of national standards, including statutory guidance, on the licensing of limousines and novelty vehicles;
- Some provision for local standards but a suggestion that in some cases a national minimum standard would still apply;
- Giving local authorities the ability to create or remove taxi zones within their areas;
- Removal of exemptions for wedding and funeral vehicles;
- Potentially re-introducing the "contract exemption";
- Placing the concept of "plying for hire" on a statutory footing; and
- Allowing the use of licensed vehicles for leisure and other non-professional use.

Many questions are asked by the Law Commission throughout the consultation document, such as whether private hire vehicles should be able to use the term taxi/cab and so on alongside "pre-booked" in advertising or whether this might cause confusion; whether airports should have special legal provision for taxi/private hire regulation; whether local standards should be maintained for signage and/or other areas; and many more.

IoL response

The IoL conducted a considerable amount of work through its Taxi Working Party (TWP) looking at whether there is a need for reform, and concluded strongly that there is. Members will remember our detailed, nationwide consultation and the subsequent report which was submitted to the Transport Committee and the DFT in January 2011.

Following the announcement of the Law Commission's consultation, the IoL replicated the consultation questions in an online survey and sought IoL members' views to inform the IoL response.

In the meantime, the IoL's Taxi Consultation Panel (which includes new members as well the TWP), is working hard to give the proposals detailed consideration and agree a group response which will also feed into the IoL response.

Members will be advised of the IoL response, and all other developments in this area. We already have taxi sessions programmed into the National Training Event in November, and there will be other information and discussion opportunities through the regions, the website and our email news updates.

National Licensing Forum

The second meeting of the National Licensing Forum (NLF) was held at Brewers' Hall, Aldermanbury Square, London on 22 February this year.

Discussions at the meeting centred around the PRSR Act commencements for April and October 2012; forthcoming national events including the Diamond Jubilee, Euro 2012, and the Olympics; and forthcoming legislative changes, including the Live Music Act 2012 and the DCMS consultation in relation to potential deregulation of Schedule 1 of the Licensing Act 2003.

With regards to the DCMS consultation on potential deregulation of Schedule 1 of the Licensing Act 2003, there is no visible timetable for any changes at present as this will depend on the conclusions and course of action taken as a result of the consultation. It is likely that there will be changes as a result, but what those changes may be remains to be seen.

There were further discussions about the use of expedited reviews and the Gary Oates case which while not binding is having a definite effect. NLF members considered if there would be scope for further guidance in some areas.

The value of the NLF was illustrated in the open and honest discussion around the table, providing a neutral platform for NLF members to discuss issues from all angles and gain a better understanding of the differing perspectives on issues such as enforcement, the PRSR Act provisions for the late night levy and other important matters.

The NLF will meet again in the third quarter of 2012.

Regular feature

Proposed changes to Guidance for licensing authorities

In mid April this year, the Gambling Commission published for consultation the draft version of the fourth edition of its *Guidance to Licensing Authorities* - the final day for a response is 6 July. Here, **Nick Arron**, considers the main proposed changes, and then examines the role of the licensing authority in relation to gambling

Guidance to Licensing Authorities was last published in May 2009. The Commission has stated that the latest edition does not represent a change of policy or approach by the Commission. The majority of changes incorporate material on topics that have already been communicated to licensing authorities via other methods. Some sections have been re-ordered and information added from other publications such as Commission quick guides and advice documents.

Significant changes are made to:

Part 13: Information Exchange

Part 18: Bingo

Part 25: Clubs

Part 26: Alcohol Licensed Premises

Part 28: Non Commercial and Private Gaming and Betting

Part 29: Poker (which was previously Permitted and Exempt Gaming in Clubs and Alcohol Licensed Premises)

Part 36: Compliance and Enforcement.

In Part 13: Information Exchange, the Commission expands on the underlining principles of the information exchange between the Commission and licensing authorities.

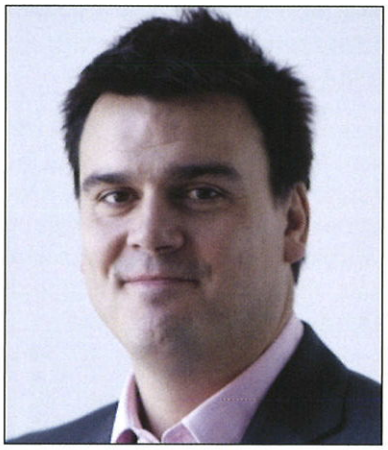
There is a useful new section which describes the premises data which the Act requires licensing authorities to maintain and report to the Commission, with a helpful list of the precise details that the authority must retain.

Within Part 18: Bingo the guidance has been updated in accordance with the new allocation of category B machines within bingo premises.

There is also a suggested update on primary gambling activity (this is repeated at Part 19: Betting Premises).

A new paragraph has been included which reads:

"Should a Licensing Authority receive an application to vary a Premises Licence for bingo or betting in order to extend the opening hours, the authority should satisfy itself that the reason for the application is in line with the requirements on primary gambling activity (i.e. the need for operating licence holders to ensure that the gambling activity appropriate to the licence type ("the primary activity" or 'the principal activity') is actually offered at those premises and not replaced by the making available of gaming machines). Therefore, the applicant should be able to demonstrate that the extension of the opening hours is not designed solely to benefit from the machine entitlement and activity which is ancillary to the primary activity of the premises, namely betting or bingo".



Nick Arron

This statement is of interest in relation to bingo premises.

The default condition attached to the bingo premises licence states:

"1. Subject to paragraph 2, no facilities for gambling shall be provided on the premises between the hours of midnight and 9am.

2. The condition in paragraph 1 shall not apply to making gaming machines available for use."

There is no concept of opening hours in the Act and bingo premises would not need to extend the opening hours to benefit from the machine entitlement. A bingo premise would not extend the hours solely to benefit from the

machine entitlement. They would only extend the hours facilities are made available for gambling. The default condition defines the time at which facilities for gambling can be made available on the premises and the condition does not limit the use of gaming machines. They can be made available at any time and will only be limited by the opening hours on the alcohol and entertainment licence.

Part 25: Clubs has been extensively revised. The revision helpfully brings together other Commission documents so there is a single point of reference on clubs. This is useful as clubs are creating particular difficulties for licensing authorities, particularly around poker. The part now focuses on the new section on exempt gaming. The three types of clubs under the Gambling Act 2005 are redefined with practical examples.

The Commission has added paragraphs which provide further assistance to licensing authorities on the often confusing fast track procedure when clubs apply for permits.

There are extensive new sections on factors to consider when granting a permit to a club, and to consider in relation to gaming in clubs and on monitoring clubs. These sections come from the Gambling Commission's advice to licensing authorities on club gaming permits and *Club Machine Permits: Gambling Act 2005*, second edition, published in April 2011. Further new sections describe the Commission Code of Practice and licensing authority powers of entry and inspection in respect of clubs.

Part 26: Alcohol Licensed Premises has been heavily revised and there are a number of new paragraphs on exempt gaming and the removal of the exemption. There are new paragraphs on the Commission Codes of Practice on prohibited gaming such as bankers' games, pontoon, black jack, roulette and other games involving staking against the holder of the bank.

Part 28: Non Commerical and Private Gaming and Betting has been extended. It previously referred only to gaming. There are a number of new paragraphs on private gaming, non commercial and private betting, occasional use notices, non commercial casino nights and non commercial race nights - and the Commission advice on the abuse of occasional use notices.

Part 29 now focuses on poker with paragraphs taken from previous advice from the Commission on poker in clubs and poker in alcohol licensed premises. There are also sections on poker in casinos, poker leagues and tournaments, poker under a club gaming permit; and then repeated are the factors to consider when granting a club gaming permit, and monitoring a club gaming permit. This revision usefully amalgamates the guidance on poker.

There are sections on powers in respect of premises, with reference to the difficulties in Scotland, sections on poker as non commercial gaming and poker as private gaming. These are particularly interesting with the spate of recent operators purporting to provide unlimited legal poker in pubs. There is detailed reference to relevant case law on poker as private gaming.

Part 34: Small Society Lotteries has a number of updated paragraphs on the issue of small societies avoiding applying for a lottery operating licence by obtaining two or more registrations from licensing authorities.

Part 36: Compliance and Enforcement places greater emphasis on enforcement action by licensing authorities in local instances of the illegality or non compliance. There are also some new paragraphs on test purchasing and age verification which summarise the Commission's *Approach to Test Purchasing – England and Wales only* advice document of May 2011.

Other minor changes to the guidance are necessary due to changing names and abolished Government bodies such as LACORs; updates to other Gambling Commission documentation such as the LCCP; updates following legislative changes such as the replacement of the Gambling Appeals Tribunal with the First Tier Tribunal (Gambling), and the Legislative Reform Order on the employment of children and young people on tracks; and following industry developments such as the Betfred purchase of Tote.

Finally, the section Best Practice in Regulation has been renamed Good Practice in Regulation.

Lessons from Gambling Act 2005 on the Licensing Authority as a Responsible Authority

Since September 2007 the Licensing Authority has also been a Responsible Authority under the Gambling Act 2005.

There are instances where licensing authorities, acting as responsible authorities, have sought to attach additional conditions to licences, over and above the mandatory and default. This is to be expected. On a number of occasions the licensing authority went further, asking the committee not to grant applications. This tended to occur in the earlier days of the Act. More recently, licensing authorities have sought to agree conditions to be attached rather than pushing for a refusal.

There have been few reviews under the Gambling Act 2005. However there are occasions where they have been initiated by the licensing authority, where the licence is no longer in use or, on at least one occasion, for crime and disorder.

Surprisingly, there are examples where there has not been a separation of responsibilities between the officer making the representation on behalf of the licensing authority and the officer presenting the report and advising the committee. This could lead to issues. I would expect local authorities to ensure the separation more effectively under the Licensing Act as they will receive many more applications and will be more likely to consider the dual role.

The experience under the Gambling Act 2005 must be put in context. There are fewer gambling premises than alcohol and entertainment premises, approximately 10% of their number. There are fewer applications made under the Gambling Act, particularly variations as there are fewer activities to vary. Variations to gambling premises are rare and generally relate to changes to plans or sometimes hours. There are not the numbers of licensed activities as with alcohol entertainment licences.

Nick Arron
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The "party" is over

What difference will the replacement of the concepts of the "interested party" and "vicinity" make to the way local objections are handled? **Richard Brown** examines the measures Government has taken to increase local involvement

After seven years of being known as an "interested party", a local resident or body representing such persons wishing to become involved with the licensing regime has been assigned the status of "other person", to distinguish him or her from a responsible authority.[1]

It is arguable that the phrase "interested party" allocated an objector a formal status that the phrase "other person" does not. However, in a reiteration of the old adage that a government gives with one hand while taking with another, that same resident has suddenly been given what at first glance seems like a concomitant opportunity to become involved with the licensing regime wherever he or she thinks fit, namely with the abolition of the vicinity test. The two measures are intrinsically linked, as the definition of an interested party was that the person had to live (or be involved in a business and so on) in the vicinity of the premises.

The changes to the Licensing Act 2003 made by the Police Reform and Social Responsibility Act 2011 (PRSRA) stem, of course, from the Home Office consultation entitled *Rebalancing the Licensing Act: A consultation on empowering individuals, families and local communities to shape and determine local licensing*. There were 1,089 formal responses to the consultation, and 2,938 "campaign responses". Regional and national events where held where more feedback was gathered. Feedback was analysed by independent consultants and collated into the Home Office's response document detailing the measures it intended to take forward.

Of the numerous measures proposed, only three received negative responses (defined in the independent report to the Home Office as negative responses from a majority (over 50%) of respondents). Of these three, the highest figure for negative responses was the 56% who baulked at the proposal to remove the requirement for interested parties to show "vicinity" when making relevant representations, although trade responses made up only 15% of the total responses. To put this in context, this was a higher figure than those who responded negatively to the proposals to make the default position on an appeal a remission back to the licensing authority.

Some readers may also recall that the Institute of Licensing conducted an online survey to inform its own response to the consultation. The responses receive their own section in the Home Office response. The view from the professional body for licensing practitioners in England, Wales and Northern Ireland was even more decisive: 234 responses were received, of which 68% disagreed with the proposal to jettison "vicinity". Interestingly, over three-quarters (78%) of respondents were from local authorities (with the police (13%), legal practitioners (7%) and "other groups" (2%) making up the balance). In contrast, respondents were generally in favour of increased community empowerment.

Richard Brown

There has been some fear that so – called "NIMBYism" (Not In My Back Yard) may transmogrify into Not In My Backyard (Or In Their Backyard Either), although the acronym is not as catchy. "Disgusted of Tunbridge Wells" would be dusting off his quill to fire missives in relation to applications from Newcastle to, well, the other Newcastle. In practice, this is unlikely to happen and the changes are unlikely to precipitate drastic changes.

The pool of potential objectors has always been fairly wide in any event, and any doubt as to vexation or frivolity was liable to be resolved in favour of the objector. Wider interest groups such as amenity societies, parish councils, town councils, charities, churches, medical practices and the like could already make representations.[2] However, publicity about the changes and rhetoric about encouraging greater community involvement may encourage these and other wider interest groups to become involved more regularly.

1 s105 Police Reform and Social Responsibility Act 2011

2 October 2010 Guidance 8.5-8.6

If increased involvement of community groups results from the new provisions, and the views of local people are put forward coherently, the licensing regime will work better and have a fairer outcome for all concerned.

The potential for temperance societies, rival businesses or individuals with an axe to grind to make blanket objections to applications outside their area regardless of their merits is unlikely. The test for representations has not changed: "the likely grant of the application on the promotion of the licensing objectives". That means the licensing objectives are still the rock on which applications and representations will either scale or founder. In fact, it seems as if the Government took on board some trade concerns. If the language of the amended guidance is examined, it is in fact more prescriptive as to the content of representations than was the previous guidance, adding the words: "In other words, representations should relate to the impact of the licensable activities carried on from premises on the objectives. For representations in relation to variations to be relevant, they should be confined to the subject matter of the variation."[3] In most cases, it would be difficult for a group in Huddersfield to be able to object to an application in Exeter with any real force while being consistent with the guidance.

Additionally, in order to be "relevant", representations from "other persons" must still not, in the opinion of the licensing authority, be frivolous or vexatious. The new guidance makes this abundantly clear. It is again more prescriptive than before as to what is to be considered vexatious or frivolous, adding the words: "A representation may be considered to be vexatious if it appears to be intended to cause aggravation or annoyance, whether to a competitor or other person[4] without reasonable cause or justification. Vexatious circumstances may arise because of disputes between rival businesses and local knowledge will therefore be invaluable in considering such matters. Licensing authorities can consider the main effect of the representation, and whether any inconvenience or expense caused by it could reasonably be considered to be proportionate."[5] Paragraph 9.6 adds the words: "Frivolous representations would concern issues which, at most, are minor and in relation to which no remedial steps would be warranted or proportionate". These definitions broadly correspond with the *OED* definitions.[6]

Of course, all this should be considered in the context of the status of the guidance. It does not have the force of statute and local authorities can depart from it, subject to the threat of judicial review if they fail to fully address themselves to the matter and give full reasons.

Vicinity

"Here lies the body of Mary Lee; died at the age of a hundred and three. For fifteen years she kept her virginity; not a bad record for this vicinity". Quint, *Jaws* (1975).

I imagine that what Quint meant by vicinity did not detain viewers of the film for long. In that respect, they differed from licensing lawyers considering what vicinity means in Licensing Act 2003. In part, the problem of vicinity stems from the fact that it was not clearly defined in the legislation. Neither are "frivolous" or "vexatious" defined, but at least they are circumscribed by the "opinion of the licensing authority"[7]. The Act merely states that an interested party is "a person living in the vicinity of the premises".[8]

It was logical that what was or was not "in the vicinity" was, in practice, also to be left to the licensing authority to decide. Some chose to set a defined distance away from the premises in question. However, many factors could affect whether a person would be likely to be affected by an application – for example, road layout, bus routes, pedestrian routes, natural boundaries, manmade structures, taxi ranks, fast food outlets and so forth. This led to a great deal of uncertainty.

One of the themes of how licensing law has developed has been to encourage community involvement. The vicinity requirement may stop people who have perfectly valid objections from taking part in the licensing process. For example, a parent may become aware that their child and his friends have been able to buy alcohol from a premises, which has resulted in one of them being hospitalised. Why should that parent be prevented from making a representation (or submitting a review) merely because they happen to live on the other side of town? Similarly, an individual may visit a premises and witness serious deficiencies in security which lead to a fight. Why should he or she be prevented from making their views known, if they so wish, just because they happened to be visiting from a neighbouring town?

One suggestion as to how the uncertainty could be resolved was to adopt the approach used in the Gambling Act 2005, under which the test is not geographic proximity but whether the person/business is "sufficiently close to the premises to be likely to be affected by the authorised activities".[9] Indeed, the revised section182 Guidance (Oct 2010 edition) borrowed heavily from this terminology.[10]

Case law (*R(oao 4 Wins Leisure Ltd) v Licensing Committee for Blackpool Council and Ors*) later confirmed the approach that it was a question of fact in each case.[11]

In fact, licensing authorities can already consider issues pertaining to the licensing objectives which occur outside the vicinity of a premises. One example is in a cumulative impact area, where a representation can focus solely on the fact that the area as a whole has been designated as one to which special policies will apply which create the presumption of refusal for certain types of application, regardless of whether there are any specific problems with the Applicant premises. Representations on the basis of cumulative impact can be made even where the area is not subject to a cumulative impact policy.[12]

3 April 2012 Guidance 9.4
4 Not, presumably, the 'other person' previously defined at 8.12
5 April 2012 Guidance 9.5
6 Vexatious – Of legal actions: Instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant.' Frivolous – In pleading – manifestly insufficient or futile.'
7 Licensing Act 2003 s18(7)(c)
8 s13(3)
9 Gambling Act 2005 s158
10 Oct 2012 Guidance 9.5, 9.6
11 [2007] EWHC 2213 (Admin)
12 April 2012 Guidance 13.32

Further, one of the questions posed in the case stated for the opinion of Ouseley J in appeal of *Luminar Leisure Limited v Wakefield Magistrates' Court and Ors*[13] was "whether it was open to the court to take into account evidence of crime and disorder in areas which were beyond Luminar's control". The answer, in the circumstances of that case, was "yes". The older case of *Lidster v Owen* (1983) confirmed that public disorder away from the premises (in the "immediate neighbourhood") was a relevant factor to be taken into account. The extent to which this conflicted with the old guidance (para 2.39) which stated that "beyond the vicinity of the premises, these are matters for the personal responsibility of individuals" rather than the licence holder has been examined.[14] The new guidance (2.40) has been amended to read "beyond the immediate area" instead of "beyond the vicinity of".

13 [2008] EWHC 1002
14 'Alcohol and Entertainment Licensing Law', Manchester, Poppleston, Allen, 2008 Francis and Taylor.

Conclusion

It is interesting that the analysis of the responses to the consultation found that there was broad support for increasing community involvement, but a negative response to the removal of the vicinity test. The aim of the Government was to empower local communities to strengthen their input into local licensing. Many of the measures in PRSRA will facilitate this, and enable residents and communities to better shape their local areas in a licensing context. The changes to the definition of "interested parties" and the abolition of the vicinity test may assist in cases which would previously have been borderline or rejected, while retaining protections for applications against vexatious or frivolous representations. In short, if a representation is relevant, not frivolous and not vexatious, why should the objector be constrained by geographic proximity?

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IoL Calendar of Training & Events

July 2012

2 Licensing fees course - Nottingham
4 Caravan site licensing course – Harrogate
5 Caravan site licensing course – Preston
5 Gambling training – London
12 Caravan site licensing course – West Sussex

September 2012

TBC Licensing hearings for all parties
TBC Caravan site licensing course – South West
11 Gambling training – Kings Lynn
12 Eastern regional meeting
12 North West regional meeting
13 North East regional meeting
18 How to inspect licensed premises course – South Bucks
20 London regional meeting
20 South West regional meeting
25 Licensing fees course – London

November 2012

14-16 National Training Event – Birmingham

December 2012

5 North East regional meeting
6 London regional meeting
6 South West regional Meeting
12 North West regional Meeting

Article

Appeals from licensing authorities to magistrates' courts

There have been several cases before the higher courts this year that have considered the powers of magistrates' courts in examining appeals on licensing decisions. **Susanna Fitzgerald QC** explains the various decisions that have been arrived at, and their implications

In the last couple of years, a variety of different arguments have been made before magistrates' courts as to the nature of licensing appeals from the licensing authority to the magistrates' court.

Typical arguments are that all the magistrates' court on appeal could consider would be the decision of the licensing authority and whether at the time the licensing authority's decision was made, the reasons were correct, or whether there was sufficient evidence before the committee to come to the conclusion it did, or whether the matter had been correctly conducted or correctly presented to the licensing panel, that is to say whether its decision was right at the time it was made.

These arguments effectively try to limit the appeal to judicial review grounds or an appeal on law only, and there have been several cases before the higher courts where this issue has been dealt with last year. The most important of these new cases was the decision of the Court of Appeal in *R on the application of Hope and Glory Public House Limited v (1) the City of Westminster Magistrates' Court and (2) the City of Westminster* [2011] EWCA Civ. 31 in January 2011. The only issue that went to the Court of Appeal was as to the nature of an appeal to the magistrates' court.

By section 181 of the Licensing Act 2003, the magistrates' court on appeal may dismiss the appeal, substitute any other decision which could have been made by the licensing authority, or remit the case to the licensing authority with directions as to its disposal.

In the various judgments, a variety of older cases were considered. The first of these is *Stepney Borough Council v Joffe* 1949 1KB 599. It concerns three street traders whose licences were revoked under the London County Council (General Powers) Act 1947. Section 25(1) of that Act provided for an appeal in very similar wording to the appeal provisions of section 181.

In *Joffe* it was argued that all the magistrate could decide on appeal was whether there was evidence from which the council could come to the conclusion that it did. Lord Goddard CJ refused to accept that argument, saying that if that were the case, the right of appeal would be "purely illusory" and tantamount only to an appeal on a point of law. He considered, in contrast, that section 25(1) gave an unrestricted right of appeal and so the appeal court could substitute its own opinion for that of the borough council.

He said that the appeal court ought not lightly to reverse the local authority's opinion and should only do so when satisfied that the court below was wrong but importantly he made the point that the appeal power was very wide, and the court should act according to the judgment it forms on the matter. If Parliament had intended the limitation on the appeal power argued for, "they would have inserted express words into the section limiting that right".

The same comment can be made about the right of appeal in section 181: to limit the appeal to judicial review or a matter of law only, express words ought to have been put into section 181. As they have not, there are no such limits.

Joffe was followed by the case of *Sagnata Investments Limited v Norwich Corporation* [1971] 2 QB 614. In that case, Edmund Davies LJ in the Court of Appeal felt that (the recorder) should be free to "embark on a complete consideration of all the relevant material presented to him", and the appeal was a complete re-hearing. Although the views of the local authority were not to be entirely disregarded, the recorder had to act on the totality of the material before him, balancing that called by the appellants and the local authority, and paying "due" regard to the local authority's decision.

Coming back to the *Hope and Glory* case, in the High Court, Burton J. made it clear that the hearing is a hearing

de novo and that new evidence can be presented and must be considered by the appeal court. At paragraph 45 of his judgment, Burton J. states:

"... the task for the district judge - having heard the evidence which is now before him, and specifically addressing the decision of the court below - is to give a decision whether, because he disagrees with the decision below in the light of the evidence before him, it is therefore wrong. What he is not doing is either, on the one hand, ignoring the decision below or, on the other hand, simply paying regard to it."

The court stated that it was not possible to give a formulaic answer to that because it depended on a variety of factors (paragraph 40). The evidence called on the appeal may, or may not, throw a very different light on matters (paragraph 44). Finally, the court concluded that given all the variables, the proper conclusion can only be stated in very general terms. While it was right that the magistrates' court should pay careful attention to the licensing authority's reasons, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities, "the weight which the magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on appeal" (paragraph 45).

The Court of Appeal considered the weight that should be given to the licensing authority's decision; it is not automatic that considerable weight or indeed very much weight at all will be placed on the decision. Such weight will be determined, in part, on the quality of that decision.

The court also considered whether the appeal should only be allowed if the appeal court is satisfied that the licensing authority's decision is wrong. At paragraph 46, the Court of Appeal agreed with the way that this had been dealt with by Burton J. in the High Court below in three specific paragraphs (paragraphs 43-45) of his judgment. Burton J. referred to Lord Goddard's and Edmund Davies LJ's words as carefully chosen: "What the appellate court will have to do is to be satisfied that the judgment below 'is wrong', that is to reach its conclusion on the basis of the evidence before it and then to conclude that the judgment below is wrong, even if it was not wrong at the time. That is what this district judge was prepared to do by allowing fresh evidence in, on both sides."

He did not think that "wrong" meant *Wednesbury* unreasonable as the appeal was not one of judicial review. Burton J. said that: "the task for the district judge - having heard the evidence which is now before him, and specifically addressing the decision of the court below - is to give a decision whether, because he disagrees with the decision below in the light of the evidence before him, it is therefore wrong".

He also stated that the burden of proof is on the claimant. This makes it quite clear that it is not a matter of *Wednesbury* unreasonableness or law only – that is to say,, was the hearing conducted properly, was it presented properly to the licensing panel, or were the reasons given by the licensing panel wrong?

The approach on appeal is not whether the council decision was wrong at the time it was made. The correct approach is that the magistrates' court, having heard all the evidence before it and having given the decision below the weight that the court considers it deserves in all the circumstances, has to decide whether it agrees with the decision below or not. In other words,the magistrates' court must come to its own opinion and if its opinion differs from the court below, then the licensing authority's decision is wrong. There is no mention of the appeal court "not lightly" reversing the licensing authority's decision nor of its decision being a "stricture", because it is up to the magistrates to decide the importance to be given to the earlier decision. The district judge in *Hope and Glory* was therefore incorrect when he stated that he ought "not lightly" to reverse the licensing authority's decision.

The next case is *R on the application of Developing Retail Limited ex parte East Hampshire Magistrates Court* [2011] EWHC 618 (Admin) (see paragraphs 29 and 30). The judge quoted the Court of Appeal decision in *Hope and Glory* and repeated that the weight which magistrates should ultimately attach to the licensing authority's reasons is a matter for their judgment "in all the circumstances, taking into account the fullness and clarity of any reasons provided, the nature of the issues and the evidence given on appeal".

The magistrates had to consider whether the licensing authority's decision was wrong on the basis of the evidence put before the magistrates court, not unreasonableness.

The judge concluded: "This means that the task of the magistrates' court, having heard the evidence and specifically addressed the decision of the authority below, is to give a decision whether, because they disagree with the decision below in the light of the evidence, it is wrong. The magistrates therefore have power not merely to review the decision on the grounds of an error of law but also on its merits".

Developing Retail quoted the Court of Appeal decision on appeals in *Hope and Glory* with approval and said that at the magistrates' hearing of the appeal, the court had to make its decision on the basis of the evidence before it.

This case also makes a different point, which is that when hearing an appeal, the court is not limited to considering only the grounds of complaint that were raised in the notice of application or the representations before the licensing authority, but is entitled to consider evidence of events occurring before the application to the licensing authority as well as evidence of events occurring since its decision. However, the other party to the appeal must have proper notice of those grounds and the nature of the case against him so that he has a fair chance of meeting it. So proper procedures must be in place in the magistrates' court to ensure that both parties are aware, in advance of the hearing, of the case they have to meet and the evidence on which it will be based. A proper pre-trial review ought to deal with that matter, and it is certainly something for all parties to be aware of when seeking those directions, and indeed later.

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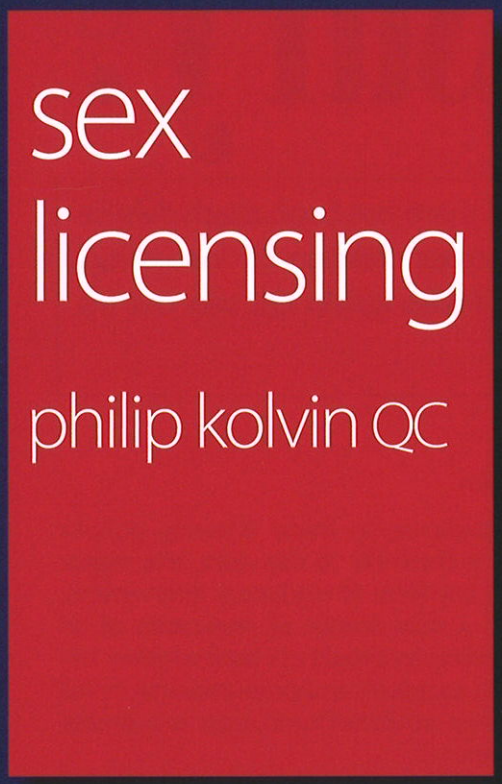
1 Essex Court

Institute of Licensing *Books*



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Philip Kolvin QC

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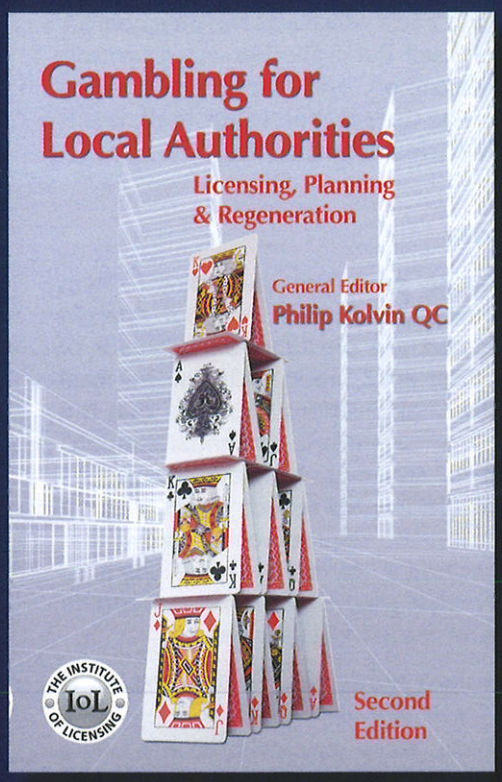

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Philip Kolvin QC

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Article

Is "appropriate" necessary?

The Government has altered the test for licensing intervention and there has been much debate over its introduction of the term "appropriate" to replace the former criterion of "necessity" in considering whether licenses or conditions should be granted. **Philip Kolvin QC** sets out his thoughts on the new test

In this article, I deal with a major change to the test for licensing intervention introduced by the Police Reform and Social Responsibility Act 2011. Whereas the Licensing Act 2003 permitted regulatory interventions only where necessary, the new legislation lowered the legislative threshold to "appropriate". Here, I consider the legal and philosophical basis of the necessity test, and the implications and lawfulness of the new lower threshold.

The necessity test

The necessity test underpinned all of the regulatory powers under the Licensing Act 2003. The word "necessary" appeared in the Act on more than forty occasions. The political philosophy which underpinned the test might be characterised as neo-liberal in origin, that is to say that business should be allowed complete freedom to operate and develop except to the extent that regulation is required in order to protect some defined elements of the public interest.

The test was also consistent with concepts of necessity and proportionality emanating from the European Convention on Human Rights, which was incorporated into our law by the Human Rights Act in 1998. For example, Article 1 of the First Protocol of the Convention stressed the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.

The same approach was taken in ensuing regulatory legislation. Section 21 of the Legislative and Regulatory Reform Act provided that any persons exercising a function to which that section applied should have regard to the principle that regulatory activities should be targeted only at cases in which action is needed.

Similar sentiments were expressed in section 5 of the Regulatory Enforcement and Sanctions Act 2008, which obliged the Local Better Regulation Office to secure that regulatory activities should be targeted at cases in which action is needed. This, then, is what came to be known as "light touch" regulation.

As expressed in guidance, in many licensing policies and by practitioners in their day to day work, this meant that before imposing any form of regulatory intervention, be it a condition on a new licence or revocation of an existing licence, the authority should ask itself whether the intervention was both necessary and proportionate, in the sense that no lesser step would suffice in order to promote the licensing objectives.

This is not, it will be noted, some kind of constraint upon what kind of evidence may be admitted by the licensing authority, or a measuring device of the quantum of evidence which is necessary before intervention is justified. Properly understood, it is a test which sets the threshold for regulatory intervention itself. Put in another way, it controls the exercise of the discretion, and forces the licensing authority before imposing the sanction to ask itself: is this really necessary? Would a lesser step suffice?

Transmogrification

The consultation exercise preceding the Police Reform and Social Responsibility Bill[1] posited, without analysis or rigorous evidence, that the presumption in favour of grant under Licensing Act 2003 made it difficult for local authorities to turn down applications. It stated that the necessity test placed a "significant evidential burden" on licensing authorities, and that the Government was considering amending the Act "to reduce the burden on licensing authorities from the requirement to prove that their actions are 'necessary' to empowering them to consider more widely what actions are most appropriate to promote the licensing objectives in their area."

The amending provisions in the Police Reform and Social

1 Rebalancing the Licensing Act: a consultation on empowering individuals, families and local communities to shape and determine local licensing (Home Office, 2010).

Responsibility Bill were entitled "Reducing the evidential burden on licensing authorities". This is of course a misnomer: the Act does not place an evidential burden on authorities; rather it sets a test for the exercise of their discretion.

At the Committee stage in the House of Commons, the Home Office Minister James Brokenshire was challenged to justify the loosening of the test and the commensurate broadening of powers of licensing authorities to impose regulatory burdens even where these were not necessary. He stated that the Government's "sense" was that local authorities had been defensive about imposing regulatory requirements for fear that upon appeal their actions would not be regarded as necessary.[2] He considered that a wider discretion was necessary in order to "enable communities to assert themselves properly", stating:

"A decision that is "appropriate" for the promotion of the licensing objectives provides some flexibility to consider the effects of the decision on the promotion of the objectives. It may therefore be decided to take steps that are suitable for, rather than necessary to, the promotion of the objectives. It provides an element to deal with that reluctance or resistance, to enable local communities to assert themselves properly in relation to this particular approach."

The Minister was therefore comfortable about regulation being imposed even when it is not necessary. Indeed, that was the very inspiration for the change.

The Minister was also challenged on whether imposing regulation on an existing business in the absence of any necessity for such intervention was compliant with the European Convention on Human Rights. He stated that the Government's legal advice was that the measure was compliant because of legal rights of appeal.[3] With respect, it is difficult to understand that position, because rights of appeal might resolve procedural issues such as bias, but they cannot resolve any substantive non-compliance of a legal test with fundamental human rights. If a test which permits an authority to impose regulation in the absence of necessity breaches the European Convention, that cannot be cured by permitting an appeal to a court which is governed by the same test.

Be that as it may, the appropriateness test has replaced the necessity test throughout the Licensing Act 2003, including for the grant and review of premises licences and club premises certificates, for personal licences and for temporary event notices.[4]

National guidance

As presaged in the Parliamentary debates, the Government has sought to elucidate the appropriateness test through amended national Guidance. This states:

"9.38 Licensing authorities are best placed to determine what actions are appropriate for the promotion of the licensing objectives in their areas. All licensing determinations should be considered on a case-by-case basis. They should take into account any representations or objections that have been received from responsible authorities or other persons, and representations made by the applicant or premises user as the case may be.

9.39 The authority's determination should be evidence-based, justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve."

So far, so helpful. But what is the threshold for appropriateness? The Guidance continues:

"9.40 Determination of whether an action or step is appropriate for the promotion of the licensing objectives requires an assessment of what action or step would be suitable to achieve that end. Whilst this does not therefore require a licensing authority to decide that no lesser step will achieve the aim, the authority should aim to consider the potential burden that the condition would impose on the premises licence holder (such as the financial burden due to restrictions on licensable activities) as well as the potential benefit in terms of the promotion of the licensing objectives. However, it is imperative that the authority ensures that the factors which form the basis of its determination are limited to consideration of the promotion of the objectives and nothing outside those parameters. ... [T]he licensing authority should consider wider issues such as other conditions already in place to mitigate potential negative impact on the promotion of the licensing objectives and the track record of the business. .. The licensing authority is expected to come to its determination based on an assessment of the evidence on both the risks and benefits either for or against making the determination."

It will immediately be seen that the Guidance equates appropriateness and suitability, while expressly discarding the test that "no lesser step will suffice". This latter test is, however, one way of expressing the principle of proportionality which is avowedly retained. What, then, does proportionality bring to the party? Further guidance is given on the issue of proportionality in Chapter 10 of the Guidance:

"Proportionality"

10.14 The 2003 Act requires that licensing conditions should be tailored to the size, type, location and characteristics and activities taking place at the premises concerned. Conditions should be determined on a case-by-case basis and standardised conditions which ignore these individual aspects should be avoided.

10.15 Licensing authorities and other responsible authorities should be alive to the indirect costs that can arise because of conditions. These could be a deterrent to holding events that are valuable to the community or for the funding of good and important causes. Licensing authorities should therefore ensure that any conditions they impose are only those which are appropriate for the promotion of the licensing objectives. Consideration should also be given to wider issues such as conditions already in place that address the potential negative impact on the promotion of the licensing objectives and the track record of the business."

2 HC Debates 10th February 2011 Col 549.
3 Ibid Col. 552.
4 Sections 109-111 Police Reform and Social Responsibility Act 2011.

The role of proportionality here seems to involve a consideration of the costs of imposing the proposed step, which may be the direct costs upon the licensee of compliance, for example, of employing extra door staff, and the indirect costs upon the community, for example, of being unable to attend an event for which there is demand.

This appears to widen the scope of the inquiry in a way which cuts across the grain of what the Government apparently intended by the legislative change. Rather than asking simply whether a step is necessary to promote the licensing objectives, the authority would now need to carry out a cost-benefit exercise in which the costs of the measure – which may be economic or qualitative – are weighed against the benefits of the measure, which are almost certain to be subjective. If this is the true nature of the exercise, the Guidance is self-contradictory because in the same breath it advises: "However, it is imperative that the authority ensures that the factors which form the basis of its determination are limited to consideration of the promotion of the objectives and nothing outside those parameters." If that is right, then questions of the cost of the measure and the benefit to the community may not be taken into account.

Critique

From the foregoing discussion, it will be seen that far from making the test simpler and broadening the ability of authorities to intervene, the change has made the test confusing and legally suspect. There are five areas which merit comment.

The first is the supposition that the necessity test imposed a constraint on authorities which caused them to fight shy of imposing effective regulation. There is no evidence for this. The root of the supposition is that the necessity test imposed a threshold which was too high in the ordinary run of cases. Not so. The necessity test was not predicated on proof that if the step was not imposed, the feared consequence would certainly or even be likely to happen. It was simply predicated on evidence that the required step was necessary to *promote* the licensing objectives. In the same way that a smoke detector may be thought necessary in a home without needing to prove that in its absence the house will burn to the ground, so a search arch might be considered necessary in a nightclub without proof that without it someone will be stabbed. It is simply a necessary precaution. And, if it is necessary, it should be imposed. Therefore, the threshold was not so high that it required to be lowered at all.[5]

Second, assuming that the threshold did need to be lowered, "appropriate" is not a valuable test. Indeed, it is not a test at all, let alone an objective one. In the context of licensing, it is vacuous. It means no more than that the licensing authority should do what it thinks right. It is most unlikely that any authority would do otherwise. It provides no ascertainable measure against which the justifiability of the regulatory intervention may be gauged.

Third, if it results in regulation being imposed on licensees which is unnecessary, it has the potential to do great damage. If, for example, a door supervision requirement is imposed with which the publican does not have the economic means to comply, s/he may well be moved to ask whether the authority thinks it necessary to impose it. If the answer is no, the publican may well ask why then it was imposed, and rue the day that a discretion was conferred to impose unnecessary measures.

Fourth, the legal basis of the dilution is at best unclear and at worst unfounded. Treating a licence as a property right,[6] Article 1 Protocol 1 of the European Convention on Human Rights clearly operates to permit control of the use of property where this is necessary. In this case, control has been sanctioned even where it is unnecessary. If the only way to comply with the Convention is to interpret "appropriate" as "necessary" then the shift has achieved nothing other than to raise expectation (of communities) and alarm (of licensees) in equal measure. If, however, regulatory intervention is imposed merely where it is considered appropriate, without its being necessary, then there is a real argument that the intervention is non-compliant with the human rights obligations of the State.[7]

Fifth, similarly, the Provision of Services Regulations 2009, which implement the Services Directive[8], require that authorisation schemes for the provision of services must be based on criteria which preclude the competent authority from exercising its power of assessment in an arbitrary manner. Further, the criteria must be (a) non-discriminatory, (b) justified by an overriding reason relating to the public interest, (c) proportionate to that public interest objective, (d) clear and unambiguous, (e) objective, (f) made public in advance, and (g) transparent and accessible.

While one might say that the licensing objectives meet the test of being non-discriminatory, justified, clear, objective and transparent, the ability to use them to prevent activities taking place or to impose constraints even where this is not necessary would appear to encourage behaviour which is arbitrary, disproportionate and unjustified by an overriding reason relating to the public interest. Therefore, there is an argument that the test, or conceivably its application in individual cases, may breach domestic and European law.

Sixth, if the solution to these difficulties is to broaden the picture as is seemingly suggested by the Guidance, so as to encompass the cost of the measures and the benefit of the proposal, the effect is arguably to convert the licensing authority from a regulator with a defined, narrow but important role to that of an economic and

5 Support in the case law for an interpretation of the necessity test as requiring something short of indispensability may be found in *R (Clays Lane Housing Co-operative Limited) v The Housing Corporation* [2005] 1 WLR 2229, in which the Court of Appeal held that, depending on the context, necessary may be interpreted as meaning merely "reasonably necessary". See also *Pascoe v First Secretary of State* [2007] 1 WLR 885 @ [70] and *Handyside v United Kingdom* (1976) 1 EHRR 737 @ [48].

6 *Tre Traktorer v Sweden* (1989) 13 EHRR 309; *Catscratch Limited v City of Glasgow Licensing Board* [2001] LLR 610.

7 Limitation of space prevents further elaboration here, but further reference may be made to the different formulations of the proportionality test in *Samaroo v Secretary of State* for the Home Department [2001] EWCA 1139, *Lough v First Secretary of State* [2007] EWCA [2004] 1 WLR 2557, *McCarthy v First Secretary of State* [2007] EWCA Civ 510 and *R (Clays Lane Housing) v Housing Corporation* [2005] 1 WLR 2229.

8 Directive 2006/123/EC on services in the internal market.

cultural arbiter, a role which it is likely to be ill-equipped or at least untrained to perform.

Resolution

Some trenchant criticisms of the test governing licensing disputes have been set out in the previous section. The criticism is, in essence, that in an attempt to broaden the discretion of licensing authorities, Parliament has succeeded in giving a discretion to impose unnecessary regulation in a manner which will create uncertainty and a possible breach of domestic, European and human rights law.

It is suggested that there may be a route out of the imbroglio for licensing authorities, without needing to await adjudication on the new provisions in the High Court. While the range of possible responses under the necessity test was relatively narrow, the range of potential responses under the appropriateness test is relatively large. In any given case, there may not be many steps which are really necessary, but there are many more arguably appropriate means of promoting the licensing objectives. These may range from steps which are merely good practice to steps which are genuinely necessary in the circumstances of the case.

However, acting sensibly, a licensing authority may consider it inappropriate to impose draconian regulation on an operator unless it is genuinely necessary to do so. In this way, while the legal test remains "appropriate", the discretion will not be exercised to impose burdensome regulation unless there is a demonstrable necessity. The term necessity may not imply that the measure is indispensable, merely that it is "reasonably necessary". But for an authority to impose a burden on a business if it is not even reasonably necessary to do so invites criticism that this is a paradigm of disproportion.

This may be demonstrated by a simple example. Imagine a case in which a review is brought because customers of a nightclub have been disturbing local residents on their departure. By the time the case gets to a hearing of the Licensing Sub-Committee, the problem has been cured through the adoption of a competent, well-thought-through dispersal policy. The licensee says that a curtailment of hours is no longer necessary because the problem has been solved. The applicants for the review, however, continue to press for an earlier terminal hour, arguing that they do not need to show that the step is necessary. It is submitted that the licensing authority would be quite at liberty to find that a condition of a dispersal policy is appropriate, but that an earlier terminal hour is not appropriate *because it is not reasonably necessary.*

It is accepted that the resolution of the problem has a tendency to conflate the appropriateness test and necessity test, when the Government clearly wanted to impose a diluted test. There is much truth in that. However, the reason for this is that, in holding the balance between local communities and local businesses, it is unlikely to be considered appropriate to regulate more than is reasonably necessary to meet the objectives of the regulation. While adoption of this solution may well reduce the gap between appropriate and necessary to a semantic one, it will have the virtue of legality, fairness, justice and common sense.

Philip Kolvin QC
Head of Licensing, Cornerstone Barristers

National Training Event 2012 - Birmingham

The Institute's signature annual event, the National Training Event returns to Birmingham this year to be hosted at the Crowne Plaza Hotel from 14th - 16th November 2012.

The programme has been designed to give maximum flexibility to delegates and to allow them to tailor the training event to suit individual needs. Speakers will include Jim Button, Gary Grant, Susanna FitzGerald QC, Philip Kolvin QC, Sarah Clover, and many others.

Details will be updated as they are confirmed and delegates are advised to book early to avoid disappointment. A full residential place is £495 + VAT (price includes £50 'Early Bird' booking discount).

The Programme

The programme can be accessed via the Institute's events page of our website **www.instituteoflicensing.org/events**

Topics include:

- PRSR Act - implementation and likely effect
- Live Music Act
- Potential deregulation of Schedule 1 of the Licensing Act 2003
- Alcohol Strategy, minimum pricing etc.
- Taxi update including the reform proposals by the Law Commission
- Gambling Act updates (including an update from the Gambling Commission)
- Licensing Hearings Training for all parties
- Best practice initiatives (e.g. Hampshire Police Proxy Watch scheme - TBC)
- Use of Summary / Expedited Reviews
- Compliance management of licensed premises
- Licence conditions
- How to plan a safe event
- Licence fees - including the Westminster case and implications
- Scotland, Wales and Northern Ireland - licensing differences, changes ahead and lessons (to be) learned
- Data Protection and CCTV
- Case law updates
- Expert and Question Time Panels
- Member Training on Wednesday 14th November

Course Objectives

To provide a valuable learning and discussion opportunity for licensing practitioner to increase understanding and to promote discussion relating to the intricacies and practical application of the law in the subject areas and the impact of forthcoming changes and recent case law. The training structure is aimed at allowing maximum benefit to be derived by delegates in allowing them to choose the subject areas most relevant to their areas of interest.

CPD

The 3 day NTE will carry 12 hours CPD in total. It is intended that the event will be CPD accredited under both the SRA and Bar Standards Board schemes.

Managing the night-time economy

National Pubwatch

"Over the last few years, town centres have become increasingly focused on the night time economy and, as a result, we have seen a growth in licensed premises. Areas such as Durham, and schemes such as Best Bar None, Purple Flag, Community Alcohol Partnerships, Pubwatch and Business Improvement Districts across the country have shown that a thriving and growing night time economy can operate where excessive drinking is tackled consistently and robustly by business, the police and local authorities working together."

Government Alcohol Strategy, March 2012

There is a realisation within Government that long term partnership work is the key to delivering sustainable improvements in the licensed economy. The subject matter of this article, Pubwatch, predates initiatives such as Best Bar None and Purple Flag by three or four decades. I remember attending a meeting of Oldham Pubwatch in the late 1990s to discuss potential licensing reform. It was, without doubt, the smokiest room I have ever sat in. There were that many licensees in the room with a cigarette in hand, it was near impossible to see across the bar.

The smoking ban might have removed the smoke but the experienced and involved licensees have remained. And that is the true power of Pubwatch. The people in the room are able to take informed decisions and implement them rapidly and comprehensively. As a result, problems can be addressed and opportunities exploited at speed and with a minimum of fuss.

Jon Collins

Core Philosophy

Pubwatch is, at its heart, the licensed trade's equivalent of Neighbourhood Watch – like-minded people coming together to collectively improve their shared environment. Over the years, Pubwatch has broadened its remit in many ways – led by local needs in a number of different directions in a bid to tackle the specific and unique problems faced by the pub, bar and club sectors. Pubwatch schemes can range in size from over 200 premises, to be found in some towns and cities, to much smaller rural schemes which may have only a handful of participants.

The basic principle of Pubwatch is that its licensee members will agree to work together to improve the safety of their premises for the benefit of their staff and customers. Invariably the work of a Pubwatch scheme will be to set standards of acceptable behaviour and act robustly against the small number of individuals who cause problems for the pub trade. This will often result in Pubwatch members agreeing to jointly ban problem individuals who are violent, damage property, use or deal drugs or act in an anti-social manner.

It is the commitment to work and stick together that is the strength of any Pubwatch. "Banned from one, banned from all" is a powerful incentive to behave, and a reassuring message for the wider public. There is no doubt that Pubwatch schemes have a significant impact on crime and anti-social behaviour in and around licensed premises.

Pubwatch has been recognised as good practice by multiple organisations including the Department of Culture Media and Sport, the Association of Chief Police Officers and the Home Office. It is also widely supported across the licensed trade – unsurprisingly, given the scheme protects staff and customers, creates a safer and more vibrant trading environment and forms the basis of an excellent working relationship between the trade, police and local authority.

Trade leadership role: desirable and necessary

Pubwatch members are best placed to manage schemes, given their experience and a clear interest both to ensure that their money and effort is focused on the most pressing local issues and to set the standards of behaviour they wish to maintain in their premises. Pubwatch has always been a voluntary activity, engaged in by operators of licensed premises primarily for their own benefit. As a voluntary body, it will avoid some of the Human Rights and Freedom of Information Act obligations faced by the police and other public bodies. Crucially, the police should not be involved in the management of a scheme, decision making or the banning processes as this could potentially open up the Pubwatch to a risk of legal challenge.

Of course, once the trade is established as the lead, the active input of local regulators is appreciated and valued. It is recognised that, to function effectively, the watch will need help and support from these agencies; and there is a reciprocal benefit for the police and other public bodies in having a forum to share information with the trade and advise them on crime trends and intelligence issues.

Starting a scheme

The existing Pubwatch network is extensive enough that, should an area wish to initiate a scheme, there will be a ready source of likeminded licensees in neighbouring areas willing and able to discuss common problems and how to build a collective appetite to work together to tackle them.

Enlisting the support of the local police and/or council licensing officers is a key second step. The spirit of collegiality within Pubwatch means local, regional and national representatives will give up their time and travel across the country to speak at an initial meeting to explain the benefits of starting up a scheme. The police will often also be willing to show their support by talking about how they liaise with local Pubwatch schemes.

A voluntary initiative

Pubwatch membership has to be voluntary. It has always been (and always will be) the case that some licensees will decide that they do not want to join or comply with the majority decisions of the watch. A Pubwatch scheme will only work effectively if the membership want to work together and do not undermine each other. In time, the licensee could attract the customers who are the problem people banned from all the other premises and who may have had a change of heart.

Some licensing authorities did seek to make membership of Pubwatch or similar schemes a standard condition on the premises licence during the transition to the new licensing regime in 2005. While this was done with the best of intentions and would often have had the support of many, possibly all, of the local venues, the approach was flawed. It is not uncommon for a scheme to cease for one of a variety of reasons (such as lack of funding, people unwilling to take up the offices of the watch or due to general apathy). If this happened in an area where membership was a requirement, then the premises licence holders could be seen as failing to comply with a condition of the licence.

National Pubwatch

Anyone wishing to establish a Pubwatch in their area is fortunate enough to be able to draw on the experience and expertise of the volunteers who make up the board and executive of National Pubwatch. National Pubwatch was set up to support existing initiatives and encourage the creation of new schemes with the key aim of achieving a safe, secure and responsibly led social drinking environment in all licensed premises throughout the UK and thus help to reduce alcohol-related crime.

Entirely funded by the licensed trade, National Pubwatch provides advice and guidance through a website, newsletters and good practice guide. Committee members and regional representatives have a wealth of practical experience of working with schemes and are committed to helping local members and their supporters.

National Pubwatch has created a national database of watches and has, to date, assisted in the creation of over 600 schemes and provided advice, support and assistance to numerous existing schemes across the country. Since its inception National Pubwatch has provided support for various industry initiatives on social responsibility and continues to run its own successful conferences around the country covering the principle issues that effect Pubwatch at a local level.

Delivering positive results

Research carried out by National Pubwatch has sought to quantify the benefit an active and engaged scheme can have in its local area. Through a rolling self-completion survey, National Pubwatch has tracked claimed reductions in alcohol-related incidents of between 20% and 80%, with an average of 50%.

Conclusion

The dedicated, grounded and experienced licensees that are the life force of a successful Pubwatch are often unsung heroes. Pubwatch is not the most glamorous of initiatives but is certainly amongst the most effective. Founded on a common-sense belief that partnership, collective good practice and information sharing will improve matters for all, Pubwatch continues to deliver wins for everyone involved in the licensing process, be they operator or regulator. Or customer.

For further information please go to www.nationalpubwatch.org.uk

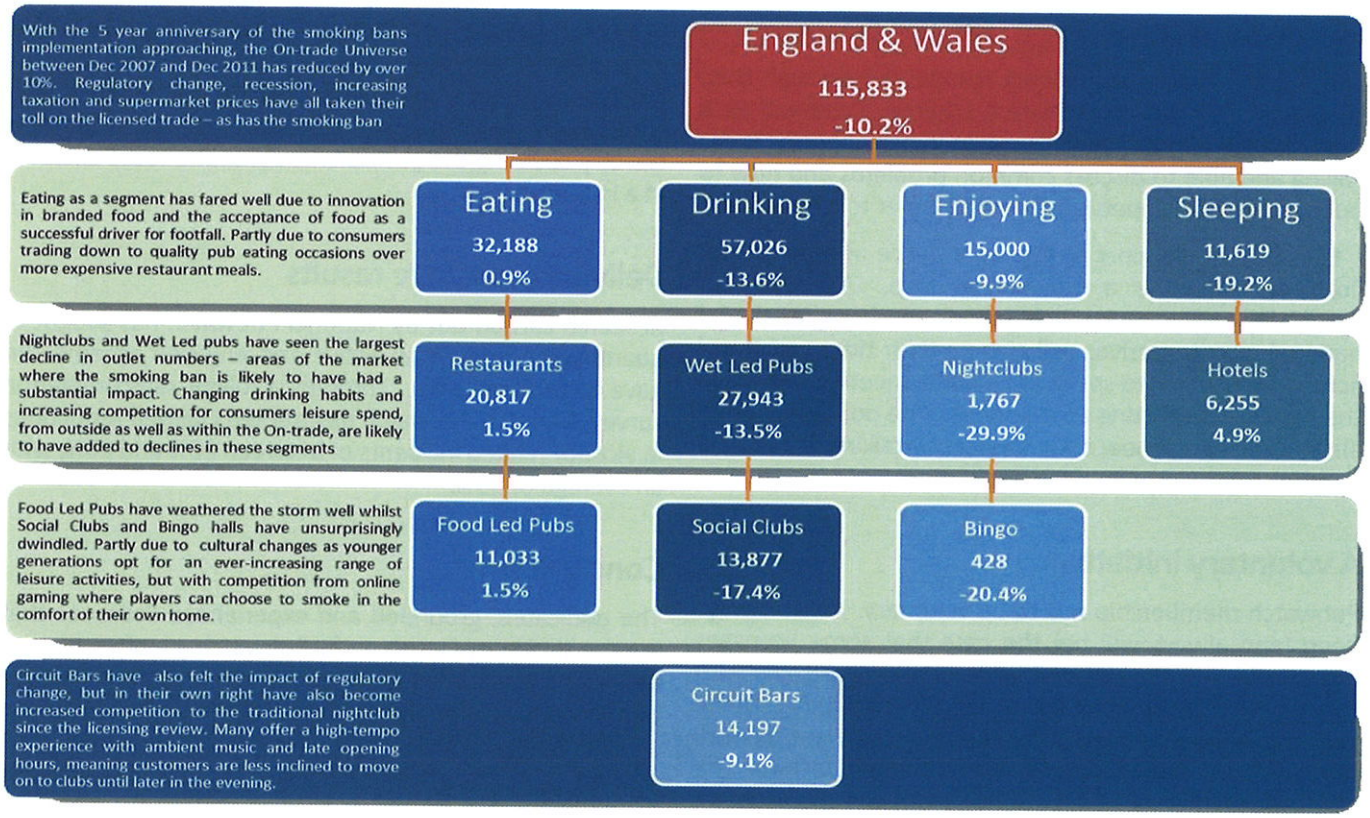
Jon Collins
Chief Executive, CGA

CGA statistical snapshot

Closure rates slowing as green shoots appear

Government legislation, tough economic conditions and changing consumer tastes have all had an impact on the licensed trade and brought about a significant decrease in outlet numbers. **Stuart Capel** of CGA discusses how these factors impact the on-trade in the latest statistical snapshot from CGA

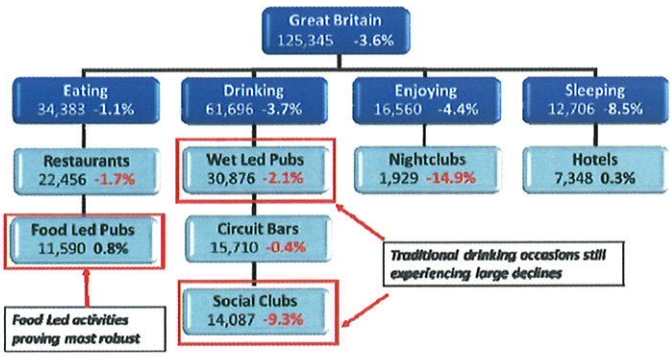
GB On-Trade Universe: March 2012 vs. 2011 Source: CGA Outlet



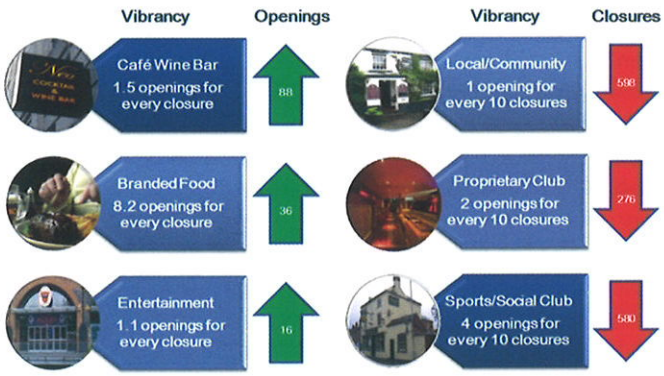
There can be no mistaking the fact that over the past five years there has been a ground-breaking shakeup in the GB licensed trade. Pressures have come from Government regulation, increasing taxation, troubling economic conditions, and a changing consumer mind-set toward value and how to spend a decreasing disposable income. Adding to the pressure has been a polarisation in the market that has seen mainstream offerings suffer as consumers move towards either a premium or value-led experience when visiting the on-trade.

These factors have been compounded by disparity in on and off-trade pricing, spiralling costs and increasing competition from other leisure propositions, both in and out of the home. After five years of declining outlet numbers the on-trade as a whole has shrunk by more than 10%, but green shoots are beginning to appear.

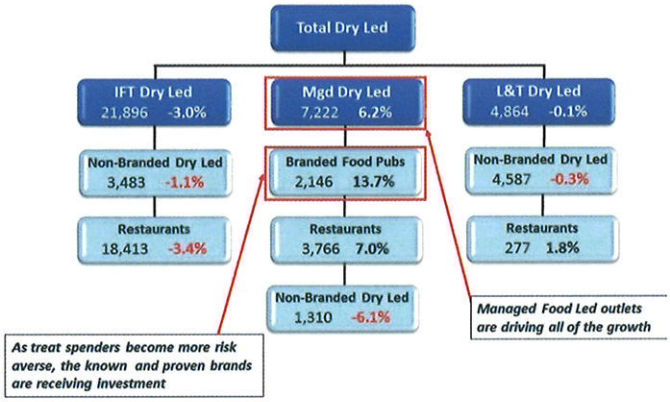
GB view of the On-trade in the approach to the fifth anniversary of the implentation of the smoking ban. Outlet Index December 2011 vs December 2007



Traditional wet-led drinking experiences have suffered and continue to see declines in beer volumes, which of course have led to outlet closures. Operators are continuing to look at new and innovative ways of driving footfall in order to compete in a changing and challenging environment. Chameleon-style outlets are becoming more prevalent, trading with a food offer in the day, changing into a circuit style in the evening and opening late into the evening, aiming to provide a higher tempo experience. Outlets like this, when executed well, place further pressure on the nightclub sector as they try to entice customers to arrive earlier, in an effort to capitalise on drink sales through the night.



GB On-trade Universe – Dry Led – March 2012 vs March 2011 Source: CGA Outlet Index



Branded food pubs have consistently grown in number, due to the fact that consumers are opting for trusted experiences. As disposable incomes are squeezed and leisure choices increase, both in and out of the home, an element of consumer risk aversion has become apparent. Retailers are investing a considerable amount in the branded concepts they offer, and polarisation is increasingly evident as chains move toward providing either a value or premium experience.

With the gloomy media picture of a declining outlet universe, it's possible that the green shoots of stabilisation could be overlooked. The rate of closure is certainly slowing, thanks to growth in café wine bars, branded food pubs and chameleon style outlets. In essence, the on-trade has been through a process of rejuvenation – adapting to changing consumer needs – and is emerging slightly different but stronger.

Definitions

Circuit Bars (High Street) – primarily branded bars with broad value led food and drink offers. But as a broader categorisation, also includes café and wine bars with a higher end offer, often with music and later opening hours. Differentiation can be made between those in high street, town and city centre locations, and those in more affluent suburban centres (such as Didsbury, Manchester and Chapel Allerton, Leeds).

Pre Loading – increasingly common behaviour amongst primarily younger drinkers, who will drink at home prior to going out. This will often result in drinkers starting their evening out at a later time then previously.

Post Loading – a newer phenomenon, where drinkers will continue to consume alcohol at home in a social situation after they return from a night out.

Weekend Millionaires – the predominance of (especially) younger drinkers to concentrate on one "big night out" a week where they are prepared to spend additional money to enjoy a more premium experience (in terms of surroundings, drinks and entertainment).

Premium Spirits – linked to the above, there has been an increasing trend over the last few years towards the purchase of high quality and priced spirits products (initially Vodka but also spreading to Gin and Rum). Typical products in this category would include Hendricks Gin and Grey Goose Vodka.

High End Venues – this classifies outlets that cater and provide for an affluent style or mainstream crowd. They will offer more opulent surroundings and a predominantly premium, broad ranging drink and food offer.

Café/ Wine Bars – often higher end and independent venues, these are differentiated from standard circuit bars by their food and drink offer/ pricing policy. Often these are more style-led venues but can also include some more premium small brands.

Wet-Led Pubs – pubs that have a high percentage of drinks sales, as opposed to food sales. Usually will also encapsulate community locals.

Alcohol strategy and the re-discovery of individual responsibility

"We can't go on like this" opines David Cameron in his recent Prime Ministerial Foreword to the Government's Alcohol Strategy. The phrase has pedigree. It appears as the first line of the Government's Health Manifesto for the NHS and "We can't go on like this" was, you may recall, the strapline on the Conservative Party's national poster campaign in the run up to the 2010 General Election. From a generation ago, Margaret Thatcher also used the phrase when seeking to persuade us not to live beyond our means. And it pops up in *Withnail and I,* the cult film about penniless actors in which Richard E. Grant's character declares: "We've got to get some booze. It's the only solution to this intense cold. Something's got to be done. We can't go on like this...".

The informed licensing practitioner might take the view that we simply *can't go on* prescribing alcohol policy by cliché, hackneyed sound-bite or, indeed, quotation. He would be right. In consequence it would be easy to dismiss the substance of the Government's Alcohol Strategy as no more than political puff following the jerk of a knee. He would, however, in this instance, probably be wrong to do so.

The Strategy provides the reader with a crystal ball, a little murky perhaps but the best we have, to gaze upon both the short and long-term future of alcohol policy and its impact on licensing practitioners. The Government views it as "a radical change in the approach and seeks to turn the tide against irresponsible drinking". It merits a careful and full read.

Nobody of any intelligence or experience dismisses the potential for harm that excessive alcohol consumption has on the individual drinker, town centres or society at large. Despite numerous historic precedents we now appear to be witnessing one of those perennial spikes, possibly of alcohol consumption, but certainly in the amount of attention being paid to the issue. We must be cautious not to use government statistics as a drunken man uses lamp posts – for support rather than illumination – but these figures stand out in the Strategy:

- there has been a 25% increase in liver disease between 2001 and 2009 (and alcohol-related liver disease accounts for over a third of all liver disease deaths)
- binge-drinking among 15-16 year olds is among the highest in Europe (57% reported getting drunk last year)

The Government's response, until now, appears to have been to echo the tabloid headlines about binge-drinking and to launch a clumsy, indiscriminate and unfocused attack on the whole drinks industry. However, in a welcome "rebalancing" of the Government's approach, the new Alcohol Strategy may just signal a far more holistic approach to the complex issues surrounding the use, abuse and impact of alcohol. The root cause of the problem, according to the Government, is *not* the responsible licensed operators whose premises usually provide a secure and regulated environment in which alcohol can be drunk safely and in good humour.

Instead, the availability of cheap alcohol, particularly that purchased from supermarkets and off-licences to fuel binge drinking, is fingered as the primary culprit. The drunken youth in our town centre has more likely than not pre-loaded with alcohol before he has ever left home. Minimum unit alcohol pricing (now enacted as law in Scotland and being consulted upon in the rest of the United Kingdom) is seen as one response. But perhaps the most welcome feature of the Strategy is the widening of its approach. It is simply not good enough to blame only the drinks industry and operators and ignore the individual and their responsibilities to the wider community. In the words of the Strategy: "There has not been enough challenge to the individuals that drink and cause harm to others".

A 25 year old who orders too many drinks in the nightclub and then thumps another clubber for some perceived slight, or having left the venue wakes up the sleeping neighbourhood by his awful rendition of a Tom Jones classic, is *not* a blameless individual. The nightclub in question may, or may not, have behaved irresponsibly in contributing to his drunken state, but to simply blame the operator is the equivalent of attacking Ferrari because some of its customers break the speed limit while driving their cars.

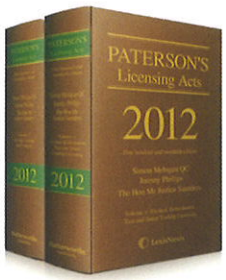
Far more needs to be done, as the Government recognises, to change the behaviour of individuals and the approach of Society to excess drinking. None of this means that *irresponsible* operators should not be targeted and clamped down upon by the authorities, far from it. But the *responsible* operator despite being an easy and immovable target should not always be held culpable for the sins of the individual. The Government's Alcohol Strategy provides some welcome support for this approach and we as licensing practitioners will have our full part to play.

Gary Grant
Barrister, Francis Taylor Building

Book Reviews

Patterson's Licensing Acts 2012

Simon Mehigan QC, Jeremy Philips & The Hon Mr Justice Saunders (ed)
Jordans, 2011, hardback, £95
Reviewed by David Lucas, Partner, Fraser Brown Solicitors



Paterson's Licensing Acts is 140 years old this year, the first edition having been published in 1872.

Paterson's Licensing Acts 2012 is published by LexisNexis who boldly describe the publication as the definitive work of reference dealing comprehensively with licensing law in England and Wales. In this case I do not think that the description is inaccurate.

My copy of the Oxford Paperback Dictionary tells me that a "definitive edition" is one with authoritative status. If there was any doubt as to the status attributed to Paterson's Licensing Acts one only has to look at an additional item contained in the latest edition.

In the front cover of each volume is a list of cases dating back to 1898 in which Paterson's Licensing Acts has been cited by the courts as an authority. On that basis the publisher could also claim that Paterson's Licensing Acts has been the authoritative work of reference in licensing law for over 100 years.

Paterson's Licensing Acts has again been published in two volumes. Volume 1 covers alcohol, refreshment, taxi and street trading licensing while volume 2 deals with betting, gaming and lotteries.

Between them the two volumes deal comprehensively with the relevant subject matter providing helpful commentaries together with the contents of the relevant statutes, secondary legislation, forms and other relevant material.

The footnotes contain a unique source of useful information for licensing practitioners. In that respect if would be helpful if the publisher could provide a magnifying glass with each copy for people such as me who think that the print appears to be getting smaller.

The fact that there has been a great deal more activity in relation to the areas covered by volume 1 is reflected in the length of the preface to that edition.

The preface to each edition is always recommended reading and that is particularly the case with volume 1 of the latest edition. The preface contains a detailed consideration of the relevant provisions of the Police Reform and Social Responsibility Act 2011 together with an informative analysis of recent case law.

There has not been the same amount of activity in relation to the areas included in volume 2 with very few judicial decisions and not a great deal of new legislation.

Nevertheless there has been a steady stream of new publications from the Gambling Commission and elsewhere which have helpfully been included within the second volume.

Paterson's Licensing Acts keeps us up to date not only on an annual basis but also by means of the free CD-ROM which subscribers receive mid-year.

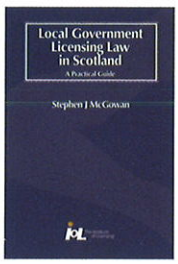
Although I would not be without my paper version of Paterson's Licensing Acts it is helpful to know that I can look to the CD-ROM for historical materials which are no longer included in the hard copy as well as downloadable forms.

In the current economic climate expenditure on items such as reference books has been the subject of close scrutiny. At an annual cost which equates to less than £1.00 per day I would suggest that Paterson's Licensing Acts represents good value for money and it should not be difficult to justify expenditure on such a useful publication.

There have been a number of different editors since Paterson's Licensing Acts was first published in 1872. Needless to say I am not in a position to compare the current general editors with too many of their predecessors. Nevertheless, I am aware that all three of the current editors have other commitments and I am grateful that they continue to find the time to produce a publication which is indispensable to myself and others who work in the areas covered by Paterson's Licensing Acts.

I am not sure who it was that said a good lawyer is not necessarily someone who knows the law but who knows where to find it. In my opinion a good licensing lawyer need look no further than Paterson's Licensing Acts 2012.

Local Government Licensing Law in Scotland



Stephen J McGowan

Institute of Licensing, 2012, paperback, £40 (£30 for IOL Members)

Reviewed, separately, by Scott Blair, Advocate, Advocates Library, Parliament House, Edinburgh and Roger Butterfield, Solicitor

When Stephen McGowan first approached me to write a foreword, *writes Scott Blair, Advocate, Advocates Library, Parliament House,* I did not envy him his task. Never before has licensing law in Scotland moved at such a rate. And, as with liquor licensing, of late civic government licensing has become the focus of increased attention from our legislature with the passing of the Criminal Justice and Licensing (Scotland) Act 2010 and with it a whole raft of supplementary statutory instruments. To keep track of such a fast-changing scene when in the middle of preparing a text is never easy.

I need not have feared. In his inimitable style Stephen has produced yet another work that will commend itself to the library of the busy licensing practitioner. However, its target audience is not just the licensing lawyer; it speaks also to the wider licensing community including local authority officials, the police and, of course, the trade itself.

The breadth of the work is quite astonishing. He does not confine himself only to the Civic Government (Scotland) Act 1982. His reach is far wider. Within this volume Stephen manages to cover topics, both obscure (to this writer at least), such as burgess tickets and zoo licensing, and mainstream, such as taxicab and street trading licences.

To achieve this breadth of treatment along with a light touch – the text is peppered throughout with interesting anecdotes and witty comments from the author – is, in my view, no mean feat.

Once again, Stephen McGowan is to be commended for bringing a text onto the market which is both informative and entertaining. It is rare indeed that a legal text can be described as entertaining. It is no rarity when Stephen McGowan is the author.

Stephen is a well-respected licensing lawyer in Scotland, *writes Roger Butterfield*. He has produced a fascinating, comprehensive and easy to read book on licensing in Scotland. The publication covers a wide range of licences including taxis/street traders/sex shops/cinemas/window cleaners and many other areas of licensing.

Clearly the law is different in some respects to the law in England and Wales. However, there are a number of similarities. The book sets the law out clearly and concisely and makes reference to many cases, which are very relevant to the legislation south of the border. The book would be a worthwhile addition to the bookshelf of lawyers and licensing off

Case Digest

ALCOHOL AND ENTERTAINMENT

Administrative Court (Case Stated)

Foskett J

Decision on appeal to Magistrates' Court – whether council reasonably declined compromise during appeal hearing and/or should have taken issues of parking regulation into account

Tower Hamlets v Ashburn Estates Ltd (trading as "The Troxy")

[2011] EWHC 3504 (Admin)

Decision: 2 December 2011

Facts: Licensing Authority heard a review application made by local residents with a view to reducing some of periods authorised for licensable activities. Their complaints related to the nuisance arising from activities in the premises, including traffic and parking difficulties. None of the responsible authorities made representations in respect of the review application. The licensing subcommittee decided to reduce the operational hours on certain days. The appeal to the Magistrates' Court became restricted to part only of that decision. The Licensing Authority continued to oppose the limited appeal as "residents' opinions were important", despite an early indication from the District Judge that a compromise offered by the Appellants did not appear to be unreasonable and there could be costs implications if it was rejected. Appeal subsequently decided in favour of the premises' owners in terms of the compromise that had been suggested by their counsel and twice rejected by the Local Authority. The decision made by the Local Authority to continue to oppose the appeal was taken honestly, but not reasonably, nor was it 'a sound administrative decision'. The District Judge found the committee's decision exceeded the 'necessary and proportionate response' recommended in the guidance and awarded costs in full against the Local Authority.

Point of dispute: Whether the Judge erred in principle, took into account something that should not have been considered, ignored some factor that ought to be considered or that all relevant factors were not balanced.

Held: The District Judge attached far too much weight to the suggested compromise offered on two occasions. She had been expecting too much when she said that the authority "had ample time to consider the offers made" and that "the remedy lay in the hands of the local authority". A limited time was available and many competing interests would need to be considered in the evaluating of the offer. Further, she had confused the statutory scheme of the Licensing Act with the control and regulation of parking, which was a separate statutory scheme. The latter was not therefore a legitimate factor to consider. The appeal would be allowed.

Costs: Awarded to the Licensing Authority

ALCOHOL AND ENTERTAINMENT

Administrative Court (Case Stated & Judicial Review)

George Leggatt QC (Sitting as a Deputy High Court Judge)

Decision on partial success of appeal - council ordered to contribute to appellant's costs. – whether correct legal test applied

The Queen on the Application of Mayor & Burgesses of the London Borough of Newham v Stratford Magistrates' Court

[2012] EWHC 325 (Admin)

Decision: 26 January 2012

Facts: Supermarket granted a licence to sell alcohol subject to certain conditions, which included restrictions on hours. Applied for a further licence for the same premises, which was granted. The Metropolitan Police subsequently applied to review both licences on the grounds of breaches of the conditions of the second licence. On review, conditions of the second licence changed to mirror those of the first licence and further conditions were imposed on both licences regarding the installation and maintenance of a CCTV system. The applicant appealed to the Magistrates' Court against the conditions imposed on both licences. On the appeal, the District Judge imposed conditions which were more favourable to the appellant in terms of hours, though substantially less than the 24-hour licensing conditions which he had sought. At the end of hearing Appellant sought an order for his costs to be paid by the Council in the sum of £8,685, submitting that he had virtually succeeded on the appeals. The Council submitted that the Appellant's conduct in applying for two concurrent licences had unnecessarily complicated proceedings and sought an order that it should be awarded 50 per cent of its costs. The District Judge ordered that costs in the sum of £5,350 were to be paid by the council to the applicant. That sum represented the difference between the amount of costs claimed by the Appellant and those claimed by the Council. In her written reasons, the District Judge had concluded: "In light of the above, I am satisfied that unnecessary work has been incurred due to the complicated way that these proceedings have evolved. I do not accept that the Appellant has virtually succeeded. I reject the submission on behalf of the Appellant that the Licensing Committee acted in bad faith but I do accept that the original decisions were wrong. As a consequence, I have taken the figure put forward on behalf of the Appellant and rather than make and award to the Respondents (in the figure I consider to be proportionate) in light of the unnecessary costs incurred and justification in respect of the conditions that have been imposed, I have made a reduction from the Appellant's costs. I therefore order costs in the sum of £5,350 to be paid by the Respondents to the Appellant."

Point of dispute: (Question posed) "Was the learned District Judge wrong in law to order the Respondents to pay a proportion of the costs of the Appellant, in circumstances where the Respondent Local Authority was defending an administrative decision made in good faith?"

Held: Principles set out by Lord Bingham in *City of Bradford Metropolitan District Council v Booth* [2000] EWHC Admin 444 is established law and strengthened in their formulation in the most recent authorities. Starting point and default position where a party successfully opposing a decision of a public authority was that no order for costs should be made. Second, that as regards financial prejudice to the successful private party, what was required was evidence that that party would suffer exceptional and substantial financial hardship. Nothing either in the judgment itself or in the subsequent response to the application to state a case indicated that any submission made that the Appellant would suffer financial prejudice or hardship unless a costs order was made in his favour. In those circumstances, no basis on which the District Judge could reasonably have found that the Appellant would suffer prejudice or hardship over and above that which every private party suffers who incurs legal costs. The appeal would be allowed.

Costs: Justices ordered to pay £2,000 costs, having refused to state a case.

ALCOHOL AND ENTERTAINMENT

Administrative Court (Case Stated)

Burnett J

Restriction on festival hours wrongly imposed by sub-committee – District Judge lifted on appeal and awarded costs against Licensing Authority – whether award reasonable in principle and amount

Mayor and Burgesses of the London Borough of Tower Hamlets v Thames Magistrates' Court, Lovebox Festivals Ltd

[2012] EWHC 961 (Admin)

Decision: 16 March 2012

Facts: Appeal against decision of District Judge to award costs of £18,138.60 to Lovebox Festivals Ltd at the conclusion of successful appeal. The decision of the sub-committee had stipulated a terminal hour of 2200 hours for Friday and Saturday and 2100 hours on Sunday. Appeal concerned with only one issue: whether significant disturbance was likely to be caused by people leaving the 2011 festival. District Judge allowed the appeal, granting Lovebox the hours sought in the application and permitted in previous two years. Application for costs made orally and included a detailed breakdown of the costs incurred in connection with the appeal. Challenge to the claim for costs before the District Judge on the basis that in all the circumstances it was not appropriate to award any costs against Tower Hamlets.

Point of dispute: Whether appropriate to award any costs against Local Authority and if so, in what sum.

Held: The sub-committee had founded its conclusion to restrict the hours on a very narrow factual finding. The District Judge was entitled to come to the conclusion that she did in respect of that matter. Further, District Judge had not misdirected herself concluding that the police supported the application, rather than were not opposing it. As regards 'public nuisance' and the evidence of three residents, it was the quality of those representations and evidence which the District Judge found wanting rather than its volume. None of the arguments advanced on behalf of the Local Authority succeeded in demonstrating that the District Judge was wrong in the circumstances of this case to make an adverse costs order against them. On the question of quantum, parties in complex matters in the Magistrates' Court who might be seeking substantial costs orders should produce a detailed breakdown to assist the court and the other party. A failure to do so might found a reason why an application for costs should fail in whole or in part, if the court concluded that it could not satisfactorily explore the detail, or the paying party were disadvantaged in challenging the quantum. A number of points bore some emphasis:

1. The indemnity principle means that the sum claimed cannot be more than the client is liable to pay his solicitor.
2. Guideline rates for solicitors practising in different locations are published in the White Book for the purposes of assisting summary assessments in civil proceedings (see CPR 48.49). Whilst not directly applicable to complex matters in the Magistrates' Court, it would be rare for a higher hourly rate to be allowed. It might also assist Magistrates and District Judges if their attention were drawn to those guideline rates.
3. When deciding the amount of costs to be awarded, the court will take account of all of the circumstances of the case but they include the following:
   (a) What was at stake in the proceedings?
   (b) What was the importance of the issue to the parties before the court?
   (c) What was the complexity of the appeal?
   (d) What skill, specialist knowledge and responsibility did the lawyers concerned require or assume?
   (e) How much time was actually spent?

In the round, the court will be concerned to check that the expenditure actually incurred was reasonable, and ensure that any award of costs is proportionate. Its finding in the present case was not unreasonable. In all the circumstances, the appeal would be dismissed.

Costs: Awarded to the Respondent.

TAXI

Administrative Court (Case Stated)

HH Bidder QC (Sitting as a Deputy High Court Judge)

Renewal of Hackney Carriage and Private Hire Vehicle drivers licences refused - decision appealed to Magistrates' Court – whether magistrates should have taken issues of family hardship into account

Cherwell District Council v Naveed Anwar

[2011] EWHC 2943 (Admin)

Decision: 10 November 2011

Facts: The Respondent was licensed as a Hackney Carriage and Private Hire Vehicle driver in 2003. On 7 October 2008 he assaulted his wife and on 18 March 2009, he pleaded guilty to an assault by beating contrary to s 39 of the Criminal Justice Act 1988. He was sentenced to a community order with a 15 month supervision requirement and ordered to pay £300 in costs. In June 2009 he applied to renew both his Hackney Carriage and Private Hire Vehicle driver licences and on 14 September 2009 he met with the Appellant's licensing inspectors and informed them of the nature of his conviction. On 29 September 2009 the Appellant wrote to the Respondent informing him of their decision to refuse his application. The ground for refusal was expressed to be that the Appellant was not satisfied that the Respondent was a fit and proper person to hold such a licence at that time. He requested a review and on 29 October 2009 the licensing sub-committee met to review the decision. They heard representations made by and on behalf of the Respondent but upheld the decision. Their reasons were, again, that he was not, in their view, a fit and proper person to hold a licence. They stated that they had had regard to

his criminal conviction for assault, the Council's guidelines and the overriding need to ensure public safety and protection. On 2 December 2009 the Respondent appealed the decision to the North Oxfordshire Magistrates Court and on 22 January 2010 his appeal was allowed by the court.

Point of dispute: Whether the needs of the Respondent's family were an important factor to be considered – was the decision one which no reasonable court could have reached.

Held: The licences in the case did not comprise "possessions" within the meaning of Article 1 Human Rights Act 1998. The council's policy did give some discretion, even where a driver was convicted of an offence of violence. However, in determining this appeal and in the light of the decision in *Leeds City Council v Hussain* [2002] EWHC 1145, the court was not right to consider and take account of the need for the Respondent to provide for his family and the personal circumstances of his wife and children. Accordingly, they took into account an irrelevant consideration, which no reasonable court would have done. The decision of the Magistrates' would be quashed and that the appeal remitted to the Magistrates' to be reconsidered by a fresh bench.

TAXI

Administrative Court (Case Stated)

Beatson J

Whether evidence supported conviction of driver for plying for hire

Dudley Metropolitan Borough Council v Mohammed Arif

[2011] EWHC 3880 (Admin)

Decision: 1 December 2011

Facts: A Private Hire Vehicle was booked at a specified time to take a person from a specified place to an identified destination. The driver was then approached at that place by a person of the same gender as the booked person soon after the specified time and asked if the driver could take her to the specified place. The driver did so without asking for her identity. The person carried was not in fact the person who was booked. The Magistrates decided that the driver was, on the facts before them, not guilty, and dismissed the information laid against the Respondent by the council.

Point of dispute: Was the driver guilty of the offence of plying for hire contrary to section 45 of the Town and Police Clauses Act 1845 and the consequential offence under section 143 of the Road Traffic Act 1988 of driving without insurance.

Held: The court accepted the formulation of the principles stated in *Nottingham City Council v Woodings* [1994] RTR 72: "(a) A carriage cannot accurately be said to ply for hire unless two conditions are satisfied. (1) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and (2) The owner or person in control who is engaged or authorises the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers: *Sales v Lake* [1922] 1 KB 553; (b) A vehicle plies for hire if the person in control of the vehicle exhibits the vehicle and makes a present open offer to the public, an offer which can be accepted, for example, by a member of the public stepping into the vehicle: *Cogley v Sherwood* [1959] 2 QB 311, 331." In the present case the issue was whether the driver has committed the actus reus of section 45, namely "driving, standing or plying for hire with any carriage within the prescribed distance". What the driver thought he was doing was relevant to whether he was "plying for hire". The position would have been the same even if the driver had asked the two women who approached him whether they had booked and they said they had. Those people would still be "people who are in fact not a pre-booked fare". The Magistrates were entitled to take into account the driver's purpose for being outside the cinema. They were also entitled to take account of the evidence of the booking records at ABC Taxis that there was a pre-booked fare for a woman wishing to travel to Kingswinford. On the evidence before them, it was open to the Magistrates in this case to find that the driver was not plying for hire. For those reasons the appeal would be dismissed.

TAXI

Administrative Court (Judicial Review)

Foskett J

Whether conditions the County Council wished to impose constituted an interference with principle that it was lawful for a Hackney Carriage to be used for private hire anywhere - alternatively if they were permissible, were they irrational and/or unworkable

R (on the application of Ian Gordon Shanks and Others trading as Blue Line Taxis) v Northumberland County Council

[2012] EWHC 1539 (Admin)

Decision: 1 June 2012

Facts: Blue Line Taxis operated approximately 600 vehicles within its ownership and/or under direction and control. Its Private Hire Vehicles operated under a Private Hire Operator's licence granted by North Tyneside Council under s.55 of the Local Government (Miscellaneous Provisions) Act 1976. Its Hackney Carriages were licensed (with an appropriately licensed driver) by various Local Authorities and by Northumberland County Council under s.37 of the Town Police Clauses Act 1847. On 2 March 2011 Northumberland's Licensing and Regulatory Committee decided to amend its Hackney Carriage and Private Hire Licensing Policy by adopting a recommendation made by Northumberland's Corporate Director, Health and Public Protection which included the imposition of conditions on any Hackney Carriage Proprietors licence which was, or was associated with, a Private Hire Operator other than licensed by the County Council, or declared as part of the intended use declaration that the vehicle may or was to be used for the purposes of fulfilling pre-booked hiring's on behalf of a Private Hire Operator not licensed by the County Council.

Point of dispute: Whether conditions the County Council wished to impose constituted an interference with the 'well-established principle' that it was lawful for a Hackney Carriage to be used for private hire anywhere and could therefore not be imposed under section 47 of the 1976 Act. Alternatively, if they were permissible, whether proposed conditions were irrational and/or unworkable.

Held: A Hackney Carriage is always a Hackney Carriage, no matter what it is doing, or where, and that its use, for whatever purpose, can never make it a Private Hire Vehicle in the statutory sense. There were entirely separate and distinct regimes for the licensing of vehicles as Hackney Carriages and as Private Hire Vehicles. The regime which regulates Private Hire Vehicles had no application to a vehicle registered as a Hackney Carriage. The purpose of the 1976 Act was to impose a scheme of licensing on otherwise unlicensed vehicles and their drivers; it was not to impose further regulation on already-regulated Hackney Carriages. The provision of a Hackney Carriage for hire together with the services of a driver pursuant to an advance booking was an activity unregulated under any statute and "the inherent right of the Hackney Carriage proprietor to undertake pre-booked

hirings anywhere in England or Wales." "Hackney Carriage" in section 80(1) meant a Hackney Carriage wherever it may be licensed as such (Britain v ABC Cabs (Camberley) Ltd [1981] RTR 395). "Private Hire Vehicle" in sections 46(1)(d) and 46(1)(e) have to be read as governed by the definition of "Private Hire Vehicle" in section 80(1) and they were, accordingly, subject to the 'Hackney Carriage exemption' (*Brentwood Borough Council v Gladen* [2004] EWHC 2500 (Admin), [2005] RTR 152). The words of the Local Government (Miscellaneous Provisions) Act 1976 were wide and emphatically so. That being the case, that was the end of the matter, subject to any condition imposed being "reasonably necessary". There was no basis upon which it could properly be argued that the proposed arrangements for self monitoring were unlawful or that the proposed arrangement were ultra vires the statutory powers. Whilst the record-keeping obligation would be an unwelcome intrusion into a driver's daily work routine, there was an important overall public safety issue and a balance had to be struck. It could not be said that these requirements (or requirements like them) were irrational or unworkable, or that the Magistrates' Court could not adjudicate on these matters. Any policy, together with its refinements, should be kept under review and if certain of the conditions proved to be unworkable, they could be changed. The challenges to the adopted policy failed and the application would be dismissed.

Costs: Awarded to the Defendant.

SEX ESTABLISHMENTS

Administrative Court (Judicial Review)

Keith J

Fees imposed on licence renewal – duty to undertake annual review – whether calculation had been made – services to be included in calculation – extent of overpayment – order to repay

Timothy Martin Hemming (trading as Simply Pleasure Ltd) & Ors v Westminster City Council

[2012] EWHC 1260 (Admin)

Decision: 16 May 2012

Facts: Annual licence fee for sex establishments in Westminster was determined at £29,102.00 in September 2004 for the year from 1 February 2005 to 31 January 2006 and thereafter remained unchanged for every year up to and including the year from 1 February 2011 to 31 January 2012. No licence fee determined for sex establishments for any of the years since the year ending 31 January 2006 to 2011/12. Requests for information about how the licence fees for sex establishments had been determined for these years were not answered sufficiently, and it was not until after the issue of the current claim that the Council admitted that the level of the fees had not been referred to either of the relevant committees.

Point of dispute: Was the Council obliged to adjust what would otherwise have been an appropriate fee for 2011/12 to reflect any previous surplus or deficit; could the costs of enforcing the licensing system be reflected in the licence fee.

Held: It was for the Council, and the Council alone, to determine what the fee should be (see comments of Forbes J in *R v Westminster City Council ex p. Hutton*, one of a number of cases tried together and reported collectively as *R v Birmingham City Council ex p. Quietlynn Ltd and ors*. (1985) 83 LGR 461 at p. 518). If there was reason to suppose that the licence fee for 2011/12 which the Council determined pursuant to the court's judgment had been arrived at by a process which was flawed, it would be open to the Claimants to challenge that determination. The Council must repay the Claimants the difference between the sum which was demanded and paid and any (lesser) amount finally determined by the Council as a reasonable fee. The recent European Directive, implemented in the UK by way of the Provision of Services Regulations 2009 (SI 2999 of 2009), no longer permitted the costs of enforcing the licensing system to be reflected in the licence fee. Whatever domestic law had permitted in the past, there had in the future to be not only a proportionate relationship between the fee which was charged and the cost of the "authorisation procedures", but the fee could not exceed the costs of those procedures. The procedures were the steps which an Applicant for a licence had to take if he wished to be granted a licence or to have his licence renewed. The cost of those 'procedures', related to the administrative costs involved, the costs of vetting the Applicants (in the case of applications for a licence) and the costs of investigating their compliance with the terms of their licence (in the case of applications for the renewal of a licence). Since the year beginning 1 February 2010, the Council had not been permitted, when determining the reasonable licence fee for sex establishments, to reflect in the fee which it determined the costs of enforcing the system. The Claimants' restitutionary claim had to succeed because the Council demanded and were paid what purported to be lawful fees for the five relevant years when the demands were unlawful because the Council had not determined what the fees for those years should be. The claim succeeded subject to two matters: first, they should only recover the difference between the sums they paid and whatever would have constituted reasonable fees for those years. Second, since the restitutionary claim had to be treated as a claim for judicial review, the question whether the Claimants' time for bringing the claim should be extended was a live one. However, it was not until 2 February 2011 when the Council responded to the third request for information that the Claimants' solicitors had the material on which they could realistically argue that the licence fee had not been determined by the Council for many years. It was significant that that date was less than three months before the Claimants' Claim was filed. The Claim succeeded. The relief to be granted depended on what the court's conclusions were on the many different issues which the claim raised. Since those conclusions were unknown to the parties, the court preferred for the parties to have the opportunity to consider the appropriate relief in the light of its findings. It would consider what orders to make for costs and whether permission to appeal (if sought) should be granted when the final judgment in this case was handed down. The parties' time for filing an appellant's notice would begin from then.

Jeremy Phillips
Barrister, Francis Taylor Building.

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Stephen Lonnia	– Chair of North East Region
David Lucas	– Chair of East Midlands Region
Sarah Oliver	– Chair of Welsh Region
Steven Wright	– Regional Director - South West Region

Officers

Sue Nelson	– Executive Officer
Jim Hunter	– Training & Qualifications Officer

Contractors

Natasha Mounce	– Co-ordinator
Caroline Day	– Book Keeper
Linda Bendell	– Administrator

Membership of the Institute of Licensing

Membership Fees - 2012/2013

- Individual/Companion/Fellow – £70.00
- Associate – £60.00

Organisation Membership Fees – 2012/2013

- Standard Organisational Member, for between 1 and 6 named contacts – £250.00
- Medium Organisational Member, for between 7 and 12 named contacts – £360.00
- Large Organisational Member, with over 13 named contacts – £500.00

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