Journal of Licensing

The Journal of the Institute of Licensing

Number 2 March 2012

IN THIS ISSUE . . .

www.instituteoflicensing.org

The Institute of Licensing

Journal of Licensing

Journal of Licensing ISSN 2048-9110

Email: journal@instituteoflicensing.org
Visit: www.instituteoflicensing.org

Institute of Licensing
Lilac Cottage
Aller
Somerset
TA10 0RA

Email: news@instituteoflicensing.org
Visit: www.instituteoflicensing.org

The Institute's Journal of Licensing is available to Institute members free of charge, with individual members receiving a copy and a set number of copies being provided to organisation members as follows:

- Standard Organisation member – 1 copy
- Medium Organisation member – 2 copies
- Large Organisation member – 3 copies

Additional copies are available to Institute members at only £10.00 each (plus VAT + P&P).

Non-members may purchase the Journal for a fee of £70.00 (plus VAT + P&P) which will include individual complimentary membership at the appropriate level for the remainder of that membership year (all memberships are renewable on 1st April annually).

To order copies, please email orders@instituteoflicensing.org

This issue shall be cited as (2012) 2 JoL.

Foreword

Jon Collins
Chairman, Institute of Licensing

Conference honours new Patron, Philip Kolvin QC

It was both hugely enjoyable and a privilege to chair the Institute's 2011 National Training Event (NTE), which was an unqualified success in terms of attendees, quality of speakers and breadth of subject matter. It was a genuinely informative three days as familiar speakers returned, new speakers made their mark and we all received a refresher in engaging with Government from former Home Secretary Jacqui Smith.

The NTE this year benefitted from a very strong set of sponsors, in particular the arrangement with No. 5 Chambers which gave us access to the tireless and creative Sarah Clover whose efforts contributed so much to the strength of the event. Of course, we must also recognise the sterling efforts of Sue Nelson, Jim Hunter, the back office team and event volunteers who make an event of such scale – 230 delegates, multiple seminar rooms, formal and informal evening events, accommodation across two hotels – come together with scarcely a glitch.

In the current economic climate and with the particular challenges facing both the licensing community and the wider public sector, it is testament to the skills, experience and enthusiasm of the Institute's team and supporters that this year's NTE was stronger than ever. The quality and breadth of speakers combined with lively and informed debate to leave all attendees well briefed to engage in licensing matters. The Institute prides itself on being a broad church and, while we have further work to do to have that reflected in our membership, the learnings from the NTE were of value for operator and regulator alike.

The success of the NTE gives the Institute great momentum going into 2012 as we seek to provide more value for your membership. As ever, value will primarily be driven through our range of targeted, relevant and informative training. In addition, we can offer ever stronger communications through the website, twitter and, of course, this Journal. And a personal goal of mine is to see the Institute valued as an expert adviser to Central Government, helping to strengthen, wherever possible, relevant legislation and guidance.

I am delighted that, as part of this latter commitment, we have been able to play the lead role in re-establishing the National Licensing Forum (NLF) and now act as its Chair. The NLF sees the Institute's commitment to partnership in action as central and local government, industry and the police discuss and debate the hot licensing issues of the day and flag up licensing matters to be addressed in the months ahead. We will share the output of the NLF with you through the normal channels of communication.

Across all of the Institute's aims and ambitions, we will be able to draw upon the expertise, experience and insight offered up by our former Chairman, Philip Kolvin QC. The Board's unanimous decision to award Philip not only the honour of Companionship but also the position of Patron was warmly received at the NTE. Indeed, Philip is a truly worthy recipient of both honours, his depth of knowledge on all matters licensing combined with his belief in dialogue and the identification of common ground made him a natural Chairman for many years. During that time, his vision and energy were integral to the Institute's growth and helped lay the foundations for our future success. As Jim Button put it: "Philip Kolvin is rightly regarded as one of the leading licensing lawyers of his generation. His vision has taken the Institute to its present position in a remarkably short time, and has ensured that it is the principal licensing organisation".

Any organisation would benefit from Philip's input so we are delighted to secure his on-going involvement through the specially created position of Patron. This role, with its connotations of support, expertise and advocacy, will allow Philip to continue to work with the IoL across our events programme, policy work and development of qualifications.

Even as Philip stepped down as Chairman, he stressed his continuing support for the Institute and his desire to play an active role in our future growth and development.

In the role of Patron, the Institute will be able to call upon Philip to act as our representative in our dealings with Government, be that through a one-off meeting, seminar or working party. In addition, Philip has made clear his enthusiasm to continue presenting, training and speaking at Institute events across the country. Given our ambitions for the Institute, the volume of licensing related matters under consideration in Westminster and the increasing scrutiny of licensing decisions at a local level, it is invaluable to have Philip in our corner in the months ahead.

Contents

Editorial

Leo Charalambides

Editor, Journal of Licensing

The past decade has seen a sustained focus by Central Government and civil society on the scope and application of local government licensing. As far as alcohol licensing is concerned, it seems that every couple of years sees some form of amendment or reform to some aspect of the Licensing Act 2003 regime. In this issue, Gerald Gouriet QC and Gary Grant give a robust and searing critique of the rebalancing exercise that informs the licensing measures contained in the Police Reform and Social Responsibility Act 2011.

It will be recalled that in 2006 the Violent Crime Reduction Bill aimed "to give police and local communities new powers to tackle knives, guns and alcohol-related violence". In 2009 the Policing and Crime Bill promised "to make local police forces more accountable to their communities and increase their effectiveness ... The measures in the new policing and crime bill will ensure that the police and local authorities tackle ... alcohol related crime and disorder". And again, in 2011, the Police Reform and Social Responsibility Bill aimed to "to make the police service more accountable to local people and to tackle alcohol related violence and disorder".

The Institute and licensing professionals properly devoted time and attention to the 2006 and 2009 measures yet the impact of many of the amendments remains negligible or non-existent (ADZ anyone?). It remains to be seen whether the 2011 Act will achieve its stated aims of giving "licensing authorities, the police, local authorities with responsibility for controlling noise nuisance and communities a greater say in licensing decisions". For my part I'm reminded of the advice given by Whitney Houston to Deborah Cox:

Just remember you've been warned.
Enjoy it now, 'cause it won't last.
Same script, different cast.

It is, of course, crucial to the role of the Institute and licensing professionals to engage properly and fully with reform proposals. This issue touches on licensing reforms across all our areas of interest. The Institute itself is strengthening its own means of participating within the various consultative processes through the development of its specialist panels and the re-establishment of the National Licensing Forum. The Journal contributes to this process and aims to support these discussions by stoking (even, where appropriate, provoking) debate.

It has often been said that the IoL provides a pew for a broad church congregation with competing and, at times, opposing interests and agendas. This has, for me, recently come into sharp focus when looking at the reforms concerning pedlars and street trading.

In 2008 the University of Durham produced a Government-sponsored report into street trading and pedlary in Great Britain. This lead to a joint UK and Scottish Government consultation, in November 2009, on modernising street trading and pedlar legislation. Alongside and independently of this consultation, the UK, other EU member states and the Commission were considering the implementation of the EU Services Directive (EUSD). As implementation proceeded, it was subsequently considered that pedlary fell within the scope of the EUSD. Consequently a fresh consultation on modernising street trading and pedlar legislation was issued. The issues that arise in the consultation concern the effect of static trading, temporary trading, temporary trading by operators of other member states and the scope of itinerant and/or mobile trading. This forces a consideration of the fundamental definition of "street trading" and the purpose behind any regulatory scheme.

The original consultation concerned Great Britain and did not include Northern Ireland (NI), which has its own statutory regime pursuant to the Street Trading Act (Northern Ireland) 2001. The NI regime attempts, successfully in my view, to tackle many of the concerns raised by contemporary pedlary and street trading and anticipates and even suggests answers to the questions raised by the implementation of the EUSD. The expertise of Northern Ireland was only engaged by Central Government subsequent to the discussion and dissemination of information provided by the Institute.

In May 2011 the DCMS, following consultation, issued the London Olympic Games and Paralympic Games (Advertising and Street Trading &c.) Regulations 2011. In these Regulations, the DCMS considers street trading not only in its traditional economic sense but also other activities that take place in open public places such as public charitable collections, itinerant ice cream trading, and public entertainment.

The street trading consultation is being led by the Department for Business Innovation & Skills. Given the initial oversight of Northern Ireland, one hopes that the recent experience of the DCMS in respect of street trading is not also overlooked. A further consultation is expected in May 2012.

What is certain is the scrutiny and response that this consultation will receive from the IoL.

Just remember you've been warned.

Amendments to the Licensing Act 2003: reform for reform's sake?

The perceived problems surrounding binge drinking have prompted Government to review and revise the Licensing Act 2003. But many questions are being asked as to whether it has laid out a convincing case for its changes. **Gerald Gouriet QC** and **Gary Grant** place the issue of Britain's excessive drinking in an historical context, and with the benefit of that perspective are led to believe the reforms may owe more to political posturing than rational response

The English have long enjoyed a tempestuous relationship with alcohol. Despite the recent tabloid, and so political, hysteria over "binge drinking", it is not a recent phenomenon. It has been endemic in English society from time immemorial. The twelfth century historian, William of Malmesbury, was able to record that among the English at the time of the Norman Conquest:[1]

"Drinking is a universal practice, in which occupation they passed entire nights as well as days...They were accustomed to eat until they became surfeited, and drink until they were sick."

Indeed, Malmesbury assures us, the Norman victory at the Battle of Hastings was attributable to the fact that whilst the Normans spent the eve of battle praying, the English occupied themselves by drinking.

By the eighteenth century *The Gentleman's Magazine* was able to record no fewer than 87 idioms for drunkenness ranging from "sipping the spirit of Adonis" down to the rather less poetic "stripping me naked".[2]

Winston Churchill, perhaps the greatest of all Englishmen, could justifiably quip towards the end of his long life that: "I have taken more out of alcohol than alcohol has taken out of me".

Nearly a thousand years since the English defeat at Hastings, the equally well-reported defeat of the English rugby team in the recent World Cup following nights spent drinking in New Zealand bars, attests that everything changes, yet nothing changes.

Alcohol is, and always has been, part of the very fabric of English society. From cradle to grave, it is present at births, marriages and deaths. It is sometimes consumed to trigger happiness and at other times to drown sorrows.

The British economy depends upon it. The pub sector alone employs some 600,000 people and contributes £22 billion to the economy. In 2010 alcohol contributed £14.6 billion to UK tax revenues[3]. In the current economic climate the country cannot afford to be dry.

Alcohol is the Englishman's drug of choice; but it is not a benign one. *The Lancet* recently published a study by the Independent Scientific Committee of Drugs that ranked the twenty most widely consumed drugs in the United Kingdom – both legal and illegal – according to criteria measuring the "harm" they caused the individual and others. Alcohol came in at number one, comfortably ahead of heroin and cocaine.[4]

The Government is naturally concerned at statistics suggesting that 47% of all violent crime was fuelled by alcohol. The total cost of alcohol-related crime and disorder to the taxpayer is thought to lie between £8-13 billion[5]. Government ministers tell us they "will not tolerate" the status quo, whilst recognising that a focus on changing "public attitudes" is just as crucial as regulation.[6]

1 Cited in "*The normalisation of binge drinking? An historical and cross cultural investigation with implications for action" Report to the Alcohol Education and Research Council*" (2007) by Berridge, Thom and Herring

2 Ibid

3 Source: BBPA Statistical Handbook 2010

4 *The Lancet*, Volume 376, Issue 9752, pages 1558 - 1565, 6 November 2010

5 Statistics taken from "Rebalancing the Licensing Act –a consultation", Home Office, 2010

6 Lord Henley, Home Office Minister address to Drinkaware, January 2012

Like any drug, alcohol can be used or it can be abused. The law is right to intervene, and some would say should only do so, when necessary to prevent the irresponsible abuser of alcohol from harming his neighbour in society. Yet alcohol consumed responsibly undoubtedly increases the aggregate sum of happiness of the nation.

Into this maelstrom of conflicting interests the Government has jumped, to "rebalance" the Licensing Act 2003: feet first and, more often than not, with eyes seemingly closed.

The reforms are contained within Part 2 of the Police Reform and Social Responsibility Act 2011. They received Royal Assent on 15 September 2011. At the time of writing none of the provisions has yet been brought into force. The Home Office has indicated that it expects some if not all of the reforms to come into effect over Spring and Autumn 2012. We will not endeavour in this article to detail all the provisions or ramifications of the reforms. Instead we aim to reflect on what we consider to be the more controversial changes, their justification and potential impact. In doing so we resist the temptation of adopting the words of the great Victorian statesman Lord Salisbury who, when told of proposed legal reforms, exclaimed: "Change! Change! Aren't things bad enough as they are?". We do, however, ask ourselves this question: are these reforms necessary, proportionate and evidence-based or are we all going to have to deal with the intended and unintended consequences of reform for reform's sake?

Reducing the evidential burden

Can it ever be "appropriate" to take a step that is "unnecessary"? If the answer is "no", then perhaps the most controversial of the Government reforms is, on analysis, a toothless tiger. The correct answer, however, must surely be "yes". It may be perfectly appropriate for me to send a Christmas card to a friend I haven't seen in years – but not at all necessary. Or it may be appropriate to the promotion of my understanding of licensing to read a textbook on the subject, but unnecessary because there are so many other books, more informative and better written. Examples of "appropriate but unnecessary" are easy to postulate because "necessity" is an entirely different concept from "appropriateness". The former is concerned with cause and effect, and need; the latter with relevance and suitability. If the Government wanted, as it said it did, merely to lower the high benchmark of "necessary", it could easily have selected from a more closely-related family of words, and given us "beneficial", or even "desirable" as steps down[7]. It's ill thought-out, lazy selection of the wrong adjective leads, as will be seen below, to far graver consequences than mere syntactical disapproval.

All references within the Licensing Act 2003 to "necessary" as the objective yardstick by which intervention in a licensing decision is justified are now, with a wave of the legislator's wand, transformed into merely "appropriate". This new lower evidential threshold applies across the board. So, for example, in considering whether to grant a premises licence a licensing authority may refuse an application or impose onerous conditions if it deems it "appropriate" to do so for the promotion of the licensing objectives. Similarly, the reduced evidential burden will apply to variations, transfers, provisional statements and Club Premises Certificates. Perhaps most troublingly of all, the "appropriate" test will also apply to decisions taken at review hearings and in deciding whether to impose interim steps following an application for summary review (from which there is no automatic appeal). Therefore a premises licence may now be revoked, its licence summarily suspended, businesses and livelihoods potentially destroyed, simply because a licensing authority deems it "appropriate" to do so. The action may not be necessary but merely appropriate.

We question the wisdom or need for such a "reform". The Government's professed rationale for the change, wholly unsupported by any evidence, was that the necessity test disempowered licensing authorities from making suitable decisions to "better reflect the needs of the local area". Somewhat ironically, the Government points out that licensing authorities "will still be required to ensure that their decisions are evidence based..."[8].

We were not previously aware of any cogently reasoned dissatisfaction among those involved in licensing decisions that the "necessary" test needed to be altered or abandoned. It is clearly understood and achieved its objective in promoting the licensing objectives by permitting proportionate intervention, but no more. A restrictive step should only be taken if no lesser step would achieve the same aim. It represented a fair balance between the interests of the operator and the wider community. That was entirely in tune with the philosophy of the Licensing Act 2003 as originally enacted: a piece of legislation that was carefully designed to be liberal in nature, to treat adults as grown-ups, but subject to strong checks and balances (such as reviews) to safeguard the licensing objectives and so the interests of the wider public.

The word "necessary" in the original legislation was not picked arbitrarily. The criterion of "necessity" ensures that the imposition of conditions is proportionate. Its replacement by "appropriate" introduces a real risk of disproportionate conditions being imposed. Much that would indubitably be of benefit to the promotion of the licensing objectives will just as certainly be wholly lacking in proportionality. Closing down all the licensed premises in the country may be an "appropriate" measure to promote the licensing objectives, but it is hardly likely to be thought, even by the severest of licensing authorities, as proportionate or necessary.

The twin tests of "necessity" and "proportionality" are not simply a mantra for licensing practitioners, they also permeate the whole of body of European and human rights jurisprudence designed to protect the individual from arbitrary or oppressive interference by the State. For example, Article 1 of the First Protocol provides (with emphasis added):

7 We have some sympathy, however – but considerable professional regret - in its avoidance of the word "expedient"; the use of which in the Betting, Gaming and Lotteries Act 1963 gave rise to so much litigation.

8 "Responses to consultation: Rebalancing the licensing act", Home Office

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems *necessary* to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The principle of "proportionality" is one of the basic principles of European and now English law. It involves consideration of not only what is appropriate but also what is necessary. In words later approved by Bingham LCJ, the European Court of Justice has stated (emphasis added)[9]:

"By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are *appropriate and necessary* in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

We return to our opening question. Can it ever be appropriate to take a step that is unnecessary? We venture to say: of course it can, but if that step deprives someone of his licence, it is likely to be unlawful.

Licensing authorities as responsible authorities

The English common-law proudly boasts that it will never permit any person to act as judge and juror in his/her own case. The justification is almost too obvious to state – an accused cannot expect a fair hearing by an independent and impartial tribunal if that very tribunal is the accuser. We have chosen to state this basic principle of natural justice because it would appear that the Government is either wholly unaware of it or has chosen to close its eyes to the obvious consequence of their decision to designate licensing authorities as responsible authorities. As such licensing authorities will, for example, be permitted to object to applications for licences, instigate reviews, and then – extraordinarily – decide on the result of those same applications to which they have objected or reviews they have launched. The year 1984 was nearly three decades ago; but "1984" is coming down upon us, fast.

Taken in conjunction with the replacement of the necessity test with one of appropriateness, the position now appears to be as follows. Mr X wishes to open a new restaurant. The licensing authority deems it inappropriate to allow Mr X to do so, in order to promote the licensing objectives, and lodges a representation objecting to the grant. The application goes to a hearing at which the licensing authority represents - to a sub-committee of itself - that a grant would be inappropriate. The licensing authority either overrules itself or, as may be more likely, agrees with itself and rejects the application. Not even W.S. Gilbert could have dreamed up such a scenario. It took the febrile imagination of the Home Office to do so. Alarmingly, however, this is not some faintly ludicrous nightmare from which we can all awake, much relieved, in the clear light of morning. It is stark reality, it has been enacted in law, and it comes into effect later this year.

When promoting this reform the Government must have been fully aware of the *existing* powers under the Licensing Act 2003. If it wasn't, that was because it refused to listen to the clamour of voices reminding it of those powers. To distort the cliché, the results of consultation went in one ear, and out the same ear. The Government's brain, perhaps, was never troubled by what the consultees had to say. Maybe the Coalition Agreement had set up an impenetrable blockade.

In a number of instances the "relevant licensing authority" and the "responsible authority" were already the same legal entity. In most of England, as section 3 of the 2003 Act makes clear, the licensing authority will be the district council (or London borough) for the area in which the premises are situated. But the district council may also be the local planning authority under the Town and Country Planning Act 1990 for the same area and therefore, by virtue of section 13(4)(d), entitled to act in the capacity of "responsible authority" as well as "relevant licensing authority" in respect of the same premises.

By way of further example, the same district council might also be the "local authority" responsible for environmental health under s13(4)(e), and by that route a "responsible authority" for the purposes of making a representation on a licensing application.

Furthermore, the original Consultation seemed to be unaware of section 53 of the Licensing Act 2003:

"53 Supplementary provision about review

(1) This section applies where a local authority is both—
  (a) the relevant licensing authority, and
  (b) a responsible authority,
  in respect of any premises.
(2) The authority may, in its capacity as a responsible authority, apply under section 51 for a review of any premises licence in respect of the premises.
(3) The authority may, in its capacity as licensing authority, determine that application."

It is clear from the provisions mentioned above (and particularly reinforced by section 53 in relation to reviews), that local authorities (typically district councils) may *both* make relevant representations (in relation to first applications, applications for variation, and reviews) as well as initiate reviews (under section 51) *and* determine first applications, applications for variation, and reviews. Local authorities are in many instances already empowered to do that which the reform seeks to allow them to do.

Moreover, ever since 29 January 2010, the definition of interested parties was widened to include councillors.

What evidence will a licensing authority rely upon to launch a review, or object to an application for a new licence? If it relates to public nuisance then presumably it will be assisted by the environmental health department.

9 *Regina v Minister of Agriculture, Fisheries and Food and Another*, [1991] 1 C.M.L.R. 507, cited in *R v Secretary of State for Health ex p Eastside Cheese* [1999] 3 CMLR 123

If it is based upon crime and disorder concerns then the best evidence will come from the police. Since both these bodies are already responsible authorities and can exercise their own professional judgement in assessing what action to take, what is left for the licensing authority to do? Is it simply to step in and overrule the bodies that provide them with the evidence in the first place?

It may well be that the (further) powers now enabling a licensing authority to act as a responsible authority will in practice be exercised by a licensing officer through a scheme of delegation and subject to Chinese walls in an effort to prevent the appearance of bias. But we challenge any reader to imagine a scenario where a premises licence holder who has had his licence revoked by a licensing authority at a review hearing – instigated by the very same licensing authority – would walk away feeling that he has had anything approaching a fair and impartial hearing. We also envisage that at the inevitable appeal hearing in the magistrates' court, the fact that a sub-committee's decision was reached in these apparently biased circumstances will greatly assist the appellant when he later asserts that the weight to be placed upon it is significantly diminished.

Removing the vicinity test

The Licensing Act 2003, as originally enacted, took it to be self-evident that whilst responsible authorities would safeguard the interests of the wider community in promoting the licensing objectives, only those persons at risk of being directly affected by the activities of a licensed premises – in other words people who lived or worked "in the vicinity" (or their representative bodies) - ought properly to have a say in licensing decisions, whether it be to make "relevant representations" in response to a licence application or to instigate a review. The 2003 Act did not seek to define "vicinity" and licensing authorities could exercise their own discretion. Some authorities introduced a yardstick to assess "vicinity" (for example, persons within 100 metres of the relevant premises). Others exercised a common-sense judgment on a case by case basis. This approach appeared to be perfectly sensible and workable. It helped, perhaps, to deter representations from persons living or working far away, but with very personal or commercial axes to grind. Nevertheless the Government was concerned that the vicinity test created "uncertainty among residents" as to whether they could make representations even if they could justify they would be directly affected by the premises. Reform was therefore needed to address a problem which, although it existed in theory, seldom arose in reality.

The modest solution? To take a bludgeon to the vicinity test, annihilate it, or anything like it, and replace it with the gloriously limitless concept - "other person". The effect will be that in addition to responsible authorities *any* person or body will now be able to object to a new application or even instigate a review. The 2003 Act now provides no geographical limitation or any requirement whatsoever for the person to justify he will be directly affected by the premises. We can already imagine the mischievous glee on a nightclub owner's face as he (or more likely his lawyers) send in their objection to a rival club's application for a new licence, albeit that the proposed premises is many miles away. Similarly, will a temperance society or religious body opposed to alcohol in principle be able to resist the temptation to systematically object to every new licence application that crosses its radar? Those of us who practised under the 1964 Licensing Act well remember the Reverend (and effective) Davies doing just that, the length and breadth of the country.

Will it be suggested by a campaigner in Torquay that a nightclub in Tyneside may undermine the licensing objectives? The 2003 Act as amended permits it. It has been said that a butterfly flapping its wings in my back garden may be responsible for a hurricane in a distant land. But one would hope to find a sounder basis for government legislation than chaos theory.

The Home Office has suggested that new s 182 Guidance may be forthcoming to assist licensing officers in exercising their existing discretion to exclude frivolous or vexatious representations. But if the revised Guidance (and we do not know what it might say) has the effect of limiting acceptable representations to those from persons directly affected by the licensed premises (akin to the test for interested parties in the Gambling Act 2005) then why not simply amend the Licensing Act 2003 to say so instead of widening the pool of potential objectors infinitely?

Late Night Levy and EMROs

Amid economic doom and gloom, struggling town centres, and a steady stream of community pubs permanently shutting their doors, the Government continues to extol the importance of enterprise and deregulation to provide the necessary impetus for growth. In stark contrast however, it has now introduced provisions permitting licensing authorities to impose a blanket policing tax on all late night venues within their area (the "late night levy") and to order all venues currently permitted to sell alcohol to stop doing so between midnight and 6am. It is not easy to think of a double-whammy more calculated to destroy an already fragile late-night economy.

The late night levy is a means to raise revenues to pay for policing. The Government believes that businesses that profit from selling alcohol in a late-night economy ought to pay extra for the privilege of doing so and contribute more to the additional costs of late-night policing. This is of course over and above the considerable amount of taxes and business rates these premises already contribute to the local economy, and the fact that the very existence of a late-night economy is down to their operator's enterprise and industry.

In the worst possible way the levy is non-discriminatory. Subject to certain exempt categories of premises (as yet unspecified) it will apply to all licensed venues that sell alcohol regardless of whether these premises are venues that actually contribute to the problems that require additional policing.

At least 70% of the levy must be paid to the police. Distribution of the remainder will be subject to regulations yet to be published. (It would be harsh to impute undue haste to any legislator simply because of a torrent of new law, the details of which are "yet to be published." But so

much of our lives "yet to be lived" will be governed by regulations which no crystal ball can give us any idea, even of the roughest outline shape.)

Early Morning Alcohol Restriction Orders (EMROs) give a wide discretion to a licensing authority to make an order prohibiting all licensed premises from selling alcohol between midnight and 6am. The EMRO may apply to the whole or just a part of the geographical area covered by the licensing authority. It may focus on any time period, so long as it falls between midnight and 6am and may be specific to certain days of the week only.

A licensing authority must hold a hearing before making an EMRO and may only do so if it considers it appropriate for the promotion of the licensing objectives. The effect of an EMRO is startling. It will trump any authorisations existing on a premises licence. Even if a specific licensed premises has for many years enjoyed a late night licence, and even if it has operated without causing any concern to the authorities or contributing to any undermining of the licensing objectives, it may have its entire business model destroyed by a catch-all EMRO. There is no appeal save by way of judicial review.

We have sensed no great appetite from the majority of licensing authorities to introduce either the late-night levy or EMROs. Local authorities are, or at least should be, in the business of improving and promoting their late-night economies not destroying them. This serves the widest public interest. We expect certain prescient local authorities will be swift to indicate their intention *not* to introduce either measure in their area. After all, businesses will be slow to invest in a late night economy if that economy is at imminent risk of decapitation. We also envisage that few local authorities would wish to be the first to declare to the nation that the issues in their town centres are so serious and irredeemable that a late-night levy or EMRO is required. Indeed this sentiment may well be behind the ill-fated history of Alcohol Disorder Zones (ADZs), which were introduced to us with fanfare of self-congratulatory trumpets just a few years ago, then (much more quietly) ushered out of the back door by a hasty repeal that is to be found in the very same set of reforms that now brings us ... late-night levies and EMROs.

The Home Office does not appear to be falling over itself to bring either of these measures into force quickly and has only just started the long process of consultation on the regulations that may provide the devil to the detail. We do wonder, however, whether EMROs and late night levies will follow their unloved and unwanted forebear, and like ADZs before them, be put out to pasture at the very moment when a bright-eyed new legislative animal is brought into Animal Farm.

Revisions to Guidance : police evidence and cumulative impact policies

The original Government consultation appeared to propose the enactment of a rebuttable presumption that all police representations, notices and recommendations ought to be accepted by licensing authorities unless there was clear evidence not to do so. We were not aware at the time of any substantial body of feeling within police forces calling for these additional measures. Not even the most partisan commentator would assert that police officers have any monopoly on accuracy or can assert any rightful claim to infallibility. What is more, such a presumption would almost certainly have been unlawful and in breach of the Article 6 right to a fair trial. Experience suggests that a proper, cogent and justified representation on behalf of the police is already given particularly strong weight by licensing authorities up and down the country, and often (though not invariably) rightly so. We are therefore concerned to read that the original proposal (unlawful if *enacted*) will now be resurrected within the revised *Guidance*. We will withhold full comment until we have seen the wording, but if fairness is believed to have any role to play in licensing decisions, even as an extra, then it may be out of work after the publication of this guidance.

Similarly we understand that the revised guidance will "lower the evidential hurdle" for cumulative impact policies (CIPs). We ask rhetorically: what evidential hurdle does the Government believe currently exists? The present guidance suggests that a licensing authority should consider whether there is "good evidence" that crime and disorder or nuisance are happening and are caused by the cumulative impact of customers of licensed premises. Should this hurdle be reduced so as to permit "bad evidence" to be given weight too? Given that the introduction of a CIP is of such consequence to local businesses and the surrounding community ought it not to be given a proper statutory footing, rather than simply being the creation of Guidance? This would have the advantage of providing us all with a well-considered, precise and ascertainable yardstick by which the propriety of a CIP can be measured and tested.

Conclusion

We end by revisiting the questions we asked in the introduction to this paper: are these reforms a necessary response to a pressing issue? And does the evidence suggest these measures will achieve their objective in a proportionate manner? Or is this reform for reform's sake? The Government has failed, in our view, to present a cogently reasoned justification for many of these measures, let alone present a body of reliable evidence in support. Too many of these amendments bear the hallmark of political knee-jerks in response to tabloid frenzy about the "contemporary issue" of binge drinking. As we have seen, however, there is nothing contemporary about the English over-indulging in alcohol. It is a historical and cultural issue. Ignorance of this is not a promising basis for legislation. We question whether the solution lies in untargeted over-regulation that affects and damages the vast majority of responsible operators in equal measure to the few irresponsible ones. Where legislators promote measures regardless of the need for them, without any understanding of (or genuine attempt to understand) their likely impact and efficacy, then we think they can fairly, accurately *and far too politely* be characterised as "reforming for reform's sake".

Gerald Gouriet QC and **Gary Grant**
Francis Taylor Building

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.

- Ely Place Chambers
- Horsey Lightly Fynn
- LexisNexis - Paterson's Licensing Acts 2012
- Poppleston Allen
- Wildy, Simmonds & Hill Publishing - Club Law Manual

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 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 delivered training courses can be delivered at your preferred location for the training fee of £750 plus expenses and VAT, therefore usually less than £1000 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.

Taxi licensing: law and procedure update

Law Commission Review of Taxi Law

The Law Commission's review of taxi licensing law has commenced with the Commission stating it favours retaining the existing two-tier system. **James Button,** who is one of the Commission's advisers on the review, examines the issues surrounding retention as well as other related licensing matters that will be consulted on from May onwards. CRB checks and out-of-district hackney carriages have also caught his eye

In the first issue of the *Journal of Licensing*, I mentioned that the Law Commission was undertaking a review of taxi law. We now have some indication as to its thinking. An Advisory Group has been convened, the membership of which is wide-ranging, and includes a representative of the Institute (Myles Bebbington) together with myself as an independent member.

Late November 2011 saw the first meeting of this advisory group and a discussion paper produced by the Law Commission to inform the debate (both the discussion paper and the minutes are available on the Institute website www.instituteoflicensing.org/taxireform).

In a nutshell, emphasising that there are no decided elements to any proposals that they may make, the Law Commission is indicating that it is: generally in favour of retaining the two-tier system (hackney carriages and private hire vehicles); generally of the view that taxi licensing should remain a local authority activity (although open to the possibility that there may be mechanisms to allow larger areas to be amalgamated between local authorities, or even smaller areas); feels that there should be basic national standards; does not seem particularly impressed with quantity restrictions for hackney carriages; feels that fees should be on the basis of cost recovery; and takes the view that the same system should apply across the country unless there are very good reasons why London should be treated differently.

As you can imagine, taking into account the people present at the meeting, this led to a significant amount of discussion. I leave it to readers to study the minutes and draw their own conclusions.

From my perspective, the question over single tier or two tier seemed one of the most interesting points. The general view from the private hire trades (inside and outside London) was that if all vehicles were allowed to stand and ply for hire, the result would be that there would be no vehicles available to radio operators at peak times.

James Button

As we know at the moment, a great many hackney carriages work on radio circuits and are effectively undertaking pre-booked work, with the option to take the risk on a hailing or waiting on the rank. If all "taxis" were able to ply or stand for hire, those attached to a radio circuit could be contractually bound to accept bookings if they did not currently have a booking.

Concerns over too many, or inappropriate vehicles using taxi ranks, could be addressed by means of new technology whereby a rising bollard rank would only drop when, for example, a wheelchair accessible vehicle approached. In my view, the argument that you would not want to have a stretch limousine or fire engine using a taxi rank can be answered in the above way, and also by the question of "would they want to?".

I am most impressed with the way that the Law Commission personnel have grasped the key issues, and have formulated a considered discussion paper. I have no doubt that the views of the meeting will be carefully assimilated and incorporated as is felt appropriate in the subsequent consultation paper.

It is clear that the consultation paper will be the vital document. The consultation is anticipated to be launched in May (after the local election purdah) with a three-month response period. This is the time when everybody must involve themselves in this process. Vital though the advisory group is, it can only be a small group of (hopefully) representative individuals.

It is the consultation which will enable everybody with interest in these proposals to have their voice heard. And there will be many voices, as the latest taxi statistics released by the Department of Transport in December show (see: www.dft.gov.uk/statistics/releases/taxi-and-private-hire-vehicle-statistics-2011). As of 31 March 2011 there were 233,100 licensed hackney carriages and private hire vehicles in England and Wales (78,000 hackney carriages and 155,100 private hire vehicles), driven by 299,200 licensed drivers and (in the case of private hire vehicles) controlled by 16,700 licensed operators.

Clearly, there will be a significant response simply from the trade. And when you factor in everybody else with an interest - licensing officers, all other local government personnel (officers and members) customers, suppliers and so forth - this has the potential to be a huge consultation exercise with an enormous number of responses.

CRB checks

Readers will be aware of the confusion surrounding Criminal Records Bureau (CRB) checks for hackney carriage and private hire drivers since the introduction of the Safeguarding Vulnerable Groups Act 2006, compounded by the view taken by the CRB itself over the last year.

Most local authorities and trade associations wanted enhanced checks to continue and there has been considerable pressure applied to the Government, not least by the Institute itself. This has resulted in an approval in principle to allow both enhanced CRB checks and checks as to whether an applicant is barred from working with children or vulnerable adults for all hackney carriage and private hire drivers. Although this was announced on 18 January 2012, there is no indication as to when the law will be altered to enable such checks to be undertaken lawfully. It is to be hoped that the CRB will recognise the importance of this and allow local authorities to apply for (and be given the results of) enhanced checks but this remains to be seen. At the time of writing no information was available from the CRB on this point.

Out-of-district hackney carriages

The saga relating to the use of out-of-district Hackney carriages for pre-booked work continues to rumble on. The latest instalment is a magistrates' court decision from *Newcastle upon Tyne, Blue Line Taxis (Newcastle) Ltd v Newcastle City Council*, which was handed down by District Judge Stephen Earl on 10 January 2012. I must emphasise that I have not succumbed to the fashion of taking a magistrates' court decision as anything other than an interesting indication of one courts' view of one set of facts on one particular day, but with that caveat it is a useful indication of the outcome of this particular case and the decision is also expected to be challenged to the High Court.

Blue Line Taxis (Newcastle) Ltd ("Blue Line") applied for and was granted an operator's licence by Newcastle City Council, subject to a condition requiring it to have a unique telephone number for its Newcastle operation (being long-established private hire operators in North Tyneside, an adjoining borough) and a second condition prohibiting it from using any hackney carriages for pre-booked work which were not licensed by Newcastle City Council.

These conditions were ignored, and Newcastle City Council revoked the operator's licence. This was appealed to the magistrates' court on the grounds that the conditions were being complied with were *ultra vires* the powers to impose such conditions or were a restraint of trade.

Although Blue Line had set up an independent telephone number, it accepted that it was not advertised and was not used, all telephone calls being answered on the existing North Tyneside number which by means of technology could be answered in either the North Tyneside office or the Newcastle office. Its assertion that it had complied with a condition by having the telephone number, and that the condition did not require Blue Line to use it, did not find favour with the district judge, and this part of the appeal was dismissed.

However, the second element of the appeal was upheld. The condition prohibiting the use of hackney carriages for pre-booked work licensed by an authority other than Newcastle City Council was held to be "taking [the local authority's] powers of regulation too far". The district judge went on to say that such a condition "whilst perhaps laudable intent, is not a power that [the local authority] have to use to regulate licensed private hire operators".

This decision was based upon consideration of not only *R (app Newcastle City Council) v Berwick-upon-Tweed Borough Council* (Unreported, 5 November 2008) Admin Ct, *Stockton on Tees Borough Council v Fidler* (Unreported, 8 October 2010) Admin Ct and *Stockton-on-Tees Borough Council v Latif* [2009] All ER (D) 156 (Feb) but also two Scottish cases: *Rossi v Edinburgh Corporation 1904 HL* and *Stewart v Perth & Kinross Council [2004] UK HL 16*. The Scottish cases both concerned the question of restraint of trade and it is interesting to note that this argument clearly had a significant impact upon the district judge.

It remains to be seen where this question of the use of out-of-district hackney carriages for pre-booked work ends. If the Law Commission does propose to retain the two-tier licensing regime of hackney carriages and private hire vehicles, it will be interesting to see if it also retains the inherent right for a hackney carriage to be used for pre-booked work anywhere.

It may appear a truism, but in this case it is actually right to say that in relation to all three of the matters considered in this article, only time will tell!

James Button
Principal, James Button & Co.

Using liquid petroleum gas at outdoor events

Liquid petroleum gas installations can very quickly become an explosive fire hazard unless they are maintained correctly. **Julia Sawyer** looks at the official guidelines governing the safe storage and the safe use of gas at external events

With the growing consumer desire for organic local produce, for multi-cultural culinary tastes and for hot food on the go, external caterers have continued to thrive and expand their activities to many different sectors and from one stand serving coffee to commuters to extensive catering provision in large-scale external entertainment events.

As new ideas and areas are trialed for entertainment, safety solutions are constantly evolving to ensure public safety at our events. One specific area that needs careful consideration is where external caterers are using liquid petroleum gas (LPG), which is often the case where power facilities are limited.

There are many guidance documents on the storage of LPG, which are very helpful in highlighting the control measures that need to be considered. But there are some areas where the guidance is lacking specific detail, particularly on the use of LPG. This report sets out what guidance is available to help you make an informed judgment for a risk assessment on the use of liquid petroleum gas at an outdoor event.

What is LPG?

LPG (propane or butane) is a colourless liquid, which readily evaporates into a gas. It has no smell, although it will normally have a gas-smelling odour added to help detect leaks.

When mixed with air, the gas can burn or explode when it meets a source of ignition. It is heavier than air, so it tends to sink towards the ground. LPG can flow for long distances along the ground and can collect in drains, gullies and cellars.

LPG is supplied in pressurised cylinders to keep it liquefied. The cylinders are strong and not easily damaged, although the valve at the top can be vulnerable to impact. Leaks can occur from valves and pipe connections, most likely as a gas. Liquid LPG can cause cold burns to the skin.

Julia Sawyer

Guidance available

There are numerous guidance documents available on the safe storage of LPG cylinders. But there is very little information available on the specific use of LPG at outdoor events; for example, how many stands can there be in one area using LPG?; what would be the recommended amount of gas permitted to be used on a stand at any one time?; and is cooking with LPG permitted under motorways or railway lines?

The following Acts, Regulations and Codes of Practice form the legislation governing the use of LPG:

- Health and Safety at Work Act 1974
- Regulatory Reform (Fire Safety) Order 2005
- Dangerous Substances and Explosive Atmospheres Regulations 2002
- The Use of LPG in Mobile Catering Vehicles and Similar Commercial Vehicles (2000) Code of Practice 24 part 3
- The Use of LPG for Catering and Outdoor Functions (1999) Code of Practice 24 Part 4

The guidance documents available for the use of LPG:

- Cylinder Cage – instructions for use by Calor Gas
- Guidelines for the Safe Use of LPG in Mobile Catering Installations and Vehicles by Calor Gas

- Chartered Institute of Environmental Health National Guidance for Outdoor and Mobile Catering by the CIEH
- Gas Safety in Catering and Hospitality by the Health and Safety Executive
- Safe Use of LPG-Fired Stage Flame Effects by the Health and Safety Executive
- Small-Scale Use of LPG in Cylinders by the Health and Safety Executive

Can LPG be used under a railway line?

There are no hard and fast rules on whether LPG can be used in an area below a railway line. The main professional bodies one normally consults for such advice (the London Fire Brigade, the Institute of Safety and Health, the Health and Safety Executive, the Chartered Institute of Environmental Health, the Office of Rail Regulation, the Safety Advisory Group Entertainment and Network Rail) all state that it is down to the site-specific risk assessment and any lease term agreements.

Although it seems common sense not to place a catering unit using LPG under a railway bridge, there is no relevant legal document or approved guidance/advisory document, which states that "you must not use LPG cylinders positioned directly below a railway line".

When considering the risk of a fire using LPG in a catering unit below a railway line, if all relevant control measures are being followed and are specific to the site, then the risk of a fire should be low. However, the financial implications should there be a fire involving LPG would be very significant. A representative of Network Rail gave an approximate cost of a railway line being closed at £50,000 for every 30 minutes it is closed.

It's clear that this is a very grey area! Nor does the draft revised Event Safety Guide (Purple Guide) document give any specific detail on this matter. The financial consequences, should there be a fire under a railway line involving LPG, should always be a major consideration in the risk assessment.

Documentation

As with any event, be it licensed or not, you would expect the following documentation to be in place for a caterer using LPG for cooking food:

- Risk assessment
- Fire risk assessment
- The correct licences, such as a Premises Licence, or a Temporary Event Notice
- Planning permission possibly, or temporary structure consent
- Portable appliance testing certificate
- Gas safety certificate
- Food hygiene certificates
- Public/employers' liability insurance
- Temperature records
- Registration with Local Authority
- Fire Extinguisher maintenance certificate

Policy

As an event organiser, it is always good practice to have a written policy on how you expect traders to use gas on the stands, in addition to the risk assessment for the event. It should be specific to the area and facilities available. Some suggested wording for the policy could be along these lines, so that it is clear to the trader what they can and can't do:

Any traders using LPG must have their equipment covered by a current Gas Safety Register test. They must also have a suitable size fire extinguisher on their stall, such as a 6 litre foam extinguisher, which has been tested within the last year. It is also good practice to have a fire blanket.

The amount of gas being used on one stand must not exceed 76kg. It should be noted that not every stand will be permitted to use gas on it; consideration will be given to the proximity of other gas users. Plans will be agreed by the Event Organiser prior to the event on the overall quantity and positioning permitted on site. Therefore it is important that you notify the Event Organiser if you wish to use gas on your stand. You will not be permitted to use gas if it has not been agreed prior to the event.

No stands using gas cylinders or naked flame should be positioned under a motorway, railway bridge or other vulnerable area.

All LPG gas cylinders must be removed from the trading area and not be left onsite overnight during the event. Spare gas cylinders must not be stored in the trading area. A cage is available for spares to be stored in. All gas cylinders stored in the cages must be labelled with the trader's name. All gas cylinders must be removed from site at the end of the final day of the event.

No smoking is permitted within the stand and refuse is collected on a regular basis.

Many of the control measures detailed in this report are not set in statute or specifically detailed in guidance but may be part of an event organiser's policy. This will show that good practices with regard to the use of LPG at an event are being followed.

The following are some examples of good practice:

- Using crimped fittings on the gas hose rather than the screw–type fixings that can be adjusted at any time.
- The provision of a gas safe certificate which is not older than 6 months, owing to the fact that the appliances are moved about so often and possibly in muddy conditions.
- Gas cylinders are not to be changed when the event is open to members of the public.
- Gas hoses should be kept clean so that it is easy to see if there are any tears or nicks in the hosepipe.

Summary

There is lots of guidance available to help you ensure you have the correct control measures in place on the storage of LPG but only limited guidance on the specific use of LPG at an outdoor event in a temporary structure. It is down to the event organiser's risk assessment as to what the policy is with regard to the use of LPG at an event.

To protect public safety, it needs to be ensured that the event organiser's risk assessment gives enough detail on the control measures that are expected when using LPG to prevent a fire and an explosion and that these are strictly adhered to and monitored during the event. It is not acceptable to have a "general" risk assessment when LPG is being used.

Julia Sawyer
Director, JSL Consultancy

Article

The Metal Theft (Prevention) Bill: copper-bottomed regulation or lead ballon?

Scrap metal theft is a growing problem which is costing the country up to £60 million a year and is in many cases threatening lives. Government is acting to clamp down on scrap metal dealers with a new Bill which is currently proceeding through the House of Commons. **Aidan Briggs** of Ely Place Chambers assesses the existing scheme, the difficulties it faces, and whether the Bill in its current form is the right tool for the job

Scrap metal theft is making headlines on an almost daily basis. Thefts ranging from works of civic art to railway track and power cables have finally brought into the spotlight a problem which rural communities, in particular, have been complaining about for years.

In the 12 months to July 2011 there were 7,000 recorded metal thefts, resulting in four fatalities and at least 31 injuries. Estimates of the cost to the public purse range wildly between hundreds of thousands to £60 million. This is hardly surprising with copper prices now at £4,800 per tonne and lead prices over £1,000 per tonne

Governments in the 1960s, and now today, have turned to licensing as the answer. Just as authorities combat drunken behaviour by regulating the sale of alcohol, the government is looking to scrap metal dealers to weld shut the market for stolen metal.

The existing statutory scheme: The Scrap Metal Dealers Act 1964

This rather rusty market is what the Metal Theft (Prevention) Bill is intended to galvanise.

The existing scheme is found in the Scrap Metal Dealers Act 1964, which has four key parts: registration, record-keeping, offences and inspection.

Under the 1964 Act a "scrap metal dealer" is someone who buys and sells scrap metal – an intermediary rather than an end user. It does not cover businesses which acquire scrap metal solely as materials for the manufacture of other articles, nor does it cover those who produce scrap metal as a by-product of manufacture.

The definition of "scrap metal" – what might seem a fairly self-explanatory term – runs to over 200 words. The term "metal" covers eight elements (aluminium, copper, iron, lead, magnesium, nickel, tin and zinc) and five alloys (brass, bronze, gunmetal, steel and white metal) – but alloys are excluded if they contain more than 2% gold, silver, platinum, iridium, osmium, palladium, rhodium and ruthenium. The term "scrap metal" currently includes "any old metal" and also broken, worn out, defaced or partly-manufactured articles, but only tooltips or dies made of hard metal or metallic carbides.

Every scrap metal dealer must be registered with the local authority in which his premises (or, if he has none, his residence) is located. The local authority must maintain its register, including every dealer's full name, address, premises and mode of business. Dealers must re-register every three years. Any dealer failing to keep his registration up to date is liable upon conviction to a level 3 fine (£1,000), but a dealer who ceases trading and fails to alert the local authority is only liable to a level 1 fine (£200).

For day-to-day trading, every scrap metal dealer must keep a book of all scrap metal received and despatched. For every transaction he must record the description, weight and value of the metal and the full name, address and vehicle registration of the seller. Books must be kept for two years after the last entry is made and failure to keep books properly incurs a £1,000 fine on conviction. Any person convicted of giving a false name or address when selling scrap metal to a dealer is liable upon conviction to a fine of up to £200.

There is also a rudimentary inspection regime. Police constables are empowered by the 1964 Act to enter and inspect any registered premises and require production of any books and metals on the site. A local authority officer may "at any reasonable time" enter any premises he reasonably believes to be an unregistered scrap metal store, but he may not force entry without a warrant. Failure to permit inspection in accordance with the act incurs a £200 fine.

Problems with the existing scheme

The statutory scheme is not without its problems; at times, parts of it are quite baffling. It is an offence punishable by a £200 fine to purchase scrap metal from a person "apparently under the age of sixteen" (it is a defence to show the seller was in fact 16 or over). There is an entirely

separate record-keeping scheme for "itinerant collectors" – those who collect scrap metal from house to house – but local authorities may impose an alternative scheme by order.

Most defective of all are the powers of enforcement: there is no provision for licenses to be rescinded or persons to be banned from carrying on scrap metal trade. Even a person convicted of carrying on unregistered business, failing to keep proper records or any other dishonest offence may only be directed by the court to operate limited hours (8am to 6pm) and to keep all scrap metal received for at least 72 hours before processing. That is the maximum regulatory penalty which the 1964 Act permits. There is no "fit and proper person" requirement for those wishing to be registered as scrap metal dealers. In an industry worth over £5 billion per annum, the fines in respect of failures to comply with the regulatory regime are small change.

As an example, if an unregistered scrap metal dealer makes a purchase for which he makes no records whatsoever, fails to check the identity of the seller and then refuses inspection of the premises to an officer, his maximum liability if convicted is £2,200; hardly a deterrent where dealers can process several hundred tonnes of metal in a day.

Perhaps this is why conviction rates under the 1964 Act are low. For the 7,000 recorded metal thefts in the run-up to July 2011 (a fair proportion of which, one assumes, must have involved a scrap metal dealer at some stage), there were eighteen convictions under the 1964 Act in 2010[1]. That is an improvement on 2009, which saw only five.

Cash transactions

The issue that has magnetised both police chiefs and legislators is the level of scrap metal transactions conducted in cash. Assuming false personal details are given, a cash payment renders the seller un-traceable for practical purposes. In his speech to Parliament in support of the Bill, Graham Jones MP claimed that an estimated £1bn of cash payments were made each year for scrap metal – 20% of the entire market. Outlawing cash transactions, it is argued, would enable authorities to trace money paid for stolen goods back to the thieves themselves.

This is opposed by the industry, which argues that the rule will only drive customers away from the legitimate sector towards unregistered dealers with a resulting loss to the taxpayer and a boon to illegal traders.

There is a case for arguing that registered sites are not the problem and so licensing will simply not assist. It is estimated that there are some 800 unregistered scrap metal dealerships in the UK, handling some 15,000 tonnes of stolen metal each year. These of course operate entirely outside of the existing scheme (and the Environmental Permitting scheme, with associated pollution risks).

Indeed, statistics from the British Metal Recycling Association, which claims to represent 95% of the legitimate scrap metal trade in the UK, indicate that around half of all scrap metal thefts are from registered scrap metal dealers themselves. These thefts are naturally less high-profile than, say, works of civic art in Dulwich, but they do demonstrate that the legitimate industry has an interest in seeing proper enforcement of the law.

Efforts to improve regulation

If that is the case, the industry has done little to demonstrate its commitment to self-reform. The BMRA does have a Code of Conduct, which runs to a tinny 109 words. It commits its members to "maintain the highest standards of commercial conduct and business ethics" and to "co-operate with local authorities, regulators and other public servants" and other such platitudes. There is nothing which goes far beyond scrap metal dealers' ordinary statutory obligations.

The Association of Chief Police Officers has gone slightly further. In October 2010 it produced a voluntary Code of Practice in conjunction with the BMRA. The code sets out four requirements for scrap metal dealers:

1. The introduction of digital recorded CCTV systems at the entrances and/or weighbridges of recycling centres, with footage retained for 28 days;
2. Cash should not be paid to persons unknown to the recycling centre or where identification cannot be produced;
3. The maintenance of accurate records required by the Scrap Metal Dealers Act 1964;
4. Suspicious persons to be reported to the local police force for the area concerned.

On any analysis, the code is hardly far-reaching. Item three is already required by law and items one and four are little more than good security sense. Its main contribution is the "No ID: No Cash" rule, designed to cut out the traceability problem. But "identification" under the code need not be photographic; it may be as little as a utility bill. Once a person has produced satisfactory identification on one occasion they need not be challenged again – they are considered "known to the centre".

This has also been applied in a pilot scheme in the Forest of Dean, but again with some difficulties. Proponents of that scheme said distrust between scrap metal dealers was a hindrance to implementing a comprehensive scheme; any iron-clad solution, it would seem, must be on a national level.

The Metal Theft (Prevention) Bill

On 15 November 2011 Graham Jones MP presented a Private Members' Bill to the House of Commons under the ten-minute rule. In that speech he outlined a five-part change to the law, essentially establishing a licensing scheme for scrap metal dealers and outlawing cash transactions for scrap.

The five key changes which Mr Jones announced in his speech were:

1. A licensing scheme for scrap metal dealers;
2. The ability for magistrates' courts to enter restrictions on scrap metal licenses;
3. Outlawing all cash transactions for scrap metal;
4. Increased search powers for scrap metal licensing officers and police; and

1 Hansard: HC Deb, 24 November 2011, c580W

5. Making the proceeds of stolen scrap metal subject to the Proceeds of Crime Act (POCA).

The Bill received its second reading in the House on 20 January 2011 and the published draft was released on 17 January 2011. It effects changes primarily by amending the 1964 Act rather than repealing it wholesale.

The key changes are as follows:

Registration scheme

Scrap metal dealers may be required to provide proof of identity and address when applying for registration, and to pay a registration fee. Before registering any new scrap metal dealer, the local authority must inform the relevant police authority. A dealer may not be registered without a hearing if any of the following apply:

(i) the applicant has been convicted of any offence under the 1964 Act;
(ii) the applicant's licence is currently subject to conditions;
(iii) a chief officer of any relevant police authority is of the opinion that the applicant is not a fit and proper person to be registered.

Convictions under (i) above are not necessarily fatal to a scrap metal dealer's career; if a disqualification order has been considered but not made, or if they have been spent in the normal way, this will not preclude a license being granted.

If any of the above criteria apply, the matter must be decided at the magistrates' court, with an appeal to the Crown Court if necessary. The court may make registration subject to conditions (still to be specified). There is the option for further guidance and regulations by the Secretary of State as to procedure. Registration will now expire after twelve months rather than three years.

Closure orders

Magistrates' courts are empowered by the new s6A to make or extend closure orders prohibiting scrap metal to be received, processed or removed without the specific authority of a police constable. An inspector (or above) may apply for the order without notice on one of the following grounds:

(1) He reasonably believes that:
   a. the trader is encouraging, supporting or facilitating the trade in stolen metal whether knowingly or not; and
   b. in his view such closure is necessary for:
      i. the prevention of theft or handling of stolen goods; or
      ii. for the further investigation of those offences.
(2) He reasonably believes that the scrap metal dealer who is registered against that store is failing to comply with any condition of his license;
(3) The place is being used as an unregistered scrap metal store.

Orders under (1) or (2) above may only be for 48 hours pending a return hearing. Orders under (3) may be indefinite. The penalty for trading in breach of a closure order is a level 5 fine.

Penalties

Penalties under the Bill will be dramatically increased. The penalty for unregistered dealing has risen to a fine of up to £20,000 and/or six months' imprisonment. Failure to keep registry entries up to date incurs a level 5 fine. In addition, the sentencing court may impose conditions upon registration or order that a person be disqualified for up to ten years and all scrap metal at his premises (however many he may have) be confiscated. Provision for committal under s 70 of POCA is also expressly made.

Once a person has been disqualified under the new s 4, it shall be an offence punishable by a level 5 fine for any other person to engage him at a scrap metal store and an offence for the convict to apply for any such post. In both cases there is a defence of genuine and reasonable ignorance (in the first case) of the conviction or (in the second case) that the work applied for would involve working with scrap metal.

The offence of dealing with persons "apparently under sixteen" is altered to those "apparently under eighteen", with the fine increased to a level 3 fine. The fine for failing to produce books upon inspection has also been increased to level 3 as has the penalty for obstructing inspection. The new offence of assaulting an officer in the course of inspecting scrap metal premises incurs a fine of up to £20,000.

There is provision for any "director, manager, secretary or other similar officer" to be personally liable for offences committed by a company. Partners in a partnership receive similar treatment.

The Bill also creates the new offence of "Scrap Metal Theft". (In fact, the new s 5(3) comes rather out of nowhere – it was not foreshadowed in the speech promoting the Bill.) It makes the theft of scrap metal a specific offence, punishable upon indictment by an unlimited fine or five years' imprisonment, or both. In considering sentence, the court "may take into account any injury, damage or loss caused by the theft of the scrap metal including, but not limited to, death, personal injury, property damage and economic loss."

Inspection

Provision is made for the appointment of at least one local authority inspector per local authority area, with a remit to carry out two periodic inspections per annum – the funding to this is to be found from local authorities' existing budgets, as there is no provision in the Bill for fine revenue to be returned to local authority revenue.

The right of constables to inspect is extended beyond registered scrapyards to any place which they may reasonably believe is so occupied.

Cash transactions

The proposed new s 1A of the Bill will make it an offence punishable by a level 5 fine to make payment in cash for any part of a "scrap metal transaction" – the phrase is not defined. The Bill also leaves open the potential for legislating what identification must be sought from sellers to verify

their identity. This is to be done by statutory instrument, but the requirements foreshadowed by the Bill include requiring dealers not only to verify the identification of the seller but also the provenance of the metal itself.

Record keeping

The definition of "scrap metal" is expanded to include "any other metal which has been or is being stored as scrap metal at a scrap metal store".

Scrap metal dealers are required by the new s 1A to keep records of all non-cash transactions for four years (curiously, under the new s 2(5) scrap metal dealers are required within 14 days of completion to surrender their books to their local authority, which is required to keep them for four years as well. It would seem then that every scrap metal dealer must make two records of every transaction.) Those book entries must also include the method of payment in every case.

Comment and criticism

The drafting of the Bill still has some oddities to be ironed out, which will hopefully take place at the committee stage, if not in the House of Lords. Certain provisions are duplicated and some references have gone astray, but the Bill has all the nuts and bolts of a wholesale change to the rather rusty existing scheme. Two criticisms which might be made are first, the additional burden on legitimate scrap metal dealers and second, the potential for disproportionality. Hopefully each of these can be polished up in due course.

Additional burdens

Scrap metal dealers must steel themselves for change. The application process is more regular, more expensive and more bureaucratic. The "fit and proper person" test imposes an additional level of uncertainty for those whose reputations are less than stainless. A scrap metal dealer is liable to a closure order – entirely suspending his business – if he is "encouraging, supporting or facilitating" the trade in stolen metal and it is no defence that he is entirely unaware (and indeed turns out to be innocent) of doing so.

Perhaps the most provocative provision in the Bill is the potential requirement (statutory instrument would be required, subject to the negative resolution procedure) for scrap metal dealers to verify the provenance of all metal brought into their stores. Although noble in its intent, the practicalities are far harder to visualise. How does one prove where a piece of scrap metal has come from? Will a receipt from the previous owner suffice? Must the metal be marked to make it traceable?

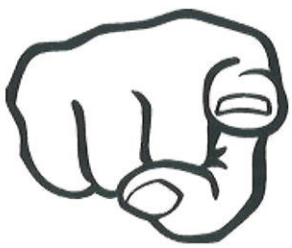
The "no cash" rule has been adopted wholesale, rather than the tempered version adopted by ACPO and the Forest of Dean. Potentially damaging for the trust between legitimate seller and dealer, it remains subject to the criticism that more sellers will be driven away to the black market. It does, nevertheless, add a layer of traceability to the £1bn of cash transactions. Considering the fierce penalty (up to £5,000), it is surprising that "scrap metal transaction" is not defined in the Bill. It remains to be seen whether the nuances of the scrap metal trade can be satisfactorily covered by such a broad term.

Potential for disproportionality

Several fairly minor clerical errors – such as failing to inform a local authority of a change of residential address – are now punishable by a level 5 (£5,000) fine. When a dealer has fallen foul of the law once, any future application for registration must go through the Court, with added expense and delay, and if he breaches a condition of his license he is liable to a closure order. All this means the legitimate route for scrap metal trading becomes less and less appealing. That will only be satisfactorily counterbalanced when the illegal trade in scrap metal has been largely stamped out. At present many dealers feel they are a soft target for overregulation when illegal traders go unpunished.

*This article follows an excellent presentation at this year's Institute of Licensing NTE in Birmingham by Matthew Kirby of the Forest of Dean Council and Inspector Richard Boyles, Forest of Dean Police.

Aidan Briggs
Ely Place Chambers



We Need YOU!

If you would like to submit an article to be considered for inclusion in a future issue of the Journal or would like to discuss an article you would like to write, please contact us at journal@instituteoflicensing.org

Licensing: the local government context

We're on a road to Nowhere

The Coalition's tampering with the Licensing Act 2003 is a confused response to the Big Society issue of empowering local people, say **Andrew Eaton** and **Alan Tolley**. Far better, they write, to have persisted with a system that was not perfect but which all parties involved with were learning to make better

Those of us old enough to remember the 80s, and the musical extravaganza that was so memorable with all the big hair and makeup, may recall a radical band called Talking Heads and their hit single We're on a Road to Nowhere.

It was a song about not knowing where you're going, or where you've been, but going along for the ride anyway! And recently, I've been thinking the band must have known something about the future world of licensing, which we didn't see coming. I say this because of the recent changes in legislation, and the start of the new "Big Society", which seems to me to be moving away from the very thing it set out to achieve. Let me try to explain.

Andrew Eaton

Alan Tolley

The Licensing Act 2003

In 2003 when we read the new Licensing Act, most of us thought this was a radical new approach to empowering local people to have their say about their local shop or pub getting a licence. Without wishing to sound like my Dad, in the good old days of licensing under the 1964 Act, if Mrs Blogs, who lived next door to the Dog & Duck, wanted to have any input into the process of granting an alcohol licence or even maybe the public entertainment licence, she had to pop along firstly to see the magistrates. There, she probably wouldn't be allowed to speak about the application, and when she asked if anything was to be done about all the noise from the music, she would be told to go and see the council. She would then trip off to see the council, only to be told they could stop the music, but they couldn't stop the drunks vomiting in her garden, and she'd be told to see the police about that. In the midst of all this, Mrs Blogs would lose patience and decide she could nothing at all to stop the licence being granted.

But then along came the 2003 Act, and all of a sudden Mrs Blogs had a voice. The Government had given her the power to make representations, and to receive an invitation to speak directly to the councillors about her experiences, and they would listen to her and make a decision about how to help her. Radical stuff indeed. "Power to the People" as Wolfie Smith would say! The Council would balance her concerns against the ambitions of the pub, and it would try to find a solution that would allow the business to thrive, but at the same time protect the people who lived nearby from suffering any disturbances under the licensing objectives.

The Coalition rethinks licensing

And so it was for the next six years. Councils trained their members. Members got a feel for what was right and what was wrong. Members began to understand the process

and how to spot a real concern from a "worried about" concern. They learnt from the mistakes in "Thwaites"[1] and they became efficient and proficient about how to make their decisions, and all were living happily ever after. Until the Coalition arrived in May 2011. And then things got complicated.

Let's be fair, it wasn't just the Coalition which wanted to tinker about with the 2003 Act in those first six years. We also had the controversy about girls dancing around poles! I have to admit, despite the protests from the lobbyists, who certainly had a right to raise the issue with the politicians, I personally had never seen a girl dancing around a pole while I was drinking my Cappuccino at Costa, despite the activists claiming I needed protecting from such a potential problem. The licensing of lap dancing clubs had to be different from licensing Cappuccinos they told us. Indeed, some of my brighter members pointed out we don't licence Cappuccino bars, and they were right.

However, behind this lay the issue of the dark world of sexual encounter venues and swingers nude discos. And when someone mentioned that at this year's Institute of Licensing event in Birmingham, it raised a few eyebrows. The move towards the new regime at least allowed members to see the logic of moving one aspect of the sex licensing world into bed, as it were, with the other under the 1982 Act! It did, however, take us back to the pre-2003 vision of local people having a say about local issues, to the complicated world of people writing irrelevant letters in green crayon about the evils of sex shops, and seemingly now, swingers dancing around and providing displays of live nudity!

So, straight away the Coalition set about making changes to the 2003 Act. It asked us what we wanted, and then it gave us what we didn't ask for. It based its manifesto for change on a broad statement that talked of "town centres becoming blighted by crime and disorder driven by irresponsible drinking".

This statement flew in the face of the statistics available for alcohol associated crime, in and out of pubs, and also contradicted the statements of youths about underage alcohol consumption.

Notwithstanding the relative success of the licensing process itself, as opposed to the press stories of alcohol-fuelled behaviour, the Coalition announced that it wanted local people to have more of a say in local issues, despite that power having already been in place since November 2005.

The Coalition's new Act in 2011 provided for full cost-recovery fees, but the politicians don't seem quite sure when or how they're going to do it. They promised people power, and then they changed the meaning of "vicinity" to allow non-local people to have their say in local issues. They told us councils would have greater control of their areas by making us a Responsible Authority, which for most of us, let's be honest, means very little.

They moved onward and upwards towards their brave new Big Society and promised a new way of thinking in the Localism Act 2011, with community empowerment at the heart of the 2011 Act, but then didn't include licensing in the Act. Instead they concentrated on allowing local people to run public services, and mentioned winter gritting contracts as an example of local people replacing services which the council currently perform! I only hope our future road safety in winter works out better than the private delivery contractor who currently has my new laptop in a van somewhere between Rotherham and Bexhill, but is not quite sure where or when it will arrive.

Not perfect but working

And then just when we thought it couldn't get any worse, they ask us all whether we agree to deregulating virtually all of our licensing powers for premises providing entertainment for fewer than 5,000 people. In my council, that's every single premise and several vacant fields all waiting for the opportunity to have a pop festival. And I suspect the local people will not exactly be thrilled at the local pop festival event in their village over the next bank holiday.

How far we have travelled in that short space of time. From full community engagement with the licensing process for all premises, to a situation now where potentially all noise complaints about former regulated entertainment will have to be reactive. So when Mrs Blogs is now awoken at 3am when the local festival starts "having it large", she can be reassured that council staff will be busy looking into who ruined her weekend's sleep. And when they find out who organised it, well gosh...they will be asked not to do it again!

Joking aside, how have we got to this situation? We had a system that was not perfect, but we were making it work. It certainly needed to be looked at from a cost point of view, but at least we knew where we were going. For those who were affected locally, we could resolve the problem to ensure local people were not harmed by the commercial ambitions of the sellers. They, in turn, knew what they were dealing with and how to resolve local problems. Now they face having to resolve problems for people who live on the other side of the country, who have never been in the Dog & Duck, but who empathise with those who apparently do.

So maybe David Byrne and his fellow Talking Heads had it all worked out when he sang:

Well we know where we're goin
But we don't know where we've been
And we know what we're knowin
But we can't say what we've seen
And we're not little children
And we know what we want
And the future is certain
Give us time to work it out

Andrew Eaton
Litigation & Licensing Lawyer, Rother District Council

Alan Tolley
Senior Licensing Officer, Sandwell MBC

1 *Daniel Thwaites plc v Wirrall Borough Magistrates' Court* [2008] EWHC 838 (Admin).

Article

How many is an audience in regulated entertainment?

The definition of the word "audience" in relation to regulated entertainment under the Licensing Act 2003 is not as clear cut as the legislators may have intended. For example, how many people constitute an audience? Can it be just one person? Deciding the correct definition is particularly to the fore in the licensing of lap dancing and busking. **Professor Colin Manchester** analyses the case law

Provision of regulated entertainment under Schedule 1 to the Licensing Act 2003 (hereafter "2003 Act") can take one of two forms: the provision of various types of entertainment, such as the playing of music, a performance of dance and a film exhibition; and secondly, the provision of entertainment facilities, where facilities are provided to enable various activities such as making music or dancing to take place.

Gardner v Morris

In the case of the former, but not the latter, it is necessary under para 2(1), for the activity to be licensable, that the entertainment "takes place in the presence of an audience and is provided for the purpose, or for purposes which include the purpose, of entertaining that audience". With some types of entertainment – for example, indoor sporting events and boxing and wrestling - it might be more customary to use the term "spectators", rather than "audience", for those attending to watch the events and para 2(2) provides: "Any reference in sub-paragraph (1) to an audience includes a reference to spectators".

Indoor sporting events

The requirement for presence of an audience or spectators is common to all of the types of entertainment specified in para 2(1), unlike under the previous law where the focus was on the public nature of the activity, for example, public dancing or music or any other public entertainment of a like kind under para 1 of Schedule 1 to the Local Government (Miscellaneous Provisions) Act 1982, and any indoor sporting event to which the public were invited as spectators under para 2 of the same schedule. It was the activities being open to the public, rather than whether the public were present as an audience or as spectators, that determined whether the activities were licensable. Thus in *Gardner v Morris* (1961) 59 LGR 187 the Divisional Court held that entertainment could be public even if no persons were present, Lord Parker CJ stating (at 189):

"The test ... is not whether one, two, or three or any particular number of members of the public were present, but whether, on the evidence, the proper inference is that the entertainment was open to the public in the sense that any reputable member of the public on paying the necessary admission fee could come into and take part in the entertainment.

"Similarly, for an indoor sporting event, the activity was licensable if the event was one "to which the public were invited as spectators" (emphasis supplied), so it was whether the public were invited that mattered rather than whether spectators were present at the activity."

Under the 2003 Act, provision of entertainment and entertainment facilities are licensable not only where provision is for the public or a section of it but also where there is provision exclusively for members and guests of a qualifying club and, in other cases, where there is provision for consideration and with a view to profit (Schedule 1, para 1(2)). In all instances, however, except in the case of provision of entertainment facilities, the entertainment is licensable only in it takes place in the presence of an audience or spectators. In addition, the premises on which the entertainment or entertainment facilities are provided have to be made available for the purpose, or for purposes which include the purpose, of enabling the entertainment to take place (Schedule 1, para 1(3)). In the case of making premises available for entertainment, an audience will

need to be present if the activity is to be licensable, so it would seem that at least one of the purposes would have to be entertaining the audience.

It can be seen, therefore, that there are three elements in respect of the "audience" requirement. First, that there is an audience; secondly, that the entertainment takes place in the presence of the audience; and thirdly, that one of the purposes is to entertain the audience. Each of these elements is considered below.

The audience

The expression "audience" is not defined in the 2003 Act, except to the extent that para 2(2) of Schedule 1 provides that any reference in para 2(1) to an audience includes a reference to spectators (see above). In accordance with the normal principles of statutory interpretation, the term should therefore be given its ordinary and natural meaning. *The Concise Oxford Dictionary* defines the term as a "whole group of listeners or spectators" and use of the plural here suggests the need for the presence of more than one person. This would also accord with the reference in para 2(2) to an "audience" including "a reference to spectators" (emphasis supplied), which again is expressed in the plural.

Dictionary meaning of 'audience'

Obviously, in most cases any audience present is likely to include more than one person but for certain types of entertainment such as lap dancing, the entertainment could just as easily be for a single individual as for a group of persons. It may be important, therefore, to ascertain whether entertainment "in the presence of an audience" will include an audience of one person. In accordance with what has been said above, this would not seem to be the case and this might be reinforced by the fact that, if "audience" was to include only one person, express provision to this effect could have been made in Schedule 1, as it has for the licensing of sexual entertainment venues. For sexual entertainment venues, para 2A(14) of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 (hereafter "the 1982 Act") provides that "'audience' includes an audience of one".

However, an alternative view might be that "audience" should be given a broader meaning to encompass cases where anyone, even a single individual, is present to watch or listen to the activity in question and to be entertained by it, although this would not sit easily with the dictionary meaning. While a dictionary meaning of "audience" can include the presence of a single person, as where a person has an "audience" with another person (for example, an audience with the Pope), this seems to be use of "audience" in a different context from "presence of an audience" in Schedule 1.

The alternative view might perhaps more easily be accommodated with para 2(2) and para 2A(14). The reference in the plural to "spectators" in para 2(2) might be taken to include the singular, since, under s6(c) of the Interpretation Act 1978, unless a contrary intention appears, "words in the singular include the plural and words in the plural include the singular". The plural reference to "spectators" might therefore be taken to include the singular reference to a "spectator". That no specific provision is made in Schedule 1 to the 2003 Act for an audience of one, as in the 1982 Act, need not be taken to indicate that "audience" in the 2003 Act cannot consist of a single individual. Inclusion of the specific provision in the 1982 Act may be regarded as having been for the avoidance of doubt and need not be taken to indicate that, where there is the absence of such a provision, as in the 2003 Act, there cannot be an audience of one.

The question of whether an audience of one will suffice has not yet arisen for judicial determination. If and when it does, it is submitted that a purposive approach should be taken to interpretation of "audience" in the 2003 Act and it should be given a broad meaning to include the presence of a single person. This will ensure consistency with the expression "audience" in the 1982 Act.

Since lap dancing can be licensed either as a sexual entertainment venue under the 1982 Act or as a form of regulated entertainment under the 2003 Act, it would be odd if the activity was licensable in the former instance if there was an audience of one but not in the latter instance. It is difficult to conceive that Parliament would have intended the position to be different in these instances.

Presence

The activity in question will need to take place in the "presence" of an audience and "presence" suggests that the audience will be at, or at least in the immediate vicinity of, the place where the entertainment is being provided. The presence of the audience will most obviously be for the duration of the entertainment, as where persons attend film shows, plays and so on, but presence might be only for a limited period of time and the composition of the audience might be a frequently changing one. This might occur, for instance, where busking takes place in the presence of passers-by. Passers-by could comprise an "audience", certainly in cases where they stop to watch, as the entertainment will then be taking place in their presence. Perhaps even if passers-by do no more than simply exercise rights of passage, it may be said that they are a "travelling" audience and the entertainment takes place in their "presence", albeit a momentary presence. The point is not free from doubt, although if the matter comes before the courts it may be that any question of whether busking is licensable as regulated entertainment is determined on other grounds. Under previous legislation, Schedule 12 to the London Government Act 1963, the Court of Appeal in *R v Bow Street Magistrates' Court, ex p McDonald* [1996] 15 LS Gaz R 30 held that a busker who habitually played his guitar at one spot in Leicester Square was not, under para 1(7) of the Schedule, providing music at a "place" and did not require a public entertainment licence. The court rejected a contention, based on the *Oxford Dictionary* meaning of "place", that it encompassed "any area which is capable of demarcation" and could therefore include any London street.

Control of premises

A similar purposive approach may be taken under the 2003 Act. Although not confined to premises to which the public is invited, as indicated above in the opening

section, Schedule 1 to the 2003 Act may nevertheless be regarded as concerned with the control of premises (which under Section 193 includes "any place") at which persons are present to be entertained. This may lead to busking not being viewed as a licensable activity taking place on "premises", without any determination of whether or not the music takes place in the presence of an audience.

For a purpose including entertaining the audience

Since, by para 1(3) of Schedule 1 to the 2003 Act, making premises available for entertainment has to be "for the purpose, or for purposes which include the purpose, of enabling the entertainment to take place", it seems to follow that, where the entertainment takes place in the presence of an audience, at least one of the purposes has to be the entertaining of the audience. It is clear from the wording used ("purposes which include") that this need not be the primary purpose, although if activities do not in any way involve entertaining an audience they will not be licensable under the 2003 Act. Paragraph 3.12 of the Guidance provides the following illustrations of activities not constituting regulated entertainment:

- Education – teaching students to perform music or to dance;
- Activities which involve participation as acts of worship in a religious context;
- The demonstration of a product – for example, a guitar – in a music shop; or
- The rehearsal of a play or rehearsal of a performance of music to which the public are not admitted.

In the first three examples, the purpose might be described respectively as instructional, spritual and demonstrational. In none of these instances is the purpose, or a purpose, to entertain those present.

Rehearsal not licensable

Provision of entertainment under para 1(2) of Schedule 1 extends beyond provision for the public (see opening remarks) and one of the purposes may be to entertain a privately invited audience that is present. If it is, the rehearsal of a play to which the public are not admitted may constitute regulated entertainment, contrary to what is said in para 3.12 of the Guidance. In the case of a rehearsal of a performance of (live) music, there is no equivalent provision to para 14(2) providing that "performance" includes a rehearsal. It would seem, therefore, that a live music concert rehearsal, to which an audience was invited, whether or not the audience comprised members of the public, would not constitute regulated entertainment.

In short, a rehearsal of a performance of music is not regulated entertainment, even if the public are admitted and even if one of the purposes is to entertain those admitted. This is unless the courts were to interpret "performance" to include a rehearsal but, given the express provision in para 14(2) for plays and the absence of any equivalent provision for music, this seems unlikely. The statement in para 3.12 of the Guidance, although not incorrect, is thus misleading in respect of reference to the public not being admitted, since this is irrelevant in the case of a rehearsal of a performance of music. The rehearsal itself, irrespective of any other circumstances, is not licensable.

If entertainment has to be for a purpose which includes entertaining the audience, this indicates a degree of deliberation on the part of the person providing the entertainment. The expression "purpose" suggests that an aim or objective of the person providing the entertainment is to entertain the audience and it may be, therefore, that an awareness that there might be an audience for the activity and that the audience might derive some entertainment from it will not suffice. This would be in keeping with para 3.15 of the Guidance.

Conclusion

The "audience" requirement under the 2003 Act is unlikely to give rise to difficulties in the vast majority of cases but, as seen in the examples of lap dancing and busking mentioned above, there may be difficult cases that arise. These have not yet exercised the attention of the courts but that is not to say that they may not do so in the future. If and when they do, there is unlikely to be any previous case law upon which to draw, not least since earlier legislative provisions, as indicated in the opening section, did not incorporate any requirement for presence of an audience. Courts, therefore, may well have to approach cases as ones of first impression on which there is no applicable precedent offering any guidance. Such situations do not arise very often but this may be one such instance.

Colin Manchester

Don't forget to renew your membership on 1 April this year. Unless you do so, you will not receive Issue 3 of the *Journal of Licensing*, which is due out in July.

Institute of Licensing News

Journal of Licensing

The Institute of Licensing was proud and delighted to announce the first edition of our professional journal for licensing. The Institute's *Journal of Licensing* was the result of many months of careful planning, unrivalled contributions from well-known and respected leaders in the field of licensing and the fruition of the Institute's goal to produce a professional reference journal.

Issue 1 of the Journal has been well received and thanks goes to all those who contributed and helped to put it together.

Following publication of the Journal, Institute Chairman, Jon Collins said: "This new Journal will allow local practitioners to make judgments in a more informed way. It also serves as evidence of the Institute's expertise as we engage with officials across Government. In so doing, we are better able to meet the first stated objective of the Institute as set out in our Memorandum and Articles of Association, namely: 'To advance the development, evaluation and recognition of professional skill, technical competency, ethical conduct and practical achievement in the field of licensing and regulatory activity; including their application in the public and private sectors and in the framing and enforcement of laws and regulations [relating to] licensing and regulatory objectives'."

The Institute will be conducting a survey regarding the Journal in the coming months and would appreciate any comments or feedback you may have. You can also submit comments and requests for extra copies of the Journal via the email address given below.

If you would like to submit an article for consideration to be included in a future issue of the Journal or would like to discuss an article you would like to submit, please contact us at journal@instituteoflicensing.org

Sue Nelson
Executive Officer, IoL

Jim Hunter
Training & Qualification Officer, IoL

Natasha Mounce
Co-ordinator, IoL

The IoL National Training Event - Birmingham 2011

The IoL's National Training Event (NTE) 2011, held in Birmingham from 16 – 18 November last year was a sell out with over 230 delegates attending over the three days. It was the biggest and best of our signature annual training events to date, write Sue Nelson, IoL, and Andrew Eaton, Litigation and Licensing Lawyer, Rother District Council.

The NTE was completely overhauled this year following feedback from Institute members against the background of a difficult financial climate. The result was a similar format but with an improved and extended programme, incorporating more choice for delegates at less cost. Key sessions were repeated within the event programme, which enabled delegates more opportunity to tailor the training to their individual preferences without having to miss other sessions.

As in past years, the NTE was a gathering of licensing minds that read like a Who's Who of licensing experts. We were treated to a gallop through the new Police Reform and Social Responsibility Act 2011 led by Philip Kolvin QC; a relatively serious wander into the complexities of maintaining properly accountable licence fees and the danger of challenges from the trade by IOL President Jim Button, who cautioned councils not to assume that legal challenges by industry (whether taxi, alcohol or other licensing areas) were beyond their financial means; and Jacqui Smith, former Home Secretary, shared a wealth of information with the delegates about how Parliament operates, and how best to engage MPs.

John Gaunt, Leo Charalambides, Gary Grant, Susanna Fitzgerald QC, Sarah Clover, Nick Arron, Professor Roy Light and Professor Colin Manchester all provided assessment of developing case law and practical experience of handling applications and appeals through a variety of detailed presentations and interactive workshops.

Andrew Eaton, Lawyer at Rother District Council said: "There is little doubt that as a licensing lawyer, this event is an absolute must for any licensing practitioner, whether licensing officers, Police, or lawyers. The sheer volume of shared, up-to- date material puts you right at the front of where the whole licensing field is moving, be that licensing of alcohol, taxis, gambling, or sex, and not forgetting the developing law through the Courts.

"From a professional point of view, you can achieve virtually all of your CPD requirements for the year in one event, and at the prices offered, it is extremely good value for money.

"The balanced views on offer throughout the Conference make this event truly unparalleled anywhere. The networking opportunity it offers, and the sharing of experiences, is simply not to be missed. Let's face it, where else would you get a chance to ask a selection of the country's top licensing lawyer's free questions!

"Times are difficult at the moment in local authorities, and indeed with the trade themselves, but this event really is a fantastic opportunity to get bang up to date on licensing law for not a lot of money. This year there were more delegates than ever, which is encouraging for the future years ahead."

The NTE carried 12 hours of CPD over the three days, accredited with the Solicitors Regulation Authority (Law Society) and the Bar Standards Board.

Following the event, delegates were asked to complete an online evaluation survey and the following quotes from three attendees have been drawn from the detailed responses received:

- The event was a perfect demonstration of what the Institute does best; bringing together all aspects of the licensing community to network and learn from first rate speakers so that the industry can move forward as one.
- In my 10 years as a solicitor and as a first-time attendee, the event, without a shadow of a doubt, is the best training course I have ever attended. I cannot fault any element of it.
- The quality of speakers and the venue made this the best licensing training event I have attended in my twenty years of involvement with licensing. Congratulations to all. See you next year!

Acknowledgements and thanks

The success of the NTE 2011 would not have been possible without the significant support from our sponsors, speakers and, of course, our delegates.

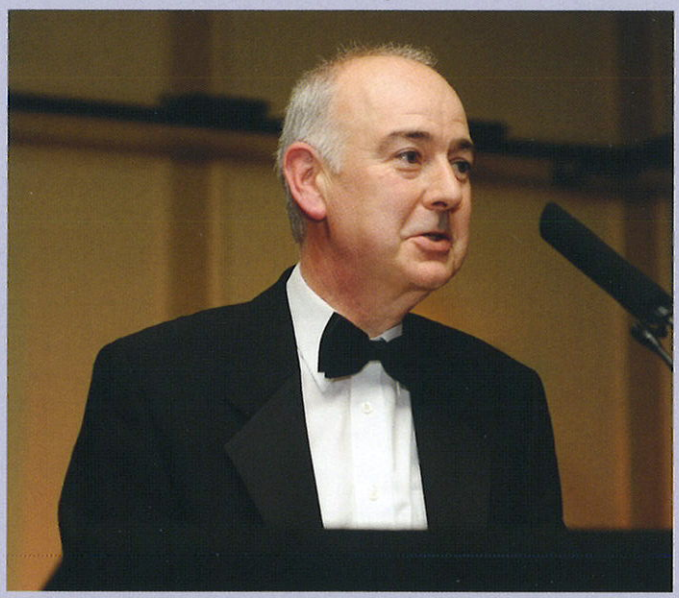
Special thanks must go to No. 5 Chambers, who were the main event sponsor, and to Sarah Clover from No. 5 Chambers (and Chair of the IoL West Midlands region), who gave unrelenting amounts of time, energy and enthusiasm to the planning and running of the event.

Finally our thanks to John Myall (Winchester Council), who worked tirelessly in between sessions to provide us with a vast selection of excellent quality digital images throughout the event, including the gala event on the Thursday evening.

Recognition & Awards

The IoL is always delighted to be able to recognise excellence in licensing, and at the National Training Event last November, we were privileged to be able to award a fellowship and a companionship as well as announcing our first ever patron and introduce the Jeremy Allen Award.

Fellowship – Councillor Philip Evans



Councillor Philip Evans

Councillor Philip Evans was awarded Fellowship of the IoL in recognition of his exceptional involvement and input into licensing, both locally and nationally, in his role as an elected Councillor. Councillor Evans stands out with his exceptionally committed and pro-active approach to the role of an elected councillor in licensing since he became involved in 1981. He was nominated by his previous colleague, Phil Rafferty, Head of Regulatory Services and Housing, at Conwy County Borough Council, who said: "My own background is that of Licensing, from an officer perspective, and it has been my privilege to work alongside Philip for over 15 years. The Honour bestowed upon him by the Institute of Licensing is absolutely well deserved and is recognition of an individual who has demonstrated a commitment to the field of licensing, over a considerable amount of time, which has without doubt assisted in promoting and enhancing licensing as a profession."

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

Patron and Companion – Philip Kolvin QC

Philip Kolvin QC (l) with Jon Collins

Alan Lynagh (l) with Jonathan Smith

We were honoured to be able to announce the appointment of Philip Kolvin QC as Patron of the Institute of Licensing, and to award him Companionship in recognition of his un-matched contributions to both the field of licensing and to the Institute of Licensing.

It is impossible to accurately summarise Philip's achievements in licensing. He is a high profile Licensing QC who has been involved in a number of important licensing cases, a respected author of licensing publications which are recognised as important reference works, and a much sought-after conference speaker with the ability to explain simply and concisely complex legal principles. There can be no doubt that Philip has had a truly significant impact on the licensing scene.

In addition, Philip's involvement with the IoL as Chair for seven years has seen the Institute grow in strength and stature, working to develop licensing as a profession rather than an occupation, to raise the standards of professionalism and education, to build social and professional networks in licensing, and to foster the ideal of common principles in the discipline of licensing. In particular, Philip has argued for the broad church approach achieving a single, unified body to represent all licensing professionals.

The Jeremy Allen Award – Alan Lynagh

The IoL was delighted to announce the presentation of the first Jeremy Allen Award, which was awarded and presented to Alan Lynagh from Westminster Council by Jonathan Smith, Managing Partner at Poppleston Allen Solicitors.

The award was presented to Alan Lynagh in recognition of his consistency in going "the extra mile" when working with applicants to assist in application processes, planning of applications and dealing with issues to resolve problems.

Future plans for the Jeremy Allen Award are in progress and we will update IoL members in due course. If the award is to be retained as an annual award, details of how to nominate, the criteria and selection process will be provided on the website.

Nominating for recognition

Do you know a licensing practitioner who deserves recognition for exceptional excellence in licensing?

Fellowship is the next level of personal membership after Individual membership and is awarded following nomination by two members of the IoL, to an individual where it can be demonstrated to the satisfaction of the Institute that the individual:

- Is a member of the IoL or meets the criteria for membership (nominations can still be made for non-members and will be considered for an outstanding achievement award in lieu of membership); and
- Has normally made a significant contribution to the Institute and has made a major contribution in the field of licensing, for example through significant achievement in one or more of the following: a) recognised published work; b) research leading to changes in the licensing field; c) as part of recognised published work; d) exceptional teaching or educational development; e) legislative drafting; and f) pioneering or taking a leading role in licensing initiatives or developments leading to significant changes or having a significant impact.

It is stressed that Fellowship is intended for individuals who have made exceptional contributions to licensing and/or related fields rather than those who have simply done their jobs well.

Nominations should be submitted to Sue Nelson (email: sue@instituteoflicensing.org), including details of how the nominee has met the criteria. The nomination will then be referred for consideration by the appropriate committee for determination.

Influence and engagement through consultation

One of the Visions set out in the Institute's Strategic Plan is: "Influence and Engagement – the Institute will provide a strong voice engaging with the Government and other relevant organisations on licensing related matters and will

be recognised as the leading stakeholder for consultation on proposed legislative and other changes."

The Institute is actively engaging with the Government and other organisations at every opportunity and ensuring that we are able to respond to consultations relaying the views of our members, or where this is not possible, ensuring that we accurately portray the views of those who have been involved in shaping the response. As part of the process, the members will, wherever possible, be consulted to obtain views, and those views will form the basis of the Institute's response, presented in a balanced and fair manner.

Our broad church base gives us an unrivalled platform from which we can view proposals from all angles, and present a clear and balanced picture on behalf of our members. Given that there will always be differing views whether within the same discipline or not, the Institute starts from a position of strength in assuming that there will be multiple perspectives and being well equipped to gather views and report accordingly.

How will we involve our members?

This will depend on the consultation under consideration, the resources available and the timescales. We will make good use of online survey facilities to gather responses and provide a comprehensive report against which the IoL response can be formed.

In addition, we aim to establish specialist panels to assist in responding to consultations. We know already from our Taxi Working Party that a small group of people with an interest in a specific area of licensing can work together effectively in coordinating the consultation response, and identifying issues with existing and proposed legislation.

Initially we propose to convene panels for the following areas:

- Alcohol & Entertainment
- Gambling
- Miscellaneous licensing functions
- Taxis – the existing Taxi Working Party will continue as the specialist panel for taxi and private hire issues

We are delighted with the response from IoL members who have volunteered to sit on the consultation panels, and are looking forward to confirming the membership and remit of the panels at the earliest opportunity. We will ensure that any views arising from the panels are reported alongside the membership views with the appropriate background, panellist information and so on.

In the main, the remit of each group will focus on consultations and the IoL response. The group may also be asked to look at good practice examples, potential guidance and other related matters for the future.

Consultation documents and Institute responses

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

DCMS consultation on proposal to examine the deregulation of Schedule One of the Licensing Act 2003

In December 2011, the IoL responded to the DCMS consultation on proposals to examine the deregulation of Schedule One of the Licensing Act 2003.

The IoL consulted members via an online survey to obtain views and as a result received 118 responses, 76% of which came from local authority members.

From the responses received, it is clear that there is a balance to be struck, and it is generally accepted that there are some types of regulated entertainment which could be deregulated, including events such as school plays. But there is significant concern at the scale of proposed deregulation, particularly proposals to deregulate regulated entertainment when provided for audiences of fewer than 5,000. Alternative limits have been suggested including 499 (in line with existing TEN provisions) and 200 (in line with section 177 of the Licensing Act 2003).

There is considerable concern at proposals to deregulate recorded music for numbers up to 5,000, with the potential for unregulated rave type events giving rise to issues relating to crime and disorder, public safety, nuisance and protection of children.

Eighty-two per cent of respondents consider that premises rendered un-licensed by the deregulation of Schedule One could potentially undermine the licensing objectives.

Some responses express concerns that potential savings will be fairly modest and outweighed by the more costly means of dealing with problems under Noise and Health & Safety legislation.

Proposals relating to performance of dance and the exhibition of films are of less concern, although 74% of respondents support the proposal that deregulation of dance should not extend to sex entertainment. And there is a clear view that there must be a legal setting for the restriction of films made available to under 18s.

The continued regulation of boxing and wrestling is supported, though some respondents ask why this should be treated differently from other regulated entertainment. There is support, too, for including similar entertainment such as cage fighting, martial arts competitions and similar activities.

There is support for proper application of the existing licensing regime as opposed to a new means of regulation of entertainment . The Licensing Act 2003 is seen as the best means of achieving a mutual co-existence while providing safeguards. And it is seen as a relatively expedient means of addressing issues which arise, through mediation and partnership working, rather than simply through regulatory means and sanctions.

Quotes from the survey responses included:

- The current licensing process provides a pro-active way of protecting the interests of local residents and communities. It also provides a relatively quick and straight forward way of addressing issues relating to licensed premises via the review process. Alternatives

such as prosecution under the Environmental Protection Act 1990 and fixed penalty notices under the Noise Act 1996, as well as equipment seizures, could seriously affect the businesses ability to operate and cost considerable sums of money.

- An audience of 5,000 is very substantial. An increase in gatherings/raves where people come for the music and bring their own alcohol is very likely to occur. Lots more events, like mini festivals (festivals being ever increasingly popular) being unregulated could be a potential source of public safety risks.
- There is a contradiction within the proposal as it seeks to remove regulated entertainment from the Licensing Act 2003 but wishes to maintain Prevention of Public Nuisance as a licensing objective. Licensing committees will need to consider all four licensing objectives when determining applications. However, how can the licensing committee apply noise conditions to a premises license when the activity is not licensable? The only feasible way of doing this would be to associate the music with the sale of alcohol, which would be a difficult link to prove.

The full IoL response is available on the Institute's website for members to download.

DFT consultation regarding the licensing of motorcycles for private hire

The Institute was consulted by Norman Baker MP, Under Secretary of State for Transport, on 17 November 2011, regarding the licensing of motorcycles as private hire vehicles.

Responses were required to be submitted by no later than 16 December 2011, giving insufficient time for surveying Institute members effectively. On this occasion, we put the matter to the Institute's Taxi Working Party to consider but made it clear in our response to the DFT that IoL members had not been consulted.

The letter from Mr Baker asked for a) views in principle about the licensing of motorcycles as private hire vehicles; and b) comments on proposed standards set out in a draft guidance note.

The response from the Institute expressed concerns at the various safety considerations, which are substantially different when considering motorcycles rather than cars for private hire purposes in terms of passenger safety. Members of the Taxi Working Party were generally uncomfortable with the idea of licensing motorcycles for private hire purposes, although it is accepted that it is possible in law to do so.

The full Institute response to both of the above consultations can be accessed via the IoL's website library.

Home Office consultation on Early Morning Restriction Orders and the Late Night Levy

A Home Office consultation was launched in January 2012 seeking 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 consultation, "dealing with the problems of late night drinking", was launched by the Minister of State for Crime Prevention and Anti-Social Behaviour Reduction Lord Henley, and looks at the implementation of two new powers contained in the Police Reform and Social Responsibility Act 2011.

The measures, due to be implemented in the autumn, will:

- Allow local authorities to charge a levy for late-night licences to contribute to the cost of extra policing; and
- Extend Early Morning Restriction Orders (EMROs), a power that will allow licensing authorities to restrict the sale of alcohol in all or part of their areas, to any time between midnight and 6am.

Late Night Levy

The levy will allow licensing authorities to raise a contribution from late-opening alcohol retailers towards policing the late night economy. It will be a local power that licensing authorities can choose whether to adopt for their areas. The licensing authority will also choose the period during which the levy applies, between midnight and 6am on each night. Non-exempt premises licensed to supply alcohol in this period will be required to pay the levy.

Licensing authorities will decide whether any (and, if so, which) of the categories of exemptions and reductions will apply to the levy. Section 6 of the consultation considers the available categories of premises to which exemptions and reductions will apply.

Early Morning Restriction Orders

EMROs are intended to allow licensing authorities to address specific problems caused by the late night supply of alcohol in their areas. An EMRO is a power introduced by the previous Government (not yet commenced) which, under existing provisions, would enable licensing authorities to restrict the sale of alcohol in the whole or a part of their areas between 3am and 6am on all or some days.

The 2011 Act amends existing provisions to allow EMROs to be applied more flexibly between midnight and 6am. Licensing authorities will be able to make an EMRO in relation to problem areas if they have evidence that the order is appropriate for the promotion of the licensing objectives.

Section 4 of the consultation considers exemptions to the EMRO power that will apply to all EMROs, exempting some types of premises from the provisions.

Partnership schemes

Section 6 looks at the use of schemes like Best Bar None, Business Improvement Districts (BIDs) and Community Alcohol Partnerships as possible alternatives or complements to EMROs or the levy.

The consultation

The 12-week consultation seeks to identify the types of premises - for example, hotels, cinemas and community

venues - which could be exempted or eligible for a reduction in levy charges if they are viewed as having a minimal effect on alcohol-related crime and disorder.

The public, licensing authorities, the licensed trade and police are all encouraged to contribute their views.

Lord Henley said: "Alcohol-related crime and disorder is a problem for many of our communities. These new measures give power back to local areas so they can respond to their individual needs. But we also recognise that some types of premises that open late to serve alcohol do not contribute to late night drinking problems and should not be unduly penalised. That is why we are seeking views on whether they should be exempt or see a reduction in fees. We are keen to hear from anyone who is affected by these new powers to help inform our plans to ensure the premises we have proposed are the right ones."

The IoL intends to respond to the consultation, and will be consulting members in order to gather views which will form the basis of the response.

National Licensing Forum

The Institute of Licensing announced the re-establishment of the National Licensing Forum (NLF) on 24 November 2011.

The original forum played a valuable role in informing licensing policy development, implementation and compliance for much of the 1990s and the first half of the last decade. Since the Licensing Act 2003 went live in November 2005, however, the forum had fallen into disuse.

Given the on-going importance of licensing and the high profile nature of related problems, the Institute of Licensing initiated the re-establishment of the forum with the intention of once again providing the opportunity for discussion between representative groups in relation to licensing issues.

We believe the forum has an essential role to play in:

- Informing the implementation of many aspects of the Police Reform and Social Responsibility Act 2011;
- Acting as a sounding board for Government as further aspects of licensing reform are considered;
- Allowing all to share best practice with regards to policy implementation; and
- Giving industry an opportunity to work in partnership with regulators to improve both compliance and regulation.

The Institute is delighted to chair and provide the secretariat for the NLF. The NLF effortlessly fits within our aim "to advance the development, evaluation and recognition of licensing in the public and private sectors".

The initial meeting in November 2011 was held with the purpose of agreeing the terms of reference for the re-established NLF and identifying the appropriate membership of the group. The terms of reference for the NLF can be found on the Institute's website. The organisations involved in the forum include:

- Association of Chief Police Officers
- Association of Convenience Stores
- Association of Licensed Multiple Retailers
- Association of Town Centre Managers
- Bar, Entertainment and Dance Association
- BII
- British Retail Consortium
- Business in Sport and Leisure
- Department of Culture, Media and Sport
- Home Office
- Local Government Association
- National Pubwatch

The National Association of Licensing and Enforcement Officers were also in attendance and will form part of the NLF.

Institute Executive Officer, Sue Nelson said: "I am delighted that the National Licensing Forum has been re-established. The previous forum was a valuable means of discussion for relevant licensing issues and forthcoming legislation both strategically and in terms of what is happening on the ground. And given the constantly changing face of licensing legislation, there is no doubt that the NLF can perform that role again.

"The Institute is ideally placed to chair the forum, given its objectives are to promote mutual understanding between licensing practitioners and its broad church membership encompassing licensing practitioners from public and private sectors, including the regulators and regulated."

It is intended that the NLF will look to meet twice yearly, but will also have regard to calendar events which may give rise to licensing issues (for example, the Queen's Diamond Jubilee and the Olympics).

Any queries in relation to the NLF should be directed to Sue Nelson (email:sue@instituteoflicensing.org).

Training

One of the IoL's main member's 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. 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
- Members training
- Sex Establishment Licensing
- Licensing Hearings for All Parties

The IoL can deliver the training at your location; you can also email training@instituteoflicensing.org for a quote on your training requirements. Most IoL delivered training courses can be offered at your preferred location for the training fee of £750 plus expenses and VAT, therefore usually less than £1000 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 *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 delivered training courses can be delivered at your preferred location for the training fee of £750 plus expenses and VAT, therefore usually less than £1000 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.

Stake and prize review for gaming machines

The gaming industry has welcomed news that the Government will be reviewing stake and prize limits for gaming machines, and is hopeful that as a result, new products may be generated. At the same time, the Gambling Commission has issued fresh guidance on primary gambling activity in betting shops in an effort to help clarify whether too much shop income derives instead from gaming. **Nick Arron** discusses developments

Following on from the increases in stake for B3 gaming machines from £1 to £2 and entitlement to numbers of category B machines in Adult Gaming Centres and bingo premises, the Government has recently announced further good news for the gaming machine industry. At the British Amusement Catering Trades Association (BACTA) AGM on 13 October last year, Tourism Minister John Penrose announced that the Government intends to carry out a review of stake and prize limits for gaming machines covered by the Gambling Act 2005.

Government committed to review

The announcement has been widely welcomed by the industry as it leads to certainty for businesses and provides regulatory impetus to develop new products. Under the Gaming Act 1968, the Government undertook customary reviews of stake and prize limits every three years – the "triennial review". The industry has been calling for a similar regular review of stake and prize under the Gambling Act 2005.

Just over a month later, Mr Penrose wrote to the industry outlining the detail of the Government's commitment to the review of stake and prize limits and announced the proposed timetable. He had anticipated initially that this would be an 18 month process starting in December 2011 with the aim of implementing new regulations on stake and prize in July 2013. The Department of Culture, Media and Sport has since updated this proposal and is suggesting a three-stage timetable with legislation by May 2013.

In the first stage, the DCMS needs to conduct and deliver the 2012 review. The second stage will be public consultation from April to September 2012, and third stage will comprise post-consultation and implementation of the regulations between October 2012 and May 2013.

Nick Arron

Penrose seeks views

The proposed timeframe would allow the Government to take into account the DCMS Select Committee's findings of the review into the Gambling Act 2005, which it's hoped will be published soon, and gaming machine research, which is currently being undertaken as part of the programme recommended by the Responsible Gambling Strategy Board. Recommendations of the Select Committee and those in the review of the machines can then be considered as part of the prize and stake review.

The timetable also takes into account the 12 week public consultation and requirement for notifying the European Commission under the Technical Standards Directive, which invokes a 12-week stand-still period.

In his letter to the industry, Mr Penrose asked for views on the timetable and process, and he also sought views on how often the reviews should be held. The current proposal is for the next review to be in 2015 in line with the

old triennial process. It previously took the Government approximately 12 months to complete a review.

Mr Penrose asked for responses to his letter by 2 December, and the industry awaits with keen interest the detailed proposals in the early part of 2012.

Primary gambling activity in betting shops

In November 2011, the Gambling Commission published further guidance on primary gambling activity in betting shops - in a guide called Indicators of Betting as Primary Gambling Activity.

This is the latest in a line of documents, decisions, guidance and Licence Conditions and Codes of Practice (LCCP) on primary gambling activity. You will know the Gambling Commission's view that the holders of General Betting Standard Non Remote Operating Licences must provide betting as the primary gambling activity on licensed betting premises. Back in May 2009 it introduced the LCCP condition 16 to reinforce this view.

The Commission clearly still has concerns and refers a number of regulatory returns from betting operators where betting activity accounts for a minimal proportion of gross gambling yield. The rest is accounted for by gaming - B2 gaming machines or fixed odd betting terminals. The Commission suggests that further assessment of these gaming-oriented premises is required to ensure that the primary gambling activity requirements in the LCCP are being met.

The Commission has outlined the six indicators it uses when assessing compliance with the LCCP. These Indicators of betting as primary gambling activity are:

- The offer of established core products (including live event pictures and bet range).
- Provision of information on products and events.
- The promotion of gambling opportunities and products.
- The actual use made of betting facilities.
- The size of premises.
- The delivery of betting facilities.

The guidance offers detail on each of the indicators and provides practical examples which can be used to assess primary gambling activity.

The guidance suggests consideration of the offer of established core products - horseracing, greyhounds, football, numbers, and other sports. It asks: are there regular betting opportunities during opening hours?; which events are shown on the screens in the betting shops?; and are there facilities to accept bets on horseracing, greyhounds, football and other sports?

The prevalence of betting opportunities is seen as one indicator that the primary gambling condition of the LCCP is adhered to.

The guidance also provides detail on the core betting products of horseracing, greyhounds, football, numbers, and other sports. On horseracing, it asks does the shop offer regular daily service from Great Britain and Ireland in line with the published fixture lists? Does it offer foreign morning meetings, for example, South Africa or even early and late Australian races? Is there a regular daily service offering greyhound betting from venues around the country and at what times are they available? Are they available morning, afternoon and evening? Similarly regarding football, does the shop offer betting on all the domestic leagues, European leagues, and international matches? On numbers, are virtual betting products offered?; and are there facilities for products such as 49s and Irish lottery? Finally, what other sports are offered (for example, golf, tennis, cricket and so on)?

The Commission refers to the facilities for live pictures from Turf TV, SIS or Sky and whether or not domestic coverage of free sports is shown. Live games in betting shops encourage betting: so what TV services and schedules are made available to customers and how are they promoted?

Commission enquiries

The guidance suggests the ranges of bets available as an indicator. Are there only simple single or multiple bets on core products or are more complex bets available? Is there ante-post betting on high profile competitions? Are forecast and tricast bets available and can customers choose between the current live show price or the starting price?

Football is starting to offer a wide range of types of bet, as is cricket, so the Commission asks which of the following are available: are there in-play bets or the options of first score, numbers of yellow cards or corners, correct score and so forth?

The Commission also asks what type of information is shown on a customer's information screen and what promotional material is displayed, particularly in relation to future events such as the FA Cup Final, Grand National or live international football match.

The Commission refers to the actual use of betting facilities within shops and states the latest industry statistics of betting within betting shops at 54% of gross gambling yield and gaming by way of machines at 46%. These figures reflect the trend towards gaming machines and the move away from traditional over-the-counter betting.

Higher levels of gaming may indicate premises are not complying with the LCCP requirements on primary gambling activity. The Commission refers to consideration of profits, slippage, and staking of betting activity against industry averages when considering when the actual use made of betting facilities is indicative of the shop offering betting as the primary gambling activity.

Easier to calculate is the size of the premises and the facilities made available for betting by way of counter or terminal compared to the area made available for gaming machines. On the delivery of betting facilities, the Commission guidance suggests the availability of betting terminals compared to over-the-counter betting.

The new guidance on indicators of primary betting activity must be considered in context of previous documents, and guidance, and the LCCP themselves. Furthermore, betting premises and activities must be viewed as a whole.

Nick Arron
Lead Partner, Betting & Gaming, Poppleston Allen

Article

Cracking the whip on horse-drawn carriages

Proposals to bring horse-drawn carriages and pedi-cabs on to the streets of Belfast this year exposed uncertainty over whether it should be Government or the City Council which licensed and regulated the activity. **James Cunningham** explains how his Council went about solving the unusual challenge

Since "The Troubles" ended in 1994, Northern Ireland (NI) and particularly Belfast have prospered. Major urban regeneration projects and new city centre shopping have played their part, as has tourism. Every year, over 9 million now visit the city, making it one of the top city break destinations in Europe.

This year, Belfast looks set to attract even more visitors thanks to new, iconic attractions, unprecedented events and historic anniversaries. And to add to the tourist experience, leisure operators have been approaching Belfast City Council with serious expressions of interest in providing commercial horse-drawn passenger-carrying services and pedi-cab services in Belfast city centre, along predetermined routes.

While these services may appear an attractive proposition, they give rise to serious concerns for both animal welfare and public safety. It is the first time in recent history that any person has tried to operate a horse-drawn type of business in the city and there are no procedures or policies in place to regulate it, never mind that of a pedi-cab.

Whose responsibility?

When the City Council received the first proposals to licence these forms of public transport, we contacted the Northern Ireland Department of the Environment, Driver and Vehicle Agency (DVA), as it is responsible for licensing motor vehicles which carry passengers for reward as a public service vehicle (motor vehicle used in standing or plying for hire or to carry passengers for hire). We believed that horse-drawn carriages and pedi-cabs would be most appropriately licensed by the DVA, as councils in NI do not regulate taxis, as it is DVA's responsibility - and a horse-drawn carriage is after all a "one-horse-powered Hackney Carriage".

However, the DVA informed us that horse-drawn carriages and pedi-cabs as modes of transport were outside its legislative authority, as current NI road traffic legislation does not cover the licensing or regulation of vehicles that are not motorised, and there are no plans to bring in legislation to regulate the activity.

This obviously caused great concern to Council officers and the police, as the prospect of unregulated passenger transport in the city could be fraught with danger. Notwithstanding public safety concerns, there are also traffic management and animal welfare issues. Furthermore, there would be no way of ensuring that the carriages would be fit for purpose or that the drivers of such carriages would be trained or qualified to drive a horse-drawn carriage in a commercial environment. It was therefore decided that we would investigate if the Council had the necessary powers to regulate this activity.

How could such activities be regulated?

It may be arguable that the Council could regulate these activities under existing street trading legislation - the Street Trading Act (NI) 2001.

Section 1 (2) of the 2001 Act provides that the term "street trading" means selling any article or thing, or supplying services, in a street, whether or not in or from a stationary position.

Section 2 of the 2001 Act sets out a number of activities which do not constitute street trading, but none of these appear to cover the use of a horse-drawn carriage or pedi-cab service.

Section 7, however, provides that a district council can grant a street trading licence in relation to a mobile trader and may impose conditions in the licence specifying those streets or area in which he may trade.

Therefore, it is arguable that the 2001 Act could extend to the activity of providing the service of horse-drawn carriages or pedi-cabs.

The benefit of granting licences under the 2001 Act would be that there is a pre-existing process in place as to how street trading applications are dealt with.

However, deciding how the Council would actually regulate and enforce the 2001 Act in the context of horse-drawn carriages and pedi-cabs would still require a significant amount of work.

Furthermore, we were acutely aware of previous issues surrounding mobile street traders, and the poor provision within the 2001 Act for situations where there have been a number of applications from mobile traders for the same geographical area. In addition, the grounds for refusal of a mobile trading licence application are extremely limited and some of the existing powers were likely to be removed or limited by a review of the 2001 Act due to the Provision of Services Regulations 2009, which give effect to the EU Services Directive.

The Council was also mindful of the Simon Lane judgement in 1998 regarding trishaws (pedi-cabs) and their definition as a "Hackney carriage".

It also became apparent during research that the Council could possibly create byelaws regulating horse-drawn carriages and pedi-cabs in the city by virtue of Section 338 of the Belfast Improvement Act 1845.

Under that provision, the Council was empowered to make such byelaws as it sees fit for regulating all carriages and carts plying for hire and for regulating the conduct of the owners and drivers.

In addition, under the terms of the Local Government Transfer of Functions (Roads Etc.) Order 1973, responsibility for roads and traffic was transferred to the Ministry of Development, which is now the Department of the Environment.

The Road Traffic (NI) Order 1981 contains some reference to horse-drawn carriages. For example, it regulates the types of lights which must be on the carriage and makes it an offence to be drunk in charge of a vehicle drawn by an animal on a road or other public place. Furthermore, it also refers to byelaws made under a local Act by the Department for the regulation of any class or description of vehicle.

It would therefore appear that the power to make byelaws to regulate this activity was transferred to the DOE in 1973. Furthermore, legislation since then appeared to contradict the Department's assertion that horse-drawn carriages and possibly pedi-cabs as modes of transport fall outside its legislative authority.

City Council takes control

Without wanting to delay the prospect of regulation, which might have hindered a viable business opportunity unnecessarily, the City Council's Licensing Committee at its meeting in June 2011 considered all of the issues as stated. After much debate, it acknowledged that horse-drawn carriages and pedi-cabs would provide an additional attraction for visitors to the City and decided that the Council would assume responsibility for regulating their provision, as this would be seen as fulfilling the Council's role as Civic Leader, given central government was not willing to regulate them. However, the point was made that issues such as traffic management, animal welfare and the safety of passengers would need to be addressed as part of the regulation process.

Locally, a number of meetings have been held between the Council, the Police Service of Northern Ireland, the Department of the Environment Licensing and Road Safety Division, the Department for Regional Development Roads Service and others to discuss the issue of horse-drawn carriages and pedi-cads operating in Belfast.

New conditions created

It is essential that the carriage and harness is safe and fit for purpose. A certificate of fitness and safety for the vehicle, fittings and equipment must be in force before the horse-drawn carriage is licensed. An annual inspection of the harness and vehicle should be carried out by a wheelwright and carriage builder or consultant agreed by the Council using the harness and carriage normally used by the operator for providing the commercial service.

In considering the licensing of a horse-drawn carriage service, the welfare of the horse is of primary importance. The Council has decided that each horse used to operate the service is micro-chipped, has a horse passport, and that the working day of a carriage horse is restricted to seven hours with a one hour lunch break. A log- book of the hours worked each day and rest periods must be kept and made available to the Council on request.

During the research it became apparent that instead of introducing a separate mobile street trading policy, an overhaul was required of the existing street trading policy and licence conditions.

The Council's new street trading policy will provide guidance on operational matters and set general conditions which will apply to all street trading licences, together with specific licence conditions in relation to the different types of street trading.

At the time of writing this article, we have a draft policy which covers such areas as general licence conditions, criminal record disclosures and specific licence conditions for stationary traders, hot food traders, mobile food traders (for example, ice cream vans) and mobile trader transport providers (horse-drawn vehicles and pedi-cabs).

James Cunningham
Regulatory Services Manager
Belfast City Council

The Interested Party

Cumulative Impact Zones — a boon for locals?

Cumulative Impact Zones have become increasingly viewed as a way of empowering local residents to determine the extent of licensed retail activities in their area. **Richard Brown** examines recent developments with CIPs and assesses to what extent they really do assist communities in ensuring that their views are given appropriate weight

Areas of a town or city which are subject to a "cumulative impact" policy are known by a variety of acronyms or Orwellian-sounding titles – CIPs, CIAs, CIZs, Stress Areas, Special Stress Areas, Special Policy Areas, Special Saturation Areas and so on. For the purposes of this article I have chosen to refer to them as CIPs.

CIPs were introduced under the section 182 Guidance as a tool for licensing authorities to limit the growth of licensed premises in certain designated areas. They have the effect of creating a rebuttable presumption to refuse certain types of Licensing Act 2003 application, subject to receipt of relevant representation(s) and subject to the fundamental principle that each case should be dealt with on its merits.

They provide some comfort to residents who live in busy areas of towns and cities where, perhaps, the appropriate balance between commercial and residential needs has become out of kilter.

One area of the consultation not taken forward by way of primary legislation was the proposal to lower the evidential burden in respect of the establishment of CIPs. In fact, the consultation document went further and stated that the intention was to remove the evidential requirement entirely, to give greater weight to the views of local people.

As CIPs are not mentioned in primary legislation, the Government not unreasonably decided that there was no need to take the matter forward in Police Reform and Social Responsibility Act 2011. However, the Home Office has subsequently said that the statutory Guidance will in future be more focussed on local needs, will make CIPs easier for licensing authorities to implement, and will give greater weight to the view of local people.

Home Office guidance on CIPs favours residents

Although these changes have not come into effect yet, and – who knows - may never, CIPs have proved responsive to residents' needs in helping to ensure that an area already under stress owing to the cumulative effect of a large number of licensed premises does not become worse. Communities can also play a role in the implementation of CIPs.

Richard Brown

"Cumulative impact" is defined in the Section 182 Guidance[1] as the "potential impact on the promotion of the licensing objectives of a significant number of licensed premises concentrated in one area" (my emphasis). In an area where there are lots of licensed premises, it is often difficult, if not impossible, for residents to be able to accurately state that the disturbances they experience emanate from a particular premises. The existence of a CIP effectively removes from residents the burden of showing this – although, in fact, the Guidance[2] makes it clear that even where no special policy is in existence, residents can still make a representation on the ground that granting the licence or variation would give rise to a negative cumulative impact on the licensing objectives.

The concept of "cumulative impact" also helps residents who contend that their area does not "need" more bars. This is, of course, a matter for planning committees and not relevant to licensing.

1 Para 13.24 2 Para 13.32

Residents can initiate CIPs

Although CIPs are usually initiated as a result of detailed evidence supplied by the police and other official bodies, residents have a role to play in their initiation and expansion, as is clear from a number of recent developments. Several licensing authorities have recently either introduced new CIPs or expanded current CIPs, whether in area or the type of application which the policies engage. In November 2011, the London Borough of Lambeth introduced a CIP around Clapham High Street and surrounding streets, a well known area for late night entertainment but also home to a large residential population. The request from the police was at least partly based on the views of the Clapham Town Ward Safer Neighbourhood Panel, which represents the views of the local community.

In order to further facilitate the involvement of the local community in the proposals, Lambeth publicised the consultation in a residents' newsletter, *Up My Street*, and of the 75 responses, 71 were from individual residents or resident's groups. Of these, an overwhelming 92% were in favour of the introduction of the CIP. NHS Lambeth also produced a detailed response based on public health grounds.

The Clapham CIP applies to all applications for new premises licences or club premises certificates, or material variations. This has not always been the case with CIPs. For example, London Borough of Camden's CIP has been added to both in terms of areas covered and type of application covered. When it was first introduced, the presumption to refuse applications related only to applications for new licences or increases in capacity, not applications by existing premises to extend hours.

Residents and residents' groups called for changes to be made to this policy to address the concerns that they had in certain areas. In 2009, the CIP in respect of the Seven Dials area in London's Covent Garden was extended. In 2011, the policy was changed so that it applied to material variations as well as to new applications and increases in capacity. It also now applies to take-away food premises and off licences. This is important to residents as these premises help delay dispersals from the area. In fact, as Camden borders Westminster, there is in effect a continuous area designated as being of cumulative impact stretching from Kingsway to the east to Regent Street to the west, roughly joined by New Oxford Street and Oxford Street to the north and the Strand to the south.

Westminster's CIP has proved to be particularly robust and the policy - which limits grants of applications engaged by the policy to "genuinely exceptional circumstances" - has been successfully defended on appeal on numerous occasions.

The introduction of CIPs is routinely presented in local media as a "victory" for local residents, giving them "more power". However, crucially, the existence of a CIP does not absolve residents of the need to make relevant representations in respect of an application; if none are received, the application must be granted as per the relevant provisions of section 18 or section 35 of the Licensing Act 2003.

The existence of a CIP is a protection for residents, but some take the view that it only acts as a protection because there is an evidential burden on establishing it. The more robust and evidence-based a policy is, the more likely it is to stand up to repeated scrutiny on appeal to the Magistrates' Court, or a judicial review to the High Court. The last thing a licensing authority wants to do is to find itself appealed on the merits of a decision and the validity of its policy, particularly if the policy was imposed arbitrarily and without proper consultation (an effective consultation itself needing to be based on something tangible to allow stakeholders to respond properly to it). Therefore, it is questionable whether reducing the evidential burden would have any beneficial practical effect for residents in the long term.

At first glance, CIPs do not greatly assist residents who wish to take action against particular premises by way of a section 51 review. By their very nature, cumulative impact policies relate to the "cumulative impact" of a number of licensed premises, and an application for longer hours can be turned down even though there have been no problems with the premises in the past. In particular, the section 182 Guidance relating specifically to reviews[3] states that "a complaint relating to a general (crime and disorder) situation in a town centre should generally not be regarded as a relevant representation unless it can be positively tied or linked by a causal connection to a particular premises...". (Having said that, it has of course been tried – as in 2009 when Oldham took 22 city centre premises to review simultaneously.)

However, the paragraph of the section 182 Guidance dealing with cumulative impact refers only to the revocation of a licence in the context of what special policies cannot be used for. The section 182 Guidance[4] makes it clear that cumulative impact should never be used as a ground for revoking a licence as a review should relate to an individual premises. This is problematic for residents as the licence holder would inevitably argue that the problems did not come from his premises. However, once a causal link is established it would seem that a licensing authority is entitled to at least consider cumulative impact, on the basis that premises that have a negative impact on the licensing objectives inevitably contribute adversely to cumulative impact.

Clearly, then, licensing authorities are increasingly seeing CIPs as an effective tool in promoting the licensing objectives and of addressing concerns from their residents. What effect the proposed changes to the section 182 Guidance have will, as with much of the Police and Social Responsibility Act 2011, become clear with time.

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

3 Para 11.7 4 Para 13.35

Article

The Licensing Authority as a Responsible Authority

The Police Reform and Social Responsibilty Act 2011 has placed new responsibilities on licensing issues across a wide range of licensable activities. **Jane Blade** of the London Borough of Redbridge explains the new duties entailed in being a responsible authority, and urges local authorities to consider carefully how they implement these duties

Licensing practitioners across the country have raised their eyebrows at some of the changes to the Licensing Act 2003 being implemented by the Police Reform and Social Responsibility Act 2011. Perhaps one of the biggest areas of consternation is the new role of the licensing authority as a responsible authority. How exactly is this going to work? Will residents and other responsible authorities abrogate their responsibilities for making representations or seeking reviews and expect the licensing authority to do their work for them?

My view is that if the licensing authority is not careful, this is precisely what will happen. Officers will be pressured by residents and members to submit representations to every application, or to review a licence each time residents are unhappy with the pub next door. Whereas once we could simply shrug our shoulders and say, "There is nothing more we can do", in 2012 this will no longer be the case. So how can the licensing authority guard against these additional demands on its already stretched services?

All is not lost. The licensing authority has a powerful tool in its armoury to deflect unnecessary burdens on its resources. That tool is the Statement of Licensing Policy (SoLP).

Statement of licensing policy

The SoLP is the licensing authority's opportunity to set out its stall to applicants, residents, members and other responsible authorities. Within this document, the authority may, among other things, set out its vision for the night time economy, its approach to cumulative impact, its expectations of licence holders and applicants, and its approach towards enforcement under the Licensing Act 2003. There is no reason why the licensing authority should not also, within its SoLP, define the manner in which it intends to exercise its power as a responsible authority. So, what approach may the licensing authority take? This is largely a matter of preference, but in this article I shall give consideration to matters that may assist in terms of a starting position.

Representations and applications for review under one or more of the licensing objectives may be made by responsible authorities as defined in the Police Reform and Social Responsibility Act 2011 and the Licensing Act 2003, or by "any other person".

This casts the net very wide. With unfettered ability for all parties to have their say, I believe the licensing authority need only become engaged as a responsible authority in limited circumstances.

Where residents have concerns about an application or grounds to seek a review, the licensing authority should make it clear in its SoLP that it expects those affected parties to make a relevant representation or apply for review in their own right. Residents wishing to protect their anonymity may request their ward councillor to make a representation or seek a review on their behalf, or may do so through their local residents' or tenants' association. The licensing authority may wish to intervene in cases where it believes there is legitimate fear of reprisals against residents, but this should only apply in exceptional circumstances and not as a result of speculation.

Turning to the role of the various responsible authorities, I suggest the SoLP should set out the situations in which each responsible authority will take a lead in making representations or seeking reviews. This should not preclude a partnership approach, but will offer some comfort to the licensing authority in terms of deflecting requests for its intervention where this is unnecessary.

Crime

The lead authority for matters relating to crime on, or in connection with, licensed premises should be the local

police force. The police have access to crime data and intelligence and are the most experienced in advising on crime prevention.

Noise

Noise nuisance from licensed premises and activities may result directly from live or recorded music or PA systems being used at the premises or from customers using external areas forming part of the premises, such as pub gardens.

Where noise is attributable to entertainment provided at the premises or from pub gardens, it can be controlled under statutory nuisance provisions and the environmental health (pollution) team is probably the most appropriate authority to comment on applications or initiate reviews. It can offer advice on decibel limits and other controls on entertainment noise. It may be less inclined to comment on patron noise from pub gardens, in which case the licensing authority may wish to take the lead role instead.

A key area where I believe the licensing authority should exercise its power is when noise is arising from dispersal or from groups of drinkers and/or smokers congregating outside licensed premises on the pavement. Such problems do not fit neatly into the remit of the other responsible authorities, but are a primary cause of concern to local residents and one where the licensing authority is perfectly placed to intervene, for example by:

- Requiring an agreed dispersal policy to be in place at the venue;
- Limiting the number of persons allowed to smoke outside at any one time;
- Prohibiting customers from taking drinks outside with them; and
- Requiring door supervisors to monitor dispersal or the use of external areas to ensure pavements are not blocked and customers are not being rowdy.

Anti-social behaviour

Anti-social behaviour can touch on various areas, including low level crime such as public urination, youths "hanging around" and noise from rowdy behaviour. As with dispersal noise, anti-social behaviour does not fit neatly into the remit of any one responsible authority. I would suggest the licensing authority may wish to take a lead in this area, with the proviso that responsibility will fall to the police where anti- social behaviour is connected to crime such as criminal damage or theft from motor vehicles. The licensing authority should state within its SoLP that it will work in conjunction with the council's anti-social behaviour team and the local police's safer neighbourhoods team on this issue. A multi-agency approach is likely to be the most successful, as anti-social behaviour can be linked to a wider range of problems in communities.

Protection of children from harm

The council's trading standards team is best placed to lead in respect of prevention of sales of alcohol to children; I doubt this point requires further clarification. However, protection of children from harm does not end with the prevention of underage alcohol sales. There are also implications for children where adult entertainment is provided at premises, such as lap dancing. Though the Local Government (Miscellaneous Provisions) Act 1982 now requires the licensing of premises regularly used for such entertainment as sex establishments (where the 1982 Act has been adopted), there remains an exemption for premises not used more than 12 occasions in a calendar year. Thus there may be implications if premises are to be used "infrequently" for sexual entertainment under the terms of their Licensing Act 2003 authorisation.

My own view is that the licensing authority is the most appropriate authority to comment on the provision of adult entertainment and preventing accidental access to such entertainment by children.

Health and safety/fire safety

The ability to attach conditions to licences relating to health and safety and fire safety is fettered by the requirement to avoid duplication with primary legislation such as the Regulatory Reform (Fire Safety) Order 2005 and Health and Safety at Work Act 1974. In the limited cases where conditions are necessary, responsibility for requiring them would usually fall to the environmental health officer (health and safety) or the local fire authority, as the case may be.

However, this position may change when the application is in relation to time-limited premises licences for events such as festivals and pop concerts. Many licensing officers are knowledgeable and experienced in dealing with temporary structures, safety management, stewarding provision and similar matters that should be covered by an event management plan. Indeed, a significant number are responsible for chairing their local safety advisory group (SAG). Until now, many of the controls the SAG considers necessary to be put in place were reliant on the co-operation of the licence holder as they could not be raised as a representation.

Now, the licensing authority itself can make a representation in order to prevent public nuisance and promote public safety, such as by requiring an approved traffic management plan or consent for use of special effects. This is a welcome step forward, and one that should be embraced in the SoLP - providing the licensing authority is willing and able to take on this role.

Public nuisance (non noise)

Aside from noise, public nuisance may be caused by light, litter, or noxious odours. In the case of nuisance from noxious odours, the environmental health team (pollution) is likely to be the most appropriate body to offer advice. Dealing with odour emissions may require technical adjustments that are outside the comfort zone of the average licensing officer.

The issue of light is more complex as it may impact on other responsible authority areas. For example, security lighting may be required by the police for crime

prevention, while local residents consider the lighting to be a nuisance that disturbs their sleep. I would suggest the SoLP indicates a flexible approach to light pollution that allows any of the responsible authorities to comment depending on the circumstances. In the case of litter, this often falls into a gap under the existing regime and may best lend itself to be the responsibility of the licensing authority. Recommendations could, for example, include the suggestion that late-night refreshment premises provide a certain number of waste receptacles or undertake a clean-up of a designated area outside the premises at the close of business each night.

Sexual entertainment

As described above, premises used "infrequently" for sexual entertainment fall outside the definition of a sex establishment in the Local Government (Miscellaneous Provisions) Act 1982 and therefore need to continue to be licensed under the Licensing Act 2003. The licensing authority is likely to expect appropriate safeguards to be put in place such as a customer code of conduct, prohibition on external advertising, requirements for dancers' welfare and restrictions on visibility of performances from the street, and it is probably the best placed to be the lead responsible authority in this area.

General

The licensing authority will not wish to fetter its discretion to make representations and seek reviews entirely. I would, therefore, recommend the inclusion of a catch-all clause which states that the licensing authority may choose to exercise its power as a responsible authority in other situations where it deems it appropriate on the merits of the individual case.

It should also be made clear that the lead roles suggested in the SoLP do not preclude partnership working between agencies, and that a partnership approach will be actively pursued and implemented in all appropriate cases.

Review and the enforcement policy

Aside from setting out its role as a responsible authority within the SoLP, I recommend the licensing authority creates a separate section in its enforcement policy relating to enforcement under the Licensing Act 2003. This is because the licensing regime offers an alternative to prosecution in the form of review. The policy should reflect the fact that review is one of the options available to the licensing authority when considering appropriate action to take in respect of enforcement at licensed premises.

The enforcement policy will set out a number of matters the licensing authority will have regard to when deciding what course of action should be taken in respect of breaches of licensing legislation. This will include such things as the history of the offender/premises, the offender's attitude, the likely punishment, the quality of evidence and whether any action taken is likely to act as a deterrent to the offender and to others. In terms of review, I would suggest the following additional considerations should apply:

- Whether the imposition of additional licence conditions or other action recommended by the Licensing Authority in its application for review is likely to result in promotion of the licensing objectives;
- The likelihood of the licence holder complying with any additional conditions imposed on the licence as a result of a successful review;
- The likelihood of a subsequent appeal "staying" the Licensing Authority's decision in respect of the licence; and
- The likely outcome of any possible appeal.

Review may also be the preferred course of action where the evidence in the licensing authority's possession falls short of the standard required for a criminal prosecution but is sufficient to demonstrate that, on the balance of probabilities, it is necessary to secure additional conditions on the licence, curtail certain licensable activities, suspend or revoke the licence or remove the designated premises supervisor.

Maintaining impartiality at hearings

Many local authority colleagues have expressed concern over whether the licensing authority's impartial role at licensing hearings will be maintained when that same authority is responsible for making representations and seeking reviews. I am not sure this will be a problem. The licensing authority is already a responsible authority under the Gambling Act 2005 and I am unaware of any cases where the authority has been challenged at a hearing in terms of it being biased. The Home Office has also given its assurance that, having taken legal advice, the changes to the Licensing Act 2003 are Human Rights compliant.

However, it may be prudent for the authority to agree a protocol that, where possible, the officer making the representation or seeking the review is a different officer to the one preparing the report to the licensing sub-committee and presenting the item to members at the hearing. In smaller authorities this may not be possible.

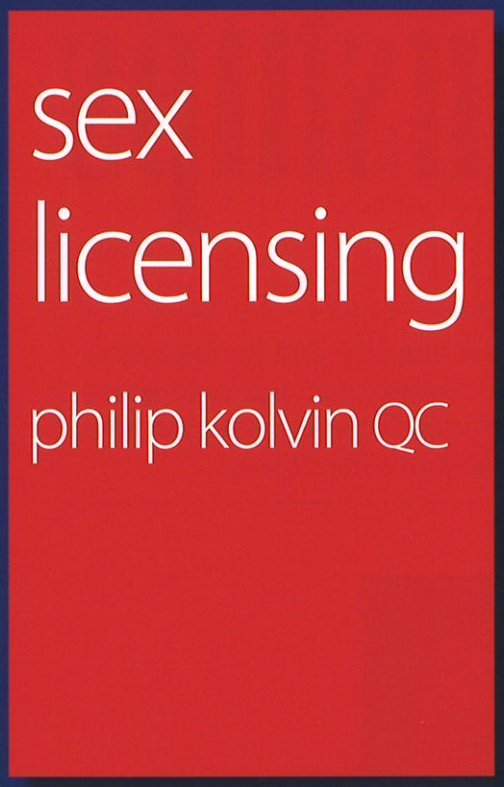
Nonetheless, where the licensing authority has sufficient resources to ensure segregation, it may wish to formalise its position within the SoLP. This will allow any concerned licence holder to challenge the authority on this point at the time the SoLP is consulted upon, and may go some way to mitigating any risk of challenge at a later stage.

Summary

Providing care is taken to state the licensing authority's strategy at the outset, I do not believe its new role as a responsible authority need be a cause of undue pressure. Indeed, there are many instances in which the additional power will be a useful tool and assist the licensing authority in the discharge of its duties. Many of the difficulties we faced since the inception of the 2003 Act will be eased by this amendment, and I believe that, managed properly, this change will eventually be welcomed by licensing authorities across the country.

Jane Blade
Senior Licensing Practitioner, London Borough of Redbridge

Institute of Licensing *Books*



Sex Licensing

Philip Kolvin QC

Published 2010 Price IoL members £25.95 (non-members £34.95) ISBN: 978-0-9555392-2-0

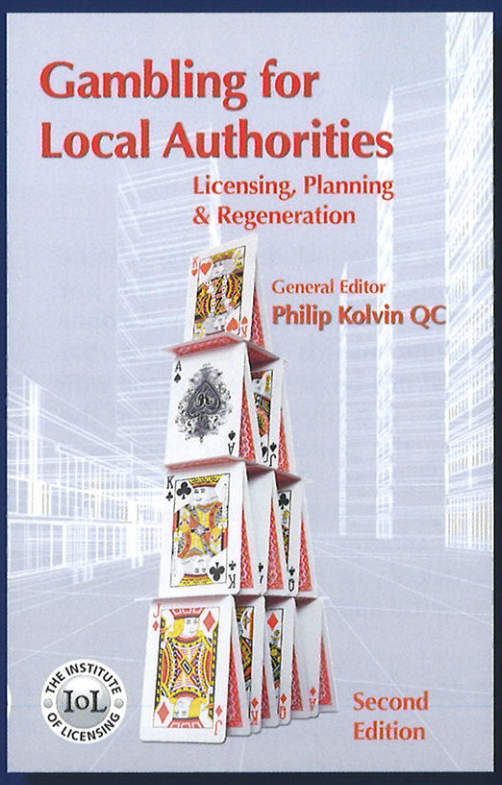
For the first time, England and Wales have a national licensing scheme for the entire range of sex establishments. In Sex Licensing, Kolvin deals with the law, procedures and philosophy of the legislation, and places it in its historical and political context.

Published to coincide with the implementation of the new laws on lap-dancing and other sexual entertainment venues, Sex Licensing provides an examination of the definitions of sex establishment, the application process, the grounds for refusal and the use of conditions.

The book explains how other statutory provisions, including the Human Rights Act and the Provision of Services Regulations, influence decision-making under the new legislation. It also deals in detail with the adoption and transition provisions, the interface between the sex establishment provisions, premises licensing under the Licensing Act 2003 and the special provisions regarding London.

Sex Licensing sets out to inform all involved in the licensing of the commercial sex industry how policy, the application process and the decision-making can all be geared to achieving a pattern and quantum of sex establishments which meets the local authority's aspirations for its area.

Order both books at the same time and receive a 10% discount



Gambling for Local Authorities

Philip Kolvin QC

Published 2010 Price £49 ISBN: 978-0-9555392-1-3

This book charts the terrain of gambling law simply and succinctly for both licensing and planning professionals.

The second edition includes important new material:

Commentary on major issues, including split premises, skills with prize machines and house prize competitions.

New regulatory material, including up-dated regulations, Guidance and Licence Conditions and Codes of Practice.

New case law, including on provisional statements, appeals, costs and bias.

New text on Planning Policy Statement 4 and the Community Infrastructure Levy.

A new chapter on problem gambling by Professor Mark Griffiths.

New tables and figures to explain and simplify the law.

Written in a clear, accessible style, supplemented by extensive use of diagrams and tables to illustrate the key concepts, this book is designed for reading by all professionals and committee members working in the licensing and planning process relating to gambling. With its insights into the working of the legislation from the regulator's point of view, the book will also be invaluable to other participants in the system, particularly industry operators and representatives

Best Bar None schemes are a catalyst for Better relationships

All too often the relationship between the late-night entertainment industry and its regulators is portrayed as one of suspicion, infrequent contact, poor operator engagement and untargeted enforcement. Best Bar None seeks to shift that relationship to one founded on mutual respect and the recognition and celebration of good practice, writes CGA Chief Executive **Jon Collins**

The now widespread Best Bar None (BBN) award scheme was created in a crowded office in Bootle Street police station in Central Manchester. The brainchild of two Greater Manchester Police officers, Steve Greenacre and Jan Brown, BBN was a by-product of the force's work in preparation for (and to maximise the legacy of) the Commonwealth Games of 2002. Civic leaders anticipated both the economic and reputational benefits and logistical problems that could stem from the one million visitors who came to Manchester over the 10 days of the Games.

At its heart, BBN was (and is) a recognition that if the only interaction between the police and the trade is as a reaction to a problem, then there would be little opportunity to drive up standards to achieve mutually beneficial goals.

Jon Collins

Structure

Every opportunity to engage the local media and generate positive coverage of the local licensed economy needs to be taken. As such, the launch of any BBN scheme should be done in such a way as to maximise exposure and positive sentiment. For example, a local DJ can be asked to host the event and the local newspaper and/or radio given a special award that can be voted on by their readers and/or listeners. Having the editor of the local paper on the judging panel is a great way to educate them as to the aims behind BBN and its part in delivering a safe, vibrant late-night offer.

Of course, the launch is also the opportunity to raise the scheme's profile with the trade and build a pool of applicants. In the early years of the scheme, this will need to be supplemented by presentations to Pubwatch and even site visits. All of this engagement with the trade brings the additional benefit of regular communication in a non-enforcement environment. As a result, relations between the trade and its regulators will inevitably improve.

Applicants

The number of categories to be included in the scheme will vary from area to area, dependent upon the size and nature of the trade. While larger conurbations will usually offer separate awards for best pub, bar and nightclub, this might not be possible in areas with a smaller licensed trade. It is important to avoid the temptation to "over-egg the pudding" by developing too many additional categories. This can devalue an individual award if it appears that no one leaves the room empty handed. In addition, it can make for a long night and thus run the risk of your host having to manage an increasingly disrespectful audience.

Inspection: Setting the right tone

The credibility of BBN rests primarily in the comprehensive and robust nature of the inspection and accreditation process and the credibility of individual inspectors. Some

schemes have come unstuck where temporary workers (often students) have been hired in to undertake venue inspection and manager interviews. Applicants will quite rightly question the ability of such individuals to make informed decisions as to the veracity, accuracy and sustainability of evidence offered.

Best Bar None status must not be easily earned. The scheme will actually benefit from entrants, regulators and the public seeing that this is not a rubber stamp exercise. A few failed applicants will only increase the value placed against success.

Inspection: Selecting your criteria

The purpose of a BBN inspection is to get a thorough understanding of the operator's systems and processes in place to meet and exceed their obligations under the Licensing Act 2003. In essence, the scheme is there to recognise and reward those operators running a safe, well managed venue that demonstrates a clear commitment to customer care across the whole night – from managing the queue for entry to facilitating a safe journey home.

Specific criteria can and will vary from area to area in order to reflect local priorities. In particular, a number of areas have begun to incorporate a section on wider health matters to see how operators can be an asset in promulgating information around issues such as sexual health or smoking cessation. However, most schemes have a common core linked to the objectives under the 2003 Act:

- Prevention of Crime & Disorder: will examine how the operator monitors and enforces capacity and uses the right security team in the right way. This section will also look at how the operator deals with and seeks to minimise incidents relating to drunkenness and/or drug misuse, thefts and disorder.
- Public Safety: ranging from basic building blocks of a safe venue such as a fire and incident evacuation policy through to the systems in place to manage crowds and under take appropriate risk assessment. Recognising that a retailer's responsibilities should not end at the door, many schemes will also look for evidence of an effect on end of night transport policy.
- Prevention of Public Nuisance: covering matters such as preventing noise nuisance (work and customer related), minimising litter and developing a long term community engagement policy to generate a positive relationship with neighbouring residents.
- Protection of Children from Harm: will primarily focus on proof of age policies.

Awards Night

The most successful schemes have now established their BBN Awards evening as a much anticipated, enjoyable and profitable element of the whole initiative. There is tremendous benefit to be had from the trade, police and local authority representatives socialising together. The positive spirit engendered by an enjoyable awards evening can be carried across to any number of partnership initiatives: from voluntary closure or removal of glassware during a particular event to part funding of a late night bus service.

Celebrating success will also provide excellent media copy resulting in positive coverage for both individual venues and the wider area. With a number of regional and national drinks companies willing to part fund the evening, ticket sales can generate funds to put towards supplementary activity such as licensing seminars or server training.

Benefits

There are multiple and varied benefits from bringing BBN to an area. Such benefits will be reinforced through the successful staging of the scheme year on year. Undoubtedly, the primary benefit is the strengthening of the relationship between the trade and its regulators, which unlocks the potential to improve the late night environment in so many other ways.

In addition, there are specific business benefits, the prospect of which can be used as part of the initial operator recruitment drive:

- External approval of an operator's systems and processes could provide support for a due diligence defence in a review.
- A successful application can be used as evidence to prospective employees of the standards maintained by their potential employer.
- Operators have noted that BBN status can be doubly positive for business: it sends out a message to customers that this is a well-run venue; and the application process causes operators to review and refine their procedures, which produces better run and more customer friendly venues.
- Both individual operators and complete circuits can create a marketing campaign built on a successful BBN scheme.
- Some areas partner with industry supplier companies, for example, insurance brokers or training firms, to offer successful applicants access to discounted services.

Conclusions

Best Bar None is both a valuable initiative in its own right and the centre piece for effective multi-stakeholder partnership work, providing goodwill and momentum to marketing, operational and strategic matters.

Time and again, BBN has proven to be a catalyst for the successful regulation of the late night economy in an increasingly varied range of locations. The feel-good factor engendered by the awards process has proven invaluable in supporting an area's work to strengthen and diversify its licensed leisure offer. It is to be hoped that the scheme can go from strength to strength in the months and years ahead.

If you feel your area would benefit from the establishment of a BBN scheme, please visit www.bbnuk.com for further details.

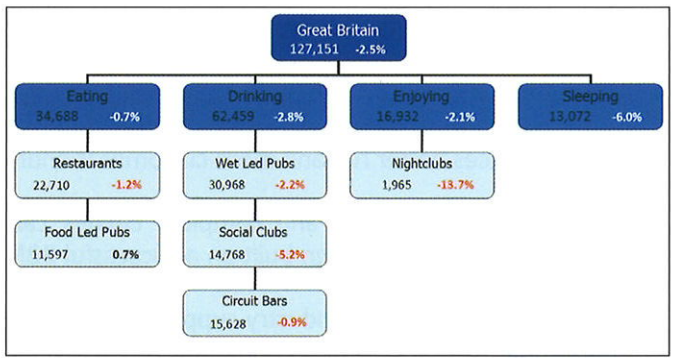
Jon Collins
Chief Executive, CGA

CGA statistical snapshot

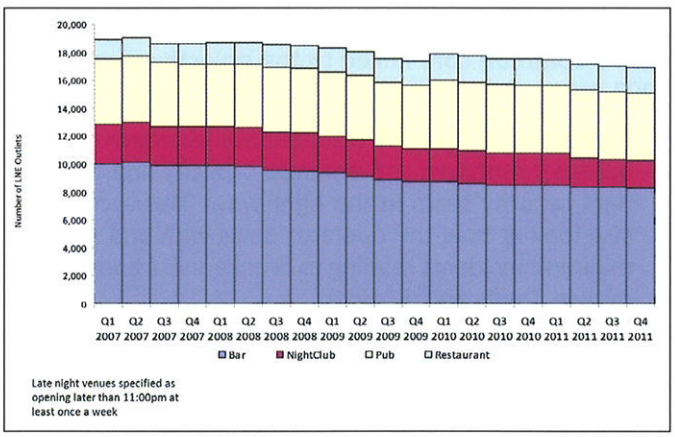
Late-night market still in decline

In each edition of the IoL Journal CGA – the UK's leading on trade research consultancy, will be providing a statistical snapshot highlighting current trends in the UK licensed trade. This data will draw on both Brand Index and Outlet Index, CGA's outlet universe and volume indices, updated on a continuous basis by our team of telephone, desk and field researchers and supplemented by an unmatched selection of data partner sources. This snapshot, taken in January, is prepared by CGA's **Mark Newton** and **Stuart Capel**

GB On-Trade Universe: December 2011 v 2010 - showing continued decline in wet led, social club and night club sectors



GB Late Night Market: shifting mix of venue types to December 2011



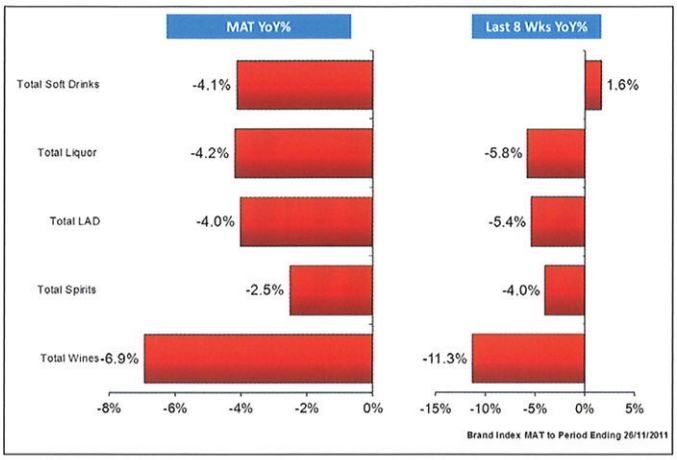
Since the last edition of the Journal, there have been some subtle – but important - changes to the performance of certain key sectors of the on trade:

- The number of restaurants has declined, suggesting an impact on this sector by the growing importance of food to the wider pub market. This is likely to have further implications for licensing as casual eating out/ family dining becomes an ever larger factor.
- The late night market continues to contract, with the number of traditional nightclubs in steep decline and the broader, more flexible offer within circuit bars not enough to prevent a fall. The potential for the remaining outlets in these sectors to move further upmarket is becoming greater all the time.
- The churn in the sleeping sector continues as multiple guest houses and holiday parks lose out to the expanding budget hotel sector. Brands such as Ibis, Premier Inn and Holiday Inn Express will continue to invest and drive value city-centre accommodation, which should provide an increase in footfall in the later-night market place.

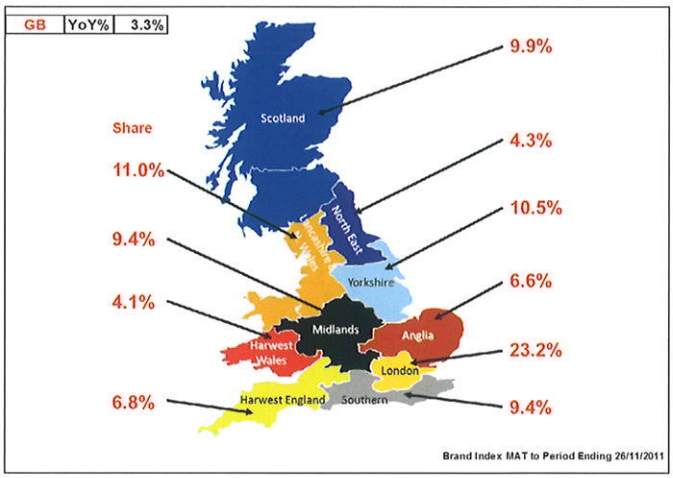
The overall trends outlined in the previous Journal have continued within the late night market, and are mirrored by general declines in outlet numbers.

However, the market share of all sectors has stabilised somewhat over the course of 2011. There are encouraging signs within the bar segment of a diversification in offer to cater for older customers, niche music tastes and so on. A wholesale upward trend in demographic could have positive consequences for the local late night market.

GB Volume Total Category Performance – MAT/ Qtr November 2011 v 2010



Share of Total Alcohol sales value: - by GB TV Region



The main drinks categories have continued to see declines in volume mirroring the further reduction in outlets over the last 12 months and the squeeze on consumer budget created by the poor economic climate.

One of the main potential areas of concern created by this environment is the encouragement it provides to pre-load prior to a night out – particularly among the younger (18-25 demographic).

Overall, spirits have tended to perform better than other long drink categories, thanks to increased interest in premium brands, shooters and cocktails.

Although wine volumes have shown particularly significant falls, this has been counterbalanced by a move towards higher-value purchases.

Soft Drinks volumes have increased as the emphasis towards food-led/ destination drinking occasions continues.

London remains the most important region of GB on trade by value – increasing its share by +0.3%, but subtle changes continue to take place on a regional basis:

- Meridian, Central, Yorkshire, Harwest (Wales & England) and Anglia have all seen small rises in value share, continuing the trend towards over indexing of higher value drinks categories.
- The spectre of minimum pricing has adversely affected Scotland with a fall of -0.4% and this is likely to continue. Westminster is likely to watch the developing situation here with much interest over the coming months and the implications for the on trade in England and Wales in the longer term are significant.

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.

Article

Betting offices: are controls sufficient?

Betting offices have found themselves in the public spotlight recently. Numerous people have criticised their operators for flooding some neighbourhoods with too many shops, which many say will often act as a catalyst for social and policing problems. So are the controls we exercise over betting offices inadequate? Does the licensing regime require rethinking? **Philip Kolvin QC** thinks not, for the reasons he outlines below

In 2008, the Labour Government published *Fair Rules for Strong Communities*. It was a high level affair, carrying the imprimatur of four separate government departments and a foreword by the Prime Minister Gordon Brown. It promised tough new rules on alcohol, sex and gambling.

With regards to alcohol, this resulted in the Mandatory Code, and the prototype Early Morning Restriction Order. In the case of sex, it resulted in the reclassification of lap-dancing clubs as Sexual Entertainment Venues and their control alongside sex shops and cinemas.

In the case of betting offices, two separate concerns were identified: that clusters of such premises can a) fundamentally alter the character of a neighbourhood; and b) harm vulnerable people. The promise was that the Department for Culture, Media and Sport would investigate how we can ensure that the licensing framework and planning system give local communities and their authorities sufficient power to address the issue. Three years later, nothing has been done. This brief article investigates the history of the issue, and asks whether anything can or should be done about the suggested problem.

Off-course bookmakers

Off-course bookmakers were first legalised in 1961, largely in response to the recognition that the options were for either a highly regulated industry or for the proliferation of unlicensed bookmakers on street corners. The ensuing half century has been characterised by incremental deregulation of the industry, as highly prescriptive rules have been relaxed one by one. So, for example, the first betting offices could not have daylight, refreshments or sporting commentary.

In response to the business opportunities flushed in by deregulation, betting offices have become more congenial environments, with better disabled facilities, refreshments, digital screens, price finder terminals and sporting press. In addition, the range of events upon which betting occurs has broadened from the traditional horses and dogs to football, cricket, the Irish Lottery and national elections. They have also become safer environments, with modern offices tending to include full counter screens, maglocks, safe havens and CCTV. National schemes such as the Safe Bet Alliance have dramatically reduced robbery rates in offices. Betting offices do not permit the consumption of alcohol and shut well before public houses. There is rarely noise leakage and nuisance cases are rare to non-existent. After a poor initial record in test purchase operations under the Gambling Act 2005, bookmakers are on top of age verification, and underage betting is very rare.

Gambling Act critics

So what is the problem? In the main, there are two recurrent themes. First, there is a perception that the Gambling Act 2005 has resulted in a large increase in the number of betting offices and/or that there has been a clustering of offices which detract from the character of the street scene, impact detrimentally on town centre vitality and viability and are a temptation to the vulnerable. Second, there is a view that betting offices are generators of crime and anti-social behaviour.

As to the first theme, the numbers argument is without substance. On 1 May 1961, 8,802 shops were opened. The numbers continued to grow and peaked in 1968 at 15,782. In 1987, betting offices were explicitly recognised as appropriate for provision in a shopping area alongside financial, professional and other services by their inclusion as A2 Uses in the 1987 Use Classes Order. At that date, there were 10,384 offices. That number fell year on year to 8,804 in 2003, prior to the advent of the Gambling Act 2005. Last year it fell to 8,595.

What has changed is that in some areas, betting offices have emerged from side streets to units in primary

shopping areas. This is partly because operators have been able to demonstrate to planning authorities and inspectors that the removal of restrictions on open shop windows for bookmakers means that betting offices no longer present dead frontage, and that they generate as much footfall, and therefore contribute to vitality and viability, as many retailers do. It is also partly because of the advent over the last decade of fixed-odds betting terminals, which are significant drivers of profit and have enabled bookmakers to afford units with higher rentals and greater prominence. In a few areas this has given rise to clustering, to a greater or lesser degree.

No link with problem gambling

No doubt, many believe that betting offices are responsible for the decline in the traditional functions of the high street. There is little evidence for this. The egregious loss of day to day retailers from our community streets – butchers, fishmongers, bakers, grocers – has nothing to do with bookmakers, who tend to take units formerly occupied by banks and estate agents. It has much more to do with the dynamics of the retail industry and the market share of the supermarkets. Furthermore, the national retail vacancy rate, now averaging well over 10%, does not suggest that occupation by one sector is ousting another.

Nor is there any significant evidence of an association between the number of betting offices in a locality and the amount of problem gambling. There is already in our nation the ability to gamble across a great variety of platforms, be they real or virtual. The market for betting offices tends to be walk-in and local, so that while a further office may divide up the cake, and to some extent pull in trade from a slightly wider catchment, there is no great belief in the industry, let alone independent evidence, that it enlarges the cake.

The high-point of the argument against more betting offices is that fixed-odds betting terminals pose a risk to problem gamblers. However, this has not been borne out by any data from the national prevalence survey or elsewhere, with the introduction of these machines into betting offices not being shown to have caused a measurable increase in problem gambling.

It should also be noted that there are strict controls on the activities of betting offices, set through the Licence Conditions and Codes of Practice on operating licences, and the Mandatory and Default Conditions on premises licences. The thesis that a vulnerable person will gamble more if there are four betting offices within walking distance rather than three, or two rather than one, is intuitively puzzling and empirically unproven.

The "character" argument is a somewhat subjective one. Are betting offices more or less harmful to the character of urban streets than lap dancing establishments, off-licences, take aways, supermarkets or the chains that can be seen on every high street everywhere? There is perhaps a judgmental element creeping in to an assessment of what is acceptable, pandering to which is no part of the role of the planning or licensing system.

As to the second theme, the argument is that betting offices give rise to crime and anti-social behaviour. The evidence that they give rise to crime is extremely thin. There have been some cases where betting offices have been used by drug dealers for their activities, but these are few and far between. There are also some cases where punters smash the screens of gaming machines perceived not to be in a giving vein. Were one to compare these incidents with crime and disorder in pubs and clubs, or even property crime in supermarkets, one would find them to barely register in official data.

Sometimes, usually in response to licence applications, police data is compiled to demonstrate the number of crimes within x metres of a betting office to show that the figures are high. But this data is usually not traceable to the betting office itself, and merely demonstrates that betting offices tend to open in high footfall areas near to other retail and licensed facilities, where one would expect a higher amount of crime, just as one would expect low amounts of crime in dairy pastures. A fairer view is that betting offices reflect their local communities, and just as criminals go into pubs and shops they go into betting offices. This does not mean that betting offices cause crime.

There has, however, been one important change. The smoking ban has meant that there is a larger amount of hanging around outside, usually by older men, some of whom might be drinking as well as smoking. This has undoubtedly given rise to concern in certain quarters. Whether it amounts to crime and disorder within the meaning of the Gambling Act 2005 is perhaps open to question. But it is an undeniable point of conflict between betting offices and some local communities.

Lammy proposes planning change

Over the last ten years, there has been a sea change in the attitude of the alcohol industry to events outside their premises, largely engendered by the same factors. It is now no longer unusual to see conditions regarding smoking areas, taxi marshalls, street wardens and door staff managing dispersal. Well-advised bookmakers are starting to tread the same path, finding imaginative solutions to these problems. But is more required?

Article 4 directions

In 2010, David Lammy MP proposed a *sui generis* use class for betting office, so that betting operators would always need planning consent to open a new betting office, rather than, as now, being able to take over an A2 use such as a bank or estate agent, or an A3 use such as a restaurant, and convert it to a betting office without the need for consent. He was told in Parliament by the planning Minister Bob Neill that a national change in the planning rules would be disproportionate when there is no evidence to suggest that the proliferation of betting offices is a widespread problem requiring national legislation. Mr Neill also pointed out that, in the small number of cases where there is an issue with over-proliferation, the answer would be a local Article 4 direction, removing permitted development rights within the Class A2 use class. This is a view also known to be shared by John Penrose, the Minister for Tourism and Heritage.

Whether in practice Article 4 directions will be used by licensing authorities is a matter for conjecture, particularly

given the potential to have to pay compensation to those whose permitted development rights are affected. But the response is clearly indicative of the Government's initial view on taking office.

Interestingly the issue has arisen yet again in the 2011 Department for Communities and Local Government's pre-consultation on change of use in the planning system. However, both because the Government's view has been consistently against tighter regulation of gambling and because further regulation is inconsistent with the growth agenda, the smart money is against further planning regulation for betting offices.

The issue is also currently being looked at by the Department of Culture, Media and Sport Select Committee. While the Committee is yet to report, the evidence sessions suggest that the Committee may believe that smart regulation would involve increasing the number of fixed odds betting terminals permitted per office, so as to dampen the demand for large numbers of offices in individual localities.

Summary

In summary, whether there is an answer to the question depends very much on the question. If the question is whether planning and licensing authorities have strong powers to prevent further betting offices, the answer is no. On the whole, betting operators have been able to overcome objections so as to make their case for new facilities. The removal of the "demand test" in the Betting, Gaming and Lotteries Act 1963 and its replacement by the "aim to permit" test in the Gambling Act 2005 has made it easier for operators to chase units in prime locations. The presumptions in favour of development in planning cases, which throw the onus onto planning authorities to rebut well-rehearsed cases advanced by experienced betting operators, have made it difficult for authorities to resist the advent of new offices.

If, however, the question is whether there are sufficient powers to control how betting operators behave, the answer is yes. Operators have shown themselves up to the task of implementing rules on age controls, problem gambling, self-exclusion and internal management of offices. In some locations, operators will need to acquire the skills to do more to overcome what is perceived by many communities to be the problem of loitering outside offices. As more cases are decided at appellate level, it is anticipated that good practice on this topic will disseminate fairly rapidly. The process would be accelerated by the setting of standards in local policies. Certainly, the industry wants resolution of this issue as much as authorities, because no business wishes to be at loggerheads with the community it serves.

Philip Kolvin QC
Head of Licensing, Cornerstone Barristers (formerly 2-3 Gray's Inn Square)

IoL Calendar of Training & Events

March 2012

6-8 Enforcement Course – Investigation Through to Trial
14 North West Regional Meeting
15 Eastern Regional Meeting
15 North East Regional Meeting
15 South West Regional Meeting
29 London Regional Meeting

June 2012

13 North East Regional Meeting
14 London Regional Meeting
14 North West Regional Meeting
14 South West Regional Meeting
15 Eastern Regional Meeting
18 Regional Officers Training Day – Stoke on Trent
19 Annual Training Day – Stoke on Trent

September 2012

12 Eastern Regional Meeting
12 North West Regional Meeting
13 North East Regional Meeting
20 London Regional Meeting
20 South West Regional Meeting

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

Institute of Licensing

Patron
Philip Kolvin QC

President
James Button

Institute of Licensing Board

Jon Collins	– Acting Chair
Myles Bebbington	– Vice Chair/Chair of Eastern Region & Chair of Events Committee
Phil Andrews	– Director
George Barnes	– Chair of South East Region
Gareth Bentley	– Chair of North East Region
Jane Blade	– Chair of London Region
David Brown	– Branch Chair for Northern Ireland
Lesley Cameron	– Chair of Home Counties Region
David Chambers	– Director & Chair of Organisation & Development Committee
Sarah Clover	– Chair of West Midlands Region
Susannah Fitzgerald QC	– Director
John Garforth	– Regional Director - North West Region & Chair of Management Committee
David Lucas	– Chair of East Midlands Region
Sarah Oliver	– Chair of Welsh Region
Sean Williams	– 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 - 2011/2012

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

Organisation Membership Fees – 2011/2012

- Standard Organisational Member, for between 1 and 6 named contacts – £230.00
- Medium Organisational Member, for between 7 and 12 named contacts – £340.00
- Large Organisational Member, with over 13 named contacts – £480.00

Apply Online – visit our website - www.instituteoflicensing.org

9 772048 911006 03