



Chartered
Institute of
Environmental
Health

Rebalancing the Licensing Act etc

Response to the Home Office consultation

26 August 2010

The Chartered Institute of Environmental Health

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We refer to your consultation document "Rebalancing the Licensing Act etc" published at the end of July. Our members in local authorities act in the role of "Responsible Authorities" under the 2003 Act. A few in private or commercial practice also advise applicants for licences and given our perspective, we were disappointed not to have been included in the pre-consultation mentioned in para. 3.02, moreover since the formal consultation period now is such a short one and spans a holiday period. Though we are concerned perhaps principally with the statutory objective to prevent public nuisance and, hence, more with the provision of regulated entertainment than the sale and supply of alcohol, some aspects of this paper are relevant to what our members do and the wider functioning of the whole licensing regime and we would like to offer the following comments in response to the paper's questions:

Giving more local powers to refuse and revoke licences

Q1: What do you think the impact would be of making relevant Licensing Authorities "Responsible Authorities"?

This proposal would, to our mind, fundamentally change the relationship between Licensing Authorities and the current Responsible Authorities and by putting them on a par, diminish the standing of all of them. Once similarly-empowered and independent of (or, at least, no longer reliant on) the views of the current Responsible Authorities, while the question would arise of on what evidential basis (or with what expertise) a Licensing Authority might make its decisions, other Responsible Authorities would become potentially redundant in that capacity. That a Licensing Authority is, at the same time, likely to share some staff with other Responsible Authorities would, if their roles came to overlap, also compromise both and the transparency of licensing decisions. It is important, we think, for the propriety of the whole regime that Licensing Authorities are able to remain at arm's length from these other bodies.

Q2: What impact do you think reducing the burden of proof on Licensing Authorities will have?

Q3: Do you have any suggestions about how the licence application process could be amended to ensure that applicants consider the impact of their licence application on the local area?

This is, of course, to do with the *standard* of proof rather than the burden of proof which it is not proposed to change. We agree with that, and that it should remain with Licensing Authorities such that they should always be required to justify their actions. The current requirement, nevertheless, is that they have to show that a condition etc is *necessary* for the promotion of a particular statutory licensing objective and we agree that this is a problematic formula. That is, however, as much to do with the "wooliness" of "with a view to promoting" as with the stringency of "necessary" but while it is important to ensure that conditions etc

remain justifiable and sufficiently relevant, something like "conducive to the attainment of..." is probably enough. To require conditions to be no more than "appropriate", as is mooted, is probably not.

We approve of the further idea that applicants should bear the burden of setting out the impacts of their applications and of demonstrating how, where necessary, those will be mitigated. That is only fair and responsible (and should bring home to them the externalities of their businesses) though we would be wary about taking such statements at face value and they would need to be checked on behalf of Licensing Authorities.

The most appropriate place to require such statements would be in the operating schedule in relation to premises licences. That would seem to be readily achievable by an amendment to s.17 of the Act and similarly to s.71 in relation to club operating schedules and to s.100 in relation to Temporary Events Notices. It might be worth considering in addition whether copies should be required to be available from applicants on demand by any "interested party" as well as, of course, on-line from the Licensing Authority.

Q4: What would the effect be of requiring licensing authorities to accept all representations, notices and recommendations from the Police unless there is clear evidence that these are not relevant?

The simple effect of this proposal would be to elevate one Responsible Authority above all others and, indeed above the Licensing Authority itself, undermining the status of that if it maintained its current quasi-judicial role and not least the proposal, were it to come about, that it too might be made a Responsible Authority. The Police are, of course, not infallible in their judgements and the proposal would present clear difficulties were another Responsible Authority to disagree with their views while the proposed safeguard – that of "clear evidence" etc – suffers from the same problem as "necessary" (see Q2 above), as well as appearing to present a new cause of appeal. While we are not aware that the views of the Police are given insufficient weight now, indeed we know elected members take them very seriously, we think this is a bad idea.

Q5: How can Licensing Authorities encourage greater community and local resident involvement?

Q6: What would be the effect of removing the requirement for interested parties to show "vicinity" when making relevant representations?

The problem is more precisely one of how to achieve greater *representative* involvement since greater *unrepresentative* involvement would hardly improve decision-making or add to democracy. It is surely a matter of quality, not quantity and it would not be helpful in our view to encourage involvement by individuals or groups (such as "pressure groups") with no genuine *locus* in a decision particularly since those satisfied with any proposal are much less

likely to see a need to say so. That is the point of the current formula and we think it should remain.

A leaf might nevertheless be taken out of the planning book in which residents close to a proposed development are automatically alerted to it (though that would incur a cost). Local councillors could, perhaps, play a greater role in soliciting public comments too.

While we acknowledge the uncertainty in the word "vicinity" and regret that a decision seems already to have been made to erase it from the Act, if it was not sufficient to indicate through guidance that Licensing Authorities should take a generous view of its meaning, some alternative formula with the same intent (i.e. demonstrating a material interest) now needs to be found. It would not be an improvement in our view to throw open the doors to all-comers with the attendant risk that decisions might be challenged for being founded on irrelevant considerations.

Q7: Are there any unintended consequences of designating health bodies as a Responsible Authority?

The proposal behind this question appears ignorant of the nature of some current Responsible Authorities and, not least, of concurrent proposals by the Department of Health while suffering from the disadvantages of the proposal discussed under the preceding question. In particular, s.17 (4) of the Act defines "Responsible authority" to include—

(c) the enforcing authority within the meaning given by section 18 of the Health and Safety at Work etc. Act 1974 for any area in which the premises are situated, and

(e) the local authority by which statutory functions are exercisable in any area in which the premises are situated in relation to minimising or preventing the risk of pollution of the environment or of harm to human health.

In practice, these roles are filled by the local authority's environmental health officers whose role, precisely, is to represent a health viewpoint and who are well qualified to do so.

Proposals published recently in the Health White Paper and a daughter document "Local democratic legitimacy in health" moreover clearly foreshadow the currently diverse responsibility for public health delivery falling squarely on local authorities. Primary Care Trusts are to be abolished. Insofar as local authorities will also take on the responsibility for drawing-up and maintaining Strategic Needs Assessments with local NHS partners (principally GP Consortia) it appears to us that health matters are currently adequately represented in the licensing process and will continue to be without the designation of additional Responsible Authorities whose interests in particular applications are likely to be remote. What may, nonetheless, provide an opportunity to inculcate a broader health perspective would be to provide by way of an amendment to s.5(3) of the Act that a Licensing Authority should consult "*(g) such other persons or bodies as it may think appropriate.*" in the determination from time to time of its Statement of Licensing Policy.

Q8: What are the implications in including the prevention of health harm as a licensing objective?

While consideration of community health could come out of the proposal we make at the end of the preceding paragraph, pursuing that by way of a statutory objective would mark a significant addition to the regime which might stretch the long title. Whereas the meaning of a new duty on a Licensing Authority to "*carry out its functions...with a view to promoting...the prevention of health harm*" is not entirely clear either, it would nevertheless seem difficult to apply, as it would have to be, to individual licensing decisions and it might be argued it is fundamentally incompatible with the purpose of the majority of licensed activities anyway. While its effectiveness must therefore be in doubt too (and the question arises whether the sort of *sequellae* suggested in para. 5.11 might only encourage alcohol "tourism"), surely the fairest and most direct way of achieving much the same aim is to enforce the provision in s.141 on serving alcohol to people who have clearly had enough already?

Q9: What would be the effect of making community groups interested parties under the Licensing Act and which groups should be included?

In addition to the requirement in section 5(3)(f) of the Act for a Licensing Authority to consult such other persons as it "*considers to be representative of...residents in its area*" on its Statement of Licensing Policy, s.13(3) already defines an "interested party" in respect of any application for a premises licence to include "*(b) a body representing persons who live in [the] vicinity*". A similar definition applies in respect of club premises certificate so it is plain that, contrary to the impression given by para. 5.13 of the consultation paper, the opportunity to participate in the process at both strategic and detailed levels is not limited to individual residents now.

The need to extend the definition is, in the first place therefore, not clear but the difficulties with doing so would include to ensure that any additional bodies had a legitimate interest in any particular application and that they neither duplicated nor contradicted the views of others they purported to represent and, indeed, that their views were representative at all. It would, however, strengthen the democracy of the process, and we would be content to see "*(e) an elected member of the local authority for the area*." added to the lists in Ss.13(3) and 69(3).

Q10: What would be the effect of making the default position for the magistrates' court to remit the appeal back to the Licensing Authority to hear?

That, in the words of para. 5.17 "The appeals process therefore often takes the power away from licensing authority to make the final decision on the application." is surely the whole point of it. Whereas it may be enough in the case of an error of law or a procedural defect for the court to point out the mistake and remit the matter to the Licensing Authority for a re-think, it would plainly be wrong to do so (or to prevent an appeal to the court in the first

place) in other cases, moreover it would undermine public confidence in both that final decision and in the Licensing Authority itself.

Q11: What would be the effect of amending the legislation so that the decision of the Licensing Authority applies as soon as the premises licence holder receives the determination?

To provide for, as the paper terms them, "sanctions", to apply notwithstanding a pending appeal is likely in our view to make Licensing Authorities more wary about imposing them in the first place for fear of compensation claims where appeals against them are subsequently successful. There may, nonetheless, be compelling reasons why a particular sanction should take effect immediately and we suggest that the Licensing Authority should be given the discretion to decide whether a sanction should stand or be suspended in the event of an appeal (and hence whether or not to incur the risk of compensation), according to the circumstances.

Dealing with the problems of late-night drinking

Q12: What is the likely impact of extending the flexibility of Early Morning Restriction Orders to reflect the needs of the local areas?

Notwithstanding the number of premises of all descriptions apparently holding 24-hour licences, the paper admits that only a small proportion (~12% - and only a few hundred in total nationwide) are of a type likely to cause local concerns about extended opening hours and far fewer still actually make use of those. This hardly amounts to a "24-hour licensing culture" and should such premises actually justify those concerns, it is not clear to us why their hours could not be curbed through reviews of their individual licences or, *in extremis*, Closure Orders. It follows that we do not think the paper has made a case for "EMROs" to be extended.

Whereas it is proposed that licences should continue to be granted against a backdrop of the statutory licensing objectives it would seem to us to require some mental gymnastics subsequently to restrict them by way of EMROs on exactly the same grounds, whether the test is of necessity, appropriateness, benefit or whatever and the proposal in para. 6.04 needs to be re-thought.

Q13: Do you have any concerns about repealing Alcohol Disorder Zones?

No.

Q14: What are the consequences of removing the evidential requirement for Cumulative Impact Policies?

Though, no doubt, it would make Licensing Authorities' work much easier if they could adopt any policy without bothering about its justification, we do not think that represents good government and it may very well prove unlawful. Whereas the current requirements do not seem to have proved an insuperable barrier in at least 129 cases so far, and the paper proposes to make the link between CIPs and the licensing objectives less onerous anyway, again, we do not think the case for this proposal has been made out.

Q15: Do you agree that the late-night levy should be limited to the recovery of these additional costs? Do you think that the local authority should be given some discretion on how much they can charge under the levy?

Though it is not clear what *additional* costs are incurred for late-night policing anyway, it is also not clear how a levy payable to a Licensing Authority would be passed-on to a Police Authority or, to put it another way, under what mechanism a Police Authority could bill a Licensing Authority, quite apart from the questions of how the drinking-related element of such costs, if they are real, might be identified and the size of a levy might be calculated. If such a levy were justifiable in principle (and arguably, licensees already pay for the costs of policing through taxation) we would have misgivings about powers to decide the scale of payments locally (which could come to resemble fees for policing) but they should, perhaps, be levied by Police Authorities directly.

Q16: Do you think it would be advantageous to offer such reductions for the late-night levy?

Again, while we understand the desire to encourage these businesses to police themselves, we suspect it might be difficult to identify best practice both in theory and in its day-to-day application and as written above we think there are more fundamental questions about how the costs of policing – a public good – should be met.

Q17: Do you agree that the additional costs of these services should be funded by the late-night levy?

Provided such additional costs are genuinely attributable to those being levied, necessarily incurred and can be accurately identified, yes.

Q18: Do you believe that giving more autonomy to local authorities regarding closing times would be advantageous to cutting alcohol-related crime?

Whereas the paper offers no justification for this proposal in terms of crime-reduction, we suspect the issue is more to do with rowdiness and other anti-social behaviours and while we also understand that this is, at least in part, often blamed on so-called "pre-loading" by drinkers, it should not be assumed that imposing earlier closing times acceptable to the wider clientele would have much effect. It would, on the other hand, clearly risk what the Guidance seeks to avoid, namely large numbers of drinkers being turned-out on to the streets together, competing for transport or in food outlets or moving *en masse* to neighbouring areas with more liberal policies.

Temporary event notices

Q19: What would be the consequences of amending the legislation relating to TENs [as described]?

To permit all Responsible Authorities (not just the Police) to object to a TEN and to permit objections on the basis of all the licensing objectives (not just the prevention of crime) would potentially incur much higher administrative costs and trigger many more hearings and run somewhat counter to the intention of TENs. On the other hand, however, they would be under no obligation to object and both a longer period of notice and a longer period in which to register objections would allow a better examination of applications, helped by the proposals for addressing them consistently.

Q20: What would be the consequences of a) capping the number of TENs a licence holder could apply for annually, and b) restricting the number of TENs which could be applied-for in the same vicinity?

But for the question of what "vicinity" means (see Q6 above), these proposals would seem to address the major abuses of the TEN scheme.

Protecting children from the harm of alcohol

Q21: Do you think 168 hours (7 days) is a suitable minimum for the period of voluntary closure that can be flexibly applied by Police for persistent under-age selling?

Q22: What do you think would be an appropriate upper limit for the period of voluntary closure that can be flexibly applied by Police for persistent under-age selling?

Q23: What do you think the impact will be of making licence reviews automatic for those found to be persistently selling alcohol to children?

Whereas self-reporting studies of children's behaviour always need to be treated with caution, if persistent under-age selling is as prevalent as they claim, i.e. to half of all under-18s who have ever drunk alcohol, that there were only 9 prosecutions for it in 2008 (and that is of *persistent* offenders, i.e. already known to Police) is shocking. Seeking to address the problem by amending the way in which offenders can discharge liability for their further offences is entirely the wrong approach, however, even if we thought it ever appropriate for enforcement agencies to determine their own penalties, which we do not.

While we would not argue against raising the maximum fine we are mindful that actual fines are typically much lower but the most effective way to deal with this problem is through the permanent removal of the licence. Self-evidently, premises unable to sell alcohol at all can no longer be responsible for under-age sales.

Banning below-cost sales

Q24: [On the retail cost of alcohol]

We are not able to answer this question, nevertheless, that the paper asks it at all does illustrate the problems of this approach and not least those of policing it.

Q25: Would you be in favour of increasing licence fees based on full cost recovery, and what impact would this have?

While that the costs of licensing would not arise but for the existence of licensable activities argues that the scheme should be self-financing, we might have some concerns about how those costs were distributed, in particular that they should not unduly fall on small events and little shops which already struggle to survive in competition with their bigger neighbours.

Reducing the burden and bureaucracy of licensing and covering its cost

Q26: Are you in favour of automatically revoking the premises licence if the annual fees have not been paid?

Yes.

Q27: Have the first set of mandatory conditions [banning irresponsible promotions, the dispensing of alcohol directly into customers' mouths and to provide free tap water] that came into force in April 2010 had a positive impact on preventing alcohol-related crime?

If it is not too early to tell at all, only the government is likely to have sufficient collated data to answer this question though we doubt that the reduction of crime was the sole motive behind the Order and do not think, accordingly, that that is a satisfactory criterion to judge its worth against.

Q28: Would you support the repeal of any or all of the mandatory conditions?

No. Moreover we were surprised not to find in the paper any consideration of a further condition to restrict the sale of "super-strength" drinks.

Q29: Would you support measures to de-regulate the Licensing Act, and what sections of the Act in your view could be removed or simplified?

The Act fulfils a useful function and we would be wary about any deregulatory steps which might reduce its effectiveness. There is, however, some duplication in the way it is set out which might be removed (though arguably at the expense of clarity) and we agree that there would appear to be no need to republish Statements of Licensing Policy until they change.
