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Foreword

Jon Collins

Chairman, Institute of Licensing

One of the mantras of the Institute of Licensing is that we are "a broad church". It was a point first made to me by the estimable David Chambers when discussing my potential involvement with the Institute (or, rather, its forerunner the Society of Entertainment Licensing Practitioners) back in the 1990s.

This broad church approach does not always make it easy for us to contribute to the debate on licensing policy. However, we have made a virtue of the spectrum of opinion held across our membership – positioning this not as a route to bland position statements but rather as an access point to intelligent, considered opinion from a range of perspectives.

Given the increasing role of health bodies in the licensing process, now is the time to build an extension on our church. Fortunately, this does not require continual jumble sales and vicars in baths of beans in order to raise the funds to purchase new slate. It merely requires us to adapt our thinking. Given the flexibility of thought and openness to new arguments that typify any Institute discussion, this should not prove too much of a challenge. After all, our goal is to share knowledge and experience and the promotion of mutual understanding and respect amongst licensing practitioners.

I believe it's a goal we meet consistently and resoundingly through our programme of national and regional events, training days and, of course, this very journal. To date, that really has meant bringing together three main constituencies – operator, council and police – and their legal advisers. I have been around licensing policy for long enough to remember the days when the typical operator would view the council as a necessary evil and the police with downright suspicion. A decade or so of partnership work and that default positon has been replaced with a more open and communicative stance (though not without the odd local exception). As a result, we have fewer unenforceable conditions and generally more enlightened and targeted regulation and, as a result, greater compliance from the trade.

For drug and alcohol policy and associated industry and police relations in the 1990s, now read present day relations between the trade and the health community around alcohol generally and the Licensing Act 2003 in particular. Clearly, central government and the health community wish to see health organisations play a more significant role in policy development and the local workings of the licensing process. Nationally, we see a push through the Responsibility Deal for a number of initiatives to reduce harmful consumption, on-going, if low level, support for the addition of a fifth objective covering health to the 2003 Act and continued lobbying for the introduction of minimum unit pricing. All this in addition to the most significant change which saw local health bodies become responsible authorities under the Act.

Can the trade find a common language and way of working with health organisations in the same way they have with the vast majority of police and local authorities? To my mind, the answer will only be yes in those areas where the parties have been able to establish common ground in the form of a mutually agreeable outcome. In the 1990s, this was achieved when all sides agreed that a mutually beneficial outcome would be a safer, more vibrant town or city centre. That would mean, less pressure on the police (and other emergency services), and a centre that works for local residents, tourists and consumers alike and thus offers a sustainable trading environment for operators.

At present, we do not appear to have a similar target toward which industry and the health community can work. One only need look at the tremendous work done in the last 20 years to reduce the health harms around drug misuse to see that this partnership can deliver. Can we, when it comes to alcohol and licensing, identify exactly what that delivery should be? Supporting problem drinkers and ensuring drunken individuals do no harm to themselves or others are obvious starting points (with good examples of local work already in place). When it comes to "whole population" initiatives, the landscape is less clear. Daily unit guidelines and the associated definition of "binge" drinking lack credibility. A clear definition of success (which presumably stops short of zero consumption) is required.

Recent meetings between the Institute and health organisations have been encouraging. There is a recognition that our knowledge and experience can be invaluable in helping both national and local health bodies find the most effective way to engage in the licensing process. As ever, our message is founded on a belief in long term partnership and dialogue. That process should, in time, see the current climate of mistrust and misalignment replaced with a sense of common purpose and the identification of mutually beneficial outcomes.

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Leo Charalambides

Editor, Journal of Licensing

I recall that as the Police Reform and Social Responsibility Act 2011 was being consulted upon, there was great concern in licensing circles that officers and members of the licensing authority would be unable to balance the roles of administering applications, making representations and decision making. At the time I found the discussion embarrassing and insulting. The IoL represents, if anything, the dedication and professionalism of licensing officers. To suggest (as was often done) that our colleagues would inevitably falter and fail was in my view not only wrong but also unfair. To borrow some of the language of *Hope & Glory,* not only was it wrong at the time but it remains wrong now.

In so far as the rebalancing reforms of the 2011 Act are concerned, I take the view that the inclusion of the licensing authority as a responsible authority is one of a few measures with the greatest potential for a positive impact upon the licensing regime and its improvement. Regrettably, it seems to me that many local authorities have failed to take up this opportunity. For the smaller local authorities there are just not enough bodies and not enough hours in the day to deal with existing duties without adding to them; and all local authorities are equally challenged by the current economic climate.

However, I would invite our membership and the delegates at this year's National Training Event to further consider and debate the proper role of the licensing authority as a responsible authority. This is hardly novel: there are many local authority regimes in which the authority takes multiple, potentially conflicting, roles and indeed this is not uncommon in licensing regimes (gambling, sex establishments, street trading and taxi licensing).

The content and focus of a contested application hearing or review is determined by the vagaries of interest and engagement, by the other responsible authorities and by civil society. In many local authority areas the starring role is occupied by the local police with environmental health in support and little, if any, involvement by the wider public. This inevitably results in a distorted perception of the licensing regime as being a policing measure. This is not a criticism. The police are rightly benefiting from their full involvement with the Licensing Act 2003.

Such partisan participation means that decisions are being made upon a narrow or incomplete basis. Decision making is an evaluative judgement requiring members to take account of conflicting interest; this is undermined when conflicting interests are not fully disclosed. There are no doubt legitimate reasons to account for the lack of participation by the other responsible authorities, but this lack of participation should not result in the information that they hold being withheld – this is an area where the licensing authority, as responsible authority, should step up and enter the arena.

It might be said that it is not for a licensing officer to present information from environmental health, trading standards, the child protection body etc. It is my view that the licensing officer is very well placed to highlight information that is relevant in the licensing context, thereby contributing to a fuller, clearer, bigger picture within which to make informed decisions. The s 182 Guidance states that "if these parties [responsible authorities or other persons] have failed to take action and the licensing authority is aware of relevant grounds to make a representation, it may choose to act in its capacity as responsible authority" (para 9.14). I would go further and state that where a licensing authority is aware of relevant grounds that are not being advanced, it has a duty to make a representation and bring these to the attention of the decision-making panel.

Section 4 of the 2003 Act requires that in carrying out its functions a licensing authority must also have regard to its statement of licensing policy. The importance of the statement of licensing policy cannot be over-stated. The s 182 Guidance sets out a number of *key aims and purposes* of the regime: these are described as *vitally important* and should be *principal aims* for everyone involved in licensing work. One of these is "providing a regulatory framework for alcohol which reflects the needs of local communities and empowers local authorities to make and enforce decisions about the most appropriate licensing strategies for their local area" (para 1.5).

Here the licensing authority as responsible authority is in a unique position to promote and protect its own statement of licensing policy; a document all too often over looked or given fleeting attention. Again, it is for the licensing authority as responsible authority to advance its licensing strategies within the determination of a particular application.

The sell-out NTE is a testament to the committed professionalism of our membership. Licensing officers are a neglected and undervalued resource that ought to be fully utilised and championed.

The Licensing Act 2003 - a lamentable failure

Why are the authorities not using their powers to crack down on binge drinkers? Why do the police stand idly by and not intervene when bad behaviour takes place? And why are politicians increasing fines when no one is ever fined? All questions posed by **Gerald Gouriet** QC, as he explains why he has lost patience with so-called law enforcers

On the weekend of 14/15 of June this year there was an illegal "rave" at an abandoned Post Office depot in Croydon. The following Monday a 15 year old boy who had attended it died in hospital having drunk beer laced with ketamine.

The rave could have been stopped by the police: it wasn't. Variations on this theme are commonplace. Less shocking – only, perhaps, because no fatality was involved – I have seen drunken youths pour out of *licensed* premises in the early hours of the morning and run the entire gamut of vile things that drunken youths do, in full view of police sitting in a patrol car opposite, and yet suffer no consequences: no arrest, no fixed penalty notice, no warning – nothing.

Recently, I was shown a letter written by a licensing authority to a complaining resident, which defensively (and wrongly) stated "there is little the licensing authority can do to prevent a high density of licensed premises" and the resultant problems they cause. In reality, the licensing authority can do whatever it thinks appropriate to prevent crime and disorder and nuisance in its area, subject only to irrationality and proportionality. This is an extremely wide discretion, and even a harsh exercise of it is unlikely to be interfered with by the High Court.

That is the backcloth against which we should assess the repeated demands (in the press and in Parliament) for additional powers to be given to local authorities so that they can effectively deal with the widespread anti-social consequences of late-night drinking. But - as is the case with many other regulated activities in this country - the real problem is not that there is a need for new laws, it is that the existing law is not being enforced – either sufficiently or at all. Particularly worrying in liquor-licensing is that the focus of enforcement is on the holders of licences, whilst little or nothing is being done about those who are actually causing the serious disorder on Friday and Saturday nights in our town and city centres – the drinkers themselves. It is as though motorway speeding were being addressed by prosecuting car-showrooms.

The growing public frustration at what seems to be an acceptance amongst the authorities that there will always be the drunk and disorderly on our streets is at last beginning to find a voice. There is a request on the e-petitions (Home Office) website in the following terms: "Laws to deal with public drunkenness already exist but there is unwillingness to deal with the problem. Punishments can be increased but if the law is not being enforced in the first place there is no point of increasing the punishment." It has been rejected. The reasons given are: *"The police, not the Government, are responsible for enforcing the law. You need to include a clear statement explaining what action you would like the Government to take on this issue. Your e-petition will then be considered for publication."*

> "The real problem is not that there is a need for new laws, it is that the existing law is not being enforced"

The action I would like to see taken by the Government is the abandonment of crowd-pleasing announcements that fines will be increased, new offences created, and tags placed round the ankles of problem drinkers; coupled with an acknowledgment that existing laws would be effective if only the trouble were taken to enforce them.

Treatment for alcohol related issues is estimated to cost the NHS a billion pounds each year, with figures up almost a third over the past five years. There is a call for "binge drinkers" who clog up the admissions at hospital A&E departments to be spot-fined. Writing in the *Daily Telegraph* on 18 August this year, Martin Evans reported that campaigners are calling for binge drinkers who repeatedly end up in A&E units to be hit with on the spot fines to deter their anti-social behavior. Figures obtained under the Freedom of Information Act found that between 2007 and 2012 the number of hospital admissions for alcohol related injuries or concerns rose from 863,566 to 1,220,293. But over the same period, penalty notices handed out to people for being drunk and disorderly went down from 46,829 to 33,637, a fall of 28 per cent.

Tony Arbour, a Conservative member of the Greater London Authority, who has been campaigning against the rising

cost of binge drinking, has called for on the spot fines to be increased in a bid to deter such behaviour. He said: "We need to urgently crack down on bingers who repeatedly hog our A&Es and take up police time because they can't handle their drink. They are costing the country millions of pounds. Not only should we double drunk and disorderly fines to £180, but the police should randomly go into A&Es on trouble nights and slap the penalties on repeat bingers." (The prospect of the police leaving the warmth of their cars, where they are simply noting the behaviour of the youths staggering out of pubs and clubs only yards from them, and instead turning up at hospital A&E departments in the middle of the morning, seems to me to be somewhat remote.)

Another Freedom of Information Act request made in 2011 discovered that in 2001 there were 20,096 arrests in the Metropolitan Police area for "drunk and disorderly": but in 2010 there were only 5,472 arrests. It can hardly be said that in that ten-year period the incidence of drunkenness in public places has decreased. More importantly, we do not have the figures for how many of those 5,472 arrests led to prosecution and punishment: I put in a Freedom of Information Act request for them, but the request was refused on the ground that it would be too costly to produce. It can confidently be predicted, however, that a very much smaller figure than the number of those arrested ever reach a Magistrates' Court.

The Government's recent announcement that the maximum fine for being drunk and disorderly in a public place will be increased from £1,000 to £4,000 therefore invites the question: "What good will that do, if so few offenders are taken to court and fined?" The increase could just as well be ten-fold. When premises close because of the behaviour of their customers, the customers move on and cause mayhem elsewhere. And why shouldn't they? Too often their appalling conduct is not even reprimanded, let alone punished.

There is a marked contrast between the current scenario and they way things were in my early days at the Bar. Attending Magistrates' Courts in London daily (as I did, to make bail applications) I heard the court officer call out, before any other criminal cases were heard, "The overnight drunks list". Into the dock, one after another, came a half-dozen, of all ages and walks of life, unkempt because of the lack of the more up-market hotel facilities, to suffer the shame of a public plea of guilty and the payment of a fine. There would be some, no doubt, regulars who did not care one jot about what should have been humiliating, and on whom (because they were indigent) only a small fine was imposed. But there were many others, I would judge them the majority - the young men in suits who had to explain to their bosses their lateness for work, the older men in suits who had to explain to their wives exactly what had happened the night before - who were without doubt mortified. The likelihood that they would ever again allow themselves to get into that position must have been slim indeed.

Those working behind the bar must, of course, take their full share of the blame. They have a responsibility not to sell alcohol to persons who are inebriated; but the condition of the drunks staggering out of our pubs and clubs, the shortness of time before they are vomiting on the pavement or urinating in nearby gardens, has no other explanation than that they were given drink when they were well and truly "over the limit".

Earlier this year a study was conducted by Liverpool John Moore's University into the scale of bar-sales to drunks. The method involved student actors from Liverpool Screen School attempting to buy alcohol while acting extremely drunk in 73 randomly selected pubs, clubs and bars in a city in North West England. The actors were served alcohol, without any hesitation, in over 80% of the venues tested. More disturbing still, on almost one in five occasions bar tenders tried to persuade the actor to take a double rather than a single measure.

To sell alcohol to a drunk is, of course, an offence under the Licensing Act 2003. [1] Just as with "drunk and disorderly", however, I have seen a marked decline in any prosecutions of the offence. I made another Freedom of Information Act request this summer, asking for the actual numbers so prosecuted: to my astonishment, in the last five years there have been as few as seven prosecutions in London for selling alcohol to someone who is inebriated, with only one prosecution in 2013. It is hardly likely that in the Metropolitan Police District of Greater London only one barman sold alcohol to a drunk in 2013.

Such sales are surely at the heart of the problem, but tackling them has drifted beyond the outer margins of solution. There used to be undercover police or local authority officers who went into licensed premises that had a bad reputation, and saw for themselves these sales taking place; and they would prosecute accordingly. No more. Lack of resources is the standard excuse: but my mind keeps returning to the police officers sitting in the patrol car opposite the club, doing nothing to prevent or curtail the awfulness of what was happening outside. It is the efficient use of resources, rather than the lack of them, that the authorities need to address.

But to return to the main theme of this article, I am calling for more to be done about the drunks themselves, and not just the licensed premises or even the barman who unlawfully sells alcohol to an already inebriated person. We don't need increased fines for offences that are rarely prosecuted: we need arrests, overnight detention, court appearances. We have enough "Partnerships" (between licensees and police and local authorities); we have no end of "Initiatives"; we have "Alcohol Reduction Strategies"; we have "Action Plans"; and the Licensing Act is "rebalanced" so often I am quite dizzy

1 Section 141, And *Manchester on Alcohol & Entertainment Licensing Law,* 3rd Edn, paras 11.5.6 – 11.5.8 for a helpful discussion of the elements of an offence of sale to a person who is drunk.

looking at it. All are laudable, no doubt: but what impact do they have on the drinkers? Precious little. The triumphant statistics showing reductions in anti-social behaviour belie experience and observation. So the problems continue and multiply – and we are given another tranche of *"action plans"* and *"initiatives"*. I don't wish to belittle the efforts being made, but I am reminded of Hamlet: "What do you read my lord?" asks Polonius. "Words, words, words," replies the prince.

As though picking up the gauntlet, a disturbingly Orwellian experiment was launched earlier this year. Those who commit criminal offences while under the influence of alcohol will be forced to stay sober (at least, the attempt will be made) by the wearing of so-called "sobriety tags". Under the terms of the pilot scheme, up to 150 at a time will be fitted with the tags and ordered to not drink alcohol. If anyone who is tagged has a drink (in the famous words of a delightfully out-of-touch judge: "Not even a small dry sherry before lunch:") it is detected by the tag and they could be brought back in front of the judge to face further punishment, which could include a prison sentence. The experiment is conducted in Croydon, Sutton, Lambeth and Southwark, and the first sobriety tag order has been made in Croydon. This seems to me a draconian measure smacking of gimmick, which misses the bigger target of the "merely" drunk and disorderly who never end up in any court of law.

> "The licensing authority can do whatever it thinks appropriate to prevent crime and disorder and nuisance in its area, subject only to irrationality and proportionality: this is an extremely wide discretion"

At a recent licensing hearing a Force Licensing inspector from Manchester gave the following evidence` -

> *My experience (includes)... a report commissioned for the Tonight programme on young people's drinking culture (broadcast Thursday 17th April 2014) and the drinking habits of my own 22 year old son and 19 year old daughter. The evidence drawn from these sources is that young people go out with the intention of getting drunk.*

That is my and a great many others' experience too. There has been a lamentable failure in our responsible authorities to acknowledge it, and we suffer the consequences.

The Licensing Act 2003 received the Royal Assent over ten years ago. It is high time we accepted that is has failed us. The 1964 Licensing Act worked: only a few minor adjustments were required to bring it up to date. Licensing justices had an unfettered discretion to do what was right - but the Act was repealed in its entirety. We should learn the lessons of the past and rescue the best of what was lost. The task has begun, but is far from completed. The Licensing Act 2003 was amended last year and the word "appropriate" replaced "necessary" as the test for the validity of enforcement: an extremely high hurdle in the way of solving problems was replaced by an extremely low one. But although the true empowerment of that substitution is yet to be recognised by a large number of licensing authorities, who have more administrative control of licensed premises at their disposal than they would seem to believe, the direction of attack remains aimed at the licensees and not the drunks who are the actual trouble-makers.

Gerald Gouriet QC
Barrister, Francis Taylor Building

Article

Voluntary alcohol removal schemes - partnership rather than posturing

Shane Brennan, Public Affairs Director at the Association of Convenience Stores (ACS), makes the case for a more constructive and pragmatic approach to the use of, and participation in, voluntary alcohol removal schemes

A few weeks ago, I spent the day with the excellent alcohol team at Portsmouth City Council. It was an eye opening experience where I was able to see familiar issues from a different perspective. I was struck by the energy and commitment of this team of professionals who are dealing with all aspects of tackling alcohol harm in Portsmouth.

There is no doubt that Portsmouth experiences alcohol harm more acutely than many other places. At the start of its strategy in 2009, Portsmouth had a higher rate of alcohol admissions than any other place in the South East region.

To their credit, the Portsmouth team understand the need and value of partnership. I first became aware of this when I met Rob Anderson-Weaver, Officer for the Safer Portsmouth Partnership, and PC Pete Rackham to learn more about their "Proxywatch" scheme that encourages retailers and the general public to report examples of adults buying alcohol on behalf of children. Proxywatch is the best example I have seen of a council working on its own initiative to show retailers that it can see the problem of underage drinking from their perspective.

That attitude has been taken into their "Reducing the Strength" scheme. Voluntary removal schemes are increasingly a familiar part of the toolkit of measures that local areas are looking to deploy to tackle particular problems related to street drinking. Portsmouth is not the only example; there is, of course, Ipswich's well publicised Reducing the Strength scheme and an increasing number of others around the country. In fact, at last count, well over a hundred areas have either implemented or are considering pursuing a voluntary removal scheme.

The growth in popularity of these schemes has been accompanied by an increasing amount of confusion and disagreement, both about when it is appropriate to deploy them, as well as about deploying them in a way that does not present risks of contravention of competition, licensing, or public administrative law.

Proliferation of schemes

Since the first wave of publicity surrounding the Ipswich scheme, retailers around the country have received dozens of requests to participate. These schemes vary from the well thought through evidence-based strategies of Ipswich and Portsmouth, to schemes which are based on vaguely threatening letters from the local Chief Constable asking retailers to take action without supporting evidence that it is needed in that area, and with no strategy for how it will be implemented.

There are also significant variations in what is being requested. Most schemes seek a removal based on products identified by their type (i.e. lager or cider) and then their ABV. The most common variance is between levels of ABV identified. Other areas choose to name specific products that they want to see removed, and others set out criteria for what they believe should be removed, but with exceptions for so called *"premium"* products that are not associated with street drinking. There is no consistency and no sense of objective criteria setting out which products should and should not be covered.

There is, at the very least, a need for a shared understanding of what a good scheme looks like. I know that this is a challenge the LGA is seeking to address through the development of best practice. This has the potential to bring greater consistency between schemes, and we hope to be able to support it. The LGA are the right people to lead the production of guidance and we are confident that they will do so in a way that brings clarity to the legal and practical issues that present.

If the LGA succeeds in this, then the next challenge is getting local authorities to recognise and work within the framework. Given the limitations on what the LGA can do in requiring co-ordination of its members, they will need support from central government, police and others to deliver the message that is necessary to drive consistency.

Legal issues

There is much debate about whether voluntary removal schemes are legal. It is also safe to say that this has been the issue where there has been the most open disagreement between scheme advocates and the industry.

There are essentially two contentious questions. The first is whether schemes that require retailers to agree to remove certain products (however defined) can be pursued in a way that is consistent with competition law. The second is how the scheme is implemented, ensuing it is consistent with the powers afforded to local authorities under the licensing act.

Competition law issues

It is to its credit that the Competition and Markets Authority (formerly the Office of Fair Trading) has stepped up to provide guidance. This gives some confidence for local authorities that they can pursue these schemes without fear of competition law sanctions. However, the CMA advice is clear that before arriving at this view, any local authority must undertake the relevant self-assessment required under the UK competition law regime.

The risk for retailers is real and present. Retailers must not act in a co-ordinated way; and they must not take action to remove a product from sale (or increase its price) as a direct result of an agreement with other competitors to do so.

Some will argue that this threat is theoretical because it is hard to see how the competition authorities would take action against a group of retailers if they took this action in this context. However, it is important (for local authorities in particular) to recognise that this is not the only threat. The other more immediate threat is from legal action by a supplier that is finding its access to market restricted by the co-ordinated action of a group of potential customers.

So as we move forward, one of the core characteristics of a good scheme will be the extent that it takes seriously the threat of exposing local retailers to competition law risk. Schemes must be pursued in way that very clearly does not encourage co-ordinated action by retailers. Again, it is to be hoped that the LGA guidance will demonstrate how this can be done to the satisfaction of both retailers and councils.

Wider legal issues

The second question is familiar to everyone engaged in the licensing system. It relates to how far a local authority should go in seeking to achieve area-wide policy outcomes through either:

- The systematic use of licensing conditions (voluntarily agreed or mandatorily imposed); or
- Compelling retailers to take a desired action through direct or indirect threat of sanctions under the Licensing Act if they don't.

This is one of a number of examples of local authority policy development that pushes the boundaries of what the Licensing Act permits, raising issues much bigger than the specific focus of this article.

Wherever local agencies and the trade resort to arguments over the legitimacy of a council's actions, it is an example of a fundamental breakdown of partnership. And it is in everyone's interests to look at how this can be resolved. Crucially, it seems to me that if a council is resorting to imposing measures on retailers, then it is not building a sustainable scheme or partnership, irrespective of whether their actions are legal or not.

Characteristics of a good scheme

We have to deal with voluntary removal schemes in practice rather than in theory and the rapid growth in their use means that over the next couple of years we will start to have a better understanding of how they work. We need to use this experience to evaluate the characteristics of schemes that work as compared to those that do not.

From what we know so far I think the following characteristics need to be present to make a scheme work.

- *Schemes must only be deployed where there is specific evidence of a street drinking problem.*

Voluntary removal is an approach targeted at tackling street drinking and therefore should only be pursued where there is an identifiable problem of this nature. It should also be linked to clear objectives for how the street drinking problem will be reduced, both in terms of the anti-social and community impacts, and tackling the drinkers' behaviour.

Schemes that are implemented without a proper assessment of the evidence of street drinking problems will lack credibility and risk a lack of engagement from retailers. Identifying the problem also helps to focus resources on the specific areas where interpretations will have most effect.

- *Schemes must be one part of a comprehensive strategy*

Voluntary removal alone is not a credible way to tackle the street drinking problem. It must be accompanied by actions to intervene directly with the drinkers and remove them from the places they congregate and also by a concerted effort to get these individuals into treatment. Ipswich and Portsmouth are great examples of how voluntary removal forms one small part of a wider strategy. If the local agencies are not committed to a comprehensive strategy, retailers will rightly be sceptical about the value of the initiative.

- *Schemes must be developed in partnership*

Partnership is vital to a successful scheme. Partnerships between agencies to ensure all aspects of the interventions with street drinkers are co-ordinated and, crucially, partnership with the trade to show the evidence, objectives and wider

strategy is vital. Across the country successful partnerships are being built on a sense of common purpose and problem sharing. The opposite to partnership working is a sense of summary measures imposed, with a thinly veiled attribution of blame and threats of consequences for non-participation.

- *Schemes must seek to achieve consistency in terms of what they are requiring*

When best practice is produced by the LGA, it will hopefully offer a consistent framework for how to set up a scheme, which can form the basis of any scheme developed in the future.

- *Schemes must be subject to review and evaluation*

Schemes should be part of an evolving local strategy to target the specific problems experienced in a community. They should not attempt to live on beyond their relevance and there should be regular reporting to all participants on whether the scheme is successful or not.

Towards best practice

All national bodies, industry associations, local authority representatives, government and others have a role to play in supporting the development of best practice. We are grateful that the LGA is seeking to lead this and we will do our best to play a constructive role in its development. We should all commit to a model that achieves as much consensus as possible and that supports good interventions that can genuinely make a difference.

Shane Brennan
Public Affairs Director,
Association of Convenience Stores

How to Plan a Safe Event – 26th and 27th February 2015

We will be running this very popular training course again in February 2015. This course is suitable for all persons involved in event planning, including Licensing Officers, Police Officers and other Safety Advisory Group Members as well as organisers of events. The trainer will be Professor Keith Still and will take place at Camden Town Hall.

The aims of the training are to increase the knowledge and practical understanding that the delegates have of event planning ,including crowd safety, risk assessment and emergency situations.

The Programme

Please note this is a draft programme and is subject to change.

Day 1

- Introduction to Crowd Risks (Licensing)
- Crowd Risk Assessment (Licensing approval process)
- Understanding Emergency Situations

Day 2

- Worked examples.
- Follow up from the worked examples done in the morning.
- Using templates for event licensing.

The course will provide 10 hours CPD, 5 hours per day. The Institute is registered with the Solicitors Regulation Authority. (CPD reference:- LGLF/CPC, course reference OUTDOO0009).

Training Fees

Members - £175 plus VAT for Day 1 OR Day 2
Members - £275 plus VAT for Day 1 AND Day 2

Non-Members - £190 plus VAT for Day 1 OR Day 2
Non-Members - £305 plus VAT for Day 1 AND Day 2

Taxi law reform, as proposed by the Law Commission

The Law Commission has finally completed its labours over how to update taxi law and produced a comprehensive report. It is now up to the Government to decide what to do with it. **James Button** reports

James Button

On 23 May 2014 the Law Commission published its long awaited report and draft Bill on taxi law reform. As readers will know, significant information about these proposals was telegraphed via the Interim Statement in April 2013 but there are some new ideas and we now have a chance to see the proposals in concrete form.

It is a huge document. The actual report consists of 290 pages, and there is an impact assessment of 39 pages and an executive summary of 19 pages. Contained within this is a full draft Bill of 77 clauses and one schedule.

The Law Commission must be congratulated on its achievement. In less than two years it has: assimilated taxi law in three jurisdictions (Greater London, Plymouth and the rest of England and Wales); produced a consultation document and analysed over 3,000 responses; produced a report that comprehensively reviews those responses and explains their proposals; and drafted a Bill which, if the Government is minded to accept, is complete and ready for placing before Parliament.

What does the Law Commission propose?

Generally speaking, the proposals are in line with the interim statement which was published in April 2013, and it is clear that the Law Commission has not had any significant changes of thought since then. What we do now have are the details of many of these proposals, although significant aspects will still be determined by regulations made by the Secretary of State. It should be noted that in the draft Bill, the references are to the Secretary of State alone and do not include or refer to the Welsh Ministers. This is interesting, as throughout the consultation document there were suggestions that taxi licensing could become a devolved function, and it now seems that, that idea is not being carried forward (certainly for the time being). The main points noted are:

- The new law will apply across the whole of England and Wales, with no distinctions between Greater London and the rest of the countries. Plymouth would lose its unique legislation.

- Taxi and private hire licensing will remain a local authority function, and will be undertaken by Transport for London (TfL) in London. The authority or TfL are referred to as the licensing authority (clause 3). Licensing authorities will have powers to combine two or more areas for taxi and private hire licensing purposes (clause 71).

- In the case of a refusal to grant a licence, suspend, or revoke a licence the applicant / licensee will have the option of requiring the licensing authority to reconsider its decision, or appealing to the Magistrates' Court. If the applicant / licensee is "dissatisfied" with the reconsidered decision, they will still be able to appeal to the Magistrates' Court (clause 64).

- The two tier system will be retained. The two different types of vehicles will be called taxis and private hire vehicles (both defined as a "regulated vehicle" in clause 2). Both will usually be licensable to carry up to eight passengers, but it will be possible to have an "opt in vehicle" (either a taxi or a PHV) which will be able to carry between nine and 16 passengers. These will be taxis or PHVs and there will be no involvement with the Traffic Commissioners.

- In addition, tri-shaws and pedicabs, horse-drawn vehicles and any other vehicle which is "constructed or adapted for use on roads" will also fall within the definition of

regulated vehicle (clause 2(4)). PSVs and trams are excluded (clause 2(5)), as are vehicles used in connection with a wedding or funeral (clause 1(4)). Stretched limousines and novelty vehicles (both of which will be defined by regulations) are included (clause 2(9) to (11)).

- Only taxis will able to take what are to be called "there and then" ("TAT") hirings, and PHVs will be prohibited from doing the same. A TAT hiring is where the driver of a regulated vehicle in a public place agrees to a hiring which begins there and then (clause 6). Taxis can only take TAT hirings within their district or zone.

- There will be new powers for licensing authorities to create and modify taxi zones, based on a number of criteria including the interests of users and disabled users, the interests of licensees, traffic congestion, environmental protection and "such other matters as may be specified in regulations" (clause 7). Taxi driver and taxi vehicle licences can be granted for one or more zones, and can be varied to add or remove zones (clause 21).

- When carrying passengers, a PHV must have been booked via a "dispatcher" (the term private hire operator is consigned to history) (clause 8) and the dispatcher must be licensed. A dispatcher is the person who "in the course of business" sends a PHV driver to fulfill a PHV booking (clause 9). A dispatcher will be able to dispatch PHVs and PHV drivers licensed by any licensing authority, and each licensing authority must maintain a register of all licensees which will be open to public inspection (clause 23). Dispatchers must make and keep booking records and provide information about the fare to a hirer on request (clauses 37 to 41).

- Drivers' licences will last for three years, vehicle licences will last for one year and dispatchers' licences will last for five years (clause 22).

- There will be prescribed application forms for all types of licences (clause 13), and there will be a national minimum standard for all licences (vehicles, drivers and dispatchers) to be set by regulations (clause 14). The licensing authority will be able to set additional criteria for taxi drivers or taxi vehicle licences.

- There will be conditions prescribed by regulations for all types of licence, but the licensing authority may set additional conditions for taxi drivers and taxi vehicles (clause 19). No additional conditions can be imposed on any private hire licences.

- A challenge can be made against the additional criteria for taxi vehicles or taxi drivers, or conditions for taxi licences by means of a "Judicial Review Lite" in the County Court. This can be brought by a licensee or a person whom the County Court considers has a sufficient interest in the decision. The court can confirm quash or vary the decision and must apply the principles applied by the High Court in an application for judicial review (clause 65).

- All licences can be suspended or revoked by the issuing authority for breach of condition, failure to comply with the (new) Act or any other reasonable cause. If necessary in the interests of public safety, such action can take immediate effect (for all licence types, not simply drivers) (clause 54). In addition in certain circumstances, action can be taken against licences granted by a different authority (clauses 55 to 60).

- Licensing authorities will be able to limit taxi numbers by making a determination. This will be based on a number of criteria (which will replace the "un-met demand" test) provided they have consulted in accordance with regulations before making their determination on numbers (clause 18), and any determination will only last for a maximum of 3 years. The matters that must be taken into account by the licensing authority are:
  (a) The interests of people who hire or seek to hire licensed taxis.
  (b) The particular interests of disabled people who hire or seek to hire licensed taxis.
  (c) The interests of people who hold taxi licences and taxi drivers' licences.
  (d) The need to avoid excessive queues of licensed taxis at taxi ranks.
  (e) The need to avoid traffic congestion.
  (f) The need to preserve the environment; and
  (g) Such other matters as may be specified in regulations.

However, these licences could not be traded. Sale of taxi licences would only be allowed in areas where an existing quantitative restriction applies under the current law (clause 24). Other points to note are:

- There will be nationally prescribed fees for PHV drivers, vehicle and dispatcher licences, but subject to regulations, licensing authorities can set higher fees for taxi driver and vehicle licences (clause 25). It will also be possible for the Secretary of State to require private hire fees to be paid to the Secretary of State and then redistributed amongst licensing authorities in accordance with a prescribed scheme.

- Licensing authorities will be able to create taxi ranks and must keep those under review every three years (clauses 26 and 27). Ranks can only be used by taxis licensed for that licensing authority area or taxi zone (clause 28).

- The licensing authority can introduce a duty to taxi drivers respond to hailings when they are within their district or zone, if their "For Hire" sign is illuminated (clause 29).

- When on a rank, taxi drivers must accept a hiring for a journey within the "compellable distance". The compellable distance will generally be the area of the licensing authority, or any zone, but the licensing authority can increase it to any distance not further than seven miles beyond the border (20 miles beyond the border of Greater London for TfL) (clause 30).

- The licensing authority can set fares for taxis, and charging more than the set fare for a journey within the area or zone will be an offence (clauses 31 and 32). It will also be possible for taxis to charge a booking fee which is separate from the fare (clause 31 (8) and (9)).

- Taxis will be able to be used for out of area pre-booked work provided records of the bookings are made and kept, and the passenger must be told the fare in advance if they ask (clauses 33 to 36).

- Licensing authorities can authorise officers ("Stopping Officers") to undertake certain stopping functions (clause 44), and obstruction of a stopping officer or a licensing officer (which is simply a person nominated as such by the licensing authority) is an offence (Clause 45). A stopping officer can stop licensed vehicles (clause 49). In addition, licensing officers or uniformed police constables will be able to require any licensee to provide information in respect of compliance and also produce the licence for inspection (clause 47).

- Licensing officers or uniformed police constables will be able to inspect and test taxis and PHVs, together with taxi meters (clause 48).

- Licensing authority offices will have powers to stop and inspect vehicles and issue fixed penalty notices, irrespective of where the vehicle is licensed. They will also be able to stop and impound vehicles that are touting contrary to clause 70.

- Clause 53 allows a stopping officer to give a direction to move on to a licensed taxi or a licensed PHV in one of three circumstances:

  1. There is a reasonable likelihood that a PHV or out of area taxi is going to take a TAT hiring.
  2. A PHV or taxi is causing an unnecessary obstruction.
  3. The place where the a PHV or taxi is waiting is in "close proximity to" a taxi rank and the driver is attempting to prevent the hire of a taxi on that rank.

- It will be possible to use fixed penalties for offences under the Act or breaches of conditions if regulations permit (clauses 61 and 62).

- Licences, plates and badges must be returned to the licensing authority within seven days of expiry or revocation and the licensing authority can require their return on suspension (clause 63).

- Change of ownership of the licensed vehicle must be notified to the licensing authority within 14 days (clause 67.

- The words "taxi", "taxis", "cab" or "cabs" or any sign suggesting the vehicle is a licensed vehicle cannot be displayed on any unlicensed vehicle, and the words "taxi" or "taxis" or any sign suggesting the vehicle as a licensed taxi cannot be displayed on a licensed PHV, although in relation to PHVs, the words "cab" or "cabs" alone does not contravene this prohibition (clause 68). In addition, adverts for hire vehicles cannot use the words "taxi" or "taxis" unless the vehicles are licensed taxis (clause 69).

This is a brief examination of the bones of this proposed legislation. It remains to be seen both whether it is enacted, and if it is, whether there will be any significant changes introduced during its passage through Parliament.

James Button
Principal, James Button & Co

Public safety and event management review

Licensing staff need to be extremely careful when selecting gas detection spray – not all types are applicable, explains **Julia Sawyer,** who also looks at the new guidance being prepared for the Construction (Design and Management) Regulations

Julia Sawyer

Do you have the correct gas detection spray?

What with festivals, licensee-hosted BBQs, premises licence holders renting out space for food pop-ups, the popularity of street food and the many other outside events requiring temporary gas provision, enforcing authorities across the country are being kept busy ensuring the installations have been set up safely.

Advice for these types of events was previously outlined in the *Journal of Licensing* (2012) 2 JoL - *Using liquid petroleum gas at outdoor events*. This article examines gas detection spray, which is used to indicate whether gas pipework has been assembled correctly.

First, though, a word of warning. Having witnessed someone in a mobile catering unit use the wrong gas detection spray for testing leaks on gas hoses, only to suffer a burnt hand in the process, I cannot stress too highly the need to be very careful with the type of gas leak detection spray that you use. Some on the market are flammable, sometimes very flammable: these are not for use on cooking appliances and are not safe to use near to food products. Just ordering "gas leak detector spray" is not specific enough to be able to assess if it is suitable for your purpose. Instead, ensure that the spray is water based, non-flammable, safe to be used in confined areas, non-corrosive and visible.

Legislation and guidance

The risk assessment (as required by the Management of Health and Safety at Work Regulations 1999) and the COSHH assessment (as required by the Control of Substances Hazardous to Health Regulations 2002 as amended) should ensure that the product has been assessed as suitable for intended use.

In addition to these regulations the following legislation and guidance would be applicable in the use of the leak detection spray:

- Section 2 of the Health and Safety at Work, etc Act 1974 specifies that an employer must ensure that "the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health."

- Provision and use of Work Equipment Regulations 1998 (PUWER) includes that equipment provided for use at work is:
  - suitable for the intended use;
  - safe for use, maintained in a safe condition and inspected to ensure it is correctly installed and does not subsequently deteriorate;
  - used only by people who have received adequate information, instruction and training; and

There are numerous standards which relate to safety to cover all parts of the gas supply system from the input of gas to the transmission system up to the inlet connection of the gas appliances, whether for residential, commercial or industrial purposes.

The standard BS EN 15001-1:2009 covers "Gas Infrastructure - gas installation pipework with an operating pressure greater than 0.5 bar for industrial installations and greater than 5 bar for industrial and non-industrial installations." This states that all joints in accessible pipework installed after pressure testing shall be bubble tested with a foaming agent using nitrogen or air as the test medium.

It goes on to state that leak detection fluids shall comply with BS EN 14291:2004; leak detection fluids shall be selected so as not to cause corrosion or failure of pressure parts; and the fluid should always be removed by washing, drying, etc

It goes on to state that leak detection fluids shall comply with BS EN 14291:2004; leak detection fluids shall be selected so as not to cause corrosion or failure of pressure parts; and the fluid should always be removed by washing, drying, etc.

Why would you use gas detection spray?

Gas detection spray is used if there is any concern about the gas hose connections or if the smell of gas arouses suspicion of a leak. Gas leaks are often the result of damaged or poorly maintained equipment or poor connections. To check for leaks, the spray should be held at least 3cm away from the gas hose and sprayed at the connections on the gas hose. If there is a gas leak, the liquid sprayed on the hose will bubble.

It is recommended that all managers / enforcing authorities involved in using or inspecting mobile catering units or retail units that use liquefied petroleum gas (LPG) keep this indicator spray to hand so that a gas leak can be detected as quickly as possible.

It is also recommended that traders and retailers use this as a safety control to show that they have connected the gas hoses correctly. If there are any concerns at a stall / vehicle/ premises and gas is smelt, the gas supply should be turned off as quickly as possible. (This spray does not provide an alternative control.)

Update on Construction (Design and Management) Regulations

On 13 August 2014 the HSE met to discuss the outcome of the public consultation on proposals to revise the Construction (Design and Management) Regulations 2007 (CDM 2007.) From that meeting the HSE published feedback from the consultation. Full details of this feedback can be found at http://www.hse.gov.uk/aboutus/meetings/hseboard/2014/130814/paugb1462.pdf

Some specific feedback to note:

- The consultation received 1,427 responses – among the highest of any consultation undertaken by HSE.
- Of these, 65% were received from either CDM co-ordinators or from the entertainments sector (which was not the target of the consultation) whose responses are effectively campaigns.
- The entertainment sector submitted over 400 responses to the consultation. This was prompted by ongoing discussions between HSE and this sector about the legal framework in which it manages risks from construction and dismantling of temporary demountable structures such as grandstands. HSE cannot disapply CDM to such work and is not proposing any changes to CDM, which specifically bear on the entertainment sector. Nonetheless, HSE has acknowledged the difficulties which the entertainment sector faces in applying CDM to minor construction work and will continue to work with the sector to take a proportionate approach to managing risks within the sector.
- HSE considers that there is a strong case to proceed with the revision to CDM broadly as proposed.
- The existing ACOP will fall by default when CDM 2015 revokes CDM 2007. This would, in any case, lead to an interim period when the revised Regulations are supported by HSE and industry guidance alone. HSE believes, however, that a case has been made to develop a new, shorter signposting ACOP, complemented by the HSE and joint HSE-industry guidance and therefore seeks the agreement of the Board for this work to proceed in 2015.

It would appear from the feedback that the consultation was not aimed at the entertainments industry. However, as the revised guidance will clearly impact on this sector, it is to be hoped that the guidance will take into account all of the concerns that the entertainment industry has detailed through this consultation.

Julia Sawyer
Director, JS Safety Consultancy Ltd

Documents referenced for this article:
Health and Safety at Work etc. Act 1974
Provision and use of Work Equipment Regulations 1998
BS EN 14291:2004
BS EN 15001-1:2009
(2012) 2 JOL
(2014) 9 JOL
http://www.hse.gov.uk/aboutus/meetings/seboard/2014/130814/paugb1462.pdf

Article

Street trading and pedlars – reform update

A series of changes to update the legislation governing street trading and pedlars has been proposed in recent years, but Parliamentary time has yet to be found to implement consulted-upon proposals, as **Ben Williams** explains

In the UK, street trading legislation essentially regulates the sale of, or offer for sale of, anything in a street. A licence is required to trade in certain streets as designated by the local authority, which is considered best placed to determine what most suits the local needs.

Pedlars differ from street traders in a number of ways, but essentially a pedlar is an itinerant seller whereas a street trader would sell from a pitch. Pedlars are regulated pursuant to the Pedlars Acts of 1871 and 1881. An individual intending to trade as a pedlar must apply for a pedlar's certificate from the police and must meet the following criteria:

- He must have resided in the police area for the chief officer of police to whom he applies for the certificate for at least one month before his application.
- Be of good character (and in good faith intend to carry on the trade of a pedlar); and
- Be above 17 years of age.

The European Services Directive 2006/123/EC ("The Directive") was implemented into UK domestic law by the Provision of Services Regulations 2009 ("the PSR") (S.I. 2009/2999). The primary aim of the directive is to make it easier for service businesses to set up or sell their services anywhere in the European Union (EU). The directive distinguishes between two categories of service provider, namely one who is exercising freedom of establishment ("an established trader") and a service provider who is exercising the right to provide cross-border services in a member state other than the one in which he is established ("a temporary trader").

Article 9 of the directive applies to established traders and prevents member states from making access to, or carrying out of, a service activity subject to an authorisation scheme unless certain conditions are satisfied. These include: not discriminating against the provider; the need for the authorisation scheme being justified by an overriding public interest such as public policy (but only in specific circumstances) public health, public safety and protection of the environment and urban environment; and if there is no less restrictive measure available.

Article 16 refers to temporary traders, and member states are prohibited from making access to, or carrying out of a service activity which do not respect the following principles:

- Non-discrimination.
- Necessity – the requirement must be justified for reasons of public health, public security, public policy or the protection of the environment.
- Proportionality.

In November 2009 the UK Government and the Scottish Government began a consultation to consider changes to existing legislation. In March 2011 the UK Government published its response to the views gathered by that consultation, which concluded that the legislation needed to be amended and that a further consultation would be issued outlining these proposals.

Consequently, on 23 November 2012 the Department for Business, Innovation and Skills launched a joint consultation on draft regulations to repeal the existing Pedlars Acts of 1871 and 1881 as well as amending the existing street trading legislation, in order to comply fully with the requirements of the directive. The consultation sought views as to a new and up-to-date definition of what constitutes acting as a pedlar for the purpose of the pedlar exemption. This was intended to protect the rights of genuine pedlars.

The draft Street Trading and Pedlary Regulations 2012 proposed that a pedlar would still be required to travel and trade on foot whether that is house to house or whilst travelling through the streets. Pedlars would be required to carry their goods on their person or in a receptacle (of defined

size) which is pushed or pulled. Further limitations were proposed in terms of a maximum "stay" time in a location of ten minutes, a minimum return time to any visited location of three hours; and a minimum distance of 50 metres between trading points.

In terms of street trading, the consultation proposed a reduction in the number of photographs required to be submitted with applications from two to one, as under the directive local authorities are required to provide the facility for applications to be submitted electronically, and therefore there is no reason for applicants to attach photographs twice. Further, applicants under the age of 17 would not automatically be refused to ensure compatibility with child employment legislation.

It was further proposed to repeal one ground of refusal by a local authority that there is sufficient existing street trading provision, including shops, in an area where an applicant wishes to trade and add a new ground of refusal if a local authority is of the view that the street is unsuitable for the trading in which the applicant desires to engage. An extension was proposed to the period for which a licence can be issued from one year to longer or indefinitely. Given that existing legislation only permits local authorities to designate streets as licence or consent streets in relation to all categories of street trader, the amendments propose that local authorities could designate streets as licence or consent streets in relation to a certain type of street trader, ie established or temporary traders.

The consultation was initially extended from 6 February 2013 to 15 March 2013 and ultimately ran to 5 April 2013. Following that consultation, the Local Government (Miscellaneous provisions) Act 1982 (Amendment) Bill was presented to Parliament by Dan Rogerson MP on 10 July 2013. The Bill seeks to amend schedule 4 of the 1982 Act by replacing "or offering for sale of any article" with "offering or providing for sale of any article or service". The Bill was due to have its second reading on 06 September 2013 but the session ran out of time. To date, that Bill has progressed no further.

Ben Williams
Barrister, Kings Chambers

Professional Licensing Practitioners Qualification – 2015

The IoL re-introduced our qualification for licensing practitioners back in May 2013. Four successfully delivered sell-out courses have now been held in Swindon and Nottingham. As a result we will be running two more course in 2015, to be held in March and May. Full details can be found on the events page on our website.

Each of the four days will finish with an exam, delegates have the option to sit the exam and on passing they will receive a certificate or they are welcome to attend the training without sitting the exam . Delegates sitting and passing the exam on all four days will be awarded the IoL accredited Professional Licensing Practitioners Qualification. In addition, those delegates sitting and passing the exams on less than all four days will be awarded the Licensing Practitioners Qualification related to the specific subject area(s) passed.

Delegates can attend as a day delegate for a single day to all four days or as a residential delegate staying in the hotel for single days or multiple days. The Professional Licensing Practitioners Qualification course will be accredited CPD and will accrue 4.5 hours CPD daily. The IoL is registered with the Solicitors Regulation Authority for CPD (CPD Ref: LGLF/CPC).

Course Objectives: To advance or refresh the knowledge, understanding and practical expertise of delegates attending the courses in relation to the licensing topics covered on each of the four days.

The Training: The training will focus on the practical issues that licensing practitioner will need to be aware of when dealing with the licensing areas covered during the course, see below.

The training is ideally suited to someone new to licensing, or an experienced licensing practitioner who would like to increase or refresh their knowledge and expertise in any of the subject matters. The training would also be suitable for Council and Police Licensing Officers, Councillors, Lawyers who advise licensing committees, managers of a licensing function and committee services officers.

The Programme
Day 1: Licensing Act 2003
Day 2: Gambling Act 2005
Day 3: Taxis
Day 4: Sex Establishments, Street Trading, Scrap Metal Dealers & Motor Vehicle Salvage Operators

Course Fees: Fees will depend on selected days/nights combination chosen. Once dates have been finalaised the fees will be put onto our events page (http://www.instituteoflicensing.org/events.html) along with the online booking link.

Each time we have run this course places have filled up quickly, therefore book early to avoid disappointment as places are limited for this course. For all event enquiries please contact us via events@instituteoflicensing.org

Speaking time limits: the potential for injustice

Brevity may be the soul of wit, but it may also be the cause of deep injustices. Some authorities, the minority, still insist on unrealistic and inflexible speaking time limits at licensing hearings. Regardless of the type of hearing or the seriousness of the potential consequences for an operator or other party, and ignoring the complexities and number of issues to be dealt with - the time-limit must be obeyed. The applicant who seeks an extra half an hour trading for his late-night café addressing a single residential obj section is afforded the same time, no more no less, as the nightclub operator at whose premises an escalation of violence over the years ends up in a customer being shot dead in an alleged gangland shooting leading to a summary review with 60 residents additionally complaining of public nuisance. Some authorities, remarkably, will only allow three minutes, others a more relaxed five minutes, a few even afford the relative luxury of 10 minutes. Farcically, the debate about whether the time-limit should be extended in a particular case often lasts longer than the time-limit itself.

> "My call is not for long-winded bombastic advocates to have a forum. It is for licensing authorities to have the wisdom not to be overly inflexible or swingeing in setting speaking time-limits in complex matters, but rather to fit the rules to the justice of the particular case and not the other way round."

Time-limits were often set at the transition from the old to the new licensing regimes owing to a fear of more hearings than an authority could handle in a compressed period. As circumstances changed, most authorities modified their hearing procedures accordingly.

The wiser licensing authorities adopted a more flexible approach: either not setting time-limits at all, or dis-applying them in appropriate cases. The dangers of too rigorous approach are numerous but include:

1) The operator (or responsible authority or other person) cannot put his case fully and properly and so leaves with a sometimes justified sense that he has been deprived of his right to a fair hearing.
2) The licensing authority denies itself the opportunity to hear the best evidence or explanations available.
3) The licensing authority risks diminishing its own authority and reputation as the dispenser of justice in the licensing setting.
4) When viewed at an appeal, probably listed over several days, a sub-committee hearing that was so time restricted as to be practically worthless will not play well with the magistrates. On being told of the procedures below, the appeal courts are less likely to place due weight on the decision made below, hampering the chances of a council defending its probably correct decision.

Sometimes, often, cross-examination of witnesses can assist sub-committees to reach better decisions on evidence improved by being challenged. To cross-examine well does not mean to examine crossly. It is to fire a well-aimed harpoon into the heart of the other side's case or to elicit crucial further information that may turn a case. Why should a sub-committee deny itself the opportunity - that the appeal court will enjoy - to hear such evidence ?

The good advocate will not take bad points, repeat himself, or pursue irrelevant lines of questioning. But if he does, then a strong chairman can and should rein him in or call a stop. The good advocate in a complex case may need a little time to elaborate a case which has, hopefully, been set out in well-organised paper submissions served well before the hearing date. That paperwork can run into many hundreds of pages in heavyweight licence reviews. Busy councillors are often assisted by being taken to the salient points in a morass of documents. An operator defending a review may need a little more time than the police applying for revocation. It takes a moment for the police to fire a forensic bullet, but it may take longer for the operator to plot the bullet's trajectory and repair the damage.

Gary Grant
Barrister, Francis Taylor Building

Article

Entertainment licensing: a new regime for Northern Ireland?

Entertainment licensing in Northern Ireland is currently under review, and licensing officers are being invited to suggest changes that remove discrepancies and bring the current system fully up to date, as **James Cunningham** outlines

In May the Northern Ireland Minister for the Environment, Mark Durkan, announced his intention to conduct a comprehensive and long overdue review of NI Entertainments Licensing legislation. Currently, entertainment licensing is regulated by the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 and is enforced by local councils.

Minister Durkan has invited representatives from various interest groups, including local government, police and industry, to look at the current legislation and make recommendations to him on any changes needed by the end of 2014.

This review provides a one-off chance for the current generation of licensing officers to feed into a licensing process that is outdated, giving us a unique opportunity to develop a more streamlined and effective licensing process in collaboration with the industry, taking account of the need to reduce bureaucratic burden.

The review is timely and links well to a separate initiative that the Department of Enterprise, Trade & Investment is undertaking in a review of business red tape, a key action in an economic pact between the UK Government and NI Executive. A key strand of the review is examining the impact of regulation on the hospitality sector, with a specific focus on issues that include both liquor licensing and entertainment licensing.

In a three phase process, the entertainments licensing review will be looking at:

1) The primary legislation.
2) Model terms and conditions of licences.
3) Fees.

Debate amongst local licensing officers based on their own experience of administering the current legislation, along with feedback from licensees and their trade bodies, has already identified many issues that warrant consideration. These include:

- *Duration of licences:* currently entertainment licences may only be issued for a maximum of 12 months. However, there is an industry lobby for licences to be issued permanently, and this would reflect the provisions of the EU Services Directive. Whilst everyone agrees an annual licence is unnecessary, there are some concerns about the sort of mechanism that could be introduced to review a longer licence, in the event of the occurrence of issues relating to public safety or nuisance, and how quickly these reviews could be dealt with.

- *Advertising:* it is a requirement to advertise details of an application through public legal notice in local newspapers. This process can be expensive and is viewed as an ineffective method of raising local awareness. It is certainly my experience that very few obj sections we get directly result from the objector having read a public notice in a newspaper.

- *Indoor and outdoor entertainment:* the definition of "indoor" and "outdoor" entertainment as it stands requires a pub to hold two licences if it provides entertainment both indoors and outdoors - for example, in a beer garden where a band is playing. A review of these definitions is needed to enable a single entertainment licence to cover this situation and reduce the costs for licensees and the administrative burden on councils.

- *Temporary licences:* at present there is no mechanism to grant a licence for a one-off entertainment event that may be arranged at short notice. Many of these come from community groups, or are organised for charitable purposes, and put councils in the invidious position of trying to fast track applications, or actually prohibiting the entertainment content of the event from proceeding.

- *Scope of the legislation:* the legislation regulates the following forms of indoor entertainment: a theatrical performance; dancing, singing, music or any other entertainment of a like kind; a circus; any entertainment

which consists of a public contest, match, exhibition or display of boxing, wrestling, judo, karate or any similar sport; billiards, pool, snooker or any similar game; darts, or any other similar game. There is a need to review the licensing of these types of entertainment to determine the merits of continuing to do so and also to examine if there are other entertainments which should now be included.

- *Licensing objectives:* whilst there are no objectives in the current licensing regime, conditions can be specified in relation to the conduct of the venue, safety, amenity and welfare of patrons and prevention of noise disturbance to local residents. It is expected that the review will look at the merits of introducing more defined objectives akin to the Licensing Act 2003.

- *Alcohol licensing:* in other jurisdictions of the UK the licensing authority is responsible for both alcohol and entertainment licensing. In Northern Ireland alcohol licensing is administered by the Magistrates' Courts. The review will also examine discrepancies between the two licensing systems where, for example, a club can provide entertainment until 3.00am but must, by law, stop serving alcohol at 1.00am.

The review is now underway and licensing officers are fully involved in contributing to the process, which is rapidly gathering pace. I mentioned the review at the Regional Officers Training Day in Birmingham in June and got some very helpful feedback from those attending based on their experience of coping with the introduction of the Licensing Act and the seemingly endless *"tinkering"* with it that has gone on ever since.

If anyone has any comments on the review we are currently undertaking, based on their own experience, including problems experienced or examples of good practice, which they wish to share – particularly in relation to the key points I have identified – then I would be delighted to hear from you, either by e-mail at Hewitts@belfastcity.gov.uk or by phone on 028 9027 0287.

James Cunningham
Regulatory Services Manager, Belfast City Council

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

Institute of Licensing News

A big welcome to Issue 10 of the Journal of Licensing and our IoL news update.

Since the July edition of the Journal of Licensing there have been a number of changes to the team. At the end of the National Training Event we will say goodbye to Jim Hunter, our Training and Qualifications Officer.

While working as a Licensing Officer Jim became involved in the Local Government Licensing Forum, which was the organisation that became the Institute of Licensing in 2003. Jim began his employment with the Institute of Licensing in October 2008 as the Training and Qualifications Officer.

Jim became the Chairman of the South West Region of the Institute of Licensing and worked for many years developing the regional network. He subsequently became a Vice Chairman on the Institute of Licensing Board, where he has continued to support the Institute of Licensing's core objectives for the benefits of its members.

Since Jim started at the Institute of Licensing he has had a major impact on the quality and quantity of the training events provided by the Institute. We have seen an increase from approximately six courses a year to nearly 100.

Jim's tireless work over the years has seen the Institute of Licensing being awarded a number of contracts to deliver courses which he has developed along with other key trainers. Jim piloted a training course aimed specifically at operational police officers in relation to their powers to deal with problem licensed premises. Shortly after the pilot was delivered the Home Office asked the IoL to tender to deliver 55 one-day training courses on the same subject matter across England and Wales, for which we were awarded the contract. The IoL was then asked to tender for an additional series of training courses with a wider audience including councillors, licensees, police and other regulators. Jim delivered the majority of these training courses himself.

The IoL was also awarded a contract to deliver training on behalf of the BRDO which resulted in a large number of one-day courses being delivered by Jim across England and Wales.

The IoL Chairman, Jon Collins, sums up Jim's impact at the IoL: "The Institute owes its rapid development from informal network to nationally significant charity to the energies and enthusiasm of a relatively small group of people. Jim is a key member of that group, consistently passionate about making licensing work to deliver great public spaces, happy residents and vibrant businesses. That passion has shone through from his time innovating in Taunton, trading opinions at Board meetings and, latterly, designing and delivering training the length and breadth of the country. Jim's contributions to the advancement of licensing in general and the Institute in particular are many and varied. We would not be where we are today without him. Oh, and above all that, he has always been great company over a pint of Guinness. I just wish I could have gotten him to take the Tube once in a while!"

Sue Nelson
Executive Officer

Jenna Parker
Training & Qualifications Manager

Jim Hunter
Training & Qualifications Officer

Hannah Keenan
Co-ordinator

Jim will be leaving the IoL after the National Training Event in November 2014 and will concentrate on running his campsite in Doonbeg, Co Clare, Ireland and his holiday homes in Port Isaac, Cornwall. We will hopefully still see Jim now and again as he tries to fit in some licensing consultancy work, predominantly delivering licensing related training.

Jim will be sadly missed by the IoL when he leaves.

The role that Jim undertook for the IoL has been developed by Jenna Parker, our Training and Qualifications Manager. Jenna's role will be to co-ordinate and develop our network of trainers, rather than carry out training herself. Some of you will already have been contacted by Jenna since July asking for training feedback. Jenna and Jim have been working hard to put a programme of training together for 2015. The aim of this is to provide our members with a clear calendar/ programme of training for the year ahead. Alongside this programme of training courses we will still be providing bespoke/closed training where there is a requirement from individual organisations. If you have any training ideas or would like to discuss a bespoke training need please email: training@instituteoflicensing.org.

Louis Krog has joined as our new part time National Communications Officer. She will help the team ensure that up to the minute news reaches our members. If you are not already following the IoL on Twitter, you can do so at @instoflicensing

The IoL has teamed up with Licensing Resource, www.licensingresource.co.uk, a free and open resource of licensing related material. This includes primary legislation for each function, secondary legislation, amendments, case law and other related resources such as guidance, forms and related links. News will continue to be reported on the Institute of Licensing Website and directly to individuals who have signed up to receive newsflashes by email. If you have some news from your region that would be useful to share please contact louis@instituteoflicensing.org or news@instituteoflicensing.org.

Finally in Team News, congratulations to Sue Nelson, whose son, Callum, arrived in late August.

Website

The IoL listens to our members and after hearing your concerns and suggestions for our website improvement we have taken these forward. We are currently commissioning a new website and will bring you more news on this exciting project as it develops.

Our regions

Our eleven regions across the UK provide regular training days that cover a wide range of topics, delivered by a diverse number of speakers. Each region has its own dedicated page on the website, which can be found at www.instituteoflicensing.org/regions.html. These pages contain a host of information, ranging from the names and contact details of each regional committee to the handouts of previous regional training days, as well as details of future training days.

Consultations

Gambling Commission Consultation - proposed amendments to the social responsibility provisions in the licence conditions and codes of practice (published 19 August 2014, closed 10 October 2014)

In his foreword to the consultation document the Gambling Commission's chairman, Philip Graf, explains that the consultation on social responsibility measures has been brought forward as a result of public and parliamentary concern. The debates on proposed amendments to the Gambling (Licensing and Advertising) Bill during its passage through parliament highlighted areas of concern to members of both houses and in particular category B2 machines, gambling advertising and the protection of children and the vulnerable.

This has resulted in a range of initiatives announced in government's review of Gambling Protections and Controls, published on 30 April 2014.

At the time of writing, responses to the consultation were being gathered from our members.

Gambling Commission Consultation - Statement of Principles & Licensing, Compliance and Enforcement Policy (published 29 July 2014, closed 8 September 2014)

The Gambling Commission consulted on proposed amendments to their "Statement of Principles for Licensing and Regulation" as well as their "Licensing, Compliance and Enforcement Policy Statement".

The Institute of Licensing sought members' views on the four questions detailed in the consultation, namely:

Q1 Do you have any comments on the proposed changes to the Statement of Principles for licensing and regulation?

Q2 Do you have any comments on the minor amendments and points of clarification for the chapters on risk, licensing, compliance and criminal investigations (chapters 2, 3, 4 and 6 respectively)?

Q3 Do you have any comments on the changes to chapter 5 on regulatory enforcement, and in particular as regards the s sections on enhanced and voluntary settlement?

Q4 Do you have any comments on the new chapter on publicity (chapter 7)?

At the time of writing, responses to the consultation were being gathered from our members.

When is it right for a licensing authority to consent to or compromise a licensing appeal?

How much latitude for manoeuvre does a licensing authority have when arriving at its decisions? It all depends on the situation, suggest **Sarah Clover** and **Ian de Prez**

Most licensing decisions are subject to a statutory appeal to the local Magistrates' Court.[1] In an ideal world, a licensing authority would be reasonably confident in defending all such appeals, but inevitably that is not always the case. If the appellant proposes a compromise, the council as licensing authority may seem to be between a rock and a hard place. Magistrates and their legal advisers do not want valuable court time to be taken up when sensible concessions can be made, and there may be some risk of a costs award. However, residents who objected to the original licence application and participated in the licensing panel hearing may well be aggrieved, believing that a compromise which extends hours or moderates conditions amounts to an undemocratic dereliction of duty by the council.

We have faced the difficulties - practical and theoretical - that arise in these situations from the different perspectives of an in-house local authority lawyer and a barrister often acting for leisure industry clients. The suggestion, made to both of us on occasion, that it is either not legally possible or usually unethical for a local authority to reconsider its decision, is demonstrably wrong.

It is true to say that in a case under the Licensing act 2003, a council may not *directly* change its decision.[2] What it can do is agree a compromise to be embodied in a consent order placed before the court. Precisely how the council achieves a settlement will depend on its constitution and particularly its scheme of delegation. Most constitutions allow the solicitor to the council to settle cases, perhaps in consultation with senior councillors. Although it may not always be strictly necessary, a consideration of the case by the whole licensing committee - as a confidential item because legal advice is being given - may be desirable, given the importance of democratic accountability.

In R (*Chief Constable for Nottinghamshire*) *v Nottingham Magistrates'*[3] *Court* the Divisional Court confirmed that the Magistrates' Court has discretion to allow responsible authorities or other persons to become parties to an appeal alongside the appellant and the council as initial respondent. The court held that the wish of the police to become a party to the appeal, although the council was defending its decision and relying on police evidence, ought to have been considered by the lower court. It must follow that a resident disapproving of the terms of a consent order would in most cases expect to obtain the court's permission to intervene, if it wished to do so.

Even if there is no formal intervention of this kind, the magistrates might not automatically accept a consent order; they may ask for explanations and further information from both the council and the appellant.

Why it is sometimes right to make concessions

It is axiomatic that a local authority always has the power and the duty to revisit any of its decisions that are challenged. A public body is subject to the scrutiny of the courts through judicial review. Any aggrieved party on the receiving end of a public body's decision may question that decision, and before referring it to the courts must comply with the relevant pre-action protocol. The very purpose of this protocol is to highlight the nature of the grievance to the public body in advance of any proceedings and to invite them to consider the challenge and respond to it. Part of the purpose of the protocol is to give the public body an opportunity to accept

[1] For sex establishments these rights of appeal are limited, leaving judicial review as the only remedy for most cases . Hackney carriage vehicle licence appeals for no apparent reason are made directly to the Crown Court.

[2] Unless of course the applicant makes a fresh application to it or the court remits the matter back to it under s 181(c) of the Act.

[3] [2010] 2 All ER 342.

that it has made an erroneous decision in some way, and to yield to the complainant's challenge. This would be impossible and the protocol would be useless if there were no mechanism by which a public body, in this case the council as licensing authority, could revisit the decision.

Licensing decisions are no different from other local authority decisions in their susceptibility to judicial review. Most challengers are likely to prefer to pursue a statutory appeal if the right to it exists, but the possibility of judicial review can quite properly influence the authority's response to a statutory appeal, given the overlap between the subject matter covered by these two types of challenge.

Judicial decision makers have assumed in several cases that councils have the power and sometimes the duty to concede or compromise appeals and that they should expect costs penalties if they do not take up this option wisely.

In *Birch House Business Centre v Denbighshire County Council* in 2010 District Judge Shaw said "the fact that a licensing committee has decided to revoke a licence does not of course mean a local authority is duty bound to resist any appeal against revocation."

As a Magistrates' Court decision, this is only of persuasive authority. However, in the High Court Foskett J made the same point in *Mayor and Burgesses of LB Tower Hamlets –v Ashburn Estates Ltd (t/a the Troxy).*[4]

It will surely be right to make concessions if the sub-committee's decision is based on an error of law or it if was affected by procedural unfairness or the overlooking of an important element in relevant policy or guidance, or if the decision simply cannot be defended to the magistrates with any degree of conviction.

What of those cases where the appellant would probably not have succeeded in a judicial review, but nonetheless hopes to persuade the Magistrates' Court that the authority's decision was *wrong* as defined by *Hope and Glory*? [5]

There is a not uncommon scenario – expressly identified in *Hope and Glory* - where the decision may not have been wrong when it was made but is wrong by the time the appeal is heard because of a significant change of circumstances (for example, where discussions between a significant objector and the appellant have led that objector to change his mind and no longer support a restrictive approach in the authority's licensing decision). In these instances the council can properly make the compromise without any embarrassment.

Some will argue that, beyond this point, a licensing authority should err on the side of caution and let the court decide an appeal.

It may be suggested that too much readiness to concede when there is some basis for defending a decision, even if it is questionable is bound to cause a loss of confidence in the decision - making process. *Hope and Glory* says that a council's decisions under the Licensing Act 2003 are administrative in nature, not quasi-judicial, but they are still formal decisions made after a hearing governed by regulations, and so should be respected.

Furthermore, although it is not unreasonable for a council to take into account a costs risk when deciding how to respond to an appeal, this factor should weigh less heavily than it would in a private law case to which the council is a party, because the public interest and the integrity of a regulatory process are in issue. Furthermore, recent case law [6] appears to strengthen the argument of a licensing authority resisting a costs application.

The *Nottingham* case has actually made little difference in practice to the involvement of third parties in appeals, because residents are fearful of the process, and of the risk of a costs award, even when it is unlikely to occur. For this reason, it may be argued that the council should continue to defend the position that the residents saw them take.

These points are not without merit. However, there is no legal reason that would prevent a licensing authority from compromising in these broader circumstances. The nature of the public interest may be a moot point; every case is different. There will be some, surely, where the public interest is best served by a compromise which removes the possibility of even longer hours and fewer conditions and protects the public purse. We conclude that it is not possible to be dogmatic. How the local authority acts is for it to decide – as long as does so in good faith and reasonably as defined by public law.

The council must be mindful that dissatisfied local residents may complain to the Ombudsman and will have certain legitimate expectations that will be recognised in public law. For these reasons proportionate consultation with those likely to be affected by a decision about an appeal is an important consideration. (Richard Brown has written about this issue in a broader context. [7])

In conclusion, it may be seen that a stark position that licensing authorities may not negotiate and compromise in advance of a licensing appeal is clearly wrong. Precisely how and when they choose to do so, however, will be a matter to be decided on its merits in every case.

Sarah Clover
Barrister
Kings Chambers

Ian de Prez
Solicitor Advocate
Suffolk Coastal District Council

[4] [2011] EWHC 3504.

[5] [2011] 3 All ER 579.

[6] *R-v-Newham LBC v Stratford Magistrates* [2012] EWHC 325 Admin.

[7] (2012) JoL 3.

Britain's Got Talent

Oh yes, ladies and gentlemen, Britain certainly has got talent, and in particular Britain has got talented members.

Showing tonight will be three councillors in the next round of "Play Your Cards Right and You Might Get a Licence", the Governments' all new game show where contestants try to outwit the councillors into believing they can uphold the licensing objectives!

And later tonight we'll have another new show "The Winner Takes All", when the licence review hearing will provide a winning group from either the applicants' team or the objectors' team with a result to make them happy. In the event of a tie we can even have licences issued / revoked after a public phone in!

Oh, the indignity of it all! Sadly, this wasn't a recent nightmare in my usual sleepless night fretting about the conduct of members during hearings, but the stark reality of the future of licensing hearings in the wake of the new Openness of Local Government Bodies Regulations 2014, which will now allow filming, recording, tweeting and general malarkey at all public meetings.

> "You Tube will be full of clips of edited excerpts from meetings involving the chairman of the committee asking the applicant 'Well, tell me, do you feel lucky punk?'"

In truth, one can have some degree of sympathy with the good intentions of Parliament in wishing to show how serious central Government is about openness and accountability. It's all very honourable really. But the problem is whichever civil servant dreamt this idea up clearly wasn't fully aware of the type of person who would want to film or record one of our meetings. I mean, I thought cricket was dreary, but watching my licensing hearing on TV is about as inviting as an afternoon at the dentist!

Let's face it, there are several people in districts up and down the country, well known to us all, who make all the representations, usually in green crayon, and sometimes enclosing gifts like feathers, or muck! In the old days we called them all sorts of names, but these days we're not allowed to! The Government persists in encouraging us to engage with it, but more to demonstrate our transparency and openness. There is no doubt who will be turning up at the next meeting with their video camera and tripod, directing the meeting for the most dramatic effect, and asking members to look angry or sad for editorial effect at a later stage.

So what is this all about, and why do we need it? In truth, the Regulations are all about explaining people's rights to attend meetings, the information they are entitled to access for meetings, and in a way to bring the 21st century into the process of government. It explains the use of modern technology by emphasising the use of filming, tweeting and blogging to enhance openness and transparency of council activity.

In essence, the use of social media has introduced a dynamic to the licensing processes that wasn't foreseen when the Licensing Act 2003 was introduced. These days you might never have seen a Blue Notice, or the local advert in relation to a proposed Premises Licence, but you may well have viewed it on a friend's Facebook page, or seen it in a tweet. In that respect, news travels so much faster than it used to, and the public is so much better informed by utilising modern technology. There is little doubt, certainly in my own area, that 80% of representations made against licences are made by email, which was possibly not envisaged 11 years ago when the Act was published.

The Regulations and the helpful guidance do explain that any filming cannot interfere with the conduct of the meeting, so attempts to "direct" the proceedings from behind the camera have been anticipated. It would seem to be very good practice for councils to adopt a policy on the matter of filming and recording, particularly to set boundaries as to where cameras can be placed; also, to deal with restrictions on filming the public, and to set out what measures will be implemented for dealing with disruptive, overzealous individuals who want to take the rights awarded to them to levels not envisaged by Parliament, or wanted by councillors.

This does not mean you can override the rights awarded under the Regulations, but as usual these days, the "devil is in the detail". Reluctant though some councils may be, it could be wise to introduce their own filming of meetings to avoid edited versions appearing that depict the council in a poor context.

So ladies and gentlemen take your seats, and cameras roll in three, two, one.... Action!

Andy Eaton
Deputy Legal Services Manager,
Wealden & Rother District Councils

No "no go areas" for the Gambling Commission in respect of regulation

Primary gambling activity, a new Act regulating remote gambling, and further updates on changes to the licence conditions and codes of practice and planning in respect of betting premises – all topics examined by **Nick Arron** in this round-up of the most important recent gambling law developments

Nick Arron

You may recall from previous journals Trafalgar Leisure Limited's successful appeal against the Gambling Commission in respect of primary gambling activity, and the judicial review brought by the London Borough of Newham following District Judge Goldspring's decision to allow an appeal by Paddy Power. In the Trafalgar decision, the First Tier Tribunal found that the licensee had not been in breach of the third paragraph of condition 16 on primary gambling activity. In the judicial review, all parties agreed a declaration that reflected the wording of s 153 of the Gambling Act 2005, which was uncontroversial and did not add to the concept of primary gambling activity. The saga now continues.

Most recently, on 13 May 2014 Judge NJ Warren delivered his decision of the First Tier Tribunal in respect of Luxury Leisure Limited's appeal against the decision of the Gambling Commission to issue a written warning.

The written warning had been issued in July 2013 and related to a breach of condition 16 in respect of betting premises operated by Luxury Leisure in Newcastle.

The betting premises licence in Newcastle had originally been granted by the licensing justices and included an undertaking that the only gambling activity would be by way of fixed odds betting terminals or as we now know them Category B2 gaming machines. The undertaking contradicts primary gambling activity and the Gambling Commission took issue with the operation of the premises.

The Gambling Commission found Luxury Leisure to be in breach of paragraph 1 of condition 16 which states: "Gaming machines may be made available for use in licensed betting premises only at times when there are also sufficient facilities for betting that may be made available".

The question raised was were there sufficient facilities for betting available at Luxury Leisure's premises in Newcastle? Acting on behalf of the Commission, Ms Stratford QC submitted that the test is whether there are sufficient facilities for betting available such as to indicate that betting is the primary gambling activity on the premises. This submission was not accepted by the judge as the construction inserted into the condition, without justification, words which were simply not there. Rather he found that the words to be applied are the plain words of the condition.

In making his decision the judge considered the consultation conducted which led to the introduction of condition 16. The Commission had consulted on a condition referring to the existence of facilities rather than the dominance of facilities. He also referred to an earlier draft condition to the effect that facilities for betting "must be sufficient in range and capacity to ensure that betting constitutes the primary activity on the premises". This draft was dropped from the consultation which subsequently led to the current wording of condition 16.

The judge concluded "that condition 16 does not require a contest between betting and the FOBTs [Fixed Odds Betting Terminals] as to which is or could be the primary activity at any given time".

Luxury Leisure, represented by Mr Howell QC, asked the judge to also consider whether condition 16 was invalid as it was inconsistent with the Act and therefore *ultra vires*.

Mr Howell referred to s 86(1)(a) of the Act which prohibits the Commission from imposing conditions "about the number or categories of gaming machine that may be made available

for use in accordance with the licence". He asked the judge to consider that the primary gambling activity condition, particularly the third paragraph which requires a greater number of betting terminals than gaming machines be made available at the premises, offended s 86(1)(a). Mr Howell went on to say that the Act, which provides the right to four Fixed Odds Betting Terminals (FOBTs) in a betting shop, contemplates that any further regulation of the machines should be by the local authority in relation to the premises licence and under the power conveyed by s 181(1) and the implication in s 172(10) that conditions in respect of gaming machines can be imposed by the local authority.

The judge was not convinced that there are "no go areas" for the Gambling Commission in respect of regulation, referring to areas of overlap in which both the licensing authorities and the Commission are empowered to impose conditions within the Act.

The judge decided s 86(1)(a) did not exclude regulation by the Commission of any activity relating to FOBTs and, reading the statute as a whole, he found that it is open to the Commission to attach conditions concerning what he called the "atmosphere" in which facilities, including gaming machines, were made available.

Thus when considering condition 16, which did not require a contest as to whether betting or gaming dominates, he concluded that the condition did not breach s 86(1)(a) and was *intra vires*.

He was then asked by Mr Howell to consider whether condition 16 was void for uncertainty. Again, as there was no judgement required when considering condition 16 as to which activity was dominant, the judge decided that the condition was not void for uncertainty. This leads to the conclusion that if condition 16 had required a judgment on which activity was dominant then the argument that it was void for uncertainty would have had greater sway.

The judge went on to consider the Code of Practice issued by the Gambling Commission in relation to condition 16. He stated that he had not found it easy to take into account the provisions of the code in part because of the ambiguity of the phrase "primary gambling activity". He found the code contains a number of meanings of "primary gambling activity" with it defined both as the existence of facilities and as the measurement of the rival activities.

Judge NJ Warren criticised the Gambling Commission Panel decision stating that it reflected confusion on the meaning of primary gambling activity and was ultimately based on primary gambling activity in the dominant sense, an approach he found erroneous and therefore the Panel decision should not stand.

As to whether sufficient facilities for betting were available, this was an unusual situation as Luxury Leisure's premises licence was originally obtained with a view to installing only the FOBT machines, reflected in the undertaking given to the licensing justices. The judge referred to evidence which demonstrated that a substantial area of the Newcastle premises was devoted to betting. There were chairs, a table, TV screens and a copy of the Racing Post available. Betting was promoted in displays and a machine linked to Betfair was installed at the premises in November 2012. Prior to the installation of the Betfair machine other similar types of machines were made available to customers allowing them to bet. Punters could use the machines themselves or hand over cash to a counter clerk who would use the machines to place the bets. It was, however, accepted that overall betting use was low. He considered the bets available, the odds and multiple bets.

The judge concluded that given the range of betting opportunities available, the counter service and the space and facilities, the premises made sufficient facilities for betting available and accordingly Luxury Leisure was not in breach of condition 16. The appeal was allowed and the decision of the Gambling Commissions set aside.

It will be interesting to see how the Gambling Commission respond to this decision. Following the Trafalgar case, the Commission redrafted condition 16 and a few practitioners would be surprised if the Commission reconsidered the wording of condition 16 once more. Redrafting of the various guidance and advice notes, which relate to primary gambling activity, would be welcome to remove any confusion of the concept. NJ Warren's decision does support the concept of primary gambling activity, in finding that it was *intra vires.* However, there is more work to be done on how it is described and interpreted by the Gambling Commission.

The Gambling (Licensing & Advertising) Act 2014

The Gambling (Licensing & Advertising) Bill has now received Royal Assent. Under the Act remote gambling by consumers in Britain will be regulated on a point of consumption basis and all operators providing gambling services to the British market, whether based here or abroad, will be required to hold a Gambling Commission licence to enable them to interact with British customers.

For the first time, operators based overseas will be subject to the regulation of the Gambling Commission.

The new regime will require foreign operators to comply with the Licence Conditions & Codes of Practice provisions on crime and disorder, fair and openness, and the protection of children and the vulnerable.

All gambling websites accessed by British consumers will have to comply with the standards set by the Gambling Commission and have to contribute to research, education and treatment in relation to problem gambling in Britain and to the regulatory costs of the Gambling Commission. From a consumer perspective, the Act offers clarity on the expectations and obligations relating to remote operators.

The Act is expected to come into effect on 1 October 2014. The Gambling Commission is now accepting remote gambling licence operations from offshore operators. Indeed as I write, the first licences have been granted.

Changes to the licence conditions and codes of practice

The changes to the licence conditions and codes of practice, referred to in Journal 9, have now come into effect. This includes changes to condition 16 on primary gambling activity for non-remote betting operators. The third paragraph, which required the licensee to provide more betting machines or terminals than gaming machines, has been removed.

Other changes relate to suspicious activity reports; complaints and disputes; co-operation with the Gambling Commission; the licensee's responsibility for third parties; the independence of the compliance function of personal management licence holders; key events; lottery operators and managers; and the location of remote gambling servers.

Government proposed changes to use class for betting shops

On the 31 July 2014, the Department for Communities and Local Government (DCLG) launched a technical consultation on planning.

The DCLG states the proposed reforms aim to make the "planning system work more efficiently" and give communities more "power in planning local development".

The consultation seeks views on proposals, which will:

- Expand permitted development rights.
- Improve the use of planning conditions and enable development to start more quickly.
- Improve engagement with statutory consultees.
- Remove unnecessary bureaucracy and reduce the cost and time taken to get planning permission.
- Expand the number of non-planning consents which can be included within a development consent order.

However, the proposed regulatory changes will effectively create a separate use class for betting premises, providing that appropriate planning permission be obtained before a change of use is permitted.

Changes of use within planning classes do not require planning permission, such as changes within class A1, which includes shops, warehouses, hair dressers, sandwich bars and internet cafes. Class A2 currently contains financial and professional services such as banks, building societies, solicitors and betting offices. The proposals provide that a wider A1 use class be created, incorporating the majority of financial and professional services that are currently found in class A2, effectively restricting the A2 class to betting premises and pay day loan shops.

The consultation states that the current planning use class for betting shops is no longer appropriate as it reflects the historic operational model for the industry. The consultation identifies that the industry has grown and that the offer made to customers has significantly changed, with particular regard to B2 gaming machines. The consultation states that the greater prominence of betting premises on the high street means that their land use impact could be considered to be different from other uses within the current A2 class, justifying why betting premises will not benefit from the proposed increased flexibility.

The Government also proposes to make changes to the General Permitted Development Order 1995 and remove the existing permitted development rights available for class A premises for a change of use to the A2 class.

The consultation accepts that the proposals "may add some costs and delay to business wishing to open new betting shops" and states that while its aim is to "streamline the planning system", the Government considers that this is an important way in which it can "support local communities and local planning authorities in shaping their local area".

The consultation closed on 26 September 2014 and further details can be found on the DCLG website.

Nick Arron
Lead Partner, Betting & Gaming, Poppleston Allen

Institute of Licensing Benefits of Membership

Institute of Licensing

As part of the Institute of Licensing's main aims and objectives we strive to increase knowledge and professionalism in licensing. 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.

Benefits of Membership

As an organisation the IoL are continuing to provide even better service and value to our members. The subscription rate has stayed the same for individual membership 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.

A small selection of membership benefits are shown 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 this year we have teamed up with various organisations 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.

Journal of Licensing

This publication, the Journal of Licensing is published three times a year, and is free of charge to all members. Additional copies can also be ordered, at a small cost. See inside front cover for more details.

Events & Training

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, to provide timely and relevant training opportunities to our members, including basic training aimed at new entrants, and advanced training for established practitioners. For more info visit the events pages of our website www.instituteoflicensing.org or contact us at events@instituteoflicensing.org

Licensing Flashes

We know that licensing is always changing and we know members need to be kept up to date with the changes and latest court decisions. Members will receive an electronic news update, a "Licensing Flash" whenever there is a news story that will be of interest to our members.

Ask a Question

Do you ever get asked a question and don't know the answer or can't remember? Members can post questions and all members get the opportunity to reply. Again, this is a free service for members.

Membership

For more information on membership and how to apply online visit our membership section of our website www.instituteoflicensing.org or contact us at membership@instituteoflicensing.org

Membership Fees - 1st April to 31st March

- **Individual - £70**
- **Associate - £60**

(Retired membership 50% of above)

- **Standard Organisation (1-6 persons) - £250**
- **Medium Organisation (7-12 persons) - £360**
- **Large Organisation (13+ persons) - £500**

New Home Office Guidance on public health

Awarding health bodies a role in local licensing aroused suspicion in many quarters when it was first introduced but new Guidance from the Home Office has allayed much of the concern, as **Alex Greaves** explains

Ever since health bodies have been included as responsible authorities, there has been concern that this would give rise to irrelevant representations, seemingly elevating the role of public health in licensing to a level that is without statutory justification.

There are those that will view the *Additional Guidance for health bodies on exercising functions under the Licensing Act 2003*, published by the Home Office on 8 September, as further evidence of an attempt to sneak a fifth (public health) licensing objective through the backdoor. However, a closer look at the new Guidance reveals that it fulfils no such purpose. Instead, it provides welcome recognition for, and guidance on, the very real contribution that health bodies can make to the *current* licensing objectives.

As a preliminary point, it is important to note that the Additional Guidance is good practice guidance and not statutory guidance and, as such, does not carry the same weight as the s 182 Guidance. In particular, there is no statutory requirement for a licensing authority to have regard to it.[1] This important distinction is made clear on the face of the Additional Guidance, which states that it "is not statutory Guidance (or any part of the statutory Guidance)". Nevertheless, the Additional Guidance will provide helpful clarification and detail to the somewhat limited s 182 guidance on the issue.

The current statutory Guidance contains a s section setting out the role of health bodies acting as responsible authorities. However, it provides a pretty vague explanation for the role health bodies are likely to have, even by the (typically) woolly standards of guidance. Paragraph 9.21 starts by indicating the sort of contribution that health bodies may be able to make. It explains that they "may hold information which other responsible authorities do not", citing A&E admissions and use of ambulance services as examples. It describes how, where these events are caused by drunkenness, the information would be relevant to the public safety and, in some cases, the prevention of crime and disorder objective. However, the reader is left wondering how that information will assist relevant representations in relation to a particular premises until the final sentence which suggests that "sometimes, it may be possible to link ambulance callouts or attendances at emergency departments to irresponsible practices at specific premises, such as serving alcohol to people who are intoxicated or targeted promotions involving unlimited or unspecified quantities of alcohol at particular groups".

Accordingly, although the statutory Guidance hints at the anticipated role of health bodies, it is of limited practical use. The good practice Guidance builds on it in a number of ways.

First, it collates important parts of the licensing regime that will be relevant to the role of health bodies. In particular, the Guidance is at pains to emphasise that "health evidence may not be relevant for each [application]" and that "for a health body to make a relevant representation, the representation must be linked to one or more of the licensing objectives". The extent of the public safety objective is also clarified by the statement that:

> *It should also be noted that public safety only concerns the physical safety of people using licensed premises and not wider alcohol-related health harms such as liver disease, alcohol related deaths and other issues around the promotion of public health. Any representation made therefore needs to focus on the physical safety of individuals, such as alcohol-related accidents and injuries.*

This re-clarification of the scope of the role of public health in licensing decisions will surely provide some comfort to those who feel that it is overstepping its mark. Whilst these important qualifications are not new, and similar statements

[1] Section 4(3) provides that a licensing authority must have regard to guidance issued under s 182.

can be found in various parts of the statutory guidance, the Additional Guidance helpfully distils them into one place, specifically targeted at the role of health bodies.

Secondly, the good practice Guidance provides further indication of the sort of public health evidence that might be relevant to the licensing objectives. The examples given for public safety and the prevention of crime and disorder largely duplicate those provided in the statutory guidance and are focused on accidents and injuries caused by drunkenness and violence. However, unlike the statutory guidance, the Additional Guidance also addresses the protection of children from harm and the prevention of public nuisance.

In relation to the protection of children from harm, the Additional Guidance states that:

> *There is a duty to protect them from moral, physical and psychological harm and therefore lots of potential for health bodies to add value. Under-18 alcohol-related A&E attendances may relate to the objective to protect children from harm and underage proxy sales of alcohol will have implications for both the crime and disorder and protecting children from harm objectives. Health teams can provide supporting evidence, for example in relation to the effects that drinking alcohol has on the adolescent body.*

The last sentence of this indicates that long-term health concerns which would not be considered relevant under public safety may, nevertheless, play a part in relevant representations where those concerns relate to the underage consumption of alcohol. This is less significant than it might initially appear. Whilst it may serve to emphasise the importance of preventing underage drinking, it is unlikely to add greater weight to a factor that is already taken very seriously.

Turning to the prevention of public nuisance, the Additional Guidance acknowledges that the role of health bodies may be a "less obvious", but suggests that they might hold data on the physical and psychological effects of noise and light pollution late at night from licensed premises, such as sleep deprivation. This may bolster established concerns with more robust evidence, but it is hard to imagine that there will be a flood of data relating to sleep deprivation from a particular premises.

In addition to setting out examples of potential contributions that health bodies will be able to make as responsible authorities, the Additional Guidance also acknowledges what is likely to be the most significant barrier to their function in making relevant representations - the need to ensure health evidence and data is relevant to the particular premises. Although it is certainly possible for data to be collected in such a way that it can be utilised appropriately for licensing purposes, this is likely to require considerable changes to the data collection procedures of health bodies. This should not be underestimated and, in practice, is likely to present a significant hurdle which health bodies wishing to make valuable contributions will need to overcome.

Whilst the involvement of public health in licensing is likely to remain controversial, and whatever your view on any future changes that may occur, this Additional Guidance will undoubtedly provide welcome clarification of the role which public health bodies currently have to play in licensing decisions. It seems clear that it is envisaged that this role will be focused around the provision of relevant data from A&E admissions which, if appropriately collated, may provide an indication of some of the harmful effects which can stem from the existing licensing objectives.

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Article

The curious reluctance of the higher courts to resolve the ongoing interim steps debate

With High Court Judges declining to allow judicial review proceedings that would deliver an authoritative resolution of the meaning of interim steps, operators and their advisers continue to face unnecessary uncertainty, write **David Matthias QC** and **Isabella Tafur**

On 27 August 2014 the ongoing saga of the "interim steps" debate took its latest twist, with Sir Andrew Collins' refusal of permission for judicial review in *Sarai v Hillingdon*.

The correct interpretation of ss 53A-53C of the Licensing Act 2003 as regards the duration of interim steps has been a matter of considerable debate in the licensing sphere ever since their introduction was proposed by way of amendment to the 2003 Act in the Violent Crime and Reduction Bill in 2005. The provisions came into force in England and Wales in October 2007, and still the debate rages on.

In the two most notable Magistrates' Court decisions, two experienced District Judges have reached opposite conclusions as to the correct interpretation of the provisions. [1] Meanwhile, two High Court Judges have refused permission to bring judicial review proceedings in two other cases, so that both opportunities for an authoritative resolution of the debate by the higher courts were lost.[2]

Since the hurdle that a claimant must cross to obtain permission to bring judicial review is low, merely having to show an "arguable case", [3] those refusals by Dingemans J and Collins J are indeed curious. Few practitioners, whichever side they favour, will be heard to say that the other side of this particular debate is "unarguable", and even Sir Andrew Collins whilst refusing permission in *Sarai v Hillingdon* conceded that "it may be a judicial decision is needed."

That is, with respect, an understatement. Either Parliament should amend the badly drafted ss 53A-53C so as to provide clarity regarding the intended duration of interim steps, or the higher courts should resolve the argument over the correct interpretation of the s sections as currently drafted by giving an authoritative determination in that regard.

In short, the argument concerns this question: if a licensing authority receives an application for a summary review of a premises licence (pursuant to s 53A of the 2003 Act), and determines within the statutorily prescribed 48 hours that interim steps should be taken pending the determination of the review application (pursuant to s 53B), how long do those steps last? Do they last only until a decision is made on the review application, or do they last until the review decision actually comes into effect (which will be 21 days after the decision is made or, if there is an appeal against the decision, until the appeal is disposed of)? [4]

Operators favour the former view. Those acting for them point to the sub-heading of s 53B – *Interim steps pending review*,[5] and the absence of any appeal mechanism against the imposition of interim steps to argue that they are intended to be short-lived interim arrangements which take effect only until the concerns in question can be fully considered at the summary review hearing.

[1] DJ Knight in *Chief Constable of Cheshire v Oates* (December 2011 and DJ Roscoe in *The Commissioner of the Metropolitan Police v Mayfair Realty Limited* (July 2014).

[2] Dingemans J in 93 Feet East Ltd v LB Tower Hamlets [2013] EWHC 2716 (Admin), July 2013 and Sir Andrew Collins in *Sarai v LB Hillingdon* CO Ref:3240/2014, August 2014.

[3] That is, that "there is a point fit for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law": *R v. Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] COD 107, 108 CA.

[4] Pursuant to s 53C(11) of the Act.

[5] Underlining supplied.

Responsible authorities (in particular licensing authorities and the police) favour the latter view and argue that premises which the chief officer of police considers to be associated with serious crime or serious disorder should not be permitted to operate free from restrictions imposed as interim steps for the many months it may take before an appeal against a summary review decision is heard and determined in the Magistrates' Court. They point in particular to s 53C(2)(c) which requires licensing authorities, on a review hearing to "secure that, from the coming into effect of the decision made on the determination of the review, any interim steps having effect pending that determination cease to have effect", to support their argument that a licensing authority must actively secure that interim steps cease to have effect once the review decision comes into effect because the interim steps continue after the determination of the summary review and until the decision taken on the review comes into effect.

Judges at all levels who have sought to interpret the summary review provisions of the 2003 Act have been troubled by them. Section 53C(2)(c) has been variously described as a provision which "defies understanding by any human being",[6] "could have been more happily and easily expressed",[7] and is "badly drafted and by no means clear".[8] Yet the High Court displays this curious reluctance to give an authoritative interpretation of the s sections as regards the duration of interim steps. This leaves operators and practitioners in the field in a difficult position: with Magistrates' Court decisions pulling in different directions and no citable decision of the High Court to clarify the position, the dilemma becomes should they (dare they) continue to operate, or advise their clients to continue to operate, in breach of interim steps whilst summary review decisions are appealed to the Magistrates' Courts?

The Violent Crime Reduction Bill of 2005 proposed the insertion of ss 53A-53C into the Licensing Act 2003, with the accompanying Explanatory Notes explaining that the Bill sought to "introduce a power for police to require an expedited review of an alcohol licence where the premises are associated with serious crime and disorder, and a power for councils to take temporary steps in relation to the licence (including imposing additional conditions) pending the determination of the review".

A Parliamentary Research Paper published on 17 June 2005 (three days before the Bill's second reading in the House of Commons) explained the new power of summary review in the following terms:

The Bill (clause 18) provides for a new 'fast-track' procedure for summary reviews, the target being licensed premises associated with the sort of serious crime targeted elsewhere in the bill, such as gun and knife crime. [...] A chief police officer may apply to the licensing authority for a review of a particular licence, providing that a senior police officer gives a certificate that, in his opinion, the premises are associated with 'serious crime or serious disorder or both'. [...] Within 48 hours of receipt the authority must consider whether to take 'interim steps', and within 28 days they must review the licence and reach a decision. The 'interim steps' (new s section 53B) take immediate effect [...] [and] could be quite drastic modifications to the existing licence [...] There is no requirement before considering interim steps to give the licensee an opportunity to make representations. However, once the steps have been taken, the authority must notify the licensee of their action and, if the licensee then makes representations, the authority must hold a hearing within 48 hours to consider the licensee's representations. At the review proper, which occurs within 28 days of the police's original application, there is a hearing to consider the application for review and any relevant representations. Whatever is decided supersedes the interim steps taken within the first 48 hours.

That use of the word "supersedes" might be thought to suggest that once a determination is made on a summary review, it was intended that the interim steps should immediately fall away. However, that conclusion was far from explicit in the research paper or the Explanatory Notes accompanying the Bill, neither of which stated in terms when interim steps would be deemed to end.

The first explicit reference to the duration of interim steps came from the Home Office, in its *Expedited / Summary Licence Reviews Guidance* of October 2007. This Guidance, (which was subsequently withdrawn), explained (at paragraph 6.2) that "The decision of the licensing authority, following the review hearing, will not have effect until the end of the period allowed for appeal, or until the appeal is disposed of. Any interim steps taken will remain in force over these periods".

However, in *Chief Constable of Cheshire v Oates* [9] District Judge Knight was persuaded that the Home Office Guidance was wrong. In that case an application had been made for a summary review of a nightclub and as an interim step, the licence was suspended by the licensing authority. On the full summary review hearing, a three-month suspension was imposed. The operators appealed against the review decision, and continued to operate pending the appeal. The police issued a closure notice, under s 19 of the Criminal Justice and Police Act 2001 on the basis that the premises were being used for the unauthorised sale of alcohol.

[6] *Chief Constable of Cheshire v Oates.*

[7] Dingemans J in *93 Feet East Ltd v London Borough of Tower Hamlets* (paragraph 13).

[8] Collins J in refusing permission in *Sarai v LB Hillingdon.*

[9] 19 December 2011, unreported.

On the hearing of a complaint under s 21 of the 2001 Act the police argued that such use was unauthorised because it breached the interim step that had been imposed by the licensing authority. However, DJ Knight did not accept that the sale of alcohol was unauthorised, and refused to make the closure order sought.

She pointed out that the imposition of interim steps was set in motion by the opinion of a police officer and that the members of the licensing sub-committee do not need to be physically present for them to be imposed. The process was, she considered, "entirely one-sided, and Parliament intended that it should be one-sided, and made it clear that interim steps can take place without a hearing. But this must be very time limited in our democracy, which does not give the Police the opportunity to rule the roost except on a temporary basis". She took the view that interim steps ceased to have effect on the determination of the summary review. Whilst she acknowledged the concern raised by the police that this would allow a premises which was (in the opinion of the police) associated with serious crime or disorder to continue to operate free from restrictions until such time as an appeal against the review decision was determined, she said this was no different from the case on an ordinary review (or indeed a summary review) where statute operated to delay the coming into effect of the decision until the expiry of the appeal period, or the disposal of any appeal.

Following, and in all likelihood because of that decision, the Home Office withdrew its previous Guidance and issued amended Summary Review Guidance. In the amended Guidance, paragraph 6.2 was modified to remove any reference to the duration of interim steps. The amended paragraph 6.2 simply read: "The decision of the licensing authority, following the review hearing, will not have effect until the end of the period allowed for appeal, or until the appeal is disposed of". Rather than endorsing or disputing the District Judge's findings in Oates, the Home Office simply ducked the issue and chose to become silent on the question of the duration of interim steps.

Practitioners and academics in the field, however, were far from silent. Following the decision in *Oates*, Professor Colin Manchester in *Alcohol and Entertainment Licensing Law, 3rd edition* (2012) discussed the continuing uncertainty as to the duration of interim steps and Gerald Gouriet QC in the *Solicitor's Journal* [10] questioned the decision and called for the "appalling piece of drafting" in ss 53A-53C to be amended.

On 16 July 2013 the dispute regarding the duration of interim steps came before the High Court for the first time upon a renewed oral application for permission for judicial review in *93 Feet East Ltd v London Borough of Tower Hamlets* [2013] EWHC 2716 (Admin). In that case the police had applied for the summary review of a premises licence following concerns regarding drug dealing at the premises. As an interim step, the licensing authority decided to suspend the licence. At the summary review hearing the licence was revoked and the sub-committee decided that the interim suspension should remain in force until the disposal of any appeal against their review decision. The premises operators appealed against the review decision and instigated judicial review proceedings on the basis that the licensing authority had no power to impose interim steps beyond the date of the full summary review hearing.

Following a fully argued renewed permission hearing, Dingemans J refused permission for judicial review. The learned Judge gave what was, with respect, a somewhat cursory judgment, given the novelty, difficulty and importance of the point at issue. Despite saying that he had initially been attracted to the argument advanced on behalf of the operators as being arguable, Dingemans J eventually came down on the side of the local authority and accepted that the effect of s 53C(2)(c) was that interim steps only ceased to have effect when a review appeal had been disposed of in the Magistrates' Court. He regarded that construction of the provision as being consistent with both the statutory objective underlying ss 53A -C and the plain wording of s 53C(2)(c), and concluded that there was no arguable proposition to the contrary for which permission to bring judicial review proceedings should be granted.

The practical effect of that refusal to grant permission came into sharp relief in *The Commissioner of the Metropolitan Police v Mayfair Realty Limited.* [11] Following an application for a summary review, the licensing authority had taken the interim step of suspending the premises licence. At the substantive summary review hearing in May 2014 the licensing authority had revoked the premises licence, and an appeal had been lodged against that decision by the premises operator. The earliest date upon which Westminster Magistrates' Court could accommodate the appeal hearing was in October 2014. The operator made no secret of its intention to re-open the premises and to continue operating until its appeal was disposed of in the Magistrates' Court.

Faced with what they regarded as blatant defiance of the interim steps, the police responded by applying for a closure order in respect of the premises on the basis of the unauthorised sale of alcohol by the operator. Accordingly, when the closure order application came before DJ Roscoe the sole issue for her to determine was whether the sale of alcohol was, as a matter of law, unauthorised. As in *Oates*, however, this required her to determine the duration of the interim step that had been imposed by the licensing authority, which authority was joined as an interested party to the application.

[10] 31 January 2012, SJ 156/4 21.

[11] 22 July 2014, unreported.

In the course of lengthy submissions advanced both in writing and orally, the operator's representative referred the District Judge to the decision of DJ Knight in Oates and urged her to take the same approach. Not surprisingly, in the course of their submissions the licensing authority and the police both urged the District Judge to determine the question of duration in the same way as Dingemans J had done in *93 Feet East.* At the mention of the decision of Dingemans J, the operator's representative objected, arguing that *93 Feet East* Ltd was not authoritative and indeed that the District Judge should disregard it entirely.

In support of this argument, reference was made to the Practice Direction issued by the Lord Chief Justice on 9 April 2001 [12] on the citation of authorities, which stipulates that certain judgments, including decisions on applications that only decide whether an application is arguable, may not be cited before any court unless they expressly state that they purport to establish a new principle or extend the present law. No such statement had been made by Dingemans J in his judgment on *93 Feet East*. So, it was argued by the operator's representative, whilst the District Judge could consider the decision of a fellow District Judge, which albeit not authoritative she might find persuasive, she was obliged by the Practice Direction to entirely disregard that of a High Court Judge on precisely the same point.

In a fully reasoned decision DJ Roscoe accepted the arguments of the police and the local authority and concluded that the interim step would remain in force until the determination of the appeal, and that the sale of alcohol at the premises was accordingly unauthorised. She side-stepped the issue as to the cite-ability of *93 Feet East* by explaining "I have not considered whether or not the decision in *93 Feet East* is authoritative as I have not relied on it in reaching my decision."

On the substantive matter, she drew particular attention to the wording of s 53B(1) which states: "This section applies to the consideration by a relevant licensing authority on an application under s 53A whether it is necessary to take interim steps pending the determination of the review applied for"[13]. She concluded that the phrase "pending the determination of the review" related to the period during which a licensing authority could take interim steps, and did not concern the longevity of those steps. On that interpretation of s 53B, the meaning of s 53C(2)(c) became clearer. The latter section, which stipulates that the licensing authority must "secure that, from the coming into effect of the decision made on the determination of the review, any interim steps having effect pending that determination cease to have effect", was a clear indication that interim steps were intended to continue until the review decision of the licensing authority came into effect - that is to say, 21 days after the review decision is made or, if there is an appeal against the decision, until that appeal is disposed of by the Magistrates' Court.

With two experienced District Judges having reached opposite conclusions in detailed written judgments regarding the duration of interim steps, and the High Court not having delivered a citeable decision on the point, one might have thought that it was high time for the High Court to determine so significant an issue in an authoritative way. The opportunity to do so duly came, but was missed when Sir Andrew Collins refused permission for judicial review in *Sarai v London Borough of Hillingdon* on 27 August 2014. Following an application for a summary review, the licensing authority had taken the interim step of suspending the premises licence (which decision was later upheld at a hearing convened to hear representations made by the licensee). At the full summary review hearing a decision was taken to revoke the licence and the licensing authority expressly decided to continue the suspension of the licence as an interim step, pending any appeal to the Magistrates' Court against the review decision.

The licensee lodged a judicial review claim alleging, amongst other things, that interim steps could not extend beyond the summary review decision. In that claim the licensee made an application for emergency interim relief, to stay the decision of the licensing authority and allow the licensee to continue trading pending the determination of the judicial review claim. Mostyn J allowed that emergency interim application, saying that "the statutory provisions concerning the evanescence (or otherwise) of Interim steps is unhappily framed and has given rise to inconsistent judicial decisions". Whilst he found the approach of Dingemans J in *93 Feet East* to be logical, he considered that the "controversy ought to be resolved".

The licensing authority applied to set aside the interim order of Mostyn J and the matter duly came before Sir Andrew Collins J as a paper application. On considering the papers Sir Andrew refused permission for judicial review, so that the order of Mostyn J was inevitably discharged. In a short and, with respect, in places not readily comprehensible statement of reasons, Sir Andrew explained that s 53B(1) "enables an interim order[14] to be made 'pending the determination of the review' but s 53C(2)(c) makes clear (if it is to be given any sensible meaning) that such an interim order may extend to when the determination comes into effect".

In reasoning which does not sit easily with the judgment of DJ Roscoe in *Mayfair Realty Ltd*, he went on to say that "section 53C(2)(c) does indeed seem to be an unnecessary provision since s 53B(1) makes clear that interim steps are what they say, namely steps taken pending determination and once a determination has come into effect they will

[12] [2001] 1 WLR 1001.
[13] Her underlining.
[14] That is, an interim step.

automatically lapse. However, it must be assumed that Parliament meant s 53(2)(c) to have some effect and in my judgment it only makes sense if it implies [...] a power to vary or indeed remove any interim steps pending the expiry of 21 days or any appeal."

Sir Andrew recognised that the relevant statutory provisions were "far from clear and it may be a judicial decision is needed", but he justified his decision to refuse permission because on his view of the merits it was "clear beyond doubt that for good reason the committee decided that the suspension should remain pending appeal".

This was a curious reason for refusing to grant permission, since the question before the judge was not concerned with the merits of the licensing sub-committee's decision, but rather with what the sub-committee was entitled to do pursuant to its powers under the Act.

Operators, responsible authorities and all those who act for them are thus left with two conflicting written decisions of District Judges (both made after hearing oral argument from the representatives of the parties before them) which are not binding authorities on any court, one decision of a High Court Judge made after hearing oral argument which is strictly not even citeable in any court by virtue of the 2001 Practice Direction, and the most recent decision of a High Court Judge made without hearing any oral argument, which comprises a brief statement of reasons for refusing permission on the papers and which is also not citeable.

For all its importance to operators and responsible authorities, the duration of interim steps accordingly remains a matter of uncertainty that will doubtless continue to generate disputed hearings before Magistrates' Courts unless and until either Parliament amends ss 53A-53C so as to provide clarity, or the higher courts "step up to the plate" and abandon their curious reluctance to give an authoritative determination on the point.

Since Parliament is unlikely to provide the necessary clarification in the foreseeable future, an authoritative decision from the High Court would surely be welcomed by all in the licensing world.

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Funky Mojoe a dead duck

HHJ Blackett's recent *Funky Mojoe* judgment makes clear that licensing authorities and residents can not ride roughshod over procedural requirements, writes **Richard Brown**

Richard Brown

The *Funky Mojoe* farrago is now, finally, over. Although granted permission to appeal to the Court of Appeal following the nightclub owners' unsuccessful judicial review on the grounds that the advertising of the application by London Borough of Redbridge was defective, the permission was contingent on a significant sum of money being paid in to court within a period of time. A recent news item on the Institute of Licensing's website[1] confirmed that this condition had not been met, so the permission to appeal fell away and the decision of HHJ Blackett in the High Court is final.

The High Court case was timely, as it occurred against a backdrop of an increasing number of reports of review applications being rendered null and void due to procedural / technical irregularities of varying degrees of severity, ranging from fairly fundamental to very minor. As the Licensing Advice Project advises and represents what used to be called "interested parties" on review applications, I took a particular interest in the developments. HHJ Blackett agreed with the District Judge's approach, which was that: "It appears to me that it would not be in the overall interests of justice to quash the decision of the committee as a result of the irregularities. Had any party been able to show substantial prejudice or injustice then the decision may have been different. This is not the case, in my judgment, where non-compliance anywhere near approaches the degree or status that would go to the jurisdiction of the committee."

Although the HHJ Blackett himself stated that he did not agree that the issues raised were matters "of great importance", because the case is one which turns on its facts, as so many licensing cases do, my feeling is that it is nevertheless extremely helpful to have a pronouncement from the higher courts because of the uncertainty caused by the reported Magistrates' Court decisions.[2] As so many licensing hearings turn on their own facts, so many appeal decisions do too, even in the High Court.

Although the issues are of great interest to licensing authorities, they are particularly important for residents too because if they are experiencing problems with a licensed premises and wish to apply for a review, they commonly do so as lay persons and, although they may be guided by helpful officers, they do not necessarily have access to legal advice. The still un-yellowed pages of the Licensing Act 2003 hide myriad pitfalls for lay-person and professional alike, as shown by those reported cases where review applications have been overturned by the Magistrates' Court due to procedural defects. And then, even if the residents do get it right, they can be faced with having the whole thing kicked out because the council did not advertise the application properly – something completely outside their control.[3] HHJ Blackett agreed with London Borough of Redbridge that it could not have been the intention of Parliament that minor errors on a notice or advertisement for a licensing review "should make any consideration of the licence void". Had the approach taken by the Magistrates' Court in other cases been endorsed by the High Court, it would have run contrary to one of the purposes of the legislation: namely, to encourage greater local participation in licensing.

The benefit of a judgment on the matter for local residents who wish to take their own action against nuisance and anti-social behaviour is that although there is plenty of case law on the consequences of breach of procedural requirements in a variety of contexts, there is now a recent case under 2003 Act specifically dealing with the issue. As the judgment makes clear, each case will be decided on its own merits; but it seems that the contention that any breach, no matter how minor and no matter if no prejudice was caused to any party,

[1] http://www.instituteoflicensing.org/article . id/1001295/2014/06/20/Funkymojoe%20Update.html.

[2] Principally, *Mu Mu* and *Tinseltown.*

[3] As happened in the *Mu Mu* case, although it was not a resident-led review.

can no longer be supported. This places the onus for decision making on those on whom it was intended to be placed - licensing sub-committees. Residents with no knowledge of the technical requirements who complete a form in good faith but make some minor error will no longer necessarily be faced with starting again. On the other hand, there is still protection for a licence holder in that a more fundamental defect (no "substantial compliance") and / or a defect through which a licence holder can demonstrate "substantial prejudice or injustice", is still liable to cause proceedings to fail.

It is perfectly possible to think of a situation which might give rise to prejudice in one circumstance where it would not in another. Consider, for example, the late serving of a review application. Pre-*Funky Mojoe,* one view (based on a strict interpretation of the provisions of s 52(b)) was that unless the application was received by the licence holder, licensing authority and responsible authorities on the same day, the application was null and void, because it did not comply with Regulation 29 of the Licensing Act 2003 (Premises licence and club premises certificate) Regulations 2005. Post-*Funky Mojoe*, that is not necessarily the case - but it depends on the context. For instance, not serving the licence holder at all is clearly more of a serious procedural deficiency than serving the licence holder a couple of days late. But would a licence holder be able to demonstrate "substantial prejudice or injustice" if the licensing authority sent the licence holder a copy of the application the day after they themselves received it from a resident? Serving the licence holder a couple of days late if the licence holder is a large pub company could be seen as having different consequences to serving an individual licence holder a couple of days late, by which time he has gone on holiday for three weeks, leaving him little time to respond to the review before the end of the consultation period. Would it make a difference if the error was made by a licensing authority or by a resident? It is inherent in licensing, being a regime which involves balancing competing interests from a potentially wide range of stakeholders, that there is an almost endless array of possibilities, and there are of course certainly defects in the process which would rightly render proceedings a nullity.

In conclusion, the judgment in no way closes the door on raising matters of procedural deficiencies. As has been made clear in the judgment and in commentaries on it, the decision does not mean that licensing authorities and residents can ride roughshod over procedural requirements. The onus is still on all participants to "get it right", and the "overall interests of justice" will prevail.

A Seville Society?

"Locals win fight for peace and quiet" trumpeted the Guardian recently. The article in question concerned noise reduction measures imposed across the city by councillors, including measures to control people standing drinking outside, and noisy rubbish collections from licensed premises - familiar areas of concern for residents who live near noisy licensed premises.

The article quoted locals as saying "Can you imagine what it's like to have 100 people under your window screaming as they watch a football match? Our children can't perform well at school. When we leave for work in the morning, we're already exhausted". A councillor is quoted as saying that "It's a balance between the right of residents to get a little rest and the development of economic activities". Familiar refrains heard at town halls up and down the country.

It is perhaps interesting to note that, although it is often lamented that the European approach to alcohol is markedly different to our own, and as late night levies imposing blanket measures seem to be becoming more popular, the subject of the article is in fact Seville, Spain. Perhaps we are not quite so different to our neighbours across La Manche as is sometimes thought.

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

Increased closures mark the hidden growth in hospitality

The landscape of the pub and leisure sector is changing fast, driven by consumers looking to eat out in a variety of different restaurant settings, as the trade research consultant **CGA** reports

While the recent increase in the number of pub closures will have no doubt gained all the headlines, not all sectors of the trade are boarding up their doors or planning for a future as a local convenience store. Consumers are still going out to drink, but the reasons for doing so are fast changing.

Eating out has become a primary driver of visits to the trade, and the foodservice market is prospering against a difficult economic climate. A recent report by CGA Peach shows that the foodservice market has increased in value by 2.7% over the last year, and is now estimated to be worth £8.7 bn a year.

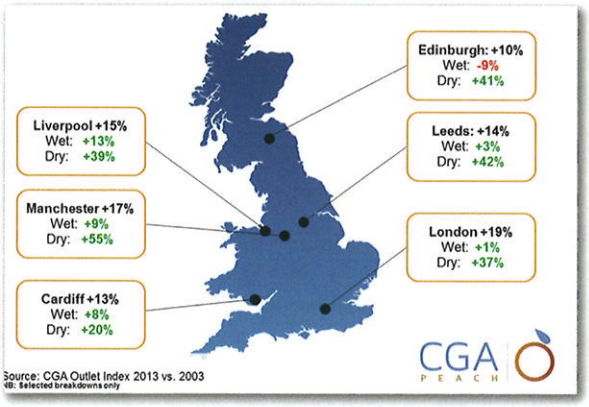
Though the sector is not immune to closures, the outlets which are opening are changing the landscape. Multi-occasion bars, casual dining brands and on-the-go concepts drive the growth here, offering a multitude of options to the increasingly fickle consumer.

CGA research shows that the average consumer visits seven different food concepts every six months, and the experimentation isn't just limited to food, with increased promiscuity also seen in drinking habits. Quality has now overtaken quantity, as evidenced by the increased popularity of craft and premium beer over standard brands. With around 43% of the people in the UK now eating out at least once a week, a figure which rises to 59% in London, food led outlets are at least offsetting some of the closures driven by wet led outlet.

Food led concepts lead growth in all styles, but managed pubs and restaurants are the big winners

Although London and the South East continue to drive the number of pub closures with more than 25 % coming from the region, eating out in London sees more openings here than in other key cities. However, the other cities aren't far behind, especially those in the North West, where the growth of food led outlets is ahead of London.

City centre openings have not been uniform



These openings have been across a number of styles. However, when CGA Peach asked 5,000 consumers what kind of outlet brand they would want locally, the majority asked for a casual dining brand, and again the top five represented a mixture of different tastes.

The number of pub closures continues to increase, yet consumers can rest assured that the eating and drinking out landscape which has grown in their place offers a wealth of range and quality. With competition so fierce, operators are focusing more on what the customer wants, and as the customer becomes even more choosy, expect the out of home landscape to continue to evolve and become even more flexible to cater to our ever-changing needs.

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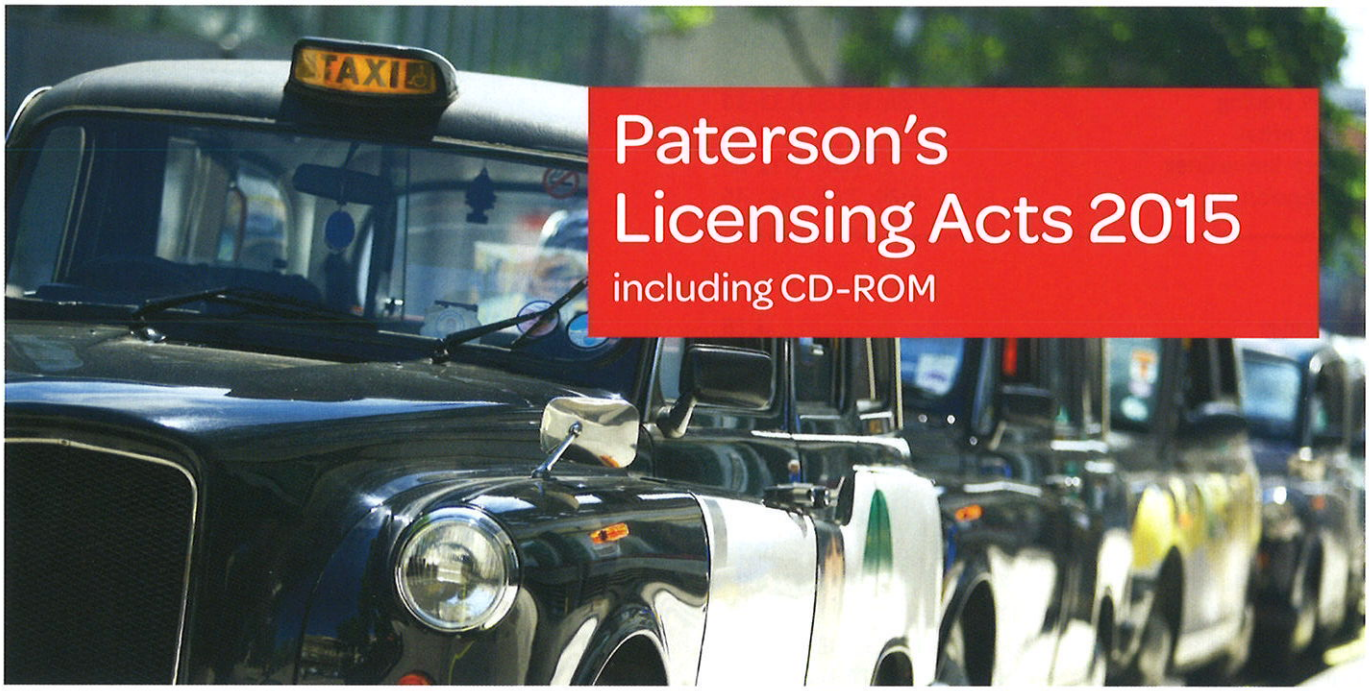

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