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Foreword

Daniel Davies
Chairman, Institute of Licensing

Welcome to the latest edition of the *Journal of Licensing* for 2016. This edition, our 16th, coincides with our signature event, the National Training Conference in November. All delegates attending the NTC will receive a copy.

In September I had the privilege of giving evidence on behalf of the Institute to a House of Lords Select Committee that was enquiring into the Licensing Act 2003 and exploring issues with regard to how well it works and whether it needs further reform, with particular emphasis on whether the four licensing objectives are adequate or whether a fifth or even a sixth objective needs to be added. Their Lordships were particularly interested in exploring opinion concerning a health and well-being objective and / or an equality objective. Issues such as minimum unit pricing were also explored.

The Institute carried out an extensive consultation with our membership in respect of the questions raised by the select committee and I would like to thank all those who responded, and for the detailed thought that clearly went into the many responses we received. I endeavoured to do justice to the balance and weight of opinions expressed by our members in my evidence to the committee and you can rest assured that my evidence together with the detailed written response we sent to the committee ensured that your responses were well and truly represented to this influential body.

I'd like to take this opportunity to thank Sue Nelson for all her hard work in compiling our response and the membership survey document. I'm also grateful to Sue and to our Vice Chairman Gary Grant for helping to prepare me for my evidence session. We await the conclusion of the House of Lords Select Committee enquiry with great interest.

Our delivery of training continues apace, but I would particularly like to mention the "Safeguarding through Licensing" course that we're running in December and January. This can be booked in the usual way through the IoL website.

As well as members of the House of Lords, I have also met recently with people from the London Mayor's office who are charged with promoting the cultural and economic benefits of the night-time economy in London and whose work will inform the Mayor's Night Czar when he or she is appointed. Among many other topics, we discussed training for council members and what could be done to get some joined-up thinking between licensing and planning so that licensing could be a tool for shaping communities, not simply a process of applying laws and regulations. I am pleased that the Institute is now at the forefront of such consultations and that our members who are at the frontline of delivering public protection through licensing can get their voice heard.

This edition of the *Journal of Licensing* contains our usual updates on taxi licensing from Jim Button and gambling licensing from Nick Arron. In addition there are articles on public safety from Julia Sawyer plus our Interested Parties feature from Richard Brown and Statistical Snapshot by Paul Bolton. Our lead article is by Philip Kolvin QC and discusses the management of risk through licensing. Tom Kiehl discusses how entertainment is regulated by the Licensing Act 2003. Jeffery Leib argues that inconsistencies in local authority enforcement powers lead to uncertainties for businesses and that a standardised rethink is required. Matt Egan considers why local alcohol licensing is a public health concern and suggests some ways forward for developing an evidence base in this area. And Gary Grant has provided an *Essence* case review.

Altogether a stimulating read!

This twentieth anniversary of the IoL has seen a hectic round of consultations, training, meetings and conferences and has led to a growing recognition of the role and importance of the Institute of Licensing. We've had a successful anniversary year with membership, income and influence all growing. A good curtain-raiser for the next twenty years!

Contents

Leo Charalambides
Editor, Journal of Licensing

The latest issue of the *Journal of Licensing* is published, as has become customary, at the start of the annual Institute of Licensing National Training Conference. This year the national training conference also celebrates the twentieth anniversary of the Institute of Licensing. As this is the fifth conference for the *Journal* - our first issue appeared in November 2011 - we are a relative newcomer in the history of the Institute but please do spare a thought and a raise a glass to our fifth anniversary edition.

In the past year the *Journal* has marked the occasion of the Institute's twentieth anniversary with a number of articles examining our history and looking forward to our future.

James Button has provided us with his *Personal Reflections* on the origins of what is now known as the IoL, which started life, both appropriately and necessarily, over a round of drinks at the Travellers Rest public house in Cambridge as "the naïve dream of three disparate individuals" and which has grown into the leading professional body for licensing practitioners. Philip Kolvin QC penned his *Love affair with the IoL*. And our succeeding Chairman Jon Collins gave us his personal reflections on why *The IoL Matters*. These reflections continue with the contribution of our current Chairman, Daniel Davies, in the present issue.

Each of these articles acknowledges that the growth, success and future of the Institute rests with our membership and the voluntary support that each of us provides. It is a truism at such times of celebration that we acknowledge a few by name and applaud anonymously those that time and space, alas, permit no mention of. I see this dedication in the work of all those who contribute to the *Journal of Licensing*, and equally, the small team of paid professionals who go above and beyond their responsibilities: Andrew Pring has shared his editorial skills from the start; Natasha Roberts has also been a stalwart from day one; and Hannah Keenan seems to accumulate more and more responsibilities in the production of the *Journal*, not least of which are her efforts to keep me on track and organised.

The *Journal* is fortunate to be able to benefit from the regular contributions of Nick Arron, Richard Brown, James Button and Julia Sawyer. I've not once had to worry about a failure to provide a draft for any regular feature in any issue. In that sense, the *Journal* reflects the wider IoL - a small dedicated team supported by the generosity of a wide network of expert contributors.

It strikes me that this will be my tenth annual training event (a personal anniversary). Having discovered an unlooked-for and unexpected licensing practice, I sought, back in 2006, for some organisation that might provide training, seminars, regular updates, a publication and so forth. The only such organisation was the Institute of Licensing and it remains, ten years on, the only such one.

As the membership and conference has grown, it amuses me somewhat that "experts" lecture to a local authority / regulatory crowd on best practice. It often strikes me that officers and regulators might themselves have a word or two of advice to offer the "industry representatives".

It is the meetings between sessions, the chats over tea and coffee, lunch and dinner, where much of my learning happens; it is here that the really good best practice tips are to be gleaned. For my part, as we continue to grow and evolve as a broad church I look forward to preserving and encouraging the front-line voice of officers and regulators whether in print, at our seminars or at our regional meetings.

In the concluding comment of his twentieth-anniversary article, Jon Collins wrote, and it is worth repeating given the current deliberations of the House of Lords Select Committee:

> *Congratulations one and all for everything that we have achieved to date. And if anyone from the Home Office is reading this – pay more attention to and put more store in anything and everything the Institute produces. It will be based on evidence, brimful of common sense and prove to be right.*

Risk: a game of strategy

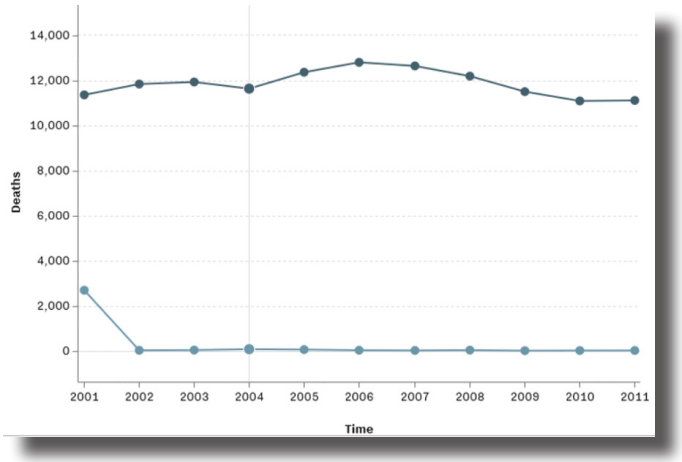
Our approach to licensing is sometimes far from logical, often to the detriment of operators, and our legislators and local authorities need to give more consideration to achieving a genuine balance of benefits and costs, suggests **Philip Kolvin QC**

The job of regulation is the avoidance or minimisation of risk. Some activities occur without needing to licence the operator or the place where it occurs – beaches and homes would be good examples. Sometimes we regulate the person engaging in the activity, such as users of motorways and shotguns. Sometimes, we regulate the service provider: a whole industry has sprung up to regulate that.

Risk: noun; the possibility that something unpleasant or unwelcome will happen

The thesis of this article is that, as a society, our approach to risk is at best subjective and ill-informed, at worst prejudiced. I shall start by taking an example from over the water.

As I write this, we are commemorating the 15th anniversary of the worst terrorist atrocity on American shores: 9/11. No fewer than 2,996 people, of all colours and faiths, lost their lives in that attack. In the same year, the number of firearm homicides in the USA totalled 11,348. Your chances of being killed by a bullet deliberately fired were three times those of being murdered by terrorists. The differential has been exponentially greater in every year since.



In the graph, you will probably have guessed that the upper line represents US firearm homicides. The lower line represents deaths from terrorism. If, then, you were going to organise your society rationally, economically and effectively, you would probably prioritise the former over the latter. But no. As President Obama said: "We spent over a trillion dollars, and passed countless laws, and devote entire agencies to preventing terrorist attacks on our soil, and rightfully so… And yet we have a Congress that explicitly blocks us from even collecting data on how we could potentially reduce gun deaths. How can that be?"

Students of oratory will recognise the last sentence as a rhetorical question. The answer is that politically it is more important to American politicians that their citizens should be able to own guns than it is to save their lives. And the perception of risk from alien forces is such that confronting them, wherever they may be, must be prioritised. The answer would not please a logician, a statistician or an economist. But who said that policy was based on evidence?

Before we get too smug over here, I must suggest that, viewed from a certain perspective, our system of regulation in the UK is in *inverse proportion* to the risk.

Activity	Per cent harm	Regulation
Food	1993 male obesity 13% 2013 male obesity 26%	No licensing requirement
Gambling	Problem gambling BGPS 2007: 0.6% Problem gambling BGPS 2010: 0.9%	Aim to permit
Alcohol	Alcohol-related hospital admissions 2012: 1 million Alcohol-related hospital admissions 2004: 500,000	Health is not a licensing objective. Regulatory objectives just crime and disorder, nuisance, children and safety
Sex establishments	No recorded incidents of physical harm from dancing	Licensing authorities have total control

Take the above table. One of the riskiest activities in our land right now is eating. Male obesity has doubled in 20 years, and will prove a time-bomb for our ailing NHS. But no fried chicken shop in the country has been required to institute a system of customer intervention or self-exclusion, employ customer welfare officers or track their spend. "Excuse me, miss, that is your third bucket of chicken nuggets this week: would you like to step aside for a chat?" is not oft heard on the high street. On the other hand, there is no statistical category for harm in sex shops or sexual entertainment venues, but local authorities are given complete power by our legislators to regulate their number, location and operating style. (I

know there are other considerations in the case of such premises – indulge me as I exaggerate to make a point.)

Externality: noun; a consequence of an industrial or commercial activity which affects other persons

Let's think of some externalities. Asbestosis, vibration white finger, pneumoconiosis and work-related upper limb disorders are well-known externalities of industrial processes in Britain and elsewhere. Emissions from chemical, nuclear and processing plants all qualify. The canalisation of our rivers to assist farmers may harm towns downstream, while the loss of hedgerows and monocultures impacts on bio-diversity. Oil drilling and transportation may lead to marine pollution. Windfarms encroach on our skylines. These are the prices of industrialisation, debated daily in our press.

Licensing is a means of re-distributing externalities. If licensing did not exist, then externalities would be borne by neighbours, victims (eg, of assault), the state (eg, the NHS or, ultimately, the taxpayer) or consumers. The licensing system narrows the field and impact of externalities and casts them onto the licensee and, through redistribution, the customer. So, for example, if a licensing authority makes a pub engage door staff, chances are that the cost will be reflected in the price of a pint.

Now, no regulatory system can demand that all externalities be obviated. For example, planning law requires environmental impacts to be assessed, not removed. Larger schemes require formal environmental assessments, which must include "a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment": Town and Country Planning (Environmental Impact Assessment) Regulations 2011. Once the impact has been assessed, it is then possible to balance it out with any positive benefits of the proposal, to ascertain whether the balance of advantage is to give the scheme a green or red light. In other words, the function of planning is to weigh up the benefits and disbenefits of the proposal in the interests of the wider community. So, a judgement is made as to the acceptable level of externalities required to achieve the benefit sought.

In licensing, it is arguable that some deference is paid to acceptable externalities in order to achieve a given benefit. But closer scrutiny of our National Guidance reveals otherwise. Paragraph 9.43 says:

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

So, in fact, what the Guidance seems to be saying is that while one should be sensible to the burden imposed on the licensee, the benefit against which that burden is to be weighed is the benefit in terms of the promotion of the licensing objectives. It is not the benefit of the proposal itself, eg, in terms of jobs, regeneration or cultural provision.

Similarly, para 10.10 says:

> *The 2003 Act requires that licensing conditions should be tailored to the size, type, location and characteristics and activities taking place at the premises concerned. Conditions should be determined on a case-by-case basis and standardised conditions which ignore these individual aspects should be avoided. For example, conditions should not be used to implement a general policy in a given area such as the use of CCTV, polycarbonate drinking vessels or identity scanners where they would not be appropriate to the specific premises. Licensing authorities and other responsible authorities should be alive to the indirect costs that can arise because of conditions. These could be a deterrent to holding events that are valuable to the community or for the funding of good and important causes. Licensing authorities should therefore ensure that any conditions they impose are only those which are appropriate for the promotion of the licensing objectives.*

Again, it will be seen that proportionality is more concerned with not going too far in imposing conditions than balancing benefit and cost. This plays through into licensing decision making, where it would be a rare licensing sub-committee which approached matters on the footing of "an acceptable level of nuisance."

So who does bear the burden?

In a speech to the Royal Society of Arts, the Metropolitan Police Commissioner Sir Bernard Hogan-Howe stated:

> *And we need to make sure there is good control of the supply of alcohol. This means licence numbers, density and licensee-regulation being a priority for local authorities, however much they would like to develop local economies... We know that many injuries occur inside or outside licensed premises, and if we can close down the repeat offenders, we will. But do we really need as many licensed premises chasing limited business?*

A fair reader of that passage may have a number of questions on their lips. Why are the offenders necessarily the premises rather than, well, the actual offenders? Why close down premises where injuries happen rather than regulating them better? Even Hillsborough was not actually closed following the disaster there. What is the evidence that the number of injuries in a town centre is caused by, as opposed to, say, being correlated with, the number of venues? When dealing with jobs, contribution to the economy and cultural provision, these questions matter. Before shutting any premises, a better understanding by regulators is needed of benefits, risks and the causal chain between regulation and risk aversion. It cannot be that any regulator would wish to neutralise an investment for no logical regulatory reason.

A constant campaigner for public understanding of regulatory burdens is Tim Martin, the Chairman of Wetherspoons. He points out that in 2014-2015 the revenue of his company was £1.5 billion. The taxes paid amounted to a breath-taking £632 million. Licensing authorities might pause for thought before imposing regulation on licensees, if they had before them a calculation of what the licensee already contributes to the public weal by way of rates, PAYE, national insurance, corporation tax, VAT, alcohol duty, licence fees, late night levy and machine duty. Some licensees might ask precisely what they get in return, apart from a threat of closure if they step out of line. Given this smorgasbord of beneficence, might they not suggest that there is an argument for *expanding* the alcohol economy to fund its regulation while enforcing against the true offenders?

Costs and benefits

The main quantifiable cost of the licensing system is alcohol-related crime and disorder and similar harms, although there is much debate about how much of this there is and how it is quantified. But we can agree that the costs include financial and other losses to victims, costs to the justice system, burdens on the NHS, lost productivity and enforcement costs. These are periodically calculated by Government, usually when publishing the latest Alcohol Strategy.

The benefits of the system include employment, supply chains, town centre regeneration, culture, tourism and, so it is said, the public safety benefits of night time diversity. In planning, as I have commented above, these benefits are generally factored in. In licensing, they generally aren't. So, as is often said, planning is about place-making, whereas licensing is about place-keeping. It is a self-imposed distortion of the full picture in the latter regime.

It is very hard to disagree with much of what the Court of Appeal said in *Hope and Glory.* But when they said the following, it is hard to relate it to any current licensing regime:

> *42.Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on …*

Which licensing regime considers how much demand there would be for establishments? Which factors in the economic benefit to the proprietor or to the locality? If these factors are weighed unconsciously or covertly, we may smile inwardly. But challenged to point to statutory wording making it so, we would struggle. One does not ever see a genuine balance of benefits and costs.

Displacement

In the evaluation of risk, there is rarely if ever an analysis of the displacement effect of regulation. There should be. Here are some examples:

- A burger bar is shut down because of flashpoints. The clientele moves to the taxi queue and doubles the flashpoints. A licensing authority might weigh whether it is better to feed some of the customers departing licensed premises and give them access to WC facilities, accepting there may be the odd incident, or instead to create an unmanageable queue at the taxi rank with the negative consequences that creates. The latter scenario, which is necessarily speculative, because it relates to future displacement, is rarely if ever considered.
- A drug death happens in a nightclub despite the medical attention available there. The club is closed. The drug-taking moves to underground raves where there is no medical attention. The risk grows greater. Is it better to accept that some drug taking will always happen in nightclubs, however well-regulated, or shut the clubs and move the activity to an unregulated environment? Again, the future consequences of closure are not necessarily weighed in the balance.

These examples do not just exemplify the necessity of taking displacement effects into account if one really wishes

to take a logical approach to regulation. More than that, they exemplify one of the central dichotomies in the management of risk through licensing: is good management enough, or will only obviation of risk do?

National Guidance suggests the latter:

> *11.26 Where the licensing authority is conducting a review on the grounds that the premises have been used for criminal purposes, its role is solely to determine what steps should be taken in connection with the premises licence, for the promotion of the crime prevention objective. It is important to recognise that certain criminal activity or associated problems may be taking place or have taken place despite the best efforts of the licence holder and the staff working at the premises and despite full compliance with the conditions attached to the licence. In such circumstances, the licensing authority is still empowered to take any appropriate steps to remedy the problems. The licensing authority's duty is to take steps with a view to the promotion of the licensing objectives in the interests of the wider community and not those of the individual licence holder.*

However, taken literally, that exhortation would shut every supermarket in the country on the grounds of shoplifting of alcohol. Nobody would suggest that is sensible. They would say that supermarkets cannot be held to account for every criminal coming through their doors. But that sentiment is not applied to nightclubs with the same emollience.

Incidence

Taking a serious statistical approach to risk would involve considering the period of trading of the premises concerned, the number of people through their doors and the average dwell time. Take this example. A pub trading principally from 6pm to midnight attracts 2,000 people per week with a dwell time of one hour. It gets 10 assaults a year. There is no real chance that anyone would clamour for closure. A nightclub opposite has hours of 10pm to 4am and attracts 10,000 customers a week with a dwell time of four hours. It gets 100 assaults annually. It is almost inevitable that a review proceeding would lead to revocation. But the "people hours" in the pub are 2,000. The "people hours" in the club are 40,000. You would expect 20 times as many assaults in the club as the pub. But in fact, there are only ten times as many assaults in the club. On that basis, there is an inadequate argument for closing the club.

Put differently, there are 2 million customer-hours in the club. So a customer is assaulted every 20,000 hours. If I visit the club for four hours every week, I would be assaulted once in 5,000 visits, or 100 years. Those do not seem like bad odds. Indeed, it may be that the chances of assault are higher in the street. But this approach may not pass muster before a licensing sub-committee. However, I have used incidence calculation in licensing cases, and they do represent a sensible means of comparing risks, both over time and between different venues.

National v local regulation

In alcohol control, the academic consensus is that the principal determinant of national level consumption, and therefore health harms, is pricing. However, pricing is nationally controlled, through taxation, rather than through minimum price, at present. That may change as the Scottish courts turn their attention to edicts from the European Court on the topic. However, come what may, it is not controllable locally. In similar vein, it is almost for sure that machine stakes, prizes and rate of play are the principal factors in the calculus of gambling harm. But, again, they are not controllable locally, at present. The reason for this is a rational one. The risks and necessary controls are universal and so should be handled at national level.

Until now, local control in gambling has been principally controlled with mediating out harms to individual customers, eg by intervention, self-exclusion, advisory literature and display of rules. Now, however, the Gambling Commission has altered its licence conditions and codes of practice, and its Guidance suggests that there should be local area profiles and local risk assessment by operators. Clearly, such risk assessments may inform management standards. But could they come to be used to curtail supply altogether? An authority, particularly for an area where there is heightened concern about problem gambling, might try. But it would face hurdles.

The rate of gambling addiction in the general population has been measured at between 0.6% and 0.9%. Translated to local level means that for every 1,000 people living around a gambling establishment, somewhere between six and nine of them will be problem gamblers. Now, imagine that a local area profile showed that the true number was not six, or nine, but 15. This might tell you something about the local population, but does it tell you anything about the risk of a further gambling establishment? There is research that shows that bringing commercial gambling to an area in which there was none previously is liable to increase risk. But the UK is a mature gambling market. Towns and cities already have a number of gambling establishments. There is no evidence, I believe, to show that one more gambling establishment causes greater harm locally. Assume that the identified 15 gamblers were even interested in the kind of establishment now proposed, the profile might just affect the management of the premises, but it is hard to see how it could affect density. And before it even affects management,

it would need to be shown that the existing operating licence conditions, codes of practice, premises licence conditions (including mandatory and default conditions) and industry codes were insufficient to mediate out the risk of harm. Otherwise, intervention would be regulation without purpose.

Risk models

Recently, there has been discussion about the distinction between determinist and probabilistic models of risk. The former discounts the risk if the cause-effect chain is not proved. The latter takes account of probabilities. For example, it may not be certain, or even probable, that a tsunami will strike a particular coastline, but the range of statistical probabilities can be identified and it is considered prudent to establish flood defences. For serious risks, a probabilistic approach is merited. But even this does not justify curtailing activity where there is no demonstrable risk at all.

A related theme is the precautionary principle. This was invoked in *Gibraltar Betting & Gaming Association Ltd v The Secretary of State for Culture, Media and Sport* (2014), which dealt with the proportionality of the regulation of remote gambling in the UK. In a short but compelling analysis of risk in licensing, Green J said:

> *Ms Dinah Rose QC for the Claimant argued to the contrary that case law suggested that there had to be, extant, evidence of real harm before a measure could be adopted. I agree with the Defendants on this. In areas relating to public health protection the precautionary principle is well established… For my part I can see no objection in a case such as the present in relation to a service with known and serious risks to the public being based upon a universal licensing system seeking to forestall anticipated harm. In my view – even if there were no evidence of actual harm – I would still find that in this area a regulator was entitled to introduce a supervisory scheme designed to ensure universal regulation. It is not disputed that remote gambling can cause serious harm, nor is it submitted that the GC [Gambling Commission] has not received many queries by concerned individuals or consumers. The document trail leading to the introduction of the new measures is replete with the GC referring to illustrations of concern and harm. It is true that there is no quantified log or body of cases of harm to be put before the Court by way of justification. However, this is an area where the Court cannot say that the concerns expressed are fanciful or illogical or that there is no discernible basis for Parliament to introduce a universal point of consumption regulatory scheme.*

In short, where there is a known risk, precautionary approaches can be justified. Such approaches may have resulted in fewer deaths from tobacco smoking had governments accepted scientists' opinions that, even short of proof positive, there was much to worry about.

But these involve considering the balance of regulation in major areas of national policy. It is doubtful that a court would, or should, extend the same margin of discretion to curtailment of an activity locally when there is no reason on balance to believe that it is causing, or will cause, harm. Judgements and inferences may need to be made. Certainly in local regulation, nil risk = nil intervention.

This approach is endorsed by this communication from the European Commission on the precautionary principle:

> *Recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty… Judging what is an 'acceptable' level of risk for society is an eminently political responsibility. Decision-makers faced with an unacceptable risk, scientific uncertainty and public concerns have a duty to find answers. This does not endorse business curtailment where there is no evidence of unacceptable risk at all.*

Conclusion

In this article I have tried to lift the lid on risk and hopefully provoke some debate. The approach to risk in licensing is often illogical and rarely thorough or scientific. Of course, licensing is not an exact science but a judgement. But that does not mean that all rigour should be abandoned. If evidence can be found, it should be.

I would exhort policy- and decision-makers to be more rigorous about: factoring in the benefits; analysing the true costs and benefits of regulation; considering displacement and unintended consequences; and discounting conclusions based on assumption rather than logic.

We cannot expect an overnight revolution. But step by step we can improve the intellectual base underlying regulation, for the benefit both of those being regulated and the wider community.

Philip Kolvin QC, CIoL
Barrister, Cornerstone Barristers

Government grandstanding and a surprise move by DVSA

Licensing measures to protect children and the implications of the DVSA's abandonment of its driving test are examined by **James Button**

There are a number of changes in the pipeline for taxi licensing: the Immigration Act 2006 ones were discussed in the last issue (also see Caroline Daly's article on pages 42-43 of this issue), although it is now an Act rather than a Bill, albeit we still do not have commencement dates at the time of writing.

Policing and Crime Bill

There is also a clause in the Policing and Crime Bill relating to taxi licensing. Originally a clause was introduced relating to child sexual exploitation (CSE) and taxi licensing which would require the body with responsibility for taxi licensing (local authorities and Transport for London) to "carry out its functions with a view to preventing CSE". Strangely this was proposed to relate only to hackney cab and private hire vehicle licensing (not drivers or proprietors).

That has now been replaced with a Government proposal in the following terms:

> CL 56 Licensing functions under taxi and PHV legislation: protection of children and vulnerable adults
>
> (1) The Secretary of State may issue guidance to public authorities as to how their licensing functions under taxi and private hire vehicle legislation may be exercised so as to protect children, and vulnerable individuals who are 18 or over, from harm.
>
> (2) The Secretary of State may revise any guidance issued under this section.
>
> (3) The Secretary of State must arrange for any guidance issued under this section, and any revision of it, to be published.
>
> (4) Any public authority which has licensing functions under taxi and private hire vehicle legislation must have regard to any guidance issued under this section.
>
> (5) Before issuing guidance under this section, the Secretary of State must consult—
>
> (a) the National Police Chiefs' Council,
>
> (b) persons who appear to the Secretary of State to represent the interests of public authorities who are required to have regard to the guidance,
>
> (c) persons who appear to the Secretary of State to represent the interests of those whose livelihood is affected by the exercise of the licensing functions to which the guidance relates, and
>
> (d) such other persons as the Secretary of State considers appropriate.
>
> (6) In this section, "taxi and private hire vehicle legislation" means—
>
> (a) the London Hackney Carriages Act 1843;
>
> (b) sections 37 to 68 of the Town Police Clauses Act 1847;
>
> (c) the Metropolitan Public Carriage Act 1869;
>
> (d) Part 2 of the Local Government (Miscellaneous Provisions) Act 1976;
>
> (e) the Private Hire Vehicles (London) Act 1998;
>
> (f) the Plymouth City Council Act 1975

What does this amount to? It appears to be little more than grandstanding by the Government. CSE is a major issue, but is by no means the only issue facing taxi licensing bodies. Added to which, the Department for Transport already issues taxi guidance,[1] which is a relevant factor (in *Wednesbury*[2] terms) and which local authorities must therefore take into account in their decision-making processes. It would not be hard to extend that Guidance to cover London. Equally, that Guidance could be expanded to address CSE and the issue of the protection of children and vulnerable persons.

In addition, it is worth noting that, as drafted, this clause gives the Secretary of State a power to issue Guidance; there is no duty to do so.

It remains to be seen whether this clause finally finds its

1 *Taxi and Private Hire Vehicle Licensing: Best Practice Guidance"* available from http://www.dft.gov.uk/pgr/regional/taxis/taxiandprivatehirevehiclelic1792.

2 *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, CA.

way into the Act, and if so, what action the Secretary of State will take.

DVSA taxi driving tests

In a surprise move (as a real journalist would say) the DVSA announced at the beginning of September that it was abandoning the popular taxi drivers test which it has run for a number of years. This was with no consultation, and very little notice, as although DVSA stated that this would take effect from 1 January 2017, it had already stopped taking bookings. It then added insult to injury by suggesting that local authorities could simply run an internet search to find alternative providers.

This sent a shock wave through local authorities, many of which have incorporated into their taxi policies a requirement for new drivers (and in some cases, existing drivers) to pass the test as a prerequisite to being licensed (or having their licence renewed).

While there are other providers, the question of the policy requirement caused concern. Did this mean that no new drivers could be licensed when a council had this requirement? This in turn leads to a wider question of the importance and application of policies.

The DVSA test as a pre-requisite

There were believed to be around 70 authorities that stated within their policies that passing the DVSA test was a requirement before applying for a driver's licence. This was considered in the case of *Darlington BC v Kaye*[3] and found to be a reasonable requirement. Obviously, if the test no longer existed, those councils would have to change their policies, but that is not a quick process. The new policy needs to be drafted (although a minor alteration such as this should not tax the draughtsman greatly). There then needs to be a consultation, consideration of the responses to that consultation and approval of the new policy.

What could be done in the meantime? The answer is to depart from the policy. That is always possible for a local authority, because a policy cannot be a hard and fast rule. The authority can always depart from the policy if there are good reasons to do so. The council could identify suitable alternative qualifications and communicate that to the trade, explaining that these would be an acceptable alternative.

Assuming that an applicant has the alternative qualification, the next question is how can that application be determined? Most local authorities have schemes of delegation which give officers the power to grant licences where the application falls within the policy, but where it falls outside the policy the matter must be determined by members, usually in a subcommittee of the non-statutory licensing committee.

As there may be a significant number of applications to be considered, which are only being referred to the subcommittee because of the changing qualification, it would be possible for the subcommittee (or the full committee) to delegate the ability to determine an application in those circumstances to an officer.

Application of policy generally

It is important to remember that any policy relating to taxi licensing (or any other function) is only guidance. The local authority considers what will be its usual approach, its lowest acceptable standards etc and incorporates those within the policy. This then benefits the authority itself in providing a consistent starting point for decision-making; it benefits applicants and licensees who know what standards are expected of them and what standards they must meet; and it also benefits the citizens of the district who understand how the authority is approaching this particular function.

Occasionally situations do arise which the policy does not address. This arose in relation to a taxi driver who had been convicted of a serious offence which directly affected his safety and suitability as a driver. However it was not addressed specifically in the authority's previous convictions policy for taxi drivers and the view was taken that because the policy did not cover it, no action could be taken against the driver.

This misunderstands the purpose and concept of a policy. The policy does not become the decision-making process: as outlined above, it is a guide to the decision-making process. If a matter arises which is not covered by the policy, then the authority must revert to first principles. Those are that a licence cannot be granted to a driver unless the authority is satisfied that the applicant is a fit and proper person. By extension, once licensed, a driver must remain a fit and proper person and if they do not, the authority has powers to take action against the licence under s 60 of the Local Government (Miscellaneous Provisions) Act 1976. So the absence of any specific reference in a policy does not mean that the appropriate action cannot be taken; it simply means that this situation was not foreseen when the policy was drafted.

Burden of proof on taxi appeals

In a previous article[4] I mentioned the case of *Kaivanpor v*

3 [2005] RTR 14, Admin Ct.

4 Jim Button Taxi licensing: law and procdure update (2016) 14 JoL p19-21.

Sussex Central Justices DC [5] where the High Court held that on an appeal against a local authority decision to take action against an existing driver's licence, the burden of proof lay with the local authority to show that the driver or applicant was not a fit and proper person, rather than the driver having to demonstrate that he remained so.

This judgment is in conflict with the decision of the Court of Appeal in *R (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [6] where it was clearly stated by Toulson LJ:

> *It is normal for an appellant to have the responsibility of persuading the court that it should reverse the order under appeal, and the Magistrates Courts Rules envisage that this is so in the case of statutory appeals to magistrates' courts from decisions of local authorities. We see no indication that Parliament intended to create an exception in the case of appeals under the Licensing Act.*

While this is a case concerning the Licensing Act 2003 there is no reason to think that the principle will be different for any other licensing matters. The decision in *Kaivanpor* was based on earlier Court of Appeal decision[7] concerning goods vehicle licences. Accordingly there are two conflicting Court of Appeal decisions, and this confusion is likely to remain unless and until the matter is resolved by the Supreme Court. In the meantime practitioners must decide which line of cases is preferable and then argue accordingly.

James Button, CIoL
Principal, James Button & Co

5 [2015] EWHC 4127 (Admin) (unreported).

6 [2011] L.L.R. 105 CA.

7 *Muck It Ltd v Secretary of State for Transport* [2006] R.T.R. 9 CA.

Controls on machine location replacing primary gambling

The Gambling Commission is introducing social responsibility code provisions for betting, bingo and casino non-remote operating licences, which means a licensing authority can consider controlling where gaming machines may be played, reports **Nick Arron**

The *Greene King v Gambling Commission* litigation has been one of my favoured topics in the *Journal of Licensing* over the past two and a half years. The latest development to report is that the appeal by Greene King to the Court of Appeal, from the Upper Tier Tribunal decision handed down on 29 January 2016, is to be heard in the spring of 2017. We will of course keep you updated.

In the meantime, the Gambling Commission has published its response to the *Controlling Where Gaming Machines May Be Played* consultation. Many in the industry have related the consultation to the concerns the Gambling Commission had with Greene King's non-remote bingo operating licence applications, relating to the provision of gaming machines within the pub environment.

Controlling where gaming machines may be played

The Gambling Commission first consulted on the proposals for controlling where gaming machines may be played in November 2015. The Commission's principal objectives underpinning the consultation were to ensure that:

- With very few low risk exceptions, non-remote gambling should be confined to dedicated gambling premises;
- The distinctions between different types of licensed gambling premises are maintained;
- Gambling activities are supervised appropriately;
- Within casino, bingo and betting premises, gaming machines are only made available in combination with the named non-remote activity or the operating licence.

The Commission went on to state in the consultation that:

Whilst the existing licence conditions and codes of practice and the GLA have largely achieved the objective of maintaining the distinctions between different types of gambling premises, they have presented difficulties in specific cases. We recognise that some of our communications and advice issued may not have delivered sufficient clarity for licensees, potential applicants and licensing authorities. We also recognise that the existing licence conditions and codes of practice, the advice and guidance we have issued to explain them and their suitability as the basis of enforcement action were found by the First-Tier Tribunal in Luxury Leisure v Gambling Commission (GA/2013/0001) not to be achieving the Commission's objectives.

The *Luxury Leisure* case has been pivotal in the Commission's thinking behind the consultation on controlling gaming machines. It delivered confirmation to the Commission that previous conditions designed to maintain the distinctions between different types of gambling premises and control gaming machines were not achieving their purpose. The conditions, which were the subject of the *Luxury Leisure* case, are those on primary gambling activity, at condition 16 of non-remote casino, bingo and betting operating licences.

Primary gambling activity was introduced in May 2009 with the Commission's aim of requiring holders of gambling premises licences to ensure that the gambling activity appropriate to the licence type is actually offered as the primary gambling activity at those premises; and not simply as an adjunct to, or sometimes wholly replaced by, the making available of gaming machines as permitted by virtue of the licence. Since then the condition has been the subject of much debate, as to the permissive nature of licensing.

According to the Commission, since its inception, condition 16 has been the subject of engagement with over 75 operators as a result of complaints from consumers, other licensed operators and licensing authorities, resulting in a number of operating licence reviews and in three cases litigation, including the *Luxury Leisure* appeal.

In that case Commission had decided that *Luxury Leisure* was making gaming machines available, in breach of condition 16. Luxury appealed. The First-Tier Tribunal found in favour of Luxury Leisure, and decided it had complied with the conditions regarding primary gambling activity and that it was not in breach of its licence. Subsequently the Commission amended condition 16. It has now decided to replace condition 16 with the new social responsibility code provision on controlling where gaming machines can be played.

However, as well as being the start of the end of primary gambling activity, for the Commission the *Luxury Leisure* case also provided the answer. In the case Judge Warren stated:

> *Reading the statute, as a whole, it seems to me that it is open to the Commission to attach conditions concerning what I might call the atmosphere in which facilities, including gaming machines, are made available.*

It is the "atmosphere" that the Commission now seeks to control, when operators make gaming machines available for use.

The Gambling Commission response to the consultation

In July 2016 the Gambling Commission published its response to the November consultation on controlling where gaming machines maybe located.

A number of the respondents to the consultation, and people who attended workshops during the consultation period, queried why the Commission was holding the consultation at all, and called for evidence of the risks to the licensing objectives. In its response the Commission restated that the reasons for holding the consultation can be summarised as follows:

- To restate the strict control of gaming machines under the Act, whereby entitlements vary dependent on the type of premises licence held;
- To respond to the calls from industry and licensing authorities for greater clarity on the Commission's objectives, requirements and approach to licensing and compliance;
- To propose proportionate and effective controls for the Commission and licensing authorities to use where appropriate.

A number of concerns have been expressed regarding the consultation, and the policy objectives (stated above). There are concerns from the industry that the proposals will result in the micro-managing of gambling premises, and that the wording of the provisions, and the risk of subjective judgements, may have a disproportionate impact, particularly on long-standing and previously legitimate and effective gambling business models, or those seeking to innovate in response to customer demand.

One subject of confusion has been the Commission's desire to "strike a balance between an approach which is overly prescriptive and impose 'one size fits all' general requirements, against lighter touch more general requirements supplemented where necessary with prescriptive conditions in specific cases".

In the response the Commission also refers to a two-stage process stating: "Avoiding prescription leaves provisions open to some degree of interpretation but the risk arising from that approach is offset by the fact any concerns based on a subjective assessment of a business model at stage one, can be distilled into specific and measurable steps to provide assurance at stage two."

The sentiment would be applauded but there is no reference to the two-stage approach in the actual changes to the LCCP or *Guidance to Licensing Authorities*, which result from the consultation.

Changes to the LCCP on controlling where gaming machines may played

Following the consultation, the Gambling Commission will remove condition 16 on primary gambling activity and replace it with social responsibility code provisions attached to betting, bingo and casino non-remote operating licences – code 9 gaming machines in gambling premises.

The choice of a social responsibility code provision is important as a licensing authority can consider controlling where gaming machines may be played under s 153 of the Gambling Act 2005 when exercising their functions under the Act. A social responsibility code provision also has the effect of a licence condition and compliance with it is mandatory.

In summary, the new code 9 states as follows:

1. Gaming machines may be made available for use in licensed premises only where there are also substantive facilities for non-remote gambling, provided in reliance on the relevant licence, available in the premises;
2. Facilities for gambling must only be offered in a manner which provides for appropriate supervision of those facilities by staff at all times;
3. Licensees must ensure that the function along with the internal and / or external presentation of the premises are such that the customer can reasonably be expected to recognise it as a premises licensed for the provision of relevant gambling facilities.

The first part of the condition extends the previous wording found in the current Primary Gambling Activity condition 16, from "sufficient facilities" to "substantive facilities". The Commission is seeking to prevent "tokenism", an approach it has seen adopted by a number of operators, while attempting to prevent prescription in the manner in which the machines are provided.

In the second part, what is appropriate supervision will depend on the circumstances of the premises and gambling.

The third strand deals with the function, internal and external presentation of the premises, and this is an issue which relates directly back to Greene King. One of the Commission's concerns was that someone entering a gambling premises, should know they are entering gambling premises. A bingo hall, is a bingo hall, but a bingo hall cannot be a pub.

The new code provisions take effect on 31 October 2016.

Other amendments to the LCCP

A number of other amendments will come into effect on 31 October including:

- A condition requiring businesses to undertake an assessment of the risks to them of money laundering and terrorist financing;
- Additional key events, on legal or regulatory proceedings or reports, to be reported to the Commission;
- Additional requirements on betting integrity, betting operators' staff and irregular betting.

These amendments reflect recent topics of focus for the Commission, with the upcoming implementation of the 4th Anti Money Laundering Directive from Europe and concerns over staff complicity with betting cheats.

Nick Arron
Solicitor, Poppleston Allen

Inheritance and development – reflections by the Chairman

In the third of our series marking the Institute's twentieth anniversary, Chairman **Daniel Davies** salutes the endeavours of his predecessors and sets out a vision for what lies ahead

In this our twentieth year I have been asked both to reflect on my experience as Chairman of the Institute of Licensing and to express how I think the Institute can develop as we move forward. I have read the articles in which my predecessors reflected on the early days of the IoL – its inception as the LGLF (LugLuv is the affectionate diminutive), and then the name change to Institute of Licensing - and I am struck by how very different all the key players are as individuals. Jim Button, Phillip Kolvin, the late and much-loved Jeremy Allen, and of course my immediate predecessor, Jon Collins. All very different personalities, but all united by a shared vision and a desire to give something back by creating something of lasting value.

The inheritance

Reading their reflections, I was also struck by some of the similarities between the early days of the IoL and its teething problems, and my own early days starting CPL Training. Like the LGLF / IoL we began on a very small scale; we were perhaps naïve about the problems we would have to solve if we were to develop; we didn't have an office or an infrastructure and we worked from home. I say "we", because CPL started as the IoL did – with a small, core group of people who shared a vision and wanted to create something that would last. We were a band of brothers – and one or two sisters as well!

The factors that were crucial to CPL's start and development were also very similar to those of the Institute: pick some key people with ability who would go on to demonstrate their loyalty to the organisation. Most of the people from those early days are still with us and we have all developed as people and adapted to change as our organisation has grown. And this is precisely what has happened and is happening at the IoL.

I have been hugely lucky in terms of what and who I inherited when I was appointed as your chairman. The collective wisdom of my predecessors, the core staff who make so much happen because of their dedication and competence, and a thriving regional membership that comes together for regional meetings, training courses, the National Training Day and, of course, our signature event, the three-day National Training Conference in November.

Even before being invited to become your chairman I was aware of the Institute of Licensing – principally because my CPL colleagues Paul Chase and Gui Chipchase have for some years attended the National Training Conference, and spoken with great enthusiasm of the quality of the content of that event. Since becoming IoL Chairman, I have been ably supported and advised by Deputy Chairman Gary Grant, and by all the Board members whose knowledge and experience of all things licensing is comprehensive and exhaustive. I am also hugely grateful for the support of our staff, particularly the indefatigable Sue Nelson, the IoL's Executive Officer, whose communication skills and advice I have found to be invaluable.

I think the past 20 years has created a firm basis for the next twenty years – and there is plenty still to do!

The future

The IoL has transitioned from what Phillip Kolvin called childhood to adolescence and now the ongoing transition to maturity proceeds apace. We've rebranded; we've changed the look and feel of the IoL's *Journal of Licensing*; and we've developed a new website which, despite initial teething problems, will provide a faster, slicker way of booking events and training courses and keeping in touch with one another. Our membership remains strong and our revenues from training and events have improved too. We're becoming more commercially savvy, but without losing that sense of idealism that infused the organisation from the outset: the chance to shape an important function that impacts on the public and their safety, through the protections that licensing provides, was and is the motivating impulse that drives us forward.

There is, however, much more to do. In terms of training, we are keen to proceed with formalising our training courses and converting them into units of learning where we clearly define the learning outcomes and assessment criteria of these courses and qualifications. We want IoL training to set the benchmark for licensing practitioners across the spectrum,

and this is a huge part of developing professionalism for all our members. I look forward to the day when possession of an IoL qualification becomes a pre-requisite for promotion and career development. The creation of branded, high quality learning support materials that are best in class, and that learners will want to keep and refer to as providing authoritative reference for licensing practice, is also part of this modernising agenda.

What I hope I have brought to the Institute is the ability to drive and manage change. The key thing to successful change management is that you have to take people with you, not leave them behind. This means convincing people of the benefits of the changes you propose while allaying their fears that the changes somehow threaten the very things they value in the organisation. What I'm talking about here is preserving the culture, the ethos of the IoL and at the same time ensuring that we modernise and become more professional in all aspects of the operation. It has been said that organisations are like bicycles – they have to move forward, because if they stand still, they fall over!

Above all, I want to see the influence of the IoL increase. There are a number of ways we can achieve this. Firstly, it is said that the Institute is a "broad church". Our membership is still predominantly local authority based, but includes police and members of the legal profession. Latterly we have expanded membership to include large licensed retail organisations and trade bodies, the very people who are the customers of local authority licensing departments.

But even a broad church must have walls. Those walls must be defined by a "community of interests". We all have a common interest in ensuring that the various licensing systems that our practitioners work in operate in a way that balances the need for public safety and the need for operators to function in free, flexible markets. So, expanding our membership base, but without compromising the community of interests that enables us all to mingle and informally discuss issues in a collegiate fashion, is one strand of development.

Another is how we are perceived by other organisations and how we influence Government and the legislative agenda. As we have seen at recent IoL events, we have attracted speakers, and articles for the *Journal*, from think tanks as diverse as the Institute of Economic Affairs and the Institute of Alcohol Studies. These two organisations are from opposite ends of the spectrum of opinion about alcohol and its relationship with society, but they both see the IoL as a key arena of debate for the viewpoints they seek to put into the market place of ideas.

The revival of the National Licensing Forum is another strand of influence that it is important for us to develop. Officials from the Home Office, the Local Government Association, police and trade bodies sit on this forum and it provides direct access to Government officials for the discussion of all the licensing issues that concern us. As IoL chairman, I am privileged to chair the National Licensing Forum and I appreciate the opportunity it provides not just for discussion with Whitehall but with representatives from other key stakeholders too.

This year saw the launch of an enquiry into the Licensing Act 2003 by a House of Lords All-Party Select Committee. By the time you read this article both myself and our Vice Chairman Gary Grant will have appeared before the committee to answer questions on the effectiveness of the LA2003. It is also worthy of note that barrister Sarah Clover has been appointed as counsel to the committee and Sarah is, as you will know, a very active member of IoL as well as being chair of the West Midlands Region.

At the grass roots, our members appreciate the very real concerns for public safety and child safety that have come to national prominence as a result of events in Rotherham. Licensing officers up and down the country recognise the function that taxi licensing plays in public protection, and harmonising the criteria used to vet taxi drivers is a priority the Institute should take forward.

An important part of our twentieth anniversary has been how we have marked it by raising awareness of licensing with the wider public. A lot of what licensing practitioners do is behind the scenes. The public has very little awareness of licensing as a function, or how it impacts on the body politic at some of its most sensitive points. I think it is important that we continue to raise public awareness of licensing, and in the process raise the status and celebrate the professionalism of all those in both the public and private sectors who work as licensing practitioners.

Educating our members; improving their professionalism; raising standards; expanding our membership; increasing our influence at grassroots and at Government level - these are the challenges before us and I believe these challenges can and will be met by the Institute of Licensing and its membership as we move forward over the next 20 years.

Daniel Davies, MIoL
Chairman, Institute of Licensing

How will the Lords pronounce on residents and the 2003 Act?

A House of Lords Select Committee is examining the effectiveness of the 2003 Licensing Act and will publish its findings by the end of March next year. **Richard Brown** looks at some of the most contentious areas in relation to community involvement, as well as reflecting on a holiday incident that highlighted one of the Act's main virtues

Many readers will be aware of the setting up earlier this year of a House of Lords Select Committee, empowered to conduct post-legislative scrutiny of the Licensing Act 2003. The Select Committee issued a call for evidence on 30 June, with a closing date of 2 September. The call for evidence invited responses and input from a wide range of stakeholders and members of the pubic. Public oral evidence sessions began on 5 July. The Institute of Licensing conducted a survey of its members prior to 2 September in order to inform its own response. Daniel Davies, the Chair of the Institute of Licensing, gave oral evidence on 6 September.

The call for evidence was wide ranging, although attention was drawn to a number of specific issues on which responses were particularly welcomed. The issues covered included fundamental matters such as whether the current licensing objectives are the right objectives, or if a health and well-being objective is desirable, along with more specialist issues such as regulation of sales of alcohol airside at airports.

Among the other issues raised was whether the Act now achieves "the right balance between the rights of those who wish to sell alcohol and provide entertainment and the rights of those who wish to object"? Do residents engage effectively in the regime? These are issues I have covered before in the *Journal*, and they do not admit of an easy answer, much less a yes or no answer. Indeed, my own response was effectively yes *and* no.

The call for evidence was accompanied by a hefty document called *Memorandum to the House of Lords Select Committee: Post-Legislative Scrutiny of the Licensing Act 2003,*[1] produced by the Drugs and Alcohol Unit at the Home Office. The memorandum is intended to provide Parliament with an update on developments since the Act was introduced in 2005, and an up to date assessment of how the Act has operated since coming in to force.

The memorandum makes interesting reading. It addresses community involvement and confirms that this is to be encouraged, although it acknowledges that legislative efforts to do so are not universally welcomed. It reports that going back to 2010 and the consultation on re-balancing the Act, "criticisms were raised during the consultation[2] that a proposed extension of the involvement of residents in licensing decisions could lead to an increase in frivolous and vexatious representations. However, many respondents welcomed greater community involvement in the licensing process. In line with the aim of extending community involvement, the Police Reform and Social Responsibility Act 2011 removed a requirement to reside in the vicinity of licensed premises in order to make representations about it."

Stakeholders have different views on whether residents have too much or too little influence in practice. For me, one of the most striking parts of the memorandum were the statistics on grants and refusals of licence applications. In the year to 31 March 2014, the last period for which statistics are available, 97% of applications for new premises licences or variations of premises licences were granted. The figures for previous years going back to 2008 are remarkably consistent, averaging out overall at 97%.[3]

As somebody who frequently represents residents at licence hearings, I am often asked how I find the process. I tell people that I "lose" 95% of my cases, to the extent that a licence hearing results in a "winner" (grant as applied for / refused completely) or a "loser" (refused completely / grant

1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/530664/Cm_9278_-_Post-Legislative_Scrutiny_-_Licensing_Act_2003.pdf.

2 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118282/alcohol-consultation.pdf.

3 https://www.gov.uk/government/collections/alcohol-and-late-night-refreshment-licensing-england-and-wales-statistics.

as applied for). It turns out that I was being overly optimistic, going by the official statistics.

However, this does not mean that residents do not and cannot engage effectively. As anyone with experience of licence hearings will tell you, it is rarely as black and white as “grant as applied for” or “refuse entirely”. A point I often make to residents and at licensing sub-committee hearings is that contested applications are almost never about a simple ”grant as applied for” or “refuse entirely”. The call for evidence recognises this: “Decision making under the Act was expected to balance these interests for the public benefit, rather than identify a ‘winning’ or ‘losing’ side.”

There are many areas for negotiation and measures and compromises that can at least partly address objectors’ concerns. Often, even if matters cannot be agreed entirely, it at least narrows down the areas of disagreement at the licensing sub-committee hearing. It is this, we suggest, where the informed and effective engagement of residents can be of great benefit both to them and to the process in general. Licensing can appear to be a minefield of jargon and procedure. Relatively benign proposals can appear out of context on the bare pages of an application form. Words like “recorded music” and “live music” can set off alarm bells, without an explanation of what is actually intended and what conditions can guard against noise breakout. An understanding of the process, the terminology and the practice can assist all residents in feeling fully engaged and that their concerns are heard.

Barriers do exist, and there are regional differences. Some barriers exist because of a lack of knowledge and access to information about applications, and lack of knowledge of how the procedure works at a local level. One response from a residents’ association to the call for evidence stated that “more could and should be done to raise awareness amongst residents. Awareness sessions to empower local residents should be publicly funded.”

One barrier I have come across a couple of times recently is a resident’s desire for anonymity, either from the council, from the applicant, or from the general public who can access public documents such as licensing sub-committee reports. Reasons for desiring anonymity are anticipated in the s 182 Guidance principally as fear of intimidation – not wanting the applicant to know who they are. This can lead to a reluctance to turn up at a hearing. There is also a sensitivity about making public personal details such as name, address, and contact details in, for example, sub-committee reports and minutes. This could be for fear of unpleasantness or simply data protection worries. Different authorities deal with these issues in different ways. Licensing can be a polarising topic. Sometimes, the process spreads more heat than light on an issue. The local media can turn “concern” into “fury”, and “misgivings” into “outrage”. Some are unwilling to put their heads above the parapet.

The Select Committee must publish its findings by 31 March 2017. Given that this is the first comprehensive root-and-branch review of the Act by a legislative body since it came in to force, the outcome will be eagerly awaited.

Food for thought

The House of Lords Press release on 1 July 2016 to launch the call for evidence was headed “Licensing Act 2003 – Lords to ask: what happened to ‘café culture’?” This, of course, relates to the food-focused café culture which is recognised as being prevalent on the Continent. Attitudes in the societies of our European cousins, it is said, afford the young generation the opportunity to be integrated in to the world of hop, grain and grape in a gradual way, becoming used to drinking modest amounts of alcohol in an appropriate setting and as an adjunct to food. This contrasts with the indulgent, binge culture which is said to predominate in Britain. The Continental attitude, so the theory goes, facilitates and inculcates a measured, responsible approach to alcohol consumption which means that drink is the servant, rather than the master.

I recently witnessed a quite shocking incident in Europe in a residential (and not tourist) area, which certainly would not be recognised as the intended outcome of a utopian café culture. I wondered what protection residents have when things go wrong? If my experience is anything to go by, certainly evidence gathering would be more difficult. I began to video the events on my phone, only to have it confiscated by the police who returned it only after deleting the photos and videos I had taken and, despite the language barrier, leaving me in no doubt that I was to desist immediately. I wondered why they did this. For all they knew, I could have captured crucial evidence. I was involved in a s 53A summary review some time ago where video evidence taken by a resident was pivotal to the police’s case.

In the UK, residents would have been well within their rights to ask for a review of the licence on the back of a similar incident. It reminded me that the situation in the UK under the Licensing Act 2003 is by no means perfect, but at least checks and balances exist, and redress can be sought when situations like this occur. Although I had lost my photos and videos, it gave me something to chew on when I returned from my holiday.

Richard Brown, MIoL
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The *Essence* of an appeal

The impact of the decision in Essence Bars (London) Ltd v Wimbledon Magistrates Court & Royal Borough of Kingston upon Thames ([2016] EWCA Civ 63) on licensing appeals in the Magistrates' Court is analysed by **Gary Grant**

"An appeal", observed the American humourist Finley Peter Dunne, "is when you ask one court to show its contempt for another court". His glib tone echoed the earlier definition of "appeal" by his co-patriot Ambrose Bierce in *The Devil's Dictionary*: "In, law to put the dice into the box for another throw".

Both of these cynical reflections were, of course, intended to be satirical. But plenty of truth lurks within satire. That is its very potency.

Not entirely unexpectedly, English judges of the 18th century adopted a somewhat more sober and high-minded attitude towards appeals. The deliciously named Lord Chief Justice Pratt had this to say:[1]

> *It is the glory and happiness of our excellent constitution, that to prevent any injustice no man is to be concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief; for this purpose, the law furnishes him with appeals...*

By the close of the 19th century the rhetoric approached legal orbit when Lord Justice Bowen was able to muse:[2]

> *If no appeal were possible, I have no great hesitation in saying that this would not be a desirable country to live in. . . . It is quite true that there is enough difficulty in appealing as it is; but if there is to be no appeal at all possible the system would be intolerable. Therefore it is of the essence, the pivot of the system, that there should be a right of appeal.*

The one simple point we can adduce from all this dubious wit and wisdom is the following: appeals are an essential component of a justice system worthy of its name. (Indeed, in more recent times, the senior courts have indicated that it may only be the existence of a right of appeal to an independent and impartial court that renders certain local authority decision-making processes, including our system of hearings before licensing sub-committees, as being compliant with a person's right to a fair hearing guaranteed under Article 6 of the European Convention of Human Rights.[3])

Set against this background, it is important we get the processes and procedures of lodging appeals to the Magistrates' Courts against licensing decisions absolutely right. The recent decision of the Court of Appeal in *Essence Bars (London) Ltd v Wimbledon Magistrates Court* has provided us all with some important guidance on how to approach appeals when their instigation has, regrettably, gone very wrong. This article will consider the *Essence* decision in so far as it impacts on these important questions:

- What happens if the appellant is incorrectly named on the notice of appeal served on the Magistrates' Court?
- How strict are the statutory time limits for instigating a licensing appeal?
- What is the impact on transfers of premises licences during the interim period between the licensing authority's decision and the appeal?

Background

In December 2013 the Metropolitan Police applied for a summary review of the premises licence of Essence nightclub in the Royal Borough of Kingston-upon-Thames following a series of assaults and incidents of wide-scale public disorder involving its customers. Additional complaints from residents suggested the club's operation was also causing a public nuisance. The council subsequently revoked the premises licence at review proceedings held in January 2014. The previously imposed interim suspension of the licence continued pending the nightclub's inevitable appeal to the Magistrates' Court and so the club remained closed throughout the long appeal period. Solicitors acting for Essence lodged a notice of appeal "by way of complaint" with the Magistrates' Court.[4] The exact wording of that notice proved to be critical to the legal issues involved and the eventual decision of the Court of Appeal. The relevant extract read:

1 *The King v Chancellor of the University of Cambridge* (1722) 93 ER 698 at 702-3.

2 *The Queen v The Justices of the County of London* (1893) 2 QB 476 at 492.

3 See, for example, *R (Alconbury Developments) v SSETR* [2003] 2 AC 295; *R (Begum) v Tower Hamlets LBC* [2002] 1 WLR 2491 and *R* (o/a/o *Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31 at [36] – [38] and at [50].

4 Pursuant to s 181 and Schedule 5A of the Licensing Act 2003 and rule 34 of the Magistrates' Court Rules 1981.

Appeal by way of Complaint

COMPLAINANT: FL Trading Ltd [c/o solicitor]
RESPONDENT: Royal Borough of Kingston upon Thames

Notice of Appeal
TAKE NOTICE that the Complainant, the premises licence holder of the premises licence for the premises "Essence" … intends to appeal … against the decision of the Royal Borough of Kingston upon Thames of 10th January 2014 … revoking the premises licence…

So far so good. Except for one thing: the named complainant, "FL Trading Ltd", was *not* the premises licence holder. FL was in fact the holding company for the *actual* premises licence holder "Essence Bars (London) Ltd". The directing mind of both companies was the same individual[5] but the two companies, FL and Essence, were separately registered companies and so distinct legal personalities. A simple, but consequential, mistake had been made by lawyers acting for the nightclub. Initially, nobody spotted the error. Not the Magistrates' Court, nor the nightclub nor the council. Indeed, the case proceeded through the High Court on the first (of two) judicial reviews as initiated and pursued by FL (as opposed to the actual licence holder, Essence). This initial judicial review was founded on a separate and unrelated challenge.[6] Its relevance was that neither the High Court nor any of the parties noticed the slip-up or took a point on it at that stage.

Proceedings in the Magistrates' Court and High Court

The error was first noticed by the council's lawyers in October 2014, shortly before a preliminary hearing in the Magistrates' Court relating to the substantive appeal hearing that was due to take place in a matter of weeks.[7] At that preliminary hearing the council submitted that the failure to instigate the appeal in the name of the actual premises licence holder deprived the court of the jurisdiction to hear the appeal. The Licensing Act 2003 specifically prescribes which parties may appeal a decision by a council following a summary review hearing.[8] Those parties are:

a. the chief officer of police for the police area (or each police area) in which the premises are situated;
b. the holder of the premises licence; or
c. any other person who made relevant representations in relation to the application for the review.

The council submitted that since the "holder of the premises licence" (Essence) had, mistakenly, not appealed, and the 21-day time limit for doing so had now long passed, that was the end of the matter. After the issue had been raised by the council in correspondence, a few days before the preliminary hearing, lawyers for the nightclub sent a significant letter to the council that, in the later words of the Court of Appeal "clearly stated that the solicitors were instructed by FL and did so at a time when it was known that FL was not the premises licence holder".[9] The letter acknowledged that the appeal should have been instigated in the name of the licence holder Essence and they would apply to the Magistrates' Court to amend the notice of appeal at the forthcoming preliminary hearing.

The only power to amend a complaint in the Magistrates' Court lies within s 123 of the Magistrates' Courts Act 1980. It is a highly curious provision that does *not* "do what it says on the tin". It reads as follows:

Defect in process
(1) No objection shall be allowed to any information or complaint … for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the … complainant at the hearing of the information or complaint.
(2) If it appears to a Magistrates' Court that any variance between a summons or warrant and the evidence adduced on behalf of the prosecutor or complainant is such that the defendant has been misled by the variance, the court shall, on the application of the defendant, adjourn the hearing.

On its face, s 123 would appear to preclude a party in the Magistrates' Court from taking *any* objection whatsoever to a defect in an "information" (the initiating document for criminal matters) or "complaint" (for civil matters – including appeals against licensing decisions), regardless of how obvious and major that defect is. But if taken literally that could lead to obviously absurd and unjust consequences. For example, if an information in a criminal matter were to allege an offence not known to English law, can s 123 really prevent the unfortunate defendant from objecting to his situation? The senior courts have taken a more sensible approach

5 Mr Franco Lumba – hence the initials.

6 See *FL Trading Ltd v Royal Borough of Kingston and Commissioner of Metropolitan Police*, (2014) Admin CO/1504/2014 (18.6.14). Patterson J dismissed FL's application for permission to apply for judicial review based on a challenge relating to whether an acting Police Superintendent (rather than a full Superintendent) could sign the certificate accompanying the police's summary review application and whether the fairness of the review hearing itself was compromised by the alleged "apparent bias" of the council's legal advisor. Both submissions were held to be "completely unarguable" by the High Court.

7 The preliminary hearing was originally listed for Essence to re-argue the "certificate point" that had previously been rejected by Patterson J in the High Court (see fn. above).

8 Paragraph 8A of Schedule 5 to the Licensing Act 2003.

9 See paragraph 23 of the Essence Court of Appeal decision.

and have repeatedly held that s 123 should not be read too strictly or literally.[10] In the present case, Essence did indeed argue that the provision precluded the council from taking the jurisdictional point at all. However, none of the courts that considered this point found it to be persuasive.

Instead, the council argued, the leading legal authorities that had previously considered the effect of s 123 (principally in the criminal context[11]) had established a quite different principle. Namely, that where the wrong corporate entity had been mistakenly named in an information or complaint, and the statutory time-period for launching the prosecution or appeal had expired, then the law did not permit a substitution of the correct corporate entity to be made. To do so, would circumvent the time limits set down by Parliament.

In the event, the district judge found in favour of the council. He refused to amend the complaint to substitute Essence for FL and dismissed the appeal against the revocation of Essence's premises licence for want of jurisdiction. The case proceeded to the High Court by way of judicial review. Similar arguments were deployed by both parties and Wilkie J, once again, found in favour of the council.[12]

The Court of Appeal

However, a strong Court of Appeal took a different approach.[13] Unlike the lower courts, the Court of Appeal did not find itself bound by the series of High Court precedents on s 123 that had weighed heavily on the lower courts in the *Essence* case. But the court did not feel itself compelled to overturn those decisions and expressly declined to distinguish them on the basis that criminal cases are different to civil cases.[14]

Instead, the court was able to distinguish the *Essence* case on a simple factual basis. Unlike the other cases considering amendments under s 123, in the Essence notice of appeal the same document that named FL as the complainant also went on to give a *description* of the complainant as "the premises licence holder". The key question of "who was the appellant, FL or the premises licence holder?" was therefore less clear-cut than in the earlier cases.

What legal approach should the Magistrates' Court take in this confusing scenario? For the first time, the Court of Appeal decided to specifically apply to the Magistrates' Courts principles of law dealing with "mistakes of names" that had hitherto only applied to proceedings in the County Court and the High Court[15]. In particular, the Civil Procedure Rules (which do not directly apply to licensing appeals in the Magistrates' Courts[16]) specifically cater for situations where a party has been mistakenly named in civil proceedings and provide a test as to when the party's name can be amended or substituted after a time-limit to instigate proceedings has expired - a situation akin to the position in *Essence.*[17]

The new test

The test laid down by the Court of Appeal is as follows. Before permitting an amendment to, or substitution of, a party's name the court has to decide which of the following situations apply:

a) Is the mistake as to the *identity* of the party – in which case no amendment is permitted and the mistake is irremediable.[18]

Or,

b) Is the mistake simply as to the *name* or nomenclature of the party – in which case an amendment will be permitted *providing* there is no reasonable doubt that the true identity of the person intending to appeal and the person intended to be appealed against is apparent to the latter although the wrong name has been used.

The courts have recognised that this distinction is sometimes "elusive", particularly where the issue concerns the name of a corporate entity within a group.[19] It will often require a certain degree of mental gymnastics. However, the Court of Appeal highlighted that "mistakes as to name" should be given a "generous interpretation".[20] On the facts of this case, was the identity of the complainant actually FL mistakenly purporting to be the licence holder (a mistake of identity and so irremediable)? Or, alternatively, was the complainant always *Essence*, the licence holder, mistakenly named as FL (a mistake of name and so potentially remediable)?

10 See e.g. *R v Greater Manchester Justices ex p Aldi GMBH & Co. KG* (1994) 159 JP 717, *Marco Croydon Ltd (t/a A & J Bull Containers) v Metropolitan Police* [1984] RTR 24, and *Sainsbury's Supermarkets Ltd v HMCS* [2009] EWHC 228. But see also the civil case of Fernandez v Broad QBD, CO/660/96 10 July 1996.

11 See cases cited in fn. Above.

12 [2014] EWHC 4334 (Admin).

13 Beatson and Simon LJJ and Sir Robin Jacob.

14 Paragraph 47 of Essence Court of Appeal decision.

15 Although Beatson LJ noted that a pre-cursor to the CPR test was referred to by Glidewell J in the *Marco* case (see para.53 of *Essence* judgment).

16 See CPR 2.1 – the CPR only applies to the county court, High Court and Court of Appeal (Civil Division).

17 See CPR 17.4 and 19.5 and *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701.

18 In the absence of express and specific powers that provide a remedy.

19 *Essence* CA para 34.

20 *Essence* CA paras 34 & 55.

The skies were severely clouded by the letter sent by the nightclub's lawyers in the days prior to the preliminary hearing appearing to confirm that their client was FL (rather than *Essence* the licence holder). The majority of the Court of Appeal decided that the question could only be decided by the Magistrates' Court hearing further evidence on the point. Therefore, the decisions of the district judge and High Court were quashed but the case was remitted back to the Magistrates' Court for the district judge to make a ruling in light of the new legal test set down by the Court of Appeal.

Time-limit for appealing

The Court considered that the same test should apply regardless of whether it was applied before or after the 21-day time for appealing licensing decisions had expired. However, this issue is far more likely to arise in the latter scenario. If the error is spotted *before* the 21-day time-limit has expired, then any appellant would be well-advised to simply re-lodge his appeal in time with the correct party being named as the complainant. (The additional court fee this may attract is likely to be dwarfed by the costs of litigating the issue before the court.)

Although the issues to be considered in *Essence* did not specifically focus on the strictness of the approach to the time-limit for appealing licensing decisions,[21] the issue was expressly canvassed before the Court of Appeal. The court's comments on the time-limit provide considerable support for the view that a Magistrates' Court has no discretion or flexibility to extend this time-limit for an appellant even if he had good reason to fail to lodge his appeal in time.[22] The classic case often cited in support of this submission is, in fact, a taxi licensing case: *Stockton-on-Tees v Latif.* [23] Importantly, the Court of Appeal in *Essence* referred to the *Latif* decision with apparent approval in the context of appeals under the Licensing Act 2003. In a passage likely to be quoted in future cases, Beatson LJ noted the public interest in adopting a strict approach to appeals against decisions made by licensing authorities in the public interest:[24]

> *It also has to be remembered, as Lord Bingham stated in Clarke, that although:*
>
> > *'technicality is always distasteful when it appears to contradict the merits of a case, the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime, a certain degree of formality is not out of place'.*
>
> *While in the circumstances of the case now before the court the state is not exercising its coercive power to put a citizen on trial for a serious crime, the coercive power of the state has been exercised to regulate those engaged in businesses involving the sale of alcohol, a context in which significant public interest factors are in play. Unlike the position in litigation in civil proceedings … the public law regulation of such areas of business and the licensing requirements affect third parties and the wider public interest. Parliament has made provision specifying who can appeal against a licensing decision and the time in which appeals against such a decision must be commenced. The Administrative Court has taken a strict approach to the 21 day statutory time limit for lodging appeals against licensing decisions. In Stockton on Tees BC v Latif [2009] EWHC 228 (Admin) it held that there is no jurisdiction to extend the statutory time limit. It would, to say the least, be curious to achieve such an extension by construing section 123 in the way for which [Essence] contends.*

Transfers pending appeal

Although not expressly dealt with in the Court of Appeal's judgment in *Essence*, the nightclub argued before the Court that the occasionally encountered practice of transferring a premises licence to another person while an appeal is pending (even after the 21-day time-limit has expired) supported its submission that parties to an appeal could be amended or substituted at a late stage. The tactic is often utilised when an existing licence holder has been the subject of adverse observations by a licensing sub-committee at a review hearing which does not go quite as well as he had hoped. The licence holder lodges the appeal to the Magistrates' Court in his own name but later on comes to the conclusion that he is unlikely to persuade the Magistrates' Court to place too much confidence in him going forward. A knight in shining armour then rides in to the rescue and seeks to transfer the premises licence subject to the appeal into his own name (with the consent of the original licence holder and initial appellant). Our knight then takes over the ongoing appeal proceedings in his own name. Often such knights are entirely legitimate and professional operators wholly independent from the licence holder - who know a good business opportunity when they see it. At other times there are suspicions that the knight is simply a puppet of the original transgressor acting as his smoke-screen.

However, there is no clear legal basis for this practice. During argument in the Court of Appeal, Sir Robin Jacobs memorably queried whether the practice was based on "lore" rather than "law". In this regard, the pithy observation of Turner J in another recent licensing case is apposite:[25]

21 The 21-day limit is imposed by paragraph 9(2) of Schedule 5 of the Licensing Act 2003.

22 The comments are *obiter*, but have persuasive force.

23 [2009] EWHC 228 (Admin).

24 Paragraph 49.

25 *Extreme Oyster v Guildford BC* [2013] EWHC 2174.

"Orthodoxy is no more proof of legality than novelty is of illegality".

There is a strong argument that the test set down in *Essence*, which emphasises that it is only appropriate for a court to permit an amendment to the name of the appellant where there has been a *mistake* as to the party's *name,* cannot be satisfied in circumstances where the *identity* of the appellant is deliberately and consciously substituted following a transfer application. This is particularly so when the 21-day time limit for appealing has expired. (Of course, if the transfer application takes place within the 21-day window then the appeal can be instigated in the name of the new licence holder and so no issue arises because no amendment is required.)

So, while licensing authorities can still lawfully process a transfer application relating to a premises licence subject to an appeal, the premises licence holder and the transferee should be aware of this unintended consequence: when the transfer takes effect the ongoing appeal to the Magistrates' Court may be brought to a sudden and rather brutal end.

Aftermath

So what happened when the *Essence* case was sent back to the Magistrates' Court following the Court of Appeal's decision in February 2016? By this time the nightclub had been closed for just over two years and, it was later discovered, had forfeited its lease while the legal proceedings were slowly moving through the court hierarchy.

In the event a consent order was agreed between the parties, whereby:

a) the council agreed not to resist the amendment of the notice of appeal to name Essence as the correct licence holder;

and then,

b) Essence immediately abandoned its appeal to the Magistrates' Court and so the permanent revocation of its premises licence ordered by the council back in 2014 had immediate effect.

C'est la vie.

Gary Grant, MIoL
Barrister, Francis Taylor Building

Events Calendar

November 2016
16th-18th National Training Conference - Stratford-upon-Avon
24th Now & Next - London
30th Animal Welfare Licensing - Bury St Edmunds

December 2016
1st London Region Training Day - Camden
7th Safeguarding through Licensing - Bristol
8th North East Region Training Day - York
9th South West Region Training Day - Bath
12th Scrap Metal Dealers Act - Leicester
15th Scrap Metal Dealers Act - Newcastle-upon-Tyne
14th How to Inspect a Licensed Premises - Cambridge
14th North West Training Day - Manchester

January 2017
25th Safeguarding through Licensing - Manchester
26th Safeguarding through Licensing - London

February 2017
8th Wales Region Training Day - Llandrindod Wells
9th-10th Public Safety at Events - London

March 2017
15th North West Training Day - Preston
20th Practical Taxis - Rushcliffe

March 2017 cont.
21st-24st Professional Licensing Practitioners Qualification - Nottingham
28th-29th Zoo Licensing - Bristol

April 2017
24th-25th Investigation through to Trial - Birmingham

May 2017
9th-12th Professional Licensing Practitioners Qualification - Birmingham

June 2017
7th Wales Region Training Day - Llandrindod Wells
14th North West Training Day - Manchester
21st National Licensing Day - Stratford-upon-Avon

September 2017
13th North West Training Day - Preston

October 2017
11th Wales Region Training Day - Llandrindod Wells

November 2017
15th-17th National Training Conference - Stratford-upon-Avon

Cultural activity and inclusion – the case for a licensing objective

Live music is still discriminated against by licensing, argues **Tom Kiehl**. Unless "the promotion of cultural activity and inclusion" becomes a positive licensing objective, an extremely valuable part of our heritage will suffer ongoing decline and local communities will pay the price

The existing licensing objectives under s 4(2) of the Licensing Act 2003 reinforce perceptions that entertainment regulated under the Act is something to be controlled, rather than enabled. That the Act does nothing to specifically encourage cultural participation and enjoyment is a missed opportunity given the importance of the Act to making events and activities happen. The lack of a positive licensing objective to support provision for entertainment can maintain prejudices between licensing authorities and licensees about their respective motivations. It is time for a change of approach.

The House of Lords is currently conducting a post-legislative scrutiny inquiry into the operation of the Licensing Act 2003. UK Music, the umbrella body for the commercial music industry, will be arguing during this inquiry that consideration should be given to the introduction of a new licensing objective - "the promotion of cultural activity and inclusion". This would sit alongside the other licensing objectives and assist local authorities when discharging their functions. The timing of such a change is right given Parliament is increasingly becoming convinced of the case for extending the number of licensing objectives. The Policing and Crime Bill, currently before the House of Lords, is being used by some peers to argue for new objectives in areas such as public health and disability.

The extent to which entertainment is regulated by the Act has been a matter of some debate since the legislation was first introduced to Parliament on 14 November 2002. In particular for music, the abolition of the "two-in-a-bar" rule and its replacement with a "none-in-a-bar" approach was seen as a regressive step that could hinder the new Act's potential for live music.

Over the past decade, attempted solutions to strengthen entertainment have centred on amending the exemptions in Schedule 1 Part 2 of the Act. Most significantly, amendments to reduce the scope of activities that may be considered regulated entertainment began with the Live Music Act 2012 and concluded with the Legislative Reform (Entertainment Licensing) Order 2014. I was working in the House of Lords at the time and was fortunate enough to play a significant part in achieving these reforms, as well as monitoring their impact afterwards.

While it is difficult to fully assess the impact of these deregulatory measure, there is reason to believe they are making a difference. The Government's most recent entertainment licensing statistics indicate overall premises licence applications have increased by 1.3% and during the same period (which happened to be the first full year of operation of the Live Music Act) there had been a 1.5% decrease in applicants seeking the need to apply for the provision of live music.[1] The same period saw a 5.9% decrease in the number of club premises certificates seeking permission for live music.[2] These decreases can be seen as attributable to fewer premises needing permission for entertainment, particularly given that more premises licences are being granted overall. However, it is hard to draw a definite conclusion that deregulation has resulted in more live music.

Perhaps the greatest success of these reforms from the last government is that they have reduced costs and complexity for small-scale entertainment events, as well as tidied up primary legislation and how it interacts with statutory guidance. This is because licensing is, sadly, still seen as a barrier to entertainment provision despite these legislative attempts. Operating music venues within London have shrunk by 35% in the past eight years.[3] These problems are not unique to the capital, with venues in Birmingham, Manchester, Edinburgh, Glasgow, Bristol, Plymouth, Newport and Swindon, to mention just a few, having either closed or had considerable threats of closure placed on their businesses in recent years.

Grassroots music venues provide an important mechanism

1 https://www.gov.uk/government/publications/entertainment-licensing-2014/entertainment-licensing-statistics-2014.

2 https://www.gov.uk/government/statistics/entertainment-licensing-2014.

3 https://www.theguardian.com/uk-news/2015/oct/20/save-londons-live-music-venues-city-wide-campaign-launched.

for talent development and means for artists to cultivate skills and access audiences. In 2015 there were 5.6 million visits to UK small venues, generating £231 million in spend in the process.[4] However, the dip in the live sector's overall performance in 2015, as reported in UK Music's annual *Measuring Music* report, is attributable to a decline in concert revenue from grassroot music venues.[5]

Restrictive licensing laws are often cited as a contributing factor in venue closures. It is not the only issue, with prohibitive business rates and planning high up the list too. Even then, licensing is a significant factor as planning law interacts with it. Consent for a new development can cause licensing problems further down the line for existing venues owing to complaints from new residents.

Research conducted by the Music Venue Trust, reported by the Mayor of London's Music Venue Taskforce,[6] demonstrated that one London venue has over 70 separate conditions on its licence. Another has its capacity set at the same level as before the smoking ban, despite the risk of fire now being reduced. We have been made aware that conditions related to music are still featuring on some small venue licences despite the fact they should be benefiting from the recent entertainment exemptions.

The taskforce's report provided further evidence that simple licensing conditions can have a butterfly effect which can ultimately lead to a venue's closure. The example provided concerned a condition on a licence for additional security in relation to music.[7] This would be an additional cost for the venue and result in less profit per event. Less profit means a venue's ability to attract quality acts will be reduced and therefore fewer events taking place. Coupled with being subject to often prohibitive business rates and vulnerable to developers moving nearby, the challenges of operating a music venue have never been so great.

The new Mayor of London, Sadiq Khan, is seeking to address these challenges in a number of ways, principally the creation of a Night Czar to support the growth of the night-time economy and the establishment of a Music Development Board, which would aim to bring industry and licensing authorities together.

Fundamentally, "the promotion of cultural activity and inclusion" is necessary as licensing authorities rely on the existing objectives when assessing complaints and applications. Without a positive objective when responding to applications or complaints related to entertainment, licensing authorities are not encouraged to acknowledge the economic, cultural and social benefits of these activities to local communities.

Live music is a key ingredient to what makes the UK music industry the success that it is. It contributes almost £1 billion in GVA and employs over 25,000 people.[8] A total of 27.7 million people enjoyed live music events in 2015.[9] Music tourists to festivals and concerts generated £3.7 billion in spend in 2015.[10] Across the nations and regions of the UK, areas such as the East of England, North West, Scotland, South West and South East all contribute hundreds of millions of pounds in music tourist spend. Live music supports local economic growth.

Beyond pure economics, music also has an intrinsic cultural value. In *The Cultural Value of Live Music from the Pub to the Stadium: Getting Beyond the Numbers* Behr, Brennan and Cloonan examine the relationship between venues and the live music ecology.[11] They argue that music venues should be recognised alongside high culture when defining publicly-funded culture. The academics suggest these spaces feed into an area's local character and provide the seed-bed from which its musical reputation grows.

The social benefits of engagement in entertainment activities is supported by the findings in the most recent DCMS Taking Part survey:[12] 60% of respondents were consistent participants in the arts, far greater than in any other category measured by the survey. Appetite for the arts and entertainment manifests itself in public well-being.

Despite music's social, cultural and economic benefits, the Licensing Act's existing objectives specifically made regulation of live music a public order issue associated with nuisance, crime and disorder, public safety and protection from harm. The fact that failure to have a licence for music could potentially lead to criminal sanctions and penalties (such as large fines and terms of imprisonment) reinforces

4 http://www.ukmusic.org/research/music-tourism-wish-you-were-here-2016/.

5 http://www.ukmusic.org/research/measuring-music-2016/.

6 https://www.london.gov.uk/sites/default/files/londons_grassroots_music_venues_-_rescue_plan_-_october_2015.pdf.

7 https://www.london.gov.uk/sites/default/files/londons_grassroots_music_venues_-_rescue_plan_-_october_2015.pdf.

8 http://www.ukmusic.org/research/measuring-music-2016/.

9 http://www.ukmusic.org/research/music-tourism-wish-you-were-here-2016/.

10 http://www.ukmusic.org/research/music-tourism-wish-you-were-here-2016/.

11 http://livemusicexchange.org/wp-content/uploads/The-Cultural-Value-of-Live-Music-Pub-to-Stadium-report.pdf.

12 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/519629/Taking_Part_Year_10_longitudinal_report_FINAL.pdf.

negative perceptions within licensing authorities.

A licensing objective for "the promotion of cultural activity and inclusion" would not open the floodgates but would provide a suitable test for licensing authorities to judge an application or appeal by assessing the wider public good and happiness that an event or venue may create.

The recent revocation of iconic London nightclub Fabric's premises licence has been well documented with over 150,000 people signing a petition seeking the intervention of the Mayor of London. I would not want to speculate that a fifth licensing objective along the lines I am arguing for would have resulted in a different outcome in this particular instance. However, I am certain that if this objective was in place then Islington Council would have had to be more mindful of the strength of feeling about Fabric and justify its decision in terms of the venue's impact on public enjoyment.

More widely, the Licensing Act 2003 is the wrong vehicle to control live music and entertainment given that other legislation largely does this job already. Other Acts of Parliament provide a basis for regulating events and festivals, making additional licensing conditions unnecessary. The Environment Protection Act 1990 makes provision for noise abatement notices. The Control of Pollution Act 1974 sets restrictions around the timings of loud speakers. The Regulatory Reform (Fire Safety) Order 2005 ensures fire safety resides with the fire service and away from licensing authorities. Entertainment events are classified as work activities and so benefit from the protections within the Health and Safety at Work Act 1974. The Anti-social Behaviour Act 2003 contains powers to disperse groups. While music remains a licensable activity a new positive licensing objective would bring balance and prevent administrative creep. When discharging their functions, licensing authorities should do so with regard to the benefits of the activities they are regulating.

The UK is not alone in these challenges. Global music industry body the IFPI and Music Canada produced a report, *The Mastering of a Music City*, which analysed how cities across the world can take steps to develop their music economies.[13] The report details restrictive and confusing licensing laws that prevent the viability of music venues and performance in Australia, Canada and Germany.

The UK creative industries contribute a massive £84 billion[14] to the UK economy, and there exists a huge opportunity to support it at its very basic level to provide further growth and societal benefits. Recalibrating legislation in the interests of enabling cultural activities to happen can achieve that aim.

Tom Kiehl, Director
Government and Public Affairs at UK Music.

13 http://www.ifpi.org/downloads/The-Mastering-of-a-Music-City.pdf

14 https://www.gov.uk/government/statistics/creative-industries-economic-estimates-january-2016

Institute of Licensing News

Volume 16 of the *Journal of Licensing* coincides with the twentieth National Training Conference in the twentieth year of the Institute of Licensing, which started life in 1996 as the Local Government Licensing Forum!

As usual, the November edition is provided as part of the delegate pack to all delegates at the National Training Conference (NTC), which this year takes place at the Holiday Inn, Stratford-upon-Avon, and neatly ties in with another anniversary – it is 400 years since the demise of Stratford-upon-Avon's most famous resident, William Shakespeare. This is the first time the NTC has taken place in Stratford-upon-Avon and we are very much looking forward to a packed three days with excellent speakers and sessions throughout.

House of Lords Select Committee – Review of the Licensing Act 2003

By far the biggest consultation this year has been the House of Lords Select Committee review of the Licensing Act 2003 and the call for evidence issued by the committee as part of the process.

The IoL consulted members and received over 300 responses to the online survey which replicated the questions in the committee's call for evidence. Further information about the results of the survey and the IoL's written response to the committee is set out on pages 50-54.

On 6 September our Chairman, Daniel Davies, attended the House of Lords Select Committee to give evidence as part of its review of the Licensing Act 2003, looking at the impact of the Act and proposals for the future. Daniel, who was accompanied by our Vice-Chair, Gary Grant, provided evidence based on the survey we asked our members to contribute to.

The Select Committee is the most significant inquiry into the workings of the Licensing Act since it came into force over a decade ago. Chaired by Baroness McIntosh of Pickering, its reporting deadline is 31 March 2017.

Safeguarding through Licensing conferences

Following on from the success and feedback from the "Safeguarding through Licensing" conferences held last year, we are looking forward to a further series of conferences in December and January which will take place in Bristol (7 December), Manchester (25 January) and London (26 January).

This is a hugely important consideration in licensing which sadly is still very much in evidence, and an area where licensing can play a powerful role disrupting and preventing sexual exploitation of children and vulnerable adults.

We will be hearing from expert speakers who will examine the realities of what is happening across the country, consider the tools available through licensing to make a difference and hear about local initiatives and case studies.

National Licensing Week 2016

We were delighted to launch the inaugural National Licensing Week in June this year. The aim was to promote awareness of the role of licensing and to bring together licensing practitioners in all areas of licensing to celebrate the important and often invisible (to the public at least) role that licensing plays in everyday lives.

National Licensing Week 2016 was very well received, with a number of activities taking place locally and nationally, including various job swaps, local joint visits and initiatives, including:

Bournemouth Council Licensing Officers Sarah Rogers and Michelle Fletcher swapped jobs with James Maidment, manager of Canvas, and Victoria Sheppard, manager of Halo, both licensed premises with the Borough.

Victoria said: "Stepping into the shoes of licensing gave me a lot of insight into the pressures of the licensing role and the responsibilities of so many licensable venues they have to manage. Seeing and understanding the relations between licensing, environmental health officers, police and emergency services each week gave me a better understanding of how they harvest information about each licensed unit and utilise that information to enforce the four licensing objectives. It was a great opportunity to get to visit another premises from a licensing point of view and appreciate the list of requirements to be met by the venue. I thoroughly enjoyed working with Sarah and Michelle."

Central Bedfordshire Council and **Carmarthenshire County Council** were notably active in raising awareness of National Licensing Week, with many email bulletins, media reports, and use of social media to publish information about licensing and what their officers were doing during the week.

On Day Two (the Gambling Day), the **Devon Licensing Officers Group** undertook a training session for licensing

officers across Devon on the topic of Gambling Act Risk Assessments - a requirement which came into effect on 6 April 2016. Sixteen officers attended an excellent training session presented by Richard Nokes (Gambling Commission's Compliance Manager SW England). The training included areas such as the expectations on operators, when assessments must be conducted, and what they must include. A workshop session was included to give practical training for officers in the critical evaluation of sample risk assessments (in this case assessments for adult gaming centres, bingo and betting establishments were used), with the aim being to increase levels of consistency across the county.

Also on Day Two, Briony Williamson, Licensing Officer at **Shepway District Council**, led the Gambling Day, with Jane Blade, the local Compliance Manager for the Gambling Commission, visiting adult gaming centres and betting shops in the district. It was an excellent opportunity covering everything from the varying categories of gaming machines, safeguarding young and vulnerable people, illegal sub-division of premises, average percentage payouts and fixed odds betting terminals. The managers of the premises visited talked about their membership of BACTA (British Amusement Catering Trades Association), which aims to improve the image of the industry, encourage good practice and create an optimal trading environment for all sectors.

These are just some of the many activities during the first-ever National Licensing Week. We were delighted with the response across the country and are grateful for everyone's input into what we hope will be the first of many Natinal Licensing Weeks. We are already planning the 2nd, which will take place from 19-23 June 2017.

For more information and how to get involved, visit the NLW website: http://www.licensingweek.org/ or alternatively email NLW@instituteoflicensing.org

A huge thank you to everyone who contributed to NLW 2016. We look forward to even more contributions and activity next year.

Team news

We are delighted to welcome back Jenna Parker, our Training and Qualifications Manager, who returned from maternity leave in October. With Jenna's return the IoL team will be at full strength and able to increase our focus on training and qualification development.

Regional news

There have been some personnel changes within the regions recently. Jane Blade has stepped down from her position as Regional Chair for London and the region will miss her dedication and the drive she has brought to the role. Leo Charalambides will be Acting Chair for the region until the AGM in March 2017.

In the North West, John Garforth makes a welcome return to the position as Regional Director allowing the role of Chair and Director to be split, with Kay Lovelady remaining as the Regional Chair. Tracy Brzozowski, who stepped down from her position as Regional Director earlier this year, has returned to the Regional Committee as a Regional Officer.

A big thank you as always to all our regional officers for their hard work and support.

Ian Webster FIoL 1956 – 2016

The Institute of Licensing is deeply saddened to hear that Ian Webster, formerly director of the IoL and South East Region Chair, lost his short battle with cancer on 3 September 2016.

Ian is a key figure in the Institute's history. As a founder of the South East region of the Local Government Licensing Forum (LGLF), he helped develop the region into the regional branch of the Institute. A key director for the Institute, he took a lead role in discussions with the Society of Licensing Practitioners leading to our amalgamation in 2004 following the LGLF transition to the Institute of Licensing in 2003.

Ian greatly assisted colleagues during the implementation of the Licensing Act with the authorship of the *Licensee's Guide to the 2003 Licensing Act*, and co-authored the *Concise Guide to the Licensing Act* alongside James Button and Jeffrey Leib (published in 2007). He also compiled the training for the Royal Town Planning Institute training programme for the Licensing and Gambling Acts.

Apart from providing training to over 90 licensing authorities and speaking at many national conferences and seminars, Ian was accredited by the Law Society and BIIAB to train on a range of licensing qualifications.

Regional Officer Focus

Yvonne Lewis, MIoL, Regional Chair for Wales

Most of my 20-plus years of adult life have been in and around licensing in some shape or form. At the tender age of 18, I joined a very small licensing section as a licensing clerk for taxis in my Welsh local authority – what a baptism of fire that was. Training truly was whatever your colleague decided to impart rather than anything structured, and only one computer, shared by all four of us, with a makeshift database as our aid!

As time went by, the section expanded, the computer work grew, emails arrived and soon we were able to access the internet, which took licensing to another level. We became involved in the Local Government Licensing Forum, and soon the networking opportunities grew. The LGLF later transformed in to the IoL and I found myself getting more and more involved with the regional duties to help out the then Chair.

Since those days, the IoL has grown immensely and we have a more formal structure in our Welsh Region with various roles carried out by a happy band of volunteers. We meet three times a year in the heart of Wales, Llandrindod Wells. To travel to the meeting takes most members between one and two and a half hours each way, passing lots of green pasture and more sheep than you can count. But they keep coming back, so I think we are getting some things right! Our only issue is attracting speakers put off by the poor road and rail links to the area, but we are continuously working on this issue, with regional officers making the most of the networking opportunities at the National Training Days and conferences, trying to entice volunteer speakers to come to our lovely part of the world to impart their immense knowledge and expertise (for free, if possible) to our members. We will get you here!

The IoL now provides structured training and networking opportunities that would be greatly missed if we didn't exist. So many friendships have formed over the years, not only within the region but nationally, and that really is priceless. Licensing is a passion and it is a breath of fresh air to see new starters coming along to our meetings to gain knowledge and expertise from those who may have a little more experience of similar issues. We really are a friendly bunch in the Welsh Region, always happy to welcome you in. Some say that the best part of our meeting is our "round robin" or any other business part at the end of the meeting – you never know what will be asked and it's great to see officers sharing opinions and expertise on how to tackle tricky situations.

I suppose it's fair to say that being a regional officer is hard work, often in your own time. But it is also very rewarding in many ways, offering knowledge, expertise, training, networking opportunities and, most of all, friendships that will last a lifetime.

If you would like to get involved in your region or find our more about who your Regional Officers are visit the homepage of our website **www.instituteoflicensing.org** and select your region from the list on the right hand side.

- EASTERN
- EAST MIDLANDS
- HOME COUNTIES
- LONDON
- NORTHERN IRELAND
- NORTH EAST
- NORTH WEST
- SCOTLAND
- SOUTH EAST
- SOUTH WEST
- WALES
- WEST MIDLANDS

Proportionality and licensing

When it comes to determining the precise legal test to apply when considering whether a given decision is proportionate, context is everything, writes **Charles Streeten**

Proportionality is a core concept in the determination of licensing applications. Paragraph 9.42 of the s 182 Guidance makes clear that a local authority's decision "should be evidence-based, justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve."

This begs the question, what constitutes a proportionate determination? In simple terms the message behind the Guidance is clear – don't use a sledge hammer to crack a nut (as one of my distinguished colleagues in chambers often puts it). However, when it comes to determining the precise legal test to apply when considering whether a given decision is proportionate, context is everything. This article considers proportionality in three different legal contexts: where rights guaranteed by the European Convention on Human Rights are engaged, under European Union law and under the common law.

Human rights

Article 1 of the First Protocol to the European Convention on Human Rights is sometimes referred to as the "blue chip" right because of the protection it affords commercial entities. A licence is commonly regarded as constituting a possession for the purposes of that article. This follows from the decision of the European Court of Human Rights in *Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309 where the court held that the economic interests licenced by the Swedish authorities, namely the running of a restaurant and the sale of alcoholic beverages, constituted a "possession" under the terms of the Convention. The crucial point is that the licences in that case could be marketed for consideration, ie they were transferrable. With this in mind the High Court subsequently held, in *R v Security Industry Authority ex p Nicholds and others* [2007] 1 WLR 2067, that existing permissions to work as door supervisors fell within the scope of A1P1; the permissions were taken to be assets with a monetary value that could be marketed for consideration and as such were "possessions" within the meaning of Article 1.[1]

The court was clear, however, that a licence which cannot be marketed should not be regarded as a possession. A number of cases support this position. In *X v Federal Republic of Germany* (1982) 26 DR 255 the Commission found that holding a driving licence did not amount to a property right and in *R v Waltham Forest Primary Care Trust ex p Malik* [2007] 1 WLR 2092 the Court of Appeal held that a doctor's inclusion on the list of practitioners authorised to work for the NHS was not a possession as it had no economic value. Following the reasoning in *Malik* the High Court has also held in *Cherwell DC v Anwar* [2011] EWHC 2943 (Admin) that hackney carriage and private hire vehicle licences are possessions as they lack independent economic value.

Nevertheless, where a licence can be transferred for consideration it will constitute a possession and A1P1 will be engaged. A1P1 is a qualified right which may not be interfered with "except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

The case law distinguishes between circumstances where a public authority deprives an individual of their property, and circumstances where they merely control the use of that property. Where a decision is merely to control the use of property, the state is not required to pay an individual compensation. However, where the decision is taken to deprive an individual of their property (eg, by revoking their licence) compensation is payable in all but exceptional cases. Exceptional circumstances will often include the promotion of the licensing objectives in the public interest. However, local authorities should be mindful that revocation of a licence (without the payment of compensation) is a draconian step and requires strong justification.

The proper test for determining whether a decision to deprive an individual of his property or to control its use is proportionate is that set out in the Supreme Court in *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39 where Lord Reed enunciated the following steps:

> It is necessary to determine:
> *(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right,*
> *(2) whether the measure is rationally connected to the*

1 It should be noted that in *Security Industry Authority v Stewart* [2007] EWHC 2338 (Admin) a different judge indicated that the "difficulties facing the contention [that the permission to work as door supervisors constitutes a possession] are mountainous". In that case, however, the court made no ruling on the matter as the measures taken by the local authority could be justified in any event.

objective,
(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

The test in *Bank Mellat* is most likely to apply where a local authority is reviewing an existing licence. Step one requires reference to the relevant licensing objective which will almost always be sufficiently important to justify some limitation on the protection afforded by the Convention. Similarly, the licensing regime expects that any restriction placed upon the licence is aimed at promoting the licensing objectives and the means will thus be connected rationally to the end.

Steps (3) and (4) present the greatest scope for disagreement. At review hearings and before the Magistrates' Courts on appeal, where revocation of the licence is on the table, those acting for operators will inevitably be at pains to suggest that the imposition of additional conditions would be sufficient to promote the licensing objectives and / or that there are other factors weighing in favour of preserving the licence that outweigh any public interest in revoking it.

While the former argument is more likely to succeed than the latter, it is important to remember that it is the substance of the decision (and not the procedure) that a court will consider if a claim for judicial review is brought. The fact that a public authority (ie, the Magistrates' Court or the licensing committee) may demonstrate that they had considered carefully the relevant convention rights will not preclude a successful challenge if the wrong balance has been struck (see *R (on the application of Begum) v Head Teacher and Governors of Denbigh High School* [2007] 1 AC 100). On the other hand, the absence of explicit evidence that a given right has been taken into account will not automatically result in a successfully challenge (*Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19).

In the context of licensing reviews, the fact that A1P1 is engaged therefore opens some scope for arguing that the wrong balance has been struck on an application for judicial review. In practice, however, such a claim will rarely succeed and the courts extend a wide margin of appreciation to local authorities and magistrates in determining what constitutes a proportionate interference with the licensee's rights.

European Union law

It is not uncommon to find reference to *R v Secretary of State for Health Ex p. Eastside Cheese Co* [1999] ALL ER (D) 710 in licensing appeal skeleton arguments. While the words of Lord Bingham in that case undoubtedly provide a useful general guide to what "proportionality" means, it must be remembered that *Eastside Cheese Co* was an EU law case and is concerned with the test to be applied where a right guaranteed by EU law is interfered with.[2] In this regard the principle of proportionality is now enshrined in EU law by Article 5(4) of the Treaty on European Union which states "under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

There are a host of different contexts in which rights guaranteed by EU law are engaged, including where national measures derogate from fundamental freedoms. Refusal of a licence will constitute a restriction on the right to freedom of establishment guaranteed by Article 49 of the Treaty on the Functioning of the European Union. In such cases the Court of Justice of the European Union has long established case law on what constitutes a proportionate derogation. In *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 the CJEU explained that:

National measures liable to make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: They must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

A notable instance where an operator argued that a measure was a disproportionate interference with the fundamental freedoms guaranteed by EU law arose in 2013 where counsel for Shell UK Oil Products argued before a local authority's licensing committee that s 176 of the Licensing Act 2003 failed to meet the criteria imposed by regulation 15 of the Provision of Services Regulations 2009 and was therefore a disproportionate restriction on the freedom of establishment. Referring to a report recorded in Hansard of a statement in the House of Commons to the effect that "there is no evidence that… the possession by garage suppliers of a licence had led to any drunken driving", counsel for Shell suggested that there was no rational justification for the restriction imposed by that section. While the sub-committee

2 In *Eastside Cheese* Co the right in question was the free movement of goods guaranteed by Art. 34 EC (as it then was).

on that occasion proceeded to consider the substantive application for a premises licence, the potential to bring this matter before the courts remains and is a telling example of the potential relevance of EU proportionality in licensing cases.

Common law

The emerging doctrine of common law proportionality has been brought into sharp focus by two recent supreme court decisions: *Kennedy v Charity Commission* [2014] UKSC 20 and *Pham v Secretary of State for Home Department* [2015] EWCA Civ 616. Both cases concerned the intensity with which the reviewing court should scrutinise a first instance decision when fundamental rights are in play.

In *Pham* Lord Mance said:

> *Proportionality is - as Professor Dr Lübbe-Wolff [former judge of the Bundesverfassungsgericht which originated the term's modern use] put it in The Principle of Proportionality in the case-law of the German Federal Constitutional Court (2014) 34 HRLJ 12, 16-17 - "a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction", "just a rationalising heuristic tool". She went on: "Whether it is used as a tool to intensify judicial control of state acts is not determined by the structure of the test but by the degree of judicial restraint practised in applying it." Whether under EU, Convention or common law, context will determine the appropriate intensity of review (see also Kennedy, para 54).*

This is important. Lord Mance makes clear that proportionality is necessarily contextual. In judicial review, analysing the proportionality of a decision provides a prism through which to scrutinise the weight given to and balancing of competing factors. How intensely the court will scrutinise a decision is not dictated by the mere requirement for proportionality; rather proportionality requires different levels of intensity depending on the importance of the right being considered. In *Pham* Lord Mance stated that the common law as well as ECHR and EU law recognises fundamental rights (in Pham, the right to citizenship). A right the English court have long recognised is the right to the peaceful enjoyment of possessions, affirmed by the seminal constitutional case of *Entick v Carrington* [1765] EWHC KB J98 in which Lord Camden stated:

> *The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.*

For all the niceties that emerge from the jurisprudence, it is common sense that to deprive someone of their property requires good and substantial justification. In many ways the prisms of EU and ECHR law are unnecessary. No less a member of the English Bar than Mahatma Ghandi said that common sense is the realised sense of proportion; and ultimately, the requirement for proportionate decision-making is just a requirement that decision makers act sensibly. At best, decided cases provide a roadmap for assisting them to do so.

Charles Streeten, MIoL
Barrister, Francis Taylor Buildings

Evaluating the public health impacts of local licensing policies

Matt Egan, an associate professor at London School of Hygiene & Tropical Medicine, considers why local alcohol licensing is a public health concern and suggests some ways forward for developing a convincing evidence base

Alcohol is a major public health concern. According to the World Health Organisation it is a causal factor in over 200 diseases and conditions.[1] The Government has estimated that alcohol-related harms in England and Wales cost around £21 billion a year, including £3.5 billion a year of NHS costs.[2] [2]The alcohol licensing system plays a crucial role in regulating alcohol sales at a local level within the UK. Because of this role, alcohol licensing has attracted the interest of the public health community (a broad term that includes researchers, policy-makers and health professionals concerned with population health). This article considers how local licensing initiatives that can potentially impact upon population health can be evaluated to better understand their impacts and inform decision-making.

Recent years have seen a range of locally implemented initiatives and activities that have the potential to affect health by changing practices around alcohol sales and availability. Furthermore, legislative changes, such as licensing reforms in England and Wales (2003) and Scotland (2005), and the return of English Public Health services to local authority responsibility (2013), have appeared to encourage cross-sectoral working between local public health and licensing teams – at least in some local authorities.[3]

The types and delivery of alcohol initiatives varies by area, as local authorities have considerable leeway to tailor strategies to meet local needs. For example, some local authorities place levies on certain premises selling alcohol after midnight, some seek to increase powers to reject licence applications in areas known to have alcohol-related problems and others encourage off-licences to voluntarily remove so-called super-strength beers and ciders from their shelves. Some combine a number of approaches.

Do these different, or combined, activities actually improve health? Are there any problems with their delivery that could potentially be remedied to improve impact? Do some people benefit from them more than others? It is often not easy to find decisive answers to these questions, particularly when considering new initiatives. As innovation necessarily involves a move from tried and tested practices into less charted territory, the existing "evidence base" may not include many or any robust studies of new initiatives. To understand if and how such initiatives work, innovators and early adopters need to consider how their own activities can be evaluated.

Research by Frank de Vocht and colleagues has found that more "intensive" local licensing policies are associated with area-level reductions in alcohol-related hospital admissions.[4] However, individual local authorities may still want to know whether the specific initiatives or combinations of initiatives being delivered in their area are having the desired impacts. This suggests a need for local evaluations – but we know from previous research and conversations with local authority professionals that evaluations are sometimes perceived to be impractical, expensive or simply confusing.[5]

Below, I consider some of the barriers to conducting local evaluations. I refer to some of the problems involved with evaluating a particular local licensing activity - cumulative impact policies (see the panel for a description). However, many of the points made can be transferable to other types of licensing (and non-licensing) initiatives. The aim here is not to present an evaluation guide – there are already many of these in circulation. Rather, the article is intended for those starting to grapple with the sometimes difficult task of evaluation – describing some of the problems that they may face and then pointing to a way forward.

1 World Health Organization. *Global Status Report on Alcohol and Health.* Geneva: World Health Organization, 2014.

2 Institute for Alcohol Studies. *The Economic Impacts of Alcohol.* London, 2016.

3 Foster J, Charalambides L. *The Licensing Act 2003: its uses and abuses 10 years on.* London: Institute of Alcohol Studies, 2016.

4 de Vocht F, et al. *Measurable effects of local alcohol licensing policies on population health in England.* Journal of Epidemiology and Community Health, 2015;70:231-7.

5 McGill E, et al. *Trading quality for relevance: non-health decision-makers' use of evidence on the social determinants of health.* BMJ Open; 2015;5(4):e007053.

What are cumulative impact policies (CIPs)?

CIPs were first described in guidance relating to the Licensing Act, 2003, and by 2014 there were over 100 local authorities across England and Wales with CIPs.[6] Local authorities implementing CIPs define specific localities where alcohol harms have been identified as a particular problem. These localities are sometimes referred to a cumulative impact zones (CIZs). Licence applications within those zones are assumed likely to be detrimental to statutory licensing objectives around crime and disorder, public safety, public nuisance and child protection, unless the applicants can demonstrate otherwise. This is a reversal of the usual burden of proof in licensing decision-making, where the default assumption is that a requested licence will not compromise any of the four objectives unless opponents can make a good enough case to suggest that it will be detrimental. (Note that in Scotland there is a fifth licensing objective relating specifically to public health, but a similar objective has yet to be put in place south of the border.)

Evaluation challenges

CIPs are an example of what is sometimes called a "complex intervention". Local authorities can choose whether or not to have them, and can tailor policies for local circumstances. The planning and delivery of CIPs may be led by local licensing teams but is also likely to involve a range of other stakeholders including public health, trading standards, police, elected representatives and the public – and of course commercial interests also engage with delivery either as lobbyists or licence applicants.

As a result of this complexity there is no "standard version" of a CIP. Some local authorities implement CIPs that cover both on- and off-licence premises, while some only cover one or the other. Local authorities with CIPs can have one or several cumulative impact zones and the size of those zones can vary from an entire city centre to a single street or block.[7] CIPs tend to target particular types of premises or licence applications (eg, traditional "stand-up" bars, large night clubs), but again this targeting varies by local authority.

This local variation in form can pose a challenge to a model of evaluation that centres around implementing the same intervention in different sites to see if it leads to similar measurable effects. Local variation is less problematic if the evaluation takes a more in-depth case study approach to understanding how particular CIPs operate within their own specific local context (or contexts, if the evaluation involves more than one area).

Besides differences in form, CIPs can also vary in terms of intervention aims (or what some evaluators call "function"[8]). This presents a further challenge for evaluators: identifying markers of success when aims are varied, unclear or specific to different stakeholders. While all CIPs are designed to support statutory licensing objectives, there are also locally specific aims such as attempting to tackle a particular hot spot for night-time disorder, or encouraging local regeneration and improving an area's reputation. The aims of a CIP may evolve over time and may vary depending on who you ask. Public health teams inevitably prioritise health improvement, which could include both acute injury and longer term health conditions, while licensing may focus on statutory objectives around crime and disorder (a public health licensing objective in England could potentially encourage a greater alignment of aims between public health and licensing, although some degree of alignment is already possible).

A third challenge relates to the degree to which evaluations should or can focus on impacts (what works?), processes (how does it work?) or both. Stakeholders that colleagues and I have spoken to often recognise the value of obtaining robust evidence of health impacts, but also feel that the kind of studies that can deliver such evidence are difficult to conduct. Commonly cited barriers include costs, difficulties finding a suitable comparison group to give the study a controlled design, and health outcomes that can take a long time to manifest and may be difficult to measure or attribute to a specific intervention. Process evaluations that examine what factors help or hinder intervention delivery may appear easier to conduct but it is also possible to underestimate the resources and expertise required for a comprehensive evaluation of this kind.

Ways forward

How do you evaluate an intervention that looks different in every location it is delivered, that has multiple or contested aims and markers of success and has potential health impacts that may be difficult to identify and measure?

The first and most important piece of advice is that local stakeholders and researchers need to think about the answer to these questions collaboratively.

Decisions about study design and methods are often not the best place to start. Instead, it is often useful to begin by focusing on the specific decision(s) that the evaluation is

6 http://www.alcoholpolicy.net/2015/01/licensing-figures-2014-premises-down-slightly-but-reviews-still-falling-and-questions-over-re-balanc.html.

7 Egan M, et al. *Local policies to tackle a national problem: Comparative qualitative case studies of an English local authority alcohol availability intervention.* Health and Place, 2016;41:11-18.

8 Hawe P, et al. *Theorising interventions as events in systems*. Am J Comm Psych; 2009; 43:267-276.

intended to inform. If local authority professionals are unsure or concerned about how to implement the intervention then a process evaluation that gives early feedback on implementation barriers and facilitators is the obvious way to proceed. This could take the form of a comprehensive (and potentially resource intensive) study or it could focus on a particular issue or barrier to delivery that stakeholders have already begun to identify.

Extra resources to conduct an impact evaluation can be considered when there is reason to be confident that implementation is feasible and if there is a plausible theory of change linking the intervention to the outcome(s) of interest. These conditions may not always be present when an initiative is initially delivered, as the form, and sometimes even the aims of the initiative may change as it beds in.

Researcher discussions with stakeholders can help to address any uncertainty about the aims and form of the intervention, as well as the means by which it is likely to lead to impacts (this is what is meant by "theory of change"). A common approach to examining aims, form and theory of change is to take a step by step approach: hypothesising pathways from the key activities that constitute the initiative, to intermediary and longer term changes that could plausibly result from those activities. A simple example based on CIPs could go something like this:

- CIP is a licensing intervention so we assume that the initial step towards impact will involve changes to licence applications and decisions (but what kind of changes? Number? Type?).
- If such changes occur, this could impact on the alcohol retail environment in that area (but how? By affecting outlet density? By affecting types of premise or business practices?).
- Changes to alcohol retail could affect customer behaviours (such as alcohol purchasing, consumption, alcohol related crime, disorder and injury).
- It may also impact upon longer term health conditions attributable to sustained alcohol consumption (is this plausible? Is it measurable within the study time period?).

So the stages here go from changes to licensing decision-making, which could lead to environmental change, which could prompt behavioural change and then health outcomes. Working through the logic of an intervention in this way can often be helpful to decision-makers in its own right – as it helps clarify what needs to happen, which impacts seem plausible and where there might be potential problems.

Evaluators often find it useful to map these stages in diagrams known as a logic model. For complex interventions it may also be desirable to continue with a more comprehensive series of interviews and document analysis to build on and refine the initial logic model. Underpinning this approach is an understanding that different local contexts shape the delivery and impacts of complex interventions: something that evaluations seek to explore. Hence, a multi-site study may generate different theories of change – and so different models - for each site.

It can be tempting when mapping out theories of change to try and include every possible type of impact that can be hypothesised. This can be thought provoking but resources for evaluation are finite (sometimes very much so) and so there is a need to identify which parts of the theory the evaluation needs to focus on to inform decisions.

Researchers may be able to help with the selection of relevant outcomes by offering guidance on what can be measured, with associated costs, and whether a measurable change in a particular outcome is plausible given initial understandings of how the initiative is intended to work and on what time scale. Given the precept to avoid harm, it is also good practice to consider how the evaluation might detect unintended and adverse consequences or how it might affect specific social groups in different (perhaps inequitable) ways.

Concurrently with all these decisions, there is a need to develop research questions into specific, measurable and achievable aims and objectives. At this point an experienced researcher should be able to suggest a study design and methods that are appropriate to the aims – these may be quantitative, qualitative or a mixture of both. There are evaluation guides available to help the selection of appropriate study designs and methods.[9, 10, 11 & 12]

Conclusion

This article has sought to describe some of the barriers and ways forward for developing an evidence base to inform decision-making around alcohol licensing. It has been prompted by recent developments encouraging greater public health involvement in licensing. The health focus reflects the research interests of the author, but many of the points made are also relevant to stakeholders with other interests such as crime or public sector management. I have

9 Moore G, et al. *Process evaluation of complex interventions:* Medical Research Council guidance. MRC Population Health Science Research Network, London, 2014.

10 Craig P, et al. *Using Natural Experiments to Evaluate Population Health Interventions*. Glasgow: Medical Research Council; 2011.

11 Craig P, et al. *Developing and Evaluating Complex Interventions: New Guidance*. Glasgow: Medical Research Council; 2008.

12 Roberts K, et al. *Standard evaluation framework for dietary interventions.* National Obesity Observatory, Oxford; 2012.

not tried to summarise extensive methodological guidance offered elsewhere. Instead, I offer what I hope is pragmatic advice on an approach to improving our understanding of processes and impacts in an area of policy that is innovative and relevant to a major determinant of population health.

Matt Egan
Associate Professor, London School of Hygiene & Tropical Medicine

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Be prepared for a storm

Getting caught up in a storm is every outside event manager's nightmare, but there are steps you can take beforehand to minimise the fall-out, as **Julia Sawyer** explains

You spend months planning for that big event. You hold numerous operational meetings, contractor briefing sessions, resident meetings, safety advisory group meetings. You get asked if you have a weather contingency plan, what wind speeds can different structures take. You carry out a desktop exercise and role play the possible scenarios with all of the key contractors around the table and discuss what action you would take if it was a *what if* situation. But nothing prepares you for when it actually happens, and you get caught in a severe storm with 20,000 people at an event, as I have done. It is a very scary situation to be in.

We are no strangers in the UK to wild and unpredictable weather so event organisers should always be prepared for the worst, no matter what season we are in. But how prepared can you be? There are so many myths surrounding what you should and shouldn't do in a storm situation, it is difficult to get any real accurate guidance and that is because no one really knows what will happen. Weather is a force of nature, a force majeure in such varying degrees that no one can predict to what extent and in what ways it might act.

This article discusses what should be included in a weather contingency plan, specifically looking at lightning, and considers the many steps that can be taken to help you if you ever get caught in a very tense and unpredictable situation.

Lightning

Lightning is an electric current. When the ground is hot, it heats the air above it. This warm air rises. As the air rises, water vapour cools and forms a cloud. When air continues to rise, the cloud gets bigger and bigger. In the tops of the clouds, temperature is below freezing and the water vapour turns into ice. The cloud now becomes a thundercloud. Lots of small bits of ice bump into each other as they move around. All these collisions cause a build-up of electrical charge. Eventually, the whole cloud fills up with electrical charges. Lighter, positively charged particles form at the top of the cloud. Heavier, negatively charged particles sink to the bottom of the cloud. When the positive and negative charges grow large enough, a giant spark - lightning - occurs between the two charges within the cloud.

Approximately 300,000 lightning strikes hit the ground in Britain each year with 30 percent of reported lightning strikes causing severe damage. Each year 30 to 60 people are recorded as being struck by lightning, three of whom die on average.

The rule of thumb is that every three seconds of delay between a flash to thunder equates to a distance of 1 km, so where there's a 30 second flash-to-thunder time interval, the lightning activity is about 10 km away.

Lightning protection

People and animal are hit by lightning by a direct strike or by conduction. Lightning can travel long distances in wires or other metal surfaces. Metal does not attract lightning, but it provides a path for the lightning to follow. Most indoor lightning casualties and some outdoor casualties are due to conduction. Whether inside or outside, anyone in contact with anything connected to metal that extends outside is at risk.

Lightning protection (also known as earthing) provides a safe route to earth for a lightning strike, thus preventing the lightning injuring anyone or damaging a building or setting fire to it. It does this by providing a path (a protective conductor) for a current to flow to earth. It is often mistakenly thought that lightning will only strike taller buildings. For buildings, the rolling sphere method is used to measure whether lightning protection is necessary. This uses an imaginary sphere 60m in diameter. The sphere is "rolled" around the building or group of buildings. Lightning protection is needed wherever the sphere touches. *BS EN62305* provides more detail on how the rolling sphere method is used.

In assessing outside eventualities, all high-risk structures, such as stages, scaffold towers, seating stands, should be earthed by a competent electrician.

If the lightning causes a surge of power, the electrical systems may fail as they are fitted with a protective device (fuse or circuit-breaker) which will switch off the electrical supply. This may affect communications on site.

What you should have in place

Technical Standards for Places of Entertainment states:

- The premises should be designed and constructed, maintained and managed so as to ensure the health

and safety and welfare of all the occupants.
- Adequate protection against lightning should be provided.

Several safety measures should be considered by the management team of an event, including:
- Early threat detection.
- Notification of affected persons.
- Evacuation to safe shelters.
- Re-assessment of threat levels.
- Resumption of activities.

The guidance states you should avoid the following, if possible: explosives magazines; munitions storage; flammable hydrocarbons and accelerants; standing near a lightning protection down-conductor, mast, or earthing system; communications towers, and tall metallic masts; any use of fixed-line telephones, especially corded headsets (cordless & mobile excluded); metal hair clips, metal clips on helmets, keys in pockets etc; umbrellas; small, unprotected buildings, barns, sheds; areas on tops of buildings; open fields, sports arenas, golf courses, car parks; swimming pools, lakes, seashores; areas near wire fences, clothes lines, overhead wires, pipelines and railroad tracks; standing beneath isolated trees, or touching or standing near any tree; riding/driving tractors or other open roof farm machinery, golf carts, bicycles, horse riding or motorcycles, non-metal top or open automobiles; contact with metal objects and electrical appliances; and hilltops and ridges

It is very difficult to avoid some of these things detailed above if the event is in an open field with limited facilities for shelter. This is when it is very important that the operational team knows the site and have had time to be familiar with the layout. When the incident hits, the team need to be as prepared as they possibly can be as conditions change very rapidly.

Having the following in place will assist the team in assessing and responding to the situation quickly:
- A named person responsible for monitoring the weather and recording it on a daily basis first thing each day prior to opening the site to the public. Depending on what the forecast is and the conditions present, this may then need to be closely monitored throughout the day. That person is to notify the operations team should there be need for concern and any proactive action required. If severe weather is due, the person is to ring the local reliable weather station to get regular updates and feed that in to the control room.
- An event evacuation plan that the team have practised and discussed. So that each person is aware of their role and responsibility.
- A scribe to take an accurate log of the decisions made and at what time.
- Formation of a management team who will remain calm in high risk situations.
- Have secondary means of communication in place in case the radios should go down during the storm.
- Alert those on site who may need to take urgent action such as the electrician, the medical team, the artists on stage, the media team, the nearby hospital, the person who may need to make the public announcement (have one prepared that can be tweaked to suit the conditions.)
- Temporarily suspend the event on stage and / or outdoor activities and direct those persons to shelter when lightning is detected approaching or threatening an outdoor event.
- Unless in imminent danger, allow the public to do what they want to do. Some may choose to leave if they have no shelter and are only a day visitor; some may choose to go back to the campsite for shelter. A member of the operational team and security to use loud hailers at the exit gates to the campsites advising people to take shelter in their vehicles rather than the tents.
- Have regular updates from those on the ground giving feedback on the conditions from different points in the event space – it's very difficult to get a feel for how the conditions have altered when in the control room.

If the thunderstorm is above you (flash-to-thunder time of under five seconds), then the operational control team needs to minimise the risk of someone being struck, or affected by the indirect effects of lightning. As a precautionary measure this may involve:
- Keeping people away from large isolated trees.
- Evacuating the largest high-risk structures (these should be listed prior to opening to the public.)
- Forming exclusion zones around possible high-risk structures such as the stage and the barriers in front of the stage.
- Media messages being sent out advising on what the conditions are like on site and suggestions as to what the public should do.
- In the event that any person is struck by lightning, the Operations team is to be notified and the emergency procedure to be followed.

Should really poor weather persist the operational team needs to decide if the show should be cancelled and people advised to go home, or if there is enough contingency to shelter people or provide additional shelter quickly. This should be planned prior to the event so that additional

shelter can be called on immediately if required.

Before deciding the show can go on, re-assess the site conditions as effects of a storm may require some additional measures to be taken, such as track way placed in flooded / muddy areas. Structures need to be re-assessed to see if they have been damaged. Assess whether any exclusion zones need to be maintained.

Staff welfare should always be considered. Those who have spent time in the storm should be permitted to take time out and get warm dry clothing on. Form a rota so there is adequate cover for the event to run safely and allow people rest time.

Tough decisions to make

Balancing the commercial fall out with the cost of safety is a difficult judgement call. You don't want to spoil everyone's enjoyment, nor do you want to cause panic - but you do want people to be safe. Weather conditions can be forecast in the area of the event; a storm may be two miles away and not touch the event site. It's all about knowing when to make the right decision.

You may sometimes feel helpless when dealing with conditions out of your control. If a member of the public is acting irresponsibly and putting themselves and others at risk they can be ejected. If a piece of gas equipment is faulty, it can be removed from site. But you cannot control or predict how the weather will affect your site. You can only make that judgement on the day and act accordingly.

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Standardising local powers

Jeffery Leib argues that the many inconsistencies in local authority enforcement powers lead to uncertainties for businesses and are therefore in need of a standardising rethink

It is well-known that the licensing landscape is littered with inconsistencies and the ruins of previous good intentions no longer relevant to the modern world. Enforcing the jungle of legislation is even more difficult when considering the wide variety of means, methods and mechanisms available.

Having spent the last two decades writing licensing policies and enforcing licensing laws, I have come to the conclusion there is an argument for Government to introduce a standard and consistent form of local authority enforcement powers. At present, enforcement powers are embedded in the relevant parent statutes and also subject (quite correctly) to over-arching legislation such as the Police and Criminal Evidence Act 1984, the Regulation of Investigatory Powers Act and the Protection of Freedoms Act 2012.

This leads to considerable inconsistency in the way licensing schemes can be enforced. For example, it is an offence under s 73 of the Local Government (Miscellaneous Provisions) Act 1976 to obstruct, fail to provide information or give reasonable assistance to an authorised officer or constable, yet there is no right of entry to premises to check whether unlicensed taxi operations take place.

Conversely, ss 179 and 180 of the Licensing Act 2003 give authorised officers and constables a right of entry (and an offence to obstruct while exercising that power) but no power to require information or provide reasonable assistance. Yet those would actually be more useful in the context of licensed premises and the management of night-time economies, potential child sexual exploitation or crime taking place on licensed premises.

There are other examples, within street trading legislation for example, where several councils – Manchester, Reading and Southampton, among others - have promoted private Acts to allow officers the right to seize goods being traded unlawfully to prevent an immediate reoccurrence of the offence, but not in relation to, say, taxi offences or scrap metal dealers. There are very limited powers to deal with unlicensed charitable collections too (with only the police having power to demand evidence of a collector's identity for instance – see s 6 of the House to House to Collections Act 1939).

Some systems – such as the distribution of free printed matter under the Environmental Protection Act 1990 – can be dealt with by fixed penalty notices but a breach of a hackney carriage byelaw (such as not displaying a taximeter) can only be resolved using formal warnings, cautions or court proceedings that are disproportionate to the offence in issue. This route is again in contrast to breaches of private hire driver licences under s 51 of the 1976 Act that do not allow for a prosecution (or caution) for breaches despite the often-vaunted argument that hackney carriage and private hire drivers are essentially carrying out the same activities.

Certain offences (but not all) under the Licensing Act 2003, such as selling alcohol to under-age children, can be dealt with by way of fixed penalty notice, prosecution, licence review or temporary closure of the premises. But under-age gambling, on the other hand, can only be dealt with by prosecution or licence review.

There are probably many other examples which can also lead to uncertainty among businesses as to what to expect and how poorly run businesses will be treated in different circumstances. I have had innumerable conversations with businesses, members of the public and councillors to explain, for example, why an offending business will "get away with it" because there is no power to prosecute, or alternatively why the only power is to prosecute but it would not be appropriate and proportionate to do so for a relatively minor offence.

In my view there could be a standard and consistent set of local authority regulatory powers applicable to all licensing schemes that as a minimum should include:

- Powers for local authority officers to exercise their powers in relation to any licensed activities within their area. This will allow officers to use powers in relation to businesses licensed outside of their districts, particularly taxis, private hire vehicles, charity collectors and scrap metal dealers.
- A power to demand information that may reasonably be required in the exercise of their duties.
- An offence to refuse to provide information with safeguards should that information incriminate the person giving the information unless previously cautioned in line with the Police and Criminal

Evidence Act 1984 provisions.

- An offence to intentionally or recklessly provide false information that may be reasonably required.
- A power to provide reasonable assistance to a local authority officer when requested (which could be limited by reference to no expense being expected of the person required to provide assistance).
- An offence to obstruct a local authority officer in the exercise of their duties.
- Standard powers of entry to licensed premises or vehicles or where there is a reasonable suspicion of unlicensed activities taking place. This would require a revision to the Powers of Entry Code of Practise 2015 issued under s 48 of the Protection of Freedoms Act 2012.
- A standard power to inspect, take reasonable samples, remove for inspection or prevent the commission of further offences any article or document (subject to safeguards and compensation in relation to the protection of property rights).
- A power for a court to exclude any evidence obtained in breach of these powers.
- Power for the Secretary of State to issue a code of practice relating to the standard enforcement powers (in common with those under the Police and Criminal Evidence Act).
- The application of Part 3 of the Regulatory Enforcement and Sanctions Act 2008 to local authority licensing regimes to allow for monetary penalties, discretionary requirements and stop notices to be used. Better, more effective compliance could perhaps be gained by requiring entities to either stop activities that are causing harm to public safety or the environment or to put in place measures to prevent those hazards reoccurring rather than the blunt instrument of prosecution.
- A power (where not already available) for all licences to be reviewed while in force and for additional conditions to be added where necessary, reasonable and proportionate, subject to appeal to the Magistrates' Courts. This would again be in line with the call by the LGA to streamline and align licensing regimes.
- Repeal of previous enforcement provisions that are no longer applicable or relevant.

These powers would have to be set out in statute, but the licensing regimes to which they apply could be specified by regulation to allow for regimes to be added or excluded as requirements change over time.

Finally, there is disparity in the way contraventions can be disposed of by local authorities. Most offences are formally disposed of by way of simple caution or prosecution. Some regimes allow for licences to be revoked or not renewed, others provide an opportunity for them to be reviewed and/or for additional conditions and restrictions to be added (and this inconsistency is partly being examined in the LGA/BDRO's Rewiring Licensing project).

The arguments set out in this article primarily concern the mechanisms best needed to achieve compliance and enforcement. However, reform could also provide the opportunity to review outcomes and sanctions across the board as well – to clarify why there is a maximum of a level 2 fine on the standard scale for failing to notify a change of licence holder's name or address under s 33, Licensing Act 2003, for instance, but no corresponding provision under the Pet Animals Act 1951. The similar provision under the Scrap Metal Dealers Act 2013, by the way, is punishable by a maximum fine up to level 3. All of those offences could be dealt with by way of fixed penalty notice or equivalent mechanisms allowing for more targeted, effective, risk-based enforcement without the need for costly and time-consuming court intervention at a time of increasingly sparse resources.

These reforms can also enhance licensing officers' professionalism by stipulating only competent and trained individuals are able to exercise those powers, and that those competencies are regularly kept up to date.

A decade ago, Sir Philip Hampton's review (*Reducing administrative burdens: effective inspection and enforcement*) considered how to reduce unnecessary administration for business without compromising the UK's regulatory regimes. He advocated applying tougher and – crucially in the context of this article – more consistent penalties and stated that the few businesses (or indeed other entities) that persistently break regulations should face proportionate and meaningful sanctions. That, arguably, is not the landscape at present.

Before these powers could be implemented, the local authority sector would have to demonstrate that they could use them effectively and proportionately on behalf of their communities. It would need to rise to the challenge of being able to use them consistently and in partnership with the regulated sector and others. It is here that regulatory delivery could play a crucial role in setting standards and codes for local authority enforcement officers to follow in the interests of national consistency and building on the primary authority scheme.

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Illegal workers and licensed premises: the latest update

The Home Office, and local authorities, have new powers to deal with illegal immigrants, as some licencees will perhaps soon discover. **Caroline Daly** explains the new amendments to the 2003 Licensing Act

In August 2015, James Brokenshire MP, the then Minister for Security and Immigration, signalled that a new hardline approach in respect of "rogue employers" would "use the full force of government machinery to hit them from all angles". The Immigration Act 2016, which received royal assent on 12 May 2016, is a significant cog in the Government's so-called hard-hitting machinery aimed at tackling illegal workers.

The Act has introduced new offences of illegal working (s 34) and employing a worker having "reasonable cause to believe" that he or she has no right to work in the UK (s 35), both of which came into force on 12 July 2016.

The Government's perception that a significant proportion of illegal working takes place on licensed premises has lead to the 2016 Act's introduction of a number of amendments to the Licensing Act 2003.

The amendments (see s 36 and Schedule 4 of the 2016 Act) are not yet in force. The Home Office has indicated that the changes may be made in Spring 2017. They are summarised as follows:

- The Secretary of State will become a responsible authority, allowing the Home Office to make representations in relation to applications for premises licences.
- Applicants for premises licences or personal licences must be entitled to work in the UK.
- Premises or personal licences will lapse if the licence holder ceases to be entitled to work in the UK.
- In relation to personal licences, the list of relevant offences will include "immigration offences and immigration penalties".
- Immigration officers will have a right to enter licensed premises.
- An immigration officer will be entitled to issue an illegal working closure notice and close a premises for up to 48 hours if it is discovered that there is a person employed at the premises who is not entitled to work in the UK. Upon application to the Magistrates' Court, the premises may be placed under special compliance requirements as directed by the courts under a compliance order.

The decision of Mr Justice Jay in April 2016 in *East Lindsey District Council v Abu Hanif (trading as Zara's restaurant and takeaway)* [2016] EWHC 1265 (Admin) provided something of a neat prelude to the Act receiving royal assent.

Mr Hanif, the owner and licensee of Zara's restaurant, had been employing an illegal worker. Upon discovery of this, the police brought review proceedings and the licensing authority revoked the premises licence.

On appeal, Mr Hanif accepted that he had employed an illegal worker without paperwork showing a right to work in the UK, paid him cash in hand, paid him less than minimum wage, did not keep or maintain PAYE records and, although Mr Hanif purported to deduct tax from his salary, he had not accounted to HMRC for the tax deducted.

However, Mr Hanif was not prosecuted under s 21 of the Immigration, Asylum and Nationality Act 2006 and instead paid a civil penalty. This fact was relied upon by his counsel to make an argument on appeal that the prevention of crime and disorder objective had not been engaged. The district judge accepted this argument and held that because prosecution proceedings had not been brought and no crime had been reported, the crime prevention objective was not operative.

The council appealed by way of case stated and argued that there was no requirement for Mr Hanif to have been found guilty of criminal offences in order to engage the crime prevention objective. The Licensing Act 2003 was concerned with the prevention rather than the fact of the crime.

Mr Justice Jay accepted that criminal convictions were not required. He said:

> *The question was not whether the respondent had been found guilty of criminal offences before a relevant tribunal, but whether revocation of his licence was appropriate and proportionate in the light of the salient licensing objectives, namely the prevention of crime and disorder.*

This requires a much broader approach to the issue than the mere identification of criminal convictions. It is in part retrospective, in as much as antecedent facts will usually impact on the statutory question, but importantly the prevention of crime and disorder requires a prospective consideration of what is warranted in the public interest, having regard to the twin considerations of prevention and deterrence.

He found that, on the facts, it was clear that offences had been committed in respect of tax evasion and non-payment of the minimum wage. With regards to the offence of knowingly employing an illegal worker, he considered that it could be inferred that Mr Hanif knew that the worker was in the UK illegally owing to the fact that the worker never provided relevant paperwork and that no tax code or national insurance number had been issued to him.

He concluded:

The respondent exploited a vulnerable individual from his community by acting in plain, albeit covert, breach of the criminal law. In my view his licence should be revoked.

The case thus confirms what to many of us may have seemed an obvious and logical principle, namely that the engagement of the prevention of crime and disorder licensing objective does not necessarily require the commission of a criminal offence. Upon request by the council, Mr Justice Jay certified the case as appropriate for citation, which will enable it to be relied upon in future revocation cases.

Once the relevant amendments to the 2003 Act come into force, immigration officers will be able to issue immediate closure notices and apply to the courts for compliance orders when faced with similar cases. We wait with anticipation to see whether and, if so, how the Home Office will use such powers.

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Pulling pints in the aftermath of Brexit - steady as she goes

So, after all the huffing and puffing, has Brexit blown down the pub? **Paul Bolton** casts his eye across the on-trade

The Brexit debate split Britain down the middle. The level of divided discourse was no different in the on-trade. Some industry leaders very publicly nailed their colours to the mast, and many pub landlords stocked cask ales that showed support for one or other camp. But what actual effect (at least in the short-term) has the leave vote had and will London bear the brunt?

To gain a snapshot of the general consensus at the top, CGA Peach re-ran its Business Leaders Survey after the vote, asking 80 board-level directors of operators and suppliers if their outlook for the rest of the year had changed after Brexit. At first glance, the results do not look positive. In January, 75% of business leaders registered positivity for the coming year. This dropped to just 15% in the latest survey. An increase in the cost of raw-materials, a drop in consumer confidence, decreased staff availability, the failing of the pound and a skills shortage were cited as the top concerns.

Perhaps surprisingly, we didn't see a noticeable exaggeration of the results in London. As Charlie Mitchell, head of consumer at CGA Peach, explained: "The availability of people is the number one worry across the trade, but surprisingly London-based operators, who might be expected to be most affected by uncertainty around EU nationals working in hospitality, are no more concerned than the country as a whole." London operators have actually emerged more upbeat than their peers outside the M25, with 26% optimistic for the short term, and almost half (48%) confident about the coming two years, against 29% nationally.

Two key reasons are helping to boost confidence in the face of a potential labour shortage: half of London business leaders think there will be an increase in business thanks to the falling pound; and 39% believe property and rental costs will go down in the long-term.

But how does this translate into actual results on the ground? The Coffer Peach Business Tracker released in July does not paint a particularly bleak picture. Managed pub and restaurant groups saw collective like-for-like sales grow 0.3% in July against the same month last year, with London propping the trade up - its healthy 2.9% sales uplift beats back a fall of 0.5% for outlets outside the capital. Although Peter Martin, vice president of CGA Peach, put some of this growth down to the weather, he explained reasons for optimism for operators: "An increase in tourism seems to have been reflected in sales and the London market is looking more robust. Nationwide, it's been a fairly sluggish market so far this year and the Brexit vote doesn't appear to actually have altered that trend one way or another. People will always go out to eat and drink during uncertain times as we saw during the recession."

It remains to be seen what effect this will have on pub closures; latest figures in July 2016 from CGA and CAMRA saw the biggest reduction in losses for years, with 21 pubs closing a week, down from 27 in December. Ahead of worrying about Brexit, the full effects of which we are unlikely to see for up to two years, the main challenge for operators is staying relevant in marketplace bursting at the seams – especially in a flat market.

Paul Bolton
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For more information on latest On-Trade market trends visit, including Brexit visit http://www.cgapeach.co.uk/ and http://www.cgastrategy.co.uk/#drinks-and-foodservice

Overprovision: consultations, clarifications and cosmetics

An amendment to the 2005 Licensing Act has, in the opinion of **Stephen McGowan,** made Scotland's new overprovision policies as determined by a licensing board "virtually bullet-proof under appeal or judicial review"

Life in the world of Scottish licensing continues at an unrelenting pace. We've had an interesting couple of cases from Dundee in connection with the board's overprovision policy, and another in Aberdeen, so this quarter's Scottish update is going to focus on the thorny issue of overprovision.

In January 2016 both Aldi and BP appeared at the Dundee Licensing Board – BP with a variation relating to an M&S "Simply Food" offer, and Aldi with an application for a provisional premises licence. Both were refused at the same hearing; both decisions appealed; and both appeals upheld.[1]

In *BP Oil UK Ltd v Dundee Licensing Board***,** 21 June 2016 (Dundee Sheriff Court, unreported), Sheriff Veal had a straightforward job of upholding the appeal because of fundamental errors in the statement of reasons. BP had applied to vary the terms of an existing premises licence to increase the alcohol display. The reason for the application was because of the introduction of M&S "Simply Food" as the forecourt shop, and this necessitated a broader alcohol selection. The increase sought was a modest 3.5 square metres. The application attracted an objection from the local NHS health board which referred to the licensing board policy in relation to overprovision, which states that the entirety of Dundee, save a development area at the waterfront of the city, was "overprovided", thus creating a rebuttable presumption against the grant of a new licence or an increase in alcohol display capacity.

In refusing the application, the board made a fundamental error in relying on the grounds of refusal for a new premises licence application under s 23 of the Licensing (Scotland) Act 2005, when of course the application had been a major variation, and also referred to it being "just another off sales".

Further error occurred in that the statement of reasons declared the application had been for an increase of 5.26 square metres when in fact that was the existing capacity and the increase was 3.5 square metres. Sheriff Veal said: "Whilst there may be scope for treating a single error as a 'clerical error', such latitude should not be extended when there is more than one error in the Statement of Reasons".

Beyond these errors, however, the sheriff also upheld the view that the refusal was an unreasonable exercise of discretion: "What was sought by the defenders was a very modest extension of that part of a retail food shop which was being refurbished to a more modern presentation". The appeal was upheld and decision to refuse reversed.

In the much more elaborate *Aldi Stores Ltd v Dundee Licensing Board*, 12 August 2016 (Dundee Sheriff Court, unreported), Sheriff Veal also overturned a decision to refuse a new provisional premises licence to supermarket Aldi. In this case, Aldi's application had also attracted objections from the local NHS health board, as well as the Dundee Alcohol & Drugs Partnership, with regard to the board's policy on overprovision (noted above). The sheriff found that the policy itself was flawed – the board had not followed the statutory process as laid down in s 7 of the Act by not identifying a locality or localities to then consult upon. Instead, the board "opened it up" to consultees to put forward views on which localities were overprovided. Counsel for the board argued that a policy challenge could only be achieved by a judicial review, but the sheriff disagreed: "The *vires* of the policy can properly be called into question during the consideration of an appeal when refusal of an application on the grounds of overprovision is used".

This, of course, follows the now well-established line first properly taken under the 2005 Act in *Brightcrew Ltd v City of Glasgow Licensing Board* [2011] CSIH 46. Sheriff Veal went on to say: "The process by which the overprovision policy was achieved did not, from its very inception, comply with statute. In these circumstances, I consider that I am entitled to disregard the policy when considering this appeal".

1 The cases are as yet unreported but I will provide full citations for the next issue of the *Journal.*

The Aldi case shines a light on the issue of what was described in another recent Scottish appeal case as the "fiction" of localities in overprovision policy - *Martin McColl Ltd v Aberdeen City Licensing Board,* 26 August 2015 (Aberdeen Sheriff Court, unreported). The Aberdeen board had a virtual blanket overprovision zone across its whole jurisdiction in respect of off sales, save a forested area and a green field site used for farming (Anguston and Kirkhill). This is therefore somewhat similar to Dundee, which also has a blanket all-premises policy save the "Waterfront" area.

The Aberdeen board stated in its policy it could not adopt its whole jurisdiction. This remains an issue of debate among practitioners because many believe this to be wrong, although the Scottish Parliament has now legislated to confirm it is possible (see below). The sheriff seems to take the view therefore that the selection of the Anguston and Kirkwall localities amount to excluding two areas "of no consequence, in an effort to present the resulting locality as other than covering the whole area", that the subtraction of these two areas was a "cosmetic exercise" and therefore the 2005 Act had not been followed, requiring as it does localities to be identified and assessed.

The sheriff also criticises the board for the absence of dealing with the steps required under s 23(e) in order to find a ground of refusal with regard to overprovision, namely to have regard to the number and capacity of licensed premises, or licensed premises of the same or similar description as the subject premises, in the relevant locality. Further criticism is levied in that the board did not refer to the locality within its policy (that is, the whole jurisdiction minus Anguston and Kirkwall), but instead chose to consider a second locality which was determined at the hearing (one kilometre from the application premises). The statement of reasons did not specify in which of these localities overprovision would have resulted with the grant of the licence.

Looking forward, we have changes to overprovision on the statute books which may yet make parts of these cases a jurisprudential footnote. The Air Weapons and Licensing (Scotland) Act 2015 has formalised the power of licensing boards to select their entire jurisdiction as an overprovision area, a power which most licensing practitioners believed they had in any event but obviously some boards such as Aberdeen did not. Section 7 of the Act, as amended, becomes:

7 Duty to assess overprovision

1. *Each licensing policy statement published by a Licensing Board must, in particular, include a statement as to the extent to which the Board considers there to be overprovision of— (a) licensed premises, or (b) licensed premises of a particular description, in any locality within the Board's area.*
2. *It is for the Licensing Board to determine the "localities" within the Board's area for the purposes of this Act and in doing so the Board may determine that the whole of the Board's area is a locality.*
3. *In considering whether there is overprovision for the purposes of subsection (1) in any locality, the Board (a) must have regard to the number and capacity of licensed premises in the locality, (aa) may have regard to such other matters as the Board think fit including, in particular, the licensed hours of licensed premises in the locality, and (b) must consult the persons specified in subsection (4).*
4. *Those persons are (a) the chief constable, (aa) the relevant health board, (b) such persons as appear to the Board to be representative of the interests of (i) holders of premises licences in respect of premises within the locality, (ii) persons resident in the locality, and (c) such other persons as the Board thinks fit .*
5. *In this section, references to "licensed premises" do not include references to any premises in respect of which an occasional licence has effect.*

Note the clarification at 7(2) referring to the whole of the board's area, but even more importantly note the new s 7(3)(aa) which was intended to allow licensed hours to be a part of the overprovision assessment, but also contains a free-for-all provision allowing the licensing board to take into account whatever it likes. This new provision has the effect of making the new overprovision policies virtually bullet-proof under appeal or judicial review, when a licensing board can determine overprovision using whatever factors it likes (assuming, of course, it follows the correct consultation procedure as Dundee failed to do in the Aldi case) without reproach.

This brings licensing law in Scotland full circle once again with a form of overprovision akin to that which existed under the old 1976 Act. And finally, the reference to licensed hours remains at odds with the general consensus that there is no "duty to trade" the hours specified in one's licence. So while a licensing board might have regard to the hours as stated on licences in the appropriate area, they will have no idea what hours are actually operated at any one time.

The new s 7, as noted above, has been enacted but not commenced at the time of writing. I would anticipate it will be in force by the summer of 2017.

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Forster and the implications for planning and licensing changes

Noise levels from pubs and live music venues will always be an issue when potentially incompatible new development takes place nearby. **Charles Holland** considers how the planning and licensing authorities should approach the issue, and applauds the Mayor of London's championing of the agent of change principle

> *Thence to Tower-wharf, and there took boat, and we all walked to Halfeway House, and there eat and drank, and were pleasant, and so finally home again in the evening, and so good night, this being a very pleasant life that we now lead, and have long done; the Lord be blessed, and make us thankful. But, though I am much against too much spending, yet I do think it best to enjoy some degree of pleasure now that we have health, money, and opportunity, rather than to leave pleasures to old age or poverty, when we cannot have them so properly.*
>
> *The diary of Samuel Pepys*, 20 May 1662

The George Tavern, Stepney has existed in its current form since the 1820s, when it was constructed as part of the development of the new Commercial Road, linking the India Docks to the City of London. It stands on the site of the Halfway House, a coaching inn mentioned by Chaucer and Dickens, and a favoured spot of Samuel Pepys. Now Grade II-listed, it comprises three floors and an attic, the upper floors enjoying 360 degrees of natural light. Under the ownership of Pauline Forster it has become a thriving arts, music and performance venue, and also serves as popular location for film and photographic shoots.

Immediately to the east and abutting The George is "Stepneys", a single-storey nightclub constructed in the 1970s, equipped with illuminated dance-floor (which featured in the video to Pulp's "Common People"). In the mid 2000s, Stepneys was acquired by a developer, Swan Housing. Swan sought to demolish the existing building and replace it with a three-storey building with commercial uses on the ground floor and six flats on the floors above.

The local planning authority, Tower Hamlets, refused planning permission in 2013. One of the grounds for refusal was that residents of the new flats would be disturbed by noise emanating from The George. For the purposes of an appeal, Swan commissioned new noise evidence, and in October 2014 the planning inspector, dealing with the case on written representations only, granted permission, concluding that the noise would be reasonable in planning terms.

Ms Forster brought an appeal under s 288 of the Town and Country Planning Act 1990. She relied on a number of grounds, including whether the inspector failed to take into account the harm the development would cause to the viability of The George and more specifically "the question ... as to possible future complaints from residents of the new flats about noise from The George, notwithstanding the inspector's conclusion ... that the residents will not be subjected to unreasonable levels of noise". She asserted that complaints may lead to nuisance proceedings against her, and / or a review of her licence.

Giving judgment in August 2015 ([2015] EWHC 2367 (Admin)), Lindblom J (as he then was) dismissed Ms Foster's claim. He held that the inspector had indeed had regard to Ms Forster's arguments and had understood the main issue to be "whether in the future residents of the new scheme would be subjected to unreasonable levels of noise". He found that if, as the inspector had concluded, the residents of the new flats were not going to be subjected to unreasonable levels of noise, "it would follow that those residents would not be likely to complain about such noise and that the spectre of future proceedings ... could therefore be reasonably discounted". (para no: 77) The inspector's task was "to make planning judgments... not to anticipate the likelihood or outcome of future proceedings against Ms. Forster". (para no:79)

Ms Foster appealed to the Court of Appeal ([2016] EWCA Civ 609), where two issues were ventilated: the noise issue, and an issue concerning the effect that loss of light would have on the location shooting business. In the event, the appeal succeeded on the loss of light issue, but not on the noise issue.

It is the noise issue that will be of interest to licensing practitioners. Laws LJ, in a judgment with which the other members of the Court agreed, noted that it was common

ground that the impact of a prospective development on the viability of a neighbouring business may be a material planning consideration. (para no: 13) However, a planning objection on such basis had to be "clearly raised... with a sufficient degree of particularity and supporting evidence to enable the inspector to reach an objective and reasoned conclusion on the point". (para no: 16) This, Ms Forster had failed to do. (para no: 17) She had aligned her case to an attack on Swan's noise assessments (para no:20) rather than bringing a positive case as to why there was a risk of a review notwithstanding the inspector's conclusion that the noise levels would be reasonable. What her objection needed was "chapter and verse - at least some material, if it could be found, to raise the possibility that the licensing or nuisance regime might reach a different conclusion, and to enable the inspector to form some assessment of the degree of risk involved". (para no: 21) If such evidence was - in fact - impossible to produce, then this did not mean that the inspector had to deal with it on a basis of no evidence. (para no: 23)

Laws LJ agreed with the Secretary of State's submission that while a licensing committee is not bound to follow a planning decision-maker's conclusion, nor vice versa, each will and should have regard to the other where both make decisions in the same context. It was thus not the case that licensed operators such as Ms Forster were "falling into a void" between the two regimes. (para no: 24) Laws LJ disagreed with Lindblom J's finding that if the residents of the new flats were not going to be subjected to unreasonable levels of noise, they would be unlikely to complain about such noise, wryly noting:

> *Humanity being what it is, people are liable to complain about anything; the question here is whether there is any objective possibility of quantifying, however roughly, the likely prospects of success of such complaints. There is none.*

Forster v SSCLG is further confirmation that planning and licensing determinations overlap, and a decision in one context may be material to the other. This is in line with previous authorities: *Gold Kebab Ltd v SSCLG* [2015] EHWC 2516 (Admin) for a case in the context of planning, and *R. (KVP Ent Ltd v South Bucks DC* [2013] EWHC 926 (Admin) for one in licensing. While a decision in one regime might be material to a decision in another, it is entirely possible that different regimes will come to different conclusions. Nor does the grant of planning permission (or any similar permission in public law to carry out an activity), of itself, authorise a nuisance: *Coventry v Lawrence* [2014] A.C. 822.

The s 182 Guidance provides that in the case of simultaneous or sequential applications for licensing and planning authorisations, licensing committees and officers should consider discussion with their planning counterparts with the aim of agreeing mutually acceptable operating hours and scheme designs. (para no: 9.44) Policy statements should indicate that the planning regime will be "… properly separated to avoid duplication and inefficiency. The planning and licensing regimes involve consideration of different (albeit) related matters. Licensing committees are not bound by decisions made by a planning committee and vice versa". (para no: 13.57)

Forster demonstrates the real difficulty an objector has in attempting to substantiate an argument that notwithstanding the reasonableness of noise levels, complaints may lead to licensing restrictions. Evidence and explanation is needed: this might include adducing the licensing authority's policy, evidence of comparable issues at comparable venues or possibly an expert report from a licensing practitioner.

One opportunity potentially missed by Ms Forster was her failure to raise the point before the inspector or on appeal that Swan's noise assessment depended on the windows to the flats being closed, a point spotted by McFarlane LJ during argument in the Court of Appeal (see para no: 25 of the judgment of Laws LJ). As HHJ Mackie QC put it in *R (O'Dwyer) v City of Westminster* [2008] EWHC 2358 (Admin), "a little anxious scrutiny" from the court can be justified when considering whether a planning committee has taken into account all material considerations:

> *The use of that amenity [opening windows] by those who buy or lease what will no doubt be called attractive flats - and legitimately so - may well lead not only to the windows being opened but of course to noise complaints. Educated, well heeled, tenants often combine to pursue such complaints sometimes leading to litigation which I was - perhaps rightly - told was inappropriate speculation. But it is difficult to turn a blind eye to what, in the real world, is obvious.*

The local development plan may well contain specific policies to safeguard pubs and live music venues from incompatible new development. The National Planning Policy Framework provides (the third bullet of para no: 123) that planning policies and decisions should aim to:

> *recognise that development will often create some noise and existing businesses wanting to develop in continuance of their business should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established (subject to the provisions of the Environmental Protection Act 1990 and other relevant law).*

Further guidance is given by the *Planning Practice Guidance* (2014, para no: 010, Reference ID 30-010-20140306):

> *The potential effect of a new residential development being located close to an existing business that gives rise to noise should be carefully considered. This is because existing noise levels from the business even if intermittent (for example, a live music venue) may be regarded as unacceptable by the new residents and subject to enforcement action. To help avoid such instances, appropriate mitigation should be considered, including optimising the sound insulation provided by the new development's building envelope. In the case of an established business, the policy set out in the third bullet of paragraph 123 of the Framework should be followed.*

This reflects the "agent of change" approach, originating in Australia, where the person or business responsible for the change is responsible for managing the impact of the change.

Class O of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015, which grants automatic planning permission for the change of use from offices to residential, subject to conditions, has been amended with effect from 6 April 2016 to add a new condition that before beginning the development, the developer must apply to the planning authority for a determination as to whether its prior approval will be required as to, *inter alia*, "impacts of noise from commercial premises on the intended occupiers of the development".

The conflict between established noisy users and developers of residential accommodation has flared up most recently in a row between operators of the Curzon Cinema in Mayfair and the developers converting the office space above into luxury flats. The matter is currently one of allegation and counter-allegation, but from it has sprung an announcement by the Mayor of London on 25 September 2016 that he intended "to protect venues like the Curzon Mayfair by introducing an 'Agent of Change' rule into the next London Plan". He stated on his Facebook page:

> *Developers would be responsible for ensuring their new developments don't threaten the future of existing venues.*
>
> *That would mean developers building flats near existing venues will need to ensure that residents are not unduly affected by sound from the venue, and that may include paying for soundproofing.*

While there is obviously a need to put derelict buildings such as Stepney's nightclub to new and economically viable uses, the cultural importance of people going out and having fun and making noise while they do so is no less valid now than it was in 1662. Although, no doubt, attempts can be made to persuade planners of the risk of future adverse licensing reviews, a more determined implementation of the agent of change principle may have more success in preventing those who seeking to profit from new developments pushing the burden onto those who were there before.

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(With thanks and acknowledgment to Caroline Daly, Barrister, Francis Taylor Building)

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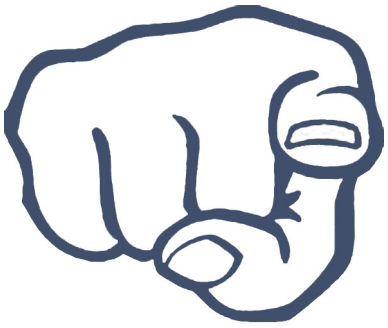

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HL Select Committee - IoL response

IoL members were consulted on the the questions set out in the call for evidence by the House of Lords Select Committee on the review of the Licensing Act 2003. Of our 319 respondents to the survey, 72% were from a local authority background, with a further 13% from police practitioners and 7% from legal practitioners. The remainder were from industry, consultancy and unspecified backgrounds. The questions in the call for evidence, and the IoL analysis of the survey results, are set out below:

Are the existing four licensing objectives the right ones for licensing authorities to promote?

Just over 85% felt they are the right licensing objectives. Of the comments that followed, some indicated support for a public health objective; there were comments stating that there is a need for local objectives; and others felt that there should be a further objective concerning the protection of children and vulnerable adults from sexual exploitation. There was some mention of the potential for a balancing objective along the lines of promoting social, cultural and economic benefit to the locality.

The question of a public health objective is dealt with below, and arguably "the protection of children from harm" is more than sufficient to enable consideration of potential or actual issues around child sexual exploitation, while sexual exploitation of vulnerable adults would almost certainly fall under the crime prevention objective. Some respondents felt that the existing objectives give wide scope for consideration of concerns, while others stated that they were too restrictive.

Should the protection of health and well-being be an additional objective?

This question continues to divide people in their opinions with 46% of respondents in favour, while 41% oppose the inclusion of a health objective, and a further 12% were undecided. Given the percentage of responses from local authorities, the national picture is likely to be equally if not even more divided.

Supporters cite the national picture in relation to alcohol health harms and question the point in allowing health bodies to make representations in the absence of a health objective. Objectors point out the difficulty of linking individual premises to evidenced health harms, and refer to the powers already available to licensing authorities, including the use of cumulative impact areas and the use of licence conditions to prevent the sale of super-strength alcohol as part of the means to address issues at local level. One respondent asks how any licence applicant seeking a licence to sell alcohol can hope to promote "the protection of health and well-being" given that alcohol is, according to most experts, indisputably a health risk.

There are further issues to do with the consistency of data collected by health authorities across the country as well as the difficulty with establishing direct links to individual premises. Some consider that this is a role for national Government to deal with through drink pricing and alcohol strength regulation. Others suggest that health and well-being should be a factor for local authorities to consider in the drafting and implementation of licensing policy rather than an objective applied to licence applications.

It is clear that any moves to introduce a health objective will meet with support and opposition in fairly equal measures, and will require careful wording and excellent guidance.

Should the policies of licensing authorities do more to facilitate the enjoyment by the public of all licensable activities?

Just over a third (35%) support this with 44% against. Many consider that licensing policies already seek to achieve a balance between regulation and permissive licensing bearing in mind the original intent of the Act to provide greater freedoms to the trade balanced with tougher powers for counteracting problems.

Comments within the survey responses reflect the split in views, with some pointing out that councils are able currently to set out within their policies, aspirations for their local areas which would encompass wider objectives, while others clearly consider that the policy should focus on the regulatory aspect of licensing and the ways in which the council will seek to ensure the promotion of the core licensing objectives. Worryingly, at least one respondent considers that policy is often ignored once introduced.

Should access to and enjoyment of licensable activities by the public, including community activities, be an additional licensing objective?

A clear consensus against this, with just 10% in support. Respondents are concerned that this would needlessly complicate the licensing system, providing a conflict within the licensing objectives themselves (rather than a balance). It is clear that some local authorities feel under significant pressure already and consider these proposals to be "another hurdle" rather than any meaningful consideration to licensing. Some suggest, again, that this is a matter for policy rather than a consideration on individual applications, and others consider that this objective would be too subjective to be achievable or enforceable.

Should there be any other additional objectives?

The clear majority - 69% - say no with 10% saying yes. Suggestions include:

- Compatibility with planning
- Local objectives (evidenced) to support localism

- Promotion of the social, cultural and economic benefit to the locality.
- Demand / need

There is more mention here of a need for objectives providing protection of children from sexual exploitation, and one suggestion of an objective to assist businesses to operate responsibly.

Has the Live Music Act 2012(LMA) done enough to relax the provisions of the Licensing Act 2003 where they imposed unnecessarily strict requirements?

A big majority - 81% - think it has, with just 6% disagreeing. Some consider that the position is now more confusing, that many organisers will still use TENS for entertainment which is now exempt. Others consider that the LMA has worked well and granted a reprieve for live bands to operate more freely. Some report that noise complaints have increased as a result of the LMA provisions and some feel that the LMA has provided too much deregulation

Are the introductions of late night levies and Early Morning Restriction Orders effective?

Most (53%) say no, although 38% are unsure – mainly due to not having experience of either in their areas. EMROS are seen as a failure, and the levy is often considered a business tax. Some consider that restricting the use of income generated through levies would assist as this would provide some assurance at the additional funds were being spent in the levy area. Other comments relate to the use of positive alternatives such as BIDS and Purple Flag awards etc. There are references to reverting to standard permitted hours for the sale of alcohol as some consider that the flexible system provided by the Licensing Act has seen later hours in pubs and clubs which has directly encouraged more pre-loading by customers, while at the same time eroding the differences between types of licensed premises which were previously established through their licence type including pubs, nightclubs but also restaurants etc.

Does the Licensing Act now achieve the right balance between the rights of those who wish to sell alcohol and provide entertainment and the rights of those who wish to object?

Just over two-thirds (67%) say yes but 25% disagree. Comments show mixed feelings on this with some considering that applicants (particularly large scale operators) have the upper hand and resources to appeal, which will sway some licensing authorities anxious to avoid costly court battles. Others consider that the balance is in favour of local residents and some refer to the removal of the "vicinity" test as a detriment leading to objections being received from residents who are not directly affected by the premises in question.

Others consider that this depends entirely on the engagement by all parties in individual cases, but that the framework is in place to allow the balance to be achieved. One comment stated:

In reality the answer is 'yes' and 'no'. The Act provides a framework where the right balance can be struct, Whether not the right balance is in fact struck on a day basis is down to numerous factors; lack of engagement by residents in the licensing regime being one of them.

Do all the responsible authorities (such as Planning, and Health & Safety), who all have other regulatory powers, engage effectively in the licensing regime?

Just over two-thirds (67%) say no with 26% saying yes.

It is clear that in the main, the police and environmental health are the Responsible Authorities (RAs) actively engaged in the licensing process. There is inconsistency across the country and it is apparent that engagement from some RAs, is scarce. That said, some consider that the mechanism is in place for RAs to engage where there are areas of concern and that this is sufficient, while a couple of respondents suggest that there should be a mandatory element requiring engagement / response to licence applications. In some areas, the licensing authority positively engages with RAs through regular meetings etc, and this may be a model worth promoting.

Do other stakeholders, including local communities, engage effectively in the licensing regime?

Just over half (52%) say yes and 33% disagree. Mention is made of the effectiveness (or not) of the requirement to advertise in the local media, and there is the suggestion that local residents should be notified of applications by the licensing authority. A further suggestion is that town / parish councils should be a statutory consultee. On the whole, the responses seem to suggest that engagement is forthcoming only where there is a concern (this may be the right balance?), and others feel that local residents are sometimes reluctant to come forward and perhaps lack understanding of the licensing regime and the protections it provides.

Again, the responses show a lack of consistency across the country in terms of the approach by local authorities.

Licensing is only one part of the strategy that local government has to shape its communities. The Government states that the Act "is being used effectively in conjunction with other interventions as part of a coherent national and local strategy." Do you agree?

Just under half (44%) say yes, 24% no and the remainder are unsure. Many of the comments question what the coherent national strategy is, and others refer to a "gulf" between planning and licensing for example. Some consider that the Licensing Act is an effective tool and being used as such, but there is also mention of the lack of resources for local authorities which is having an impact across the board in terms of the capacity of local authorities to do more than the minimum to fulfil its statutory duties.

Should licensing policy and planning policy be integrated more closely to shape local areas and address the proliferation of licensed premises?

Strong feelings on this question with a high level of support for more integration between licensing and planning. Some respondents consider that planning permission should be a pre-requisite to licence applications (although this would be a burden on businesses). Many consider that a regime where planning and licensing can impose the same (but different) restrictions (for example different hours of operation), is an anomaly, while others accept that different considerations apply for each regime and the business is bound by both sets of restrictions and should therefore operate within them. Closer integration would hopefully reduce the instances where there are apparent contradictory requirements, although it may not alleviate it altogether. A more joined up approach in drafting and adopting policy should be beneficial to all parties.

Are the subsequent amendments made by policing legislation achieving their objects?

Nearly 50% of respondents were unsure. Some consider that there have been so many changes made to the Licensing Act 2003, the overall picture now is confusing and fragmented. Others refer to the lack of police resources, meaning that there is limited means to put the powers to good use. Some feel it is too early to judge the effectiveness at this stage.

Do they give the police the powers they need to prevent crime and disorder and promote the licensing objectives generally?

Varied feelings on this but some consistent themes arise including the lack of police and police resources, the lack of effective use of the powers, and at the opposite end of the scale, the overzealous use (misuse in some cases) of powers by some police officers. One member comments that "The closure powers and the s 53A reviews do give police wide-ranging powers. Whether the resources and training exist for these powers to be used proportionately and effectively is another matter."

Are police adequately trained to use their powers effectively and appropriately?

Over 50% of respondents consider that the police do not have sufficient training in relation to powers under the Licensing Act 2003. The comments refer to lack of training to officers "on the ground" and a perception at least that licensing is a low priority, in training terms, for police officers. Respondents comment that police *in situ* rarely seem to know how to deal with a licensing offence, and others refer again to lack of police resources and also to the rapid change within police forces, meaning that experience and knowledge gained in licensing is lost when knowledgeable officers are redeployed elsewhere. This is well illustrated by the following comment:

> *Our police licensing section who had mostly the same specialist officers was about 18 months ago, completely replaced, by officers with no licensing background. They now have working practicies which are now a watered down weak system. We had a traffic lights system. Refer to lic panel for early review, so if needed, a revocation at panel would stick at appeal, but not now. They expect Cllrs to rubber stamp, or be very weak in serious cases, which they have not handled properly.*

Should sales of alcohol airside at international airports continue to be exempt from the application of the Act?

An even split in views with just over a third saying yes, a third saying no and the final third undecided. Some consider the situation a cause for concern, or at least an anomaly without justification. Some suggest restricting the hours for sales of alcohol at airports, and others consider that unless there is an evidenced need for regulation the status quo should continue, and point out that airport security is necessarily strict in any case and issues arising can be dealt with effectively as a result.

Should sales on other forms of transport continue to be exempt?

A near 50-50 split in views on this question. Some consider that alcohol regulation should be the same across the board, while others point out the difficulty of regulating trains, for example. One comment (shown below) points out that methods of alcohol sales are evolving and consideration should be given to this.

> *The Licensing Act 2003 needs to be updated to reflect that the methods of selling alcohol are evolving from traditional methods. In particular, we've had enquiries about people wanting to be able to sell/purchase alcohol while in taxis in certain circumstances ie buy a glass of champagne to drink while in a limo or wedding car. Also, we've had enquiries about people wanting to have a mobile van selling alcohol from venue to venue. There is another issue regarding off-sale deliveries of alcohol. At the moment the provider would need to have a premises licence and the alcohol pre-paid for at that premises in order for it to be licenced. If a specific vehicle itself (regardless of its location at any given time) could be licenced (if it met specific criteria and subject to certain caveats) this could provide a solution. Obviously thought would need to be given to how this would work in practice!*

The Act was intended to simplify licensing procedure; instead it has become increasingly complex. What could be done to simplify the procedure?

There are many comments on this and some consider that the Act and procedure are not in fact complicated. Others entirely disagree and suggest either a redrafting to pull all the subsequent amendments into a concise Act, or simply that the Act be left alone and the "tinkering" stop. Several respondents support a simplified (online) application process and there is support too for removing the requirement for newspaper advertising. Others consider that the application for a licence to sell alcohol cannot be simplified, nor should it be, since the sale of alcohol is an important and complex issue. There are other suggestions besides, including deregulation on the one hand, and amalgamation on the other. The role of the

licence holder and / or DPS is mentioned here with the suggestion that there should be a responsible person named on the licence in a way similar to that under the previous Act.

What could be done to improve the appeal procedure, including listing and costs?

The main theme arising in response to this question is the delay in getting an appeal to court. It is a source of frustration to licensing authorities, in particular, who make a decision at a hearing based on the information to hand and current at the time, only to see that decision held in abeyance pending a hearing which may not take place for several months - during which time the licensee has either rectified the position to the point that the original decision would not have been necessary or, alternatively, continued to operate without change until just before the appeal date and then left the premises. This concern is raised more than once in the survey responses.

Some respondents support the idea of a licensing tribunal or similar to adjudicate licensing decisions and avoid the delays experienced in the current system of appeals to the magistrates.

Should appeal decisions be reported to promote consistency?

There is strong support for this but a consistent theme running through the comments is that regardless of such reporting, all applications must be determined on their merits. Reporting of decisions may assist in promoting more consistency.

Is there a case for a further appeal to the Crown Court?

Sixty per cent say no, 26% say yes. In the main, respondents consider that this additional level of appeals would prove cost-prohibitive although some accept that there may be reason to go to the higher level.

Is there a role for formal mediation in the appeal process?

Just under 60% say yes; 25% say no. Concerns are raised about resources, and some consider that the process of mediation should start much earlier (pre licensing authority hearing for example) to discuss the concerns / problems in order to seek resolution and in doing so avoid the need for an appeal.

Given the increase in off-trade sales, including online sales, is there a case for reform of the licensing regime applying to the off-trade?

Just under two-thirds (64%) support the need for reform in relation to off-sales. There are clear concerns about online sales, pre-loading and super-strength alcohol. There is a perception that the off-trade is less regulated than the on-trade, and that there is a lack of training in smaller off sales establishments. Some consider that it is too late to impose greater controls given that "almost all convenience stores now sell alcohol", and others are concerned that DPS and personal licence holders are often absent from the premises, leaving poorly trained staff in charge of the sale of alcohol.

How effectively does the regime control supermarkets and large retailers, under-age sales and delivery services?

A range of responses here with many feeling that the regulations are in place, if not always enforced because of the lack of resources. There is a general feeling that larger operators are less likely to cause problems than smaller independent retailers, and there is a definite concern with alcohol delivery services and the difficulties in regulating them.

Should the law be amended to allow licensing authorities more specific control over off-trade sales of super-strength alcohol?

Yes, say 59%. Respondents raise questions about the effectiveness of super-strength schemes in place, and some feel that the issue here is about personal responsibility of the consumer rather than the retailer. Others point out that consideration must also be given to premium craft beers which may be high-strength but are less likely to be a cause for concern in relation to binge drinking or street drinkers due to cost. The combined effect of high-strength and low costs are the problem areas and there is a feeling among some that this is an area which would benefit from central rather than local control.

Should alcohol pricing and taxation be used as a form of control?

Mixed views here. Some feel that price is not the only factor, and that using pricing in this way will penalise consumers with less money who do not in fact have a drink problem. Others feel that this would have limited if any impact on the actual cost of alcohol and would therefore be a pointless exercise.

Should the Government introduce minimum unit pricing (MUP) in England?

Again mixed views, with 42% against, 32% in favour and 25% undecided. Some consider that the issues should first be resolved in Scotland before attempted in England. Others consider it will have limited effect, and may penalise less affluent consumers rather than necessarily targeting problem consumption.

Does the evidence that MUP would be effective need to be "conclusive" before MUP could be introduced, or can the effect of MUP be gauged only after its introduction?

Again mixed views, with some considering it will be almost impossible to gather conclusive evidence, and others pointing out that any moves to introduce MUP will be fiercely opposed whatever the evidence. With regards to reviewing it, opinions remain divided about when such as review should take place and what the level of evidence would need to be to justify retention or removal of MUP.

Do licence fees need to be set at national level?

Another divisive question with 46% in favour and 46% against. There are concerns that the current fee levels are insufficient, but on the other hand a concern that locally set fees would prove to be widely inconsistent which would be burdensome for businesses and a postcode lottery, with more potential for challenge, and

therefore more burdensome on local authorities. That said, there is mention of the need for licence fees to be set at a level sufficient to achieve cost recovery.

Should London, and the other major cities to which the Government proposes to devolve greater powers, have the power to set their own licence fees?
No, say 44% compared to 42% who think they should. Many consider that London and other devolved areas are no different from the rest of the country, and that premises are likely to be of higher rateable values so would have a higher licence fee as a result (based on the current system).

Is there a correlation between the strictness of the regulatory regime in other countries and the level of alcohol abuse?
Nearly 70% don't know or feel there are too many other factors involved to draw a direct comparison. Some feel that the UK has cultural and educational issues around alcohol which need to be dealt with.

Are there aspects of the licensing laws of other countries, and other UK jurisdictions, that might usefully be considered for England and Wales?
Respondents consider that there are certainly lessons which could usefully be learned from the licensing regimes abroad, but most feel unable to comment in detail.

Conclusion
It is clear from the responses received that there is inconsistency in the application of the licensing regime and potentially misunderstanding, or at least differing opinions, about the scope of the current objectives – the clear example here being the call for an objective concerning protection of children from sexual exploitation (safeguarding). Safeguarding is a keen concern for licensing authorities, and rightly so, but the existing objective of protecting children from harm is in place and clearly encompasses safeguarding and CSE issues.

Planning and licensing regimes should benefit from a more joined-up approach, but more generally there is concern in relation to the ever decreasing resources for both local authorities and police. This is combined with a dilution of knowledge and expertise in licensing as a direct result of efficiency savings, merging of services and redundancies. The danger is that the continuing pressure to save already limited resources can force a focus on statutory minimum requirements and divert efforts from other avenues which would otherwise assist.

Mediation is an excellent example of this. Here, the opportunity to bring parties together to discuss problems and identify solutions is often overlooked, when it may actually have negated the need for objections to applications or requests for review thus more than saving the time and effort involved in the mediation in the first place.

There are very split views and strong feelings in relation to key questions about potential developments including the introduction of a public health objective, fee setting, super-strength, and drinks pricing.

Tell us about it and get involved

One of the Institute's key objectives is to increase knowledge and awareness amongst practitioners. The IoL is always grateful for contributions from members and there are a number of ways you can get involved.

Regionally: Through volunteering to serve on your regional committee or assisting the committee with events and communications.

News and information: We are always keen to hear about news stories in licensing so that we can report on happenings, initiatives, case outcomes etc. Please keep us informed by emailing news@instituteoflicensing.org and making sure you have us on your press release distribution list!

Training ideas: Let us know what training you want and think others would like to see by emailing training@instituteoflicensing.org

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