

Summary and observations, Licensing Act amendments proposed by the Police Reform and Social Responsibility Bill 2010

Clause 103. Licensing authority to become a responsible authority.

This is a proposal to enable licensing authorities acting in their own right to make representations on applications or to initiate reviews of premises licences or club premises certificates.

It is not immediately clear at what level this is intended to operate but the scheme of delegations currently found in section 8 of the Licensing Act does not preclude the delegation to officers of the powers available to a responsible authority, if a licensing authority is designated as such.

All Members of the authority have equivalent existing rights as interested parties so the option of a licensing committee convening in order to initiate a premises licence review looks rather cumbersome. A requirement for all applications of whatever kind to be referred to a special licensing committee for initial assessment would be similarly bureaucratic.

The intention appears to be to emulate the processes available in the Gambling Act, whereby a licensing officer can put forward expert advice and opinion on a formal basis, ensuring that a licensing panel is able to debate an application, irrespective of whether any other responsible authority has commented or not. The same would apply in relation to reviews.

This change would remove any doubt about the appropriateness of licensing officers offering expert guidance to licensing panels or setting out the context within which an application is determined. Since however representations from the licensing authority as responsible authority would be subject to normal time limits, the content of committee reports would be constrained by what has been said previously, within the time limit. The logic of that is for reports to contain a briefing and recommendations from the Head of Licensing as an appendix, much as Planning reports do now.

The proposals place far greater influence in the hands of licensing officers. It appears that licensing authorities will be able to initiate applications to review premises licences and club premises certificates but it would be helpful if the wording of the Act was explicit on that point.

Clause 104. Health bodies to become responsible authorities.

This is a proposal to make Primary Care Trusts and Local Health Boards responsible authorities under the Licensing Act 2003. Since this extends the already over-burdensome notification procedures on making an application and will add a substantial burden of unproductive red tape to health bodies, this proposal looks to be fundamentally misconceived. All of the advantages can be gained without those burdens, by designating those bodies as interested parties [or 'persons' as they become under a separate modification], rather than as responsible authorities. Most of the existing responsible authorities do not exercise their powers as it is. Only three agencies do so on a regular basis.

Clause 105 and 107. Power to make representations.

This clause proposes to remove the concept of 'interested parties' altogether, replacing that with two different categories, according to the process involved. An application must be made known to "persons who live, or are involved in a business, in the relevant licensing authority's area and who are likely to be affected by [the application]". In terms of who can comment though, all geographical limits are dispensed with and any 'person' from anywhere can comment.

The notification provision as proposed appears to exclude people just across the road but across the borough boundary. Removing the vicinity limitation will in any event have no practical effect unless the text of the statutory Guidance is re-drafted to encompass public nuisance other than that which occurs on or at premises. The clause proposes an arrangement whereby people will be invited to comment but will then have those comments struck out as being vexatious.

A sensible alternative would be to abandon the 'vicinity' test but to replace it with a 'real practical effect' test. In reality, that is what must happen anyway, if objections are to be persuasive.

It is not proposed to remove the obligation on applicants to advertise their proposals but the clause seeks to require licensing authorities to advertise them as well. Since the rules for both will be set by as yet unannounced regulations, the impact cannot be predicted. In the worst case scenario, a requirement to place newspaper advertisements could be placed on licensing authorities. If that were to happen it would effectively wipe out all licensing income apart from annual fees. In the best case scenario it would place a very large new burden on licensing authorities. In the Swindon case it would probably equate to at least one new full time administrative post.

Clauses 106 and 108. Eligibility to bring a review.

The proposal is to remove the reference to interested person and to replace it with "any other person". There are no caveats at all beyond the usual limitations on representations which are vexatious, frivolous or repetitious.

There is no requirement to show that the person will be affected in any practical way. This would open the way for campaigning groups from anywhere to submit objections based on the beliefs which they hold. There is limitless potential here for mischief and expensive litigation. Again, some limitation based on geography and real practical impact would be sensible.

Clauses 109, 110 and 111. Power of the Licensing Authority to take action.

When powers such as those to impose conditions or to suspend a licence or to remove a designated premises supervisor are taken, the test which must be applied at the moment is that they are 'necessary'. That implies that the action is essential and that there is no reasonable alternative.

This clause seeks to shift the balance by applying a test of whether the measures are 'appropriate', meaning that they are reasonable, intelligent, proportionate etc.

This change will provide much more scope for the exercise of policy, allow a more flexible approach and the possibility of tighter and more future-proof controls. It will substantially reduce the vulnerability of the licensing authorities to legal challenge, provided that they stay within the realms of common sense.

It will provide Members with far more influence when pursuing the licensing objectives.

Clause 112. Who may object to a temporary event notice.

At present, only the Police can object to a temporary event notice and then only on crime prevention grounds.

This clause proposes to extend the right to object to noise / pollution teams.

At the same time, the potential scope of an objection will extend to any of the four licensing objectives.

This will at last do away with authorisations being granted as of right, even where it is obvious that there will be serious problems.

Clause 113. Conditions on temporary event notices.

As things stand, conditions cannot be attached to a temporary event notice at all. Where there is an objection, a licensing authority can only grant or deny the notice but cannot grant it with conditions. In practice that means that a counter notice is the only precautionary measure available. An ability to insist on stewarding or safety barriers might however allow an event to go ahead in safety.

The problem is that any condition applied must already be on any premises licence which is already in force for the venue. This makes little sense as a temporary event notice is often used to add a licensable activity not currently authorised by the licence. A boxing match, for example. Might merit additional constraints. It would also be odd if venues without a licence could have any reasonable set of conditions imposed, whereas those already with a licence could only be made subject to a limited, inflexible and potentially clumsy mix of conditions.

As framed, the wording makes little sense.

Section 114. Late submission of temporary event notices.

One of the frustrations of the existing rules is that low risk events such as school plays or a film show can be wrecked by the failure of the organiser to obtain an authorisation, giving ten working days notice. There is no flexibility or room for the exercise of common sense.

This clause introduces a new category of temporary event notice, for submissions five to nine working days before an event.

So as not to encourage lateness, this proposed flexibility is balanced by the fact that an objection notice automatically translates into a 'No'. Nobody will be allowed to enter all or most of their temporary event notices late though. This is an enlightened and fair amendment which will assist community groups and individuals, while blocking commercial misuse.

Clause 115. Limits on temporary event notices.

Surprisingly, this proposes far more flexibility in the use of temporary event notices. At the moment, two key limitations are that an event period cannot last more than 96 hours [i.e. spanning up to five days]. The proposal is to extend that to 168 hours [i.e. spanning up to eight days]. Commercially, that might allow a Christmas market to run for a week, without having to have an artificial break of a day, part way.

At the moment, temporary event notices are available for fifteen days in a calendar year [but Saturday 22:00hrs until Sunday 01:00hrs is *two* days]. This clause proposes that this should rise to twenty-one days.

Clauses 116 and 117. Notifications and police objections.

These propose some changes to notifications and give Police an extra day to submit objection notices when they receive temporary event notices.

Clause 118. Penalties for persistently selling alcohol to children.

The clause proposes to double the potential fine, to £20,000. It is up to the courts, whether that has any real effect.

More importantly, it is proposed that the closure versus prosecution option offered to offenders be changed so that instead of closure being up to 48 hours, it would be at least 48 hours but anything up to 336 hours [i.e affecting up to fifteen days]. That would be a far more effective sanction. In this context, closure means exactly that, not just a suspension of licensable activities but exclusion of the public. What 'closure' means in relation to a internet or tele-sales operation needs some clarification, as these are not mentioned at all.

Clause 120. Suspension of licence for non-payment of fees.

This is broadly as expected but proposes suspension rather than revocation. There are some unfortunate loop-holes offered by the suggested wording. Suspension does not take place if the licence holder disputes that they are responsible or if they dispute the amount. They are also immune if they make an 'administrative error'. There is no specified mechanism for resolving any of these loose ends, so saying "Not me", "It should be £5 less" or "I forgot to put the cheque in the envelope" could stall suspension forever. This is a mounting problem and early implementation would be very welcome.

Clause 121. Licensing Statement.

This would require a revision every five years, rather than every three years.

Clause 122. Personal licences - offences

This would make attempts at crime and conspiracy to commit crimes as relevant as the crimes themselves.

Clauses 119, 124, 125, 126, 127, 129, 130, 131, 132, 133, 134 and 135. Early morning restriction orders and late night levy.

These clauses propose a complex set of new measures, involving two new schemes. These schemes have a lot of similarities but some important differences. They are either alternatives or potentially might be used in parallel.

An Early Morning Restriction Order is a mechanism for applying area controls over late sales of alcohol. It can be applied everywhere or just in particular places. It can apply differently to different types of venue or different days of the week. Imposed time restrictions must fall somewhere between midnight and 06:00hrs. The controls would be retrospective and would over-ride any authorisation already granted.

The test which a licensing authority must satisfy is that the application of the ban is 'appropriate'. This goes much wider than showing that it is 'necessary'. The power would enable either temporary or permanent bans to be put in place. There is no mechanism for challenge, if it becomes clear that a restriction has made no material difference.

Implementation would involve a standard set of consultations and notices.

A Late Night Levy follows the same options between midnight and 06:00hrs. It allows the activity of selling alcohol to go ahead but imposes a levy on those who trade late, whether on or off sales. A fundamental difference from the above is that it must apply across the whole area of the borough and cannot just be applied to zones such as town centres. That said, particular categories of premises can be exempted from the requirement to pay a levy. Instead of those categories being decided nationally, they would be decided locally. It is highly likely with that formulation that licensing authorities would come under intense lobbying and litigation, to pressure them to exempt certain traders, notably the big supermarket chains.

If government does not provide a clear framework for the liability of different types of premises, Councils will find themselves in a difficult position. Regulations (the detail of which is not known) will set applicable fees and prescribe reduced fees for some categories of premises.

It is proposed that payment will be triggered by the fact of having a licence, not by actual late trading. Liability would also be based on any authorisation for late trading, even if it is only for one day. There will be provisions for rebates but only when an authorisation begins or ends mid-year, not on the basis of whether an authorisation covers five days a year or two hundred days a year.

It appears that if a cut-off point of 02:00hrs is nominated by a local authority, a venue which opens until 02:15hrs one night a week will pay the same as an equivalent venue which opens until 05:00hrs six nights a week. If that were to be the case, the levy would likely provoke mass applications for later hours, from venues desiring to get the full benefit from the fee. That would produce the opposite of the desired outcome.

Fee calculations might be very complicated and require considerable administrative input. Dispute resolution could be a major drain and might conceivably wipe out any financial benefit.

It is proposed that the Police should have at least 70% of any funds raised, after deduction of collection costs. They would however have no liability at all for any costs incurred as a result of legal challenge. The local authority would benefit by a maximum of 30% of the net funds but would be liable for the whole cost of any legal challenge. There is a case to be made that the Police should be made liable for 70% of the risk, if they receive 70% of the benefit. From a local authority standpoint the balance between risk and benefit is an uncomfortable one.

It is very difficult to gauge the scale of funds which might accrue from such a scheme in Swindon but on the basis of what has been said so far it might be something in the order of £35k net, with around £25k going to the Police. The principal effect would perhaps be to retrench hours rather than to raise funds but while a nominated cut-off time of 02:00hrs might possibly pull back those trading until 03:00hrs, it appears that a cut-off of midnight (which would affect many more premises) would offer no incentive to change, for any late-opening premises.

The potential financial benefits look very small when compared with the potential cost of litigation. The more tightly the detail is framed, the lower the risk of legal challenge – but at the cost of local discretion. If for example the position on supermarket chains is left vague, no licensing authority will wish to lead the way, for fear of the likely legal costs.

As currently framed, a Late Night Levy looks to be a very high risk, low gain mechanism. Of course, a great deal depends on the terms of the regulations which set out the detail of the scheme.