

THE MAGISTRATES' ASSOCIATION
JUDICIAL POLICY AND PRACTICE COMMITTEE

RESPONSE

Balancing the Licensing Act: Consultation

Magistrates' Association members deal with the consequences of alcohol consumption on a daily basis. For instance, there are now more women in custody for acts of violence than any other offence group. This may not be entirely unrelated to the changes in the regulation of alcohol that started with the Better Regulation Task Force Report in the early 1990s and ended in the passing of the 2003 Licensing Act.

The Magistrates' Association believes that transferring control of licensing to local councils and away from the courts was a mistake. For example, there has been a failure to produce any national control over personal licence holders, and this has resulted in a more expensive and less satisfactory system than before the Act came into force. The Association would urge the government to seriously consider returning control and management of the licensing of alcohol and its sale and consumption back to magistrates' courts. It is therefore disappointed that a review of responsibility does not form part of this consultation.

Moreover, there appears to be no suggestion that licences can and ought to be revoked for long periods, if persistent flouting of the law is maintained. There is some mention at section 5 of temporary closure of premises, but we do not feel that this is sufficient to meet the coalition commitment to 'give local authorities and the police (and by implication, the courts) much stronger powers to remove licences from, or refuse to grant licences to, any premises that are causing problems.

Section 8 talks about the effect on children, but nowhere is the target marketing of drinks like alco-pops to children mentioned. These are aimed specifically at getting youngsters into a drinking culture and at the very least there ought to be some investigation (if there hasn't already been some) into their effect. The Youth Courts Committee of the Magistrates' Association has recently produced a Policy Paper on Alcohol, reflecting its serious concerns about the 'binge culture', particularly in relation to young people throughout England and Wales.

Setting a 'cost' level as suggested in section 9 would be an excellent way of getting the alcohol manufacturers into the equation. They know exactly what their cost levels are, before and after on costs such as marketing have been added. Copies of our Youth Courts Committee and Judicial Policy and practice Committee papers on alcohol are appended to this consultation response.

Criticism is levelled at the courts that they do not ask if those convicted of crimes are personal licence holders. However, it is our understanding that the courts do not have the power to ask — the Act lays the duty on the person to tell the court. This is why we have always pushed for the national register of personal licence holders.

These are our specific responses to the consultation questions:

Consultation Question 1: What do you think the impact would be of making relevant licensing authorities responsible authorities?

Responsible bodies have a special status in the 2003 Act in that they must be notified of applications – Clause 17 (5)(b) and have other powers. The Act specifically defines the departments that qualify as responsible bodies — these are not normally the local authority and never the determining licensing authority. To make the determining licensing authority a party to the granting by allowing them to raise objections would be to sever the notion of a degree of independence between the councillors on the licensing authority and the council as a whole. If the desire is to increase the role of the council in commenting on licensing applications then there would be a case for returning licensing to the courts as an independent body that can arbitrate fairly and without risk of favour that would be inherent in a decision to make a licensing authority *per se* a responsible body.

If the intention is to do away with any semblance of independence in the licensing process, then a new Act would be necessary as such a decision would undermine one of the major tenets of the 2003 Act.

Consultation Question 2: What impact do you think reducing the burden of proof on licensing authorities will have?

This question is not about changing the ‘burden of proof’ in the legally accepted sense of the word. It would presumably remain as ‘the balance of probabilities’ in weighing any conflicting evidence between the two sides to an application. However, it would change the word ‘necessary’ to ‘appropriate’. This might be regarded as a weaker term, depending on how enforced. Thus, it would be necessary to meet the first objective for ‘to employ a licensed doorman’ to become ‘it would be appropriate to employ ...’ This might allow a licensee to say I employed a doorman but didn’t bother to check they were licensed as the key appropriate bit attached to the employment of a doorman, not a licensed doorman.

Consultation Question 3: Do you have any suggestions about how the licence application process could be amended to ensure that applicants consider the impact of their licence application on the local area?

Paragraph 8.28 of the *Licensing Guidelines* should be amended to include a statement making clear that applicants must consider the impact of their licence application on the local area. However, in order to make sure that this is properly addressed by applicants the questions needs to be sufficiently probing, eg. ‘*what do you anticipate the impact of a licensed premises at the proposed location to be, and how do you propose to address this impact to ensure it is kept to a level commensurate with public interest?*’ Local licensing policy documents should also contain such explicit reference. In view of the range of activities covered by the 2003 Act there is a danger that all activities might be caught by too draconian a change in the law.

Consultation Question 4: What would the effect be of requiring licensing authorities to accept all representations, notices and recommendations from the police unless there is clear evidence that these are not relevant?

It is not clear what ‘*accept all representations*’ means in practice and we strongly recommended that it is revised. In our view the current wording of ‘*must have regard to representations ...*’ seems sufficiently strong. In ignoring police representations, a licensing committee should always make clear why it has done so in order that the matter may be challenged on appeal. It is assumed that a right of appeal would still exist; otherwise the police would effectively have a veto with no challenge by the citizen. It is also not clear what is meant by ‘not relevant’ in these circumstances. If it was beyond the licensing objectives then that offers a wide scope for information to be included. However, would a premises thought to be purchased with the proceeds of crime be a relevant consideration to refuse a license under this provision?

Consultation Question 5: How can licensing authorities encourage greater community and local resident involvement?

This is not a question where the Magistrates’ Association feels competent to comment.

Consultation Question 6: What would be the effect of removing the requirement for interested parties to show vicinity when making relevant representations?

The risk would be that many more parties would object to some proposals, making it necessary either to judge which parties were relevant, and risk a challenge from those excluded, or to considerably lengthen hearing and possibly appeal durations as more groups of active citizens became involved in making representations. It is difficult to see how a review of licences prompted by resident groups near to say a footpath from a town centre could identify individual premises unless only one premises had a different closing time to others; not often the case. This change might especially affect large events as for example, users of Castle Carey railway station could claim ‘public nuisance’ during the Glastonbury Festival as a reason for restricting numbers attending if the vicinity test was removed. Indeed, Public Order ‘harassment’ reports might escalate from members of the public trying to prove a point in order to trigger a review of licences in a town centre many miles away but linked to a local transport node.

Consultation Question 7: Are there any unintended consequences of designating health bodies as a responsible authority?

This question can only be answered in conjunction with the decision on the next question.

Consultation Question 8: What are the implications in including the prevention of health harm as a licensing objective?

The addition of a fifth licensing objective would be a major change and would need considerable thought. From the point of view of the Magistrates’ Association, the issue of linking a ‘prevention of health harm’ to particular premises would be a key issue in any appeal. Regular admissions to A&E could already be covered by the crime and disorder objective since being drunk in a public place can be an offence and any consequences of violence or road traffic matters is covered by the crime and disorder objective. Wider health harm should be dealt with through other policies than those dealing with the licensing of individual premises and their licensees.

Consultation Question 9: What would be the effect of making community groups interested parties under the Licensing Act, and which groups should be included?

There is a risk of a loss of objectivity by councillors since many more would be members of these groups. The need for objectivity would require licensing committees to be free from perceived bias in any direction. This would be another good reason for returning licensing to the courts where there is no conflict of interest. The issue of how interested parties were represented at appeals where the local authority had decided in their favour and the present Act provides no 'standing' for such groups and individuals on appeal would need to be addressed. There would likely be more, and possibly longer, appeals if more groups were involved; potentially there would be more demands for reviews in the early days of any change.

Consultation Question 10: What would be the effect of making the default position for the magistrates' court to remit the appeal back to the licensing authority to hear?

This would be unacceptable. Appeals can be generated by either side following dissatisfaction with the decision of a licensing committee at the local authority level. As the local authority is not a totally disinterested party, and can even be the licence holder, such a move would result in judicial reviews being used as the alternative route to appeal decisions. At present, there is no evidence that the process — as opposed to the *time taken* — isn't working. The alternative option would be to return the whole licensing regime to the courts. Authorities could then become a party to an action as envisaged in Question One. The magistracy generally has a 'feel' for what is needed whereas the local authority may not as the officers may well live in an entirely different area. Magistrates retaining the appeal function fits better with the government's desire for determination at a local level.

There are improvements that could be made to the appeal process, but what is proposed in the consultation document is not the way forward.

Consultation Question 11: What would be the effect of amending the legislation so that the decision of the licensing authority applies as soon as the premises licence holder receives the determination.

Where a licence was revoked or suspended it might not be possible to appeal the decision before its effect had ended. A better route would be to impose a time limit on the hearing of appeals. Fourteen days to lodge and appeal and 28 days to a hearing would seem sensible time limits. Local authorities need to be sensitive as to when proceedings are brought. An alternative would be to extend the use of closure notices to include premises guilty of more serious offences including sale to under-age persons and sale to those already 'drunk'. A court could order the closure as a penalty without the need to refer the case to a licensing committee.

Consultation Question 12: What is the likely impact of extending the flexibility of Early Morning Restriction Orders to reflect the needs of the local areas?

This would effectively re-introduce local licensing hours. The issues for and against such a decision have been well rehearsed in the past. However, the relation of such hours to Clause 172 would need to be made clear as would whether they would affect the work of warehouses supplying alcohol over the internet. It is not clear whether the intention is for such Orders to

affect both on or off sales, and whether table meals and hotel mini-bars would be included or excluded. If widely used, this type of Order could re-introduce the complexity of the 1964 Act that was removed by the 2003 Act. There might well be an increase in appeals.

Consultation Question 13: Do you have any concerns about repealing Alcohol Disorder Zones?

As no ADZs have been introduced, we find it difficult to comment.

Consultation Question 14: What are the consequences of removing the evidential requirement for Cumulative Impact Policies?

Without an evidence base it is difficult to see how decisions would be reached. There would, inevitably, be appeals and courts cannot operate without evidence. There would probably be an increase in the number of judicial reviews.

Consultation Question 15: Do you agree that the late night levy should be limited to recovery of these additional costs? Do you think that the local authority should be given some discretion on how much they can charge under the levy?

The Magistrates' Association does not wish to comment on this question.

Consultation Question 16: Do you think it would be advantageous to offer such reductions for the late night levy?

The Magistrates' Association does not wish to comment on this question.

Consultation Question 17: Do you agree that the additional costs of these services should be funded by the late night levy?

The Magistrates' Association does not wish to comment on this question save to say that not all issues of street cleaning are alcohol related.

Consultation Question 18: Do you believe that giving more autonomy to local authorities regarding closing times would be advantageous to cutting alcohol-related crime?

It would depend upon how local authorities reacted. The idea of staggered closing times was discussed when the present Act was introduced. The problem now may relate more to pre-loading before entering the night-time economy and this solution would do nothing to stop that problem. More use of refusal of entry to premises of those already under the influence of alcohol might prevent the problem from occurring. Closing times are a very blunt instrument in dealing with the issue and could make matters worse.

Consultation Question 19: What would be the consequences of amending the legislation relating to TENs so that:

- a. All the responsible authorities can object to a TEN on all of the licensing objectives?*
- b. The police (and other responsible authorities) have five working days to object to a TEN?*
- c. The notification period for a TEN is increased, and is longer for those venues already holding a premises licence?*
- d. Licensing authorities have the discretion to apply existing licence conditions to a TEN?*

The present rules are too lax. However, the extent of any problems with TENs needs determining before deciding what changes are appropriate. The five working days change for police objections prevents the abuse of posting a TEN at 7pm on a Friday at a police station that is unstaffed over the weekend, and is a sensible move. However, courts used to have a facility for late applications in emergencies, and this should be restored if possible. Licensed premises applying for TENs should have the TEN for the premises subject to the same restrictions as appear on the substantive licence.

Consultation Question 20: What would be the consequences of:

a. Reducing the number of TENs that can be applied for by a personal licence holder to 12 per year?

b. Restricting the number of TENs that could be applied for in the same vicinity (e.g. a field)?

The Magistrates' Association does not wish to comment on the first part of this question. Part b would remove an anomaly but as Clause 1(1) (a) relates only to the sale of alcohol and not the consumption that clause would need to be re-drafted with consequent effects throughout the remainder of the Act.

Consultation Question 21: Do you think 168 hours (7 days) is a suitable minimum for the period of voluntary closure that can be flexibly applied by police for persistent underage selling?

Any period of agreed closure is a compromise. However, the greater the economic loss the more it should be liable to scrutiny so that it is not abused. It is not the role of the police to be sentencers. Deciding on punishment is either the role of the local authority or the courts. To provide the police with a minimum of seven days is to breach the separation of powers. There should always be a right to appeal such a decision.

Consultation Question 22: What do you think would be an appropriate upper limit for the period of voluntary closure that can be flexibly applied by police for persistent underage selling?

In line with our answer to Question 21, the Magistrates' Association do not think this is a role for the police. Such draconian sentences affecting the livelihood of potentially many people should be decided in an open forum of either a licensing committee or a court. Whilst it is acceptable for the police to have closure powers in emergency situations, it is not acceptable for them to abrogate the role of other bodies in society. We think there should be no extension beyond the present 48 hours. Clause 164 of the original Act provided a suitable route for extended closures.

Consultation Question 23: What do you think the impact will be of making licence reviews automatic for those found to be persistently selling alcohol to children?

If a licence is revoked then a review is not necessary. Persistent selling should lead to revocation, preferably by a court on conviction rather than following a review.

Courts should be able to revoke licences without the need to wait for a review if any premises have habitually been used to sell alcohol to under-age persons. The court should also be able to ask, not require to be told, whether a person is a personal licence holder. The working of the question seems to fail to understand that there is a difference between a premises licence

and a personal licence. At present, the offence is committed by an individual and the 2003 Act separated the individual from the premises except where the link was as designated premises supervisor. This is the reason that there has to be a review of the premises licence. An offence that allowed a court to revoke or suspend a premises licence on conviction would be faster. If other conditions are imposed by a licensing authority other than revocation, then regular test purchases might be a more cost-effective way of monitoring the situation.

Consultation Question 24: For the purpose of this consultation we are interested in expert views on the following.

- a. Simple and effective ways to define the 'cost' of alcohol*
- b. Effective ways to enforce a ban on below cost selling and their costs*
- c. The feasibility of using the Mandatory Code of Practice to set a licence condition that no sale can be below cost, without defining cost.*

The Magistrates' Association does not wish to comment on this question.

Consultation Question 25: Would you be in favour of increasing licence fees based on full cost recovery, and what impact would this have?

The Magistrates' Association does not wish to comment on this question.

Consultation Question 26: Are you in favour of automatically revoking the premises licence if the annual fees have not been paid?

Yes.

Consultation Question 27: Have the first set of mandatory conditions that came into force in April 2010 had a positive impact on preventing alcohol-related crime?

The Magistrates' Association believes it is too early to tell.

Consultation Question 28: Would you support the repeal of any or all of the mandatory conditions?

The Magistrates' Association does not wish to comment on this question. However, the Association believes that SIA approved door staff should refuse entry to those already intoxicated and that those powers that already exist should be rigorously enforced. SIA staff that fail to enforce the law should lose their accreditation. Courts should be able to remove SIA accreditation from those who work in and around licensed premises.

Consultation Question 29: Would you support measures to de-regulate the Licensing Act, and what sections of the Act in your view could be removed or simplified?

There are no parts of the Act we would support removing except that we would suggest the whole regime be returned to the Magistrates' Courts, thus removing the ambiguous role of local authorities as both controller and decider of alcohol and other licensing regimes. The anomaly between live music and large screen television presentation of entertainment may need consideration with regard to regulating on the same terms.

Schedule 5 needs clarification with regard to the status of those whose requests for a review to a licensing committee are upheld when the issue goes to appeal. At present their right to be heard is not included in the legislation.

Attached

Association paper 10/28 Licensing Policy
Association paper 10/50 Alcohol Policy