

Welcome to our round up of key licensing issues and developments. Highlights include:

- Consultation on locally set licence fees imminent – increases likely.
- EMRO and Levy Consultations and Considerations – Newcastle has launched its formal consultation on the introduction of a late night levy, although Islington seem to be back-tracking. Hartlepool, Northampton, Warrington and Blackpool have all indicated that they are considering the introduction of an EMRO. Camden requested views on both EMROs and the Levy. We summarise the proposals of each Authority and current status.
- Better Regulation Delivery Office (BRDO) Code of Practice on Age Restricted Products – the Code of Practice for regulators and enforcers has now been published. We consider the key implications for your business.
- Deregulation of Entertainment – the response to the consultation has now been published by the Department of Culture Media and Sport. Most entertainment activities that are licensable will be deregulated up to an audience threshold of 500 people between 08.00 and 23.00, save for indoor sport, which will have a higher audience ceiling of 1000 people. We set out the proposed exemptions and how they may affect your business; and perhaps more importantly, what will remain licensable.

If you have any queries about any of the highlights in this month's review, or if you need any advice on your licensing requirements, applications, or procedures, please contact us. We can assist with drafting and submission of applications, contested hearings, audits and advice on procedures, policies and/ or training, prosecutions or licence reviews.

Consultation on Premises Licence Fees

The Police Reform and Social Responsibility Act contained powers for Licensing Authorities to set fees for licence applications locally, on the basis of cost recovery, subject to a national cap. There are, as yet, no details on the proposed level of the national cap.

However, it has been reported that the Home Office has confirmed that a consultation on regulations for locally-set licensing fees is imminent. They have indicated that new fees are likely to come into force in the Summer.

Currently, all fees for premises and personal applications under the Licensing Act 2003 are fixed national charges, depending on the type of application and the rateable value of the premises. For a new Licence application or variation, the fee payable is up to £635. These levels have been fixed since the Licensing Act came into force in November 2005.

Clearly, once the legislation is in force, the cost of licence fees will vary from Authority to Authority. However, it is widely anticipated that fee levels are set to rise from current levels for all applications and Authorities.

We will report further on the details of the fee proposals and the proposed level of the national cap once the consultation is launched.

EMRO and Levy Consultations

Early Morning Restriction Orders (EMROs) and Late Night Levies were brought into force in October 2012 under the Police Reform and Social Responsibility Act. A number of Local Authorities are now consulting on, or considering, introduction of an EMRO or a Levy in their areas.

Under the Police Reform and Social Responsibility Act, the Council will have discretion to seek an EMRO for all or part of their area at any time between midnight and 6am. Levies can only apply to the whole of a Licensing Authority area.

The amount of the levy is set down by legislation and will be a yearly amount between £299 and £4,440 depending on the rateable value of the premises and their actual use.

It should be noted that if your Licence currently allows sales of alcohol between midnight and 6am for flexibility, you can vary that Licence before any Levy comes into force to remove the relevant hours from the scope of your Licence. In these circumstances, you would not be liable to pay the levy.



Newcastle upon Tyne - Levy

Following much speculation, Newcastle upon Tyne City Council has formally launched a consultation on the introduction of a late night levy to apply across its jurisdiction. The Consultation closes on 30 April 2013 and the Council proposes that the levy will be introduced on 1 November 2013. If approved, the levy will require holders of premises licences or club premises certificates that authorise the supply of alcohol at any time between midnight and 6am on one or more days in a year to pay a late night levy. This will apply to on licences and off licences.

The Council proposes a number of exemptions – hotels may be exempt if the licence only allows alcohol sales to hotel residents during relevant times. Any hotel with a licence allowing sales to non-residents between midnight and 6am would still be liable to pay the levy.

The Council will consult on developing a business led best practice scheme and if an acceptable scheme is developed, the Council is willing to consider permitting a 30% reduction in the levy for members of the scheme.

If you are a licence holder in Newcastle upon Tyne, you are entitled to respond to the consultation. If you would like to discuss the process, or would like help with making a representation, please contact us for advice.

Islington – Levy?

Following stories last year that Islington would be one of the first Authorities to introduce a Levy, it seems that the Council are re-thinking the proposal. It has been reported that the Council are concerned that there would be no guarantees under the legislation that any money raised would be spent in the Borough (it is a requirement that 70% of the Levy goes to police, but there is no requirement on the police to spend the revenue on late night policing in the area where the Levy is imposed – in this case it could be spent in any area covered by the Metropolitan police). There has been no formal consultation on the levy to date.

Hartlepool Borough Council – EMRO?

Hartlepool have announced a proposal to introduce an Early Morning Restriction Order (EMRO), between 02.00 and 06.00 for the area covered by the Council's Cumulative Impact Policy. The effect of any such EMRO would be to prevent any sales of alcohol (on or off sales) between the relevant times, regardless of whether existing Licences allow sales in the timeframes.

The Council are holding a meeting on 22 February to explain the proposals and have indicated that the consultation will run from 14 February to 28 March 2013. Where relevant representations are made, the Council will be required to hold a public hearing within 30 working days of the end of the consultation.

Northampton Borough Council – EMRO?

Northampton's Licensing Committee met on 11 February to consider the introduction of an EMRO in their area. The Agenda sets out that it is up to the Committee to determine the area, days and times in relation to which the EMRO would apply (although EMROs do not apply to any premises on New Year's Eve).

No formal consultation has been announced by Northampton to date. It is anticipated that the earliest date that an EMRO could be put in place would be June/July 2013.

Warrington – EMRO?

The Report to the Warrington Partnership on 13 December noted that "There is a general consensus amongst the owners of Licensed Premises that an EMRO may be beneficial and discussions will continue until formal consultation can legally commence in the near future. An outcome of the discussions is that the partnership has established a Licensed Premise Owners Forum and a Security Company Forum to progress joint working arrangements and collectively improve the standards in the Town Centre".

No consultation has been launched to date.

Blackpool – EMRO?

Over the last few days, Blackpool has also announced that its Licensing Committee will discuss the introduction of an EMRO between 3am and 6am next month. If they decide to proceed, a full consultation will follow, as is required under the legislation. The Publican's Morning Advertiser reports that licensees claim such a move will 'devastate' Blackpool's late night economy.

Camden – Levy or EMRO?

Camden launched an initial assessment on the introduction of a Levy or an EMRO in late December 2012. No formal consultation on either measure has yet been announced.

Code of Practice on Age Restricted Products

A draft Code of Practice on test purchasing for regulators and enforcers opened for consultation in July 2012. The consultation closed in September and the new Code on Regulatory Delivery has now been published by BRDO. The Code is not statutory i.e. regulators are not required to comply with it by law, but is likely to have significant persuasive weight in any prosecutions or licence reviews.

The Code applies to all local regulatory activities in England and Wales and covers all products and services for which statutory age restrictions are in place. It will therefore apply equally to firework, lottery, knife and tobacco sales, as well as alcohol. It will also apply to gambling.

From a responsible operator's perspective, the benefits of the Code are that it stresses the principles of 'good regulation' (as set out in the Legislative and Regulatory Reform Act 2006) i.e. that regulation should be proportionate, consistent, accountable, transparent and targeted. The Code is divided into 4 parts, being prioritisation; working with businesses and communities; conduct of checks on compliance; and responses to non-compliance.



The Code emphasises the importance of enforcement agencies and the policies of those agencies, being open and based on risk. This will no doubt be welcomed by responsible retailers. The principles of the Code include the principles that enforcing authorities should:

- Understand and communicate the contribution that regulatory activities in respect of age restricted products and services make to the outcomes that it is committed to delivering. It suggests an annual service plan, business plan or a compliance and enforcement policy for communicating this contribution. It also suggests that the Licensing Policies prepared under both the Licensing Act and the Gambling Act can be used to set out the outcomes in relation to the protection of children from harm and the contribution that enforcement activities will make to delivery.
- Ensure regulatory resources are allocated on the basis of an assessment of priority risks i.e. an evidence based approach.
- Work collaboratively with other organisations that have shared outcomes, in particular considering public health initiatives, co-ordination with police and co-ordination with national regulators such as the Gambling Commission.
- Ensure transparency as to enforcement policies and approach. This means that the policy on compliance and enforcement should be clear, published and easily accessible. It should also make clear whether activities are targeted on the basis of its own risk methodologies, or national ones.
- Select compliance and enforcement activities that offer the greatest opportunity to deliver improved outcomes for young people, local communities and businesses. This makes clear that raising awareness, providing advice and guidance and working through primary authorities are options, as well as conducting checks on compliance and dealing with breaches.
- Provide clear information and guidance on legislation to those it regulates;
- Prioritise support to businesses that are least likely to have robust compliance arrangements in place, particularly in priority risk areas (the Guidance recognises that businesses in a Primary Authority partnership covering age restricted sales are able to receive authoritative advice from their primary authority and as such they will usually represent a low priority for other local authorities);
- Ensure information and guidance is clear and consistent in relation to acceptable forms of age;
- Where a local authority is acting as licensing authority, have regard to the statutory principles of good regulation when considering licence conditions (the Guidance stresses that standardised conditions should be avoided and ensuring that conditions are proportionate);
- Target proactive checks (presumably this would include test purchases) on compliance on the basis of a robust risk assessment model – the Guidance notes that this should include consideration of the potential harm of the product/ service, the number of young people that might access it, past compliance records, systems for managing compliance, evidence of external accreditation including retailer self-testing or third party tests and management competence/ willingness to comply;
- Ensure responses to complaints or intelligence, both about geographic locations and specific businesses, is proportionate. The Guidance specifically states that in the event of complaints/ intelligence about a specific business, the enforcing authority should review the business's approach to compliance, its history of compliance and the mechanisms that are available to the authority. This means that the consistent application of robust due diligence systems are likely to be even more important for businesses;
- Consider the statutory requirements for authorisation under the Regulation of Investigatory Powers Act 2000. It goes on to state that it is unlikely that authorisations under RIPA for covert methods will be considered proportionate without demonstration that overt methods have been attempted and have failed. Guidance published by the Office of Surveillance Commissioners sets out that a single test purchase is unlikely to be classed as covert human intelligence, for which authorisation would be required. It also states that when conducting covert test purchase operations at more than one establishment, it is not necessary to obtain authorisation for each premises. However, equally, "the intelligence must be sufficient to prevent fishing trips".
- Select test purchasers with regard to suitability e.g. age, appearance, dress;
- Notify businesses in writing of the outcome of a test purchase event (whatever the outcome) – to be sent to the owner of the business and the premises licence holder in the case of alcohol. This is an improvement on current practices, where often it is only the individuals who make the sale and the Designated Premises Supervisor who are notified of a test purchase result. The Code sets out that notifications should be made 'promptly' in the case of a failure (up to 5 working days) and within a reasonable period (up to 10 working days) if purchase is denied. It also sets out the information that should be included in a notification; and
- Ensure that it communicates effectively with the business in relation to any non-compliance and with any individual who may be responsible for the non-compliance. The Guidance makes clear that where the business is a multi-site operator, discussions at premises level must not replace discussions with the licence holder.
- Respond to breaches of compliance in accordance with published policy; proportionately; responsively with a consideration of what is appropriate; and aim to secure on-going compliance and eliminate financial gain or benefit from non-compliance.



Importantly (and in contrast to the draft Code proposals), the published Code sets out that the test purchaser may be allowed or instructed to present proof of age if they are asked for this by the business but this proof of age should be genuine and relate to the test purchaser. This is good news for businesses, as allowing the use of 'fake' ID could have unfairly trapped responsible businesses and staff members.

The requirement in the Code that enforcing authorities must notify the business owner and premises licence holder in writing of the result of any test purchases will be welcomed by businesses. In our experience it is a real frustration that most Local Authorities do not advise businesses when they have passed a test purchase operation, only if they have failed; and that they do not always let the business know the result of test purchase operations, but instead deal only with staff at the premises.

Notifications of a positive outcome could serve to validate due diligence procedures and may provide valuable evidence on compliance for Licence applications and reviews.

If you need assistance with developing or improving your age verification procedures, or if you have failed a test purchase and need advice and assistance for any subsequent meeting, interview, prosecution or Licence review, we can help.

Deregulation of Entertainment

The DCMS have now published their response to the Consultation on the deregulation of entertainment under the Licensing Act 2003. Legislation will be required before the proposals come into force, but it is clear that the intention is to publish the required legislation later this year. It is expected that plays, dance and indoor sport will be deregulated from April 2013 and live and recorded music will be deregulated from April 2014.

Currently under the Act, any 'regulated entertainment' provided to members of the public or a section of the public, or for consideration and with a view to profit, is licensable, regardless of the times that the entertainment takes place (subject to a limited number of exemptions). Regulated entertainment not only includes music and dance performances, but also plays, films, indoor sporting events and boxing or wrestling entertainments.

Since 1 October 2012, the Live Music Act removed the requirement for live music to be licensed in certain circumstances as follows:

- Live unamplified music in any location between 08.00 and 23.00;
- Live amplified music in on-licensed premises or workplaces for audiences of up to 200 persons between 08.00 and 23.00.

The proposed deregulation of other forms of entertainment will go much further than that. The DCMS set out in their consultation that between the hours of 08.00 and 23.00:

- The "performance of plays" and "exhibition of dance activities" will be deregulated for audiences of up to 500.
- The "indoor sport" activity will be deregulated for audiences of up to 1000.
- A Legislative Reform Order will be made to raise the Live Music Act's audience threshold for permitted music performance from 200 to 500 in on-licensed premises and workplaces.
- This Order will also suspend regulation for the "recorded music" activity in on-licensed premises.

In addition, there will be exemptions for all forms of entertainment held by Local Authorities, Schools (except Higher Education establishments), Nurseries and Hospitals on their own premises between 08.00 and 23.00 (with no audience restrictions). Live and recorded music held (by others) with their permission on their premises, will be exempted for audiences up to 500.

Community premises such as church halls, community centres and village halls will also be exempt from the requirement to be licensed for live and recorded music for up to 500 people. Circuses will be exempt from regulation for live and recorded music, plays, dance and indoor sport between 08:00-23:00 with no audience restrictions.

What will remain licensable?

Regulation will remain in place for all activities that exceed the audience limits and timings above. For example, if you intend to provide live or recorded music until 2am, you will still need a Premises Licence or a Temporary Event Notice for 11pm to 2am. If you intend to have an audience of over 500 persons for live or recorded music, the entire duration will need to be covered by a Premises Licence or Temporary Event Notice.

It is also important to note that, as with the current live music exemption, where the criteria are met, existing conditions on Licences which relate to the provision of regulated entertainment will be of nil effect. However, conditions can be re-activated or imposed at a review hearing; and, of course, the conditions will still apply to any music outside of the specified time frames of 08.00 to 23.00.



Film exhibitions will remain regulated, although the DCMS have indicated that they will consult this year on community film deregulation proposals to examine the possibilities for safe community-focussed screenings that maintain child protections. It is anticipated that following that consultation, limited deregulation for films will be introduced from April 2014.

Boxing and wrestling will also remain regulated, with the exception of the Olympic sports of Greco-Roman and Freestyle wrestling. As proposed in the consultation, cage fighting / mixed martial arts will become regulated activities.

Finally, please remember that all playing of music in "public" (which for these purposes means audible by more than one person, even if those persons are all staff) requires copyright licences issued by PPL and/ or PRS as appropriate, whether they are amplified or unamplified.

Contact

For further advice, training, or copies of our previous newsletters, please contact:

Stephanie Perraton

Partner

T +44 121 222 3559

M +44 7778 341 244

F +44 870 460 2829

E stephanie.perraton@squiresanders.com

Nicola Smith

Senior Associate

T +44 121 222 3230

M +44 7771 726 555

F +44 870 460 2915

E nicola.smith@squiresanders.com



The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Sanders.