

Review

Licensing Without Hiccups



Briefing Note

POLICE AND SOCIAL RESPONSIBILITY BILL

The Police and Social Responsibility Bill (the "PSR Bill") covers five distinct policy areas: alcohol licensing; police accountability and governance; the regulation of protests around Parliament Square; misuse of drugs; and the issue of arrest warrants in respect of private prosecutions for universal jurisdiction offences.

The parts of the PSR Bill that deal with alcohol licensing are far-reaching and, if introduced in the current form, will have a significant impact upon the licensed industry in England and Wales. We consider in this publication the basic proposals within the Bill and how those proposals may affect you.

Underage Sales

The focus on underage sales is clearly continuing under the Coalition. The PSR Bill proposes that for the offence of persistently selling alcohol to children (which is committed if two such sales take place within a three month period) the penalties will increase as follows:

- The maximum fine will be doubled from £10,000 to £20,000. Many have questioned the logic of this as the current maximum fine has not generally been imposed in practice in any event.
- Where a closure order is issued in relation to the offence, the maximum period for closure will be increased from 48 hours to 336 hours i.e up to two weeks! The minimum period of closure will be 48 hours.

The industry has generally invested significantly over the last few years to prevent underage sales, for example by running Challenge 21 Schemes and increased staff training. Due diligence will need to continue apace given these proposals as the increased penalties could prove to be very costly for your business.

Early Morning Alcohol Restriction Orders

The PSR Bill contains the power for a Licensing Authority to make 'Early Morning Restriction Orders' between midnight and 6am if it considers that such an Order is appropriate for the promotion of the licensing objectives. If such an Order is made, operators will not be able to serve alcohol during the period of the Order regardless of their Licence/ Certificate / Temporary Event Notice.

However, it should be noted that where a Licensing Authority intends to make such an Order, they must advertise it and affected persons can make representations. Where representations are made, the Authority must hold a hearing to consider them. It is likely that any Authority seeking to make such an Order would face significant opposition and the likely expense and delay may deter Authorities from seeking to introduce this measure.

It should also be noted that there may be exceptions from the effect of Early Morning Restriction Orders with reference to particular kinds of premises or particular days. The Government say (in their summary of Consultation responses) that Local Authorities will be able to apply these Orders flexibly so that responsible businesses operating after midnight are not penalised unfairly. They also state that they intend to amend the Guidance to ensure that Licensing Authorities can reflect the needs of their local area by using measures such as fixed closing times, staggered closing times and zoning where they consider them to be appropriate.

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What will happen in practice is likely to depend on the final form of the legislation and the strength of will of each Authority.

Late Night Levy

The PSR Bill as currently drafted would also authorise Licensing Authorities to apply a "late night levy". If an authority decides to introduce this levy, it must apply to the whole of their jurisdiction and will be payable by all licence holders with a Premises Licence (or Club Premises Certificate) which authorises the sale of alcohol during the 'late night supply period'. The relevant period will be defined by the Authority, but can be anywhere between the times of midnight and 6am.

The levy will not apply if a Premises Licence only authorises late night refreshment and/ or regulated entertainment. It is only Premises Licences for the sale of alcohol that will be affected.

Local Authorities will not be able to choose to impose a levy only in part of their area, for example in the town or City centre only. This may discourage them from applying the Levy at all as it could hit small businesses hard although conceivably a Levy stating later, for example at 2am, may not have such an impact on these businesses. There will be 'exemption categories' which Authorities can choose to apply and in those categories holders would not be liable to pay the levy even if they were within the Authority's boundary.

The detail as to how levy charges will be set/ calculated, and what exemption categories there will be, is not included within the draft Bill. The detailed proposals will form part of secondary legislation. This itself is likely to be subject to public consultation given the potential impact / sensitivity of the proposals and it is therefore not yet clear what will be implemented.

There is a danger that the levy may herald a return to standard closing times, with all premises in an area stopping sales of alcohol at the same time to avoid the levy. If premises have included extended opening hours for flexibility only, it may well be more cost effective for the operators of those premises to vary the Licence to reduce hours for alcohol and rely on Temporary Event Notices when necessary.

However, what is clear is that if the Bill is passed in its current form, an authority proposing to make an Order as to a late night levy must consult holders of relevant licences about the proposal. Therefore, there will be further opportunities for operators to resist these proposals at a local level.

We would advise that it is too early yet to predict how this proposal will work in practice as it depends on many factors: including feedback to the Bill Committee; consultation on any secondary legislation detailing the level of charges and the exemption categories; and the views of Licensing Authorities in practice.

Temporary Event Notices (TENs)

There are various proposed changes to the TEN regime. The bad news is:

- Environmental Health Officers (EHOs) will be entitled to object to the application on the grounds of any of the licensing objectives, including Nuisance (currently only the Police can object, on the basis of Crime and Disorder);
- Conditions may be imposed on any TEN if the Licensing Authority considers it 'appropriate' to do so (note there is no requirement for these conditions to be 'necessary', see below as to the reduced evidential burden generally under the proposals). Furthermore, there is no right of appeal against these conditions within the Bill.
- There will be an extra day to object to TENs i.e. the Police/ EHO will be able to object up to the end of the third working day following the day on which they are given a copy (this is currently the second working day, only recently amended from the original strict 48 hour time limit).

There are, however, two bits of good news for operators regarding TENs:

- Late notices will be permitted, up to 5 working days before the event period begins (although there will be maximum numbers of late TEN applications per person per annum).
- Time limits will be relaxed allowing one event to last for up to 168 hours i.e. 7 days (as opposed to the current limit of 96 hours i.e. 4 days) and allowing a maximum aggregate of 21 days per annum (as opposed to the current limit of 15). There is, however, no proposed change to the current annual limit of twelve TENs per premises.

Conditions Imposed to be ‘Appropriate’, not ‘Necessary’

Under the Licensing Act 2003 as it is currently drafted, Licensing Committees, when considering an application or a Review, have the power to take the steps they consider necessary for the promotion of the licensing objectives. Case law has developed during the last five years requiring that any conditions imposed upon Premises Licences must be necessary, protecting to some extent against Licensing Authorities imposing ‘blanket’ conditions on all Licences in their area.

The PSR Bill, in contrast, amends various sections of the Act so that Licensing Committees can take steps that they consider appropriate for the promotion of the licensing objectives. There will be no requirement that they must be necessary. This is a significantly reduced burden and the word ‘appropriate’ is imprecise. We may well see a return to the days of pages of conditions similar to those that were attached to Public Entertainment Licences and it is likely that compliance with additional conditions that aren’t necessary for a particular premises or style of operation will mean additional cost for the industry.

Interested Parties – the Meaning of “Vicinity”

Under the Licensing Act 2003, currently only a Responsible Authority or an Interested Party can submit representations to a Licence application and/ or apply for Review of a Premises Licence. To be an ‘interested party’ a resident or business must reside/ be based within the “vicinity” of the relevant licensed premises. In practice, this means that it is only persons who may be directly or indirectly affected by the licensable activities at that premises who “have a say”.

The PSR Bill proposes that any person can submit representations to and/or apply for review of any Premises Licence. It will not be necessary for them to show that they live within a certain distance of the premises, or to demonstrate that they will be affected by the licensable activities there. However, it would still be necessary for a representation to be relevant and not frivolous or vexatious.

In some areas of the country, this may mean that objections are received to all applications from certain residents/ associations who submit ‘blanket’ objections to licence applications on grounds of principle, as opposed to anticipated problems with a specific premises. As long as they couch their representations in terms of the licensing objectives, it would be difficult for a Licensing Authority to rule that the representation was not relevant or was frivolous or vexatious. This will not only mean additional delay and expense for licence holders, but also for Licensing Authorities who will be required to hold more hearings. There is no ability to apply for costs in relation to committee hearings.

The trade are opposed to this provision in the Bill and numerous parties have responded to the Government to criticise this proposal and suggest that a vicinity test should be retained within the Licensing Act.

Annual Fees – Suspension of Licence for Failure to Pay

The Bill also provides that where a licence holder has failed to pay an annual fee that is due, a Licensing Authority must suspend the Premises Licence unless the failure is due to an administrative error or the licence holder has notified the authority that they dispute liability for the fee and it is still within the ‘grace period’, which will be 21 days.

A suspension of a Licence would be catastrophic for many businesses in terms of lost revenue so it will be essential to ensure that the payment of annual fees is dealt with efficiently and promptly. This may be interesting in practice given the wide discrepancies in how different Authorities deal with payments now; and the number of annual fees that have been paid to Authorities, but cannot be traced.



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Responsible Authorities – Inclusion of Licensing Authorities and Primary Care Trusts

The Bill proposes that Licensing Authorities themselves will be Responsible Authorities under the Licensing Act. This will mean that the Licensing Authority can submit representations to Licence applications and can make applications for Review of a Premises Licence without receiving representations from any other body. The Government have introduced this measure as they wish to make it easier for Licensing Authorities to target ‘problem’ premises and ‘irresponsible’ operators. However, in practice this reform is highly controversial as it brings into question procedural fairness and in particular the independence of a Licensing Committee when being asked to consider matters raised by the Licensing Authority.

The Bill also proposes that Primary Care Trusts and Local Health Boards are made Responsible Authorities. Whether these bodies are likely to make representations in respect of particular premises is perhaps questionable.

If you would like advice on how the Bill may affect your business, please contact Stephanie or Nicola.

FURTHER INFORMATION

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