



# The Licensing Act (2003): its uses and abuses 10 years on

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# Executive summary

In this research project the Institute of Alcohol Studies (IAS) set out to assess the impact of the Licensing Act 2003 (hereon referred to as 'the Act') on the wider public sector 10 years after its implementation. IAS has been involved with the Act from its very beginning; while there was undoubtedly a real need for reform, at the time we cautioned that the proposals seemed:

Likely to undermine rather than protect the public welfare

and described the White Paper as 'confused and ambiguous.'<sup>1</sup> In partnership with the Civic Trust, IAS founded 'Open All Hours?', a network of local residents' and amenity groups, to ensure their voice was heard in the policy process. This group lobbied in particular for the cumulative impact provision that was finally included in the guidance.

On starting this project there appeared to be wide disagreement as to what licensing could and should do, whether it is regulatory or permissive, and whether it is narrowly administrative or guided by a wider view of the public good. We hope that this project will stimulate debate on these issues and lead to greater clarity for all involved in licensing.

IAS wants to see licensing support diverse, inclusive and sustainable communities, without undermining local areas and putting undue pressure onto the public sector. Alcohol is used and enjoyed by many, but it can also be the cause of significant social and personal problems; licensing should have a key role to play in addressing and preventing many of these problems.

## Looking back: 10 years of the Act

In many respects the Act has resulted in continuity rather than change, yet this research found common complaints from local authorities who felt that it has caused them significant problems, particularly in regard to the off-trade.

This report puts forward the view that the Act has been interpreted to the advantage of the licenced trade and there is a need to address some of the myths that have developed around the Act's use.

### Issues impacted by the Act

- There was a common view that the Act has improved day-to-day coordination and cooperation, both within the various regulatory agencies and between the regulators and the licenced trade.
- At the strategic level many participants from a regulatory background saw the Act as fundamentally permissive, reactive and led by market forces at the expense of local communities. Controlling the off-trade was seen to be a particular problem.
- Late night opening has spread crime and disorder back into the early hours, causing significant problems for the police. Most police forces had to rearrange their shift patterns and allocate increased resources to the night time economy to address this change.
- Late night opening seems not to have increased the amount of time or money that people spend in the night time economy, but to have shifted the night out backwards. This has probably increased pre-loading, as people have more time to drink at home before going out.
- While overall numbers of licenced premises have increased slightly under the Act, the growth of the off-trade is the most significant trend; around twice as many off-licences than on-licences have been granted over the last ten years.

### Relevant issues not impacted by the Act

- Overall crime levels, and those specifically related to alcohol, have been dropping since before the Act was introduced and there is no evidence that the Act has contributed to this reduction.
- There is no evidence of a relaxed continental drinking culture developing, or that the Act has led to increased diversity within the night time economy, two key aims of the Act.
- Overall levels of alcohol consumption have been declining since before the Act was introduced. Since the Act came in rates of binge drinking have declined

while the number of people abstaining from alcohol has increased. However, there is nothing to link these developments with the Act itself.

## Other key concerns and issues

- Many Home Office initiatives were viewed with scepticism, particularly Early Morning Restriction Orders (EMROs) which were seen as impractical to implement. Late Night Levies (LNLs) were viewed as useful in certain locations but too inflexible to be commonly used.
- Cheap alcohol was seen as a significant problem by almost all participants, including those from the licenced trade. The ban on below cost selling introduced by the Home Office was thought to be totally ineffective in addressing this issue.
- The Act is poorly equipped to deal with the off-trade, and is based upon an incorrect assumption that most alcohol is consumed via the on-trade. In fact around two-thirds of all alcohol comes from the off-trade.
- Police and local government funding cuts are already causing problems, particularly because the Act's fee system means that many areas are not able to recover their costs. This raises serious questions about the regulation and policing of licensing and the night time economy.
- Moves to put greater emphasis on the self-regulation of the licenced trade via voluntary schemes were viewed with concern and scepticism. There is a significant lack of evidence that such schemes are effective at reducing crime and disorder.
- Many participants reported that the Act had lead to alcohol being found in every walk of life. While the impact of this is difficult to quantify, the normalisation of alcohol was seen to be problematic, particularly for children, and one interviewee likened it to a 'reverse smoking ban'.

Overall this suggests that the Act has had no impact on levels of crime and disorder, overall alcohol consumption and the diversity of the night time economy. Given the widespread predictions that the Act, and specifically 24-hour licences, would increase binge drinking and alcohol-related harms, this is significant, and clearly these predictions have not come to pass.

It would be wrong however to see all of these non-impacts as a success, and the Act has failed to have a positive effect in areas it was intended to, such as alcohol-related violence. There is also a mismatch between the assertion that the Act is benign and the view, found in both this and other research, that the Act significantly handicaps local authorities while being overly lenient on the licenced trade, particularly the off-trade. The impact of this discrepancy is not necessarily universal, but seems to be most sharply felt in areas of high alcohol-related harms.

## Looking forward: Using the Act differently?

There appears to be a significant mismatch between the written detail of the Act and its practical application; many considered that the Act has often been interpreted to the advantage of the licenced trade. There is a real need to address some of the myths that have developed around the Act, and to encourage all those involved in licensing to reengage with the detail of the Act, the section 182 Guidance and relevant case law. As part of this the objectives could be used in a far more even manner, and with their preventative nature emphasised more fully in order to actively create environments where the objectives are less likely to be undermined.

The Act should only be narrowly permissive, and it gives licensing authorities more discretion than most realise to reach reasoned and balanced evaluative judgements in the public interest. The Act does not require licensing authorities to make decisions upon incontrovertible facts, and it does not prevent them from considering the wider geographic location within which a premises sits – indeed the High Court states that a venue's impact, or potential impact, upon its wider location should be carefully considered. There is nothing in the Act, s 182 Guidance or case law that directly underpins the 'premises by premises' approach.

Licensing authorities do need to make better decisions. Many are understandably worried about the prospect of expensive legal costs if a decision is appealed, and clear examples were given in the course of this project where consciously 'safe' decisions were made in order to avoid this prospect, despite concerns about an application. Indeed, the money and legal power available to certain sectors of the licenced trade are key reasons as to why local authorities have failed to properly assert their powers under the Act. The best remedy to this problem is good clear decision making; in the words of the High Court:

The fuller and clearer the reasons, the more force they are likely to carry  
(*Hope and Glory v Westminster* [2011] para 43)

A higher standard of decision making could be achieved by clearer training and guidance for licensing committees and the better use of specialist legal advice by local authorities, resulting in greater legal clarity and focus within licensing hearings. This would narrow the gap in legal rigour between licensing committees and appeal hearings.

While individual applications must be judged on their own merits, decisions should also be informed by wider strategic aims and the public interest; yet beyond guarding against irresponsible operators, many licensing authorities do not seem to have a view as to what these might be in their local area. If asked about their strategic vision for licensing in their area most chairs of licensing committees would not know what to say. As a result, across much of England and Wales there is no coherent and strategic approach to licensing and the wider evening and night time economy. This does seem to be slowly changing as local authorities cautiously adopt locally based strategic policies.

## Key areas of tension

**The true extent of the permissiveness (if at all) of the licensing regime:** see chapter 4.

**The extent of local authority powers to administer and regulate the licensing regime for the public good:** see chapters 4, 13 and 14.

**The nature and use of evidence within licensing decision-making:** see chapter 14.

**Questions on terminal hour, including the role of police evidence:** see chapters 10 and 14.

**The greatly overplayed role of the premises by premises approach:** see chapter 14.

**Locality context and its importance in licensing decisions:** see chapter 14.

**The questionable application of economic considerations:** see chapters 5 and 14.

**The role of public health, well being and the wider quality of life:** see chapter 15.

**The difference between reactive decisions and decisions based on strategic thinking:** see chapter 13.

## **Selected recommendations**

**(A full list of recommendations can be found at the end of this report)**

Taken as a whole, these recommendations would give local authorities a great ability to be proactive and assertive in their use of the Act, using it more effectively to promote the public good in their local area.

### **1. Better application of the s 182 Guidance in practice**

It is evident that there has been a failure to have proper regard to the s 182 Guidance and we encourage all parties to engage with it fully. As per paragraph 1.7, all those involved in licensing should be clear that:

It is a key medium for promoting best practice, ensuring consistent application of licensing powers across England and Wales and for promoting fairness, equal treatment and proportionality.

### **2. Ensuring local authorities have a clear and coordinated strategic approach to licensing**

Local authorities should be given greater steer to outline a clear strategic vision for licensing in their area, building upon the advice in para 1.5 of the s 182 Guidance and others, and coordinated with other relevant council strategies. This strategic view should be developed by elected councillors, with the input of licensing officers and other responsible authorities.

At present there is no requirement for local authorities to consult with anyone from a child protection background in developing their Statement of Licensing Policy. This should be amended at section 5(3) of the Act, and then paragraph 13.4 of the s 182 Guidance.

### **3. Locally set fees**

The ability of local authorities, and indeed all responsible authorities under the Act, to properly fund their licensing operations is a key concern. At present many struggle to do this, and locally set fees, reflective of costs, are needed to address this problem. This is also needed for fees to be compliant with the EU Services Directive.

As with alcohol licensing, street trading comes under the EU Services Directive. Its fees and charges provisions have been reviewed by the Department for Business Innovation and Skills in order to ensure compliance with the Directive. Under street trading statutes the local authority is entitled to charge an application fee to recover its administrative costs in respect of the application. There is thereafter a further power to charge a fee in respect of the control and supervision arising from the operation of the licensing regime and the impact of the licences granted.

A similar approach separating application charges from charges arising out of the ongoing operation of the licensing regime might be used to frame the *locally set fees*

debate. Using street trading legislation, we suggest an amendment to the Licensing Act 2003 which would enable this.

#### **4. The introduction of a health and well being objective: To promote the health and well being of the locality and local area**

This objective would clarify that locally based impacts on health and well being are a consideration in licensing, both during licensing decisions and while SLPs are developed. With this objective, licensing decisions over time would be more likely to create an environment in which alcohol does not unduly undermine society and lead to health and social hazards.

The key legal principles within the Act would limit this objective in exactly the same way as they do for the other objectives, meaning that health and well being impacts more proximal to licensed venues are more likely to fall within its remit.

#### **5. The introduction of an economic objective: To promote sustainable economic development and the well being of the locality and local area**

This objective would allow for the consideration of sustainable economic factors – both positive and negative - that should be taken into account, both during licensing decisions and while SLPs are developed. It should address issues like employment and stimulating demand, the need for licensed premises, oversaturation, the importance of diversity and the economic impact of licensed premises in the locality of the premises, but also within the wider context of the wider local area.

An alternative to this objective, which may be more straight forward for local authorities to use in practice, would be introducing the concept of ‘overprovision’, as used in Scotland.

#### **6. Minimum Unit Pricing**

There was very strong support for MUP from participants with experience in compliance and enforcement within the night time economy, as well as those from a public health background. No one policy can be considered a ‘silver bullet’, but the evidence base for MUP is far stronger than for the ban on below cost sales. Subject to the legal case in Scotland, its introduction at an effective level would help to address a number of short and long term issues identified by participants in this report related to the impact of very cheap alcohol.

#### **7. Re-introduction of national or locally set opening / operational hours for off-licensed premises**

Scottish off-license hours of 10am – 10pm were widely supported by participants in this study, and there was a strong view among participants that extended opening hours within the off-trade had increased alcohol-related problems. As one licensing officer put it:

Early morning sales are just for street drinkers, late opening is for binge drinkers.

Participants also talked of the off-trade's impact within the night time economy, including en route loading, side loading and post loading, which could potentially be off-set by controlled opening and operational hours.

While on the one hand nationally set operational hours may be more effective, the stronger use of framework hours within SLPs could be used to similar effect at the local level. Some local authorities already do this for both the on and off-trades, in places with more restrictive hours than those mentioned above.

In addition, changes equivalent to the 2010 Alcohol Act (Scotland) should be introduced in order to reorientate licensing to the fact that around two thirds of alcohol is bought via the off-trade. This should include limiting alcohol and alcohol-related products to one part of the store and introducing bans on multi-buy discounts.

## **8. Better engaging local residents in licensing**

While it does have cost implications, Westminster has had great success with its licensing advice project, where it funds licensing advice for local residents in conjunction with the Citizens Advice Bureau. Replication of this elsewhere seems likely to be very beneficial, and could be legitimately factored into a licensing authorities costs under locally set fees.

## **9. A flexible Late Night Levy**

For the LNL to be a genuine option open to local authorities it needs to be made more flexible, targeting only certain geographic locations rather than the whole local authority area.

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<sup>1</sup> IAS. Response from IAS to the consultation on Time for Reform: Proposals for the Modernisation of Out Licensing Laws