

LEGISLATIVE & INDUSTRY UPDATE - JANUARY 2024

Committee	Licensing Committee
Officer	Legal Services
Wards	All

HEADLINES

This report advises the Licensing Committee of the recent legislative, case law and industry news updates under the functions within its remit.

RECOMMENDATION

That the Committee notes the report.

Licensing Act 2003

Legislation Updates - Revised Section 182 Guidance

December 2022 Update:

On 20th December 2022 the Home Office issued a revised version of the Section 182 which has not been updated since April 2018. Under section 4 of the Licensing Act 2003 Licensing Authorities whilst carrying out their functions must “have regard to” guidance issued by the Secretary of State under Section 182 therefore, the guidance is binding on all Licensing Authorities and departing from it could give rise to an appeal or judicial review – there must be clear, reasoned decisions where there is any deviation from the guidance.

Changes in the right to work and entitlement:

Paragraph 4.22:

“Since 1 July 2021, EEA citizens and their family members require immigration status in the UK. They can no longer rely on an EEA passport or national identity card, which only confirms their nationality, to prove their right to work. They are required to provide evidence of lawful immigration status in the UK, in the same way as other foreign nationals.”

Persons operating an alcohol delivery service "may consider contacting their licensing authority" as opposed to "should" to obtain their view on whether an application to vary the licence is necessary:

Paragraph 3.10

*“Persons who run premises providing ‘alcohol delivery services’ should notify the relevant licensing authority that they are operating such a service in their operating schedule. This ensures that the licensing authority can properly consider what conditions are appropriate. Premises with an existing premises licence, which choose to operate such a service in addition to their existing licensable activities, **may consider** contacting their licensing authority for its view on whether this form of alcohol sale is already permitted or whether an application to vary the licence will be required.”*

New section on "Closure Notices"

Paragraph 4.83

“Section 19 of the Criminal Justice and Police Act 2001 (the Act) gives licensing authorities, police and local authorities the power to serve a closure notice where any premises are being used (or have been used within the last 24 hours), for the sale of alcohol for consumption on or in the vicinity of the premises; and the activity was not authorised (premises licence, club premises certificate or temporary event notice) or not in accordance with the conditions of authorisation. The notice informs the person with control of, or responsibility for, the activities carried on at the premises (normally the licence holder or the designated premises supervisor) that if unauthorised alcohol sales continue, an application may be made to a court under section 20 for an order to close the premises under section 21 of the Act. Such an application cannot be made less than seven days or more than six months after the service of the closure notice under section 19.”

Clarifying that Home Office Immigration Enforcement is not responsible for Clubs

Paragraph 6.11

“...Licensing authorities do not have to satisfy themselves that applicants for club premises certificates are entitled to work in the UK before issuing a club premises certificate. Consequently, Home Office Immigration Enforcement is not a responsible authority in relation to club premises certificates.”

Updates to TENs statutory limits

Paragraph 7.15

“...the number of times a TEN may be given for any particular premises is 15 times in a calendar year (for the 2022 to 2023 calendar years this will increase from 15 to 20)”

“the maximum total duration of the events authorised by TENs in relation to individual premises is 21 days in a calendar year (for the 2022 to 2023 calendar years this will increase from 21 to 26 days)”

Full Variation Process

Paragraph 8.76 has been amended to include the *phrase “vary substantially the premises to which the licence relates.”* In short, if there is to be a substantial change to the premises, there should be a new licence application rather than a full variation.

Proposed Condition

Paragraph 10.5 more emphasis regarding operating schedules including conditions which must be "appropriate and proportionate for the promotion of the licensing objectives."

“It is not acceptable for licensing authorities to simply replicate the wording from an applicant’s operating schedule. A condition should be interpreted in accordance with the applicant’s intention and be appropriate and proportionate for the promotion of the licensing objectives.”

The "Agent of Change" principle

Paragraph 14.66

“...Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or ‘agent of change’) should be required by the local planning authority to provide suitable mitigation before the development has been completed”

The Agent of Change principle places the responsibility on a person/persons or business (the agent) responsible for the change (to the local/surrounding area) for mitigating impacts from existing noise-generating premises or uses on the proposed new noise-sensitive development. In short, the person or business responsible for the change must also be responsible for managing the impact of the change, the onus will be on the 'agent' to put in place noise mitigating measures.

An example would be if a housing development is going to be built near an existing busy pub or airport, it is the responsibility of the housebuilder or developer to ensure the new properties have measures in place (for example sound proofing) to mitigate against the noise pollution.

Removal of "Annex A – documents which demonstrate entitlement to work in the UK"

Annex A of the Home Office's Employer right to work checks supporting guidance is no longer contained within the revised guidance instead, a link to the Annex A can be found within paragraph 4.9.

August 2023 Update:

Following on from the recommendations made in relation to the Manchester Arena Inquiry, the Home Office have made amendments to the section 182 Guidance which accompanies the Licensing Act 2003.

The amendments are as follows:

New section on Counter terrorism and public safety

Paragraph 2.11

"Licensing committees may wish to give due consideration to appropriate counterterrorism measures and advice when considering licence applications, for example at high profile or large premises or events or where there are factors which may increase attractiveness to attacks, and in particular when in receipt of relevant advice from police counter terrorist staff."

Paragraph 2.12

"It is particularly relevant to consider conditions around health care provision in this regard. Any additional licensing conditions should be appropriate and proportionate to the venue as noted in para 1.16. We recommend that all licensing authorities pay particular attention to terrorist threats when making specific licence conditions in relation to security or health care provision at appropriate premises and events applying for a licence."

Paragraph 2.13

"As noted in para 2.8 licensing authorities can recommend conditions where appropriate to do so, such as ensuring appropriate access for emergency services and vehicles such as ambulances; good communication with local authorities and emergency services, for example communications networks with the police and signing up for local incident alerts (see paragraph 2.4); and ensuring the presence of sufficient trained first aiders on the premises and appropriate first aid kits."

Paragraph 2.14

"However, in some instances, licensing authorities may wish to tailor their approach, depending on the particular nature of the application, and go further when addressing concerns around possible terrorist or other such risks. We have provided an Annex to help inform and support licensing authorities in their decision making with regards to additional licence conditions for premises and events, that may benefit from further security planning and health care provision in the aftermath of a particular type of incident."

December 2023 Update

On 18 December 2023 the guidance was updated to include " information about spiking".

Under paragraph 2.7, it now states:

"The objective to crime under the Licensing Act 2003 would include taking measures to prevent incidents of spiking which would usually be prosecuted under section 23 and 24 of the Offences Against the Person Act 1861, and section 61 of the Sexual Offences Act 2003. The following examples are within the range of behaviours that would be considered spiking.

This list is not exhaustive:

Putting alcohol into someone's drink without their knowledge or permission.

Putting prescription or illegal drugs into an alcoholic or non-alcoholic drink without their knowledge or permission.

Injecting another person with prescription or illegal drugs without their knowledge or permission.

Putting prescription or illegal drugs into another person's food without their knowledge or permission.

Putting prescription or illegal drugs into another person's cigarette or vape without their knowledge or permission".

Notable Case

In April 2023, a Magistrates' Court has ruled that neither the Licensing Act 2003 nor the Licensing Act (Hearings) Regulations 2005 require hearings to be held in a physical "place", in a case that challenged the London Borough of Lewisham's use of a remote hearing procedure to revoke a premises' license.

District Judge Abdel Sayed, sitting at Bromley Magistrates' Court, dismissed a nightclub owner's appeal of the council's decision to revoke the premises license in what is thought to be a first-of-its-kind ruling.

The district judge found that remote hearings are permitted under the relevant legislation and that, in principle, a "place" for the purposes of the Hearings Regulations 2005 can include a "virtual platform" and "attendance" at such a hearing can include "electronic attendance" concluding that "s.9(3) of the Licensing Act 2003 allows licensing committees – subject to the basic procedural framework in the Hearings Regulations – to regulate their own procedure. Whether a hearing is conducted in person, or remotely, is 'a matter of procedure' and therefore something the licensing committee may opt for in its discretion."

"The ruling in R (Hertfordshire County Council) v Secretary of State for Housing, Communities and Local Government [2021] EWHC 1093 (Admin) applied only to ordinary meetings of local authorities; it did not apply to hearings conducted under the Licensing Act 2003."

In R (Hertfordshire County Council) v Secretary of State for Housing, Communities and Local Government, Dame Victoria Sharp and Mr Justice Chamberlain concluded that the Secretary of State was correct to say that primary legislation would be required to allow local authority "meetings" under the Local Government Act 1972 Act to take place remotely.

District Judge Abdel Sayed's judgment is not technically binding on any other case, as it is a decision of the Magistrates' Court.

It is currently the only case that has considered the issue and is therefore persuasive authority, Lewin said. "It remains to be seen whether the High Court will be asked to give a definitive ruling on this important issue."

The barrister acting for Bromley Council recommended that a licensing authority opting for remote hearings should have in place a remote hearings protocol, which sets out (as a minimum):

- Who decides whether the meeting takes place in person or remotely and any criteria used to inform that decision?
- How is a “remote hearing” defined?
- What constitutes valid attendance by members of the committee, parties to the hearing, officers and members of the public?

Notable Case

On 12th September 2023, Hillingdon successfully prosecuted the former director of Kho Kho Restaurant and Bar in Ruislip. Mr Walia was convicted at Uxbridge Magistrates’ Court for two offences contrary to s.136 (1)(a) and s.136 (1)(b) of the Licensing Act 2003 for carrying on a licensable activity (namely playing loud amplified recorded music) in breach of the premises licence. The Court awarded full prosecution costs to the council.

Alcohol Licensing (Coronavirus) (Regulatory Easements) (Amendment) Regulations 2021

The 2021 regulations came into effect on 16th September 2021 and increased the annual number of TENS that a licensed premise user can have in respect of a premises from 15 to 20 per year and increased the maximum number of days on which temporary events may be held at such premises from 21 to 26 per year. The Home Office confirmed on 14th August 2023 that this regulatory easement will not be extended, given that the additional TENS have been under-utilised. As such, on 31 December 2023, this easement will lapse.

The Alcohol Licensing (Coronavirus) (Regulatory Easements) (Amendment) Regulations 2022

The 2022 Regulations came into effect on 29th September 2022 and extends the off-sales provision in section 11(13) of the Business and Planning Act 2020 (modification of premises licences to authorise off-sales for limited period) until September 2023. The Home Office confirmed on 14th August 2023 that this regulatory easement will be extended until 31 March 2025. The Alcohol Licensing (Coronavirus) (Regulatory Easements) (Amendment) Regulations 2023 is expected to come into force on 28th September 2023.

The Business and Planning Act 2020 (Pavement Licences) (Coronavirus) (Amendment) Regulations 2023

The Business and Planning Act 2020 made temporary provision for a quicker and cheaper process to allow businesses selling food or drink to obtain authorisation from the Local Authority to place furniture such as tables and chairs on the highway adjacent to their premises (Fast Track Pavement Licence). The Business and Planning Act 2020 (Pavement Licences) (Coronavirus) (Amendment) Regulations 2023 came into force on 10th August 2023 and extends Fast Track Pavement Licences until 30th September 2024.

Existing Fast Track Pavement Licences will expire on the 30th September 2023 therefore, operators will need to make an application in good time to continue to benefit from the provisions beyond that date.

Police Reform and Social Responsibility Act 2011

The late-night levy (‘the levy’) is a power, conferred on licensing authorities by provision in Chapter 2 of Part 2 of the Police Reform and Social Responsibility Act 2011 (‘the 2011 Act’). This enables licensing authorities to charge a levy to persons who are licensed to sell alcohol late at night in the authority’s area, as a means of raising a contribution towards the costs of policing the late-night economy.

The decision to introduce the levy is an option available to all licensing authorities in the whole of their respective areas. The levy will be payable by the holders of any premises licence or club premises certificate ('holders'), in relation to premises in the authority's area, which authorise the sale or supply of alcohol on any days during a period (the 'late night supply period') beginning at or after midnight and ending at or before 6am.

Industry News & Updates

Nitrous Oxide Ban

Possession of nitrous oxide, also known as 'laughing gas', will be illegal by the end of the year, with users facing up to two years in prison, under a zero-tolerance approach to anti-social behaviour.

The ban was promised as part of the government's Anti-Social Behaviour Action Plan, with the Home Secretary urging police forces to get tougher on flagrant drug taking in the streets, which blights communities.

Secondary legislation was brought forward on Tuesday 5 September which will control nitrous oxide as a Class C substance under the Misuse of Drugs Act 1971. The new measures are expected to come into force by the end of the year.

Those found in unlawful possession of the drug could face up to two years in prison or an unlimited fine, and up to 14 years for supply or production. There will be exemptions for legitimate uses of nitrous oxide, for example in medical or catering industries.

Letter from The Minister of State for Crime, Policing and Fire

The Minister has written to licensing authorities on the provision of training for licensing practitioners, and the collaboration between local licensing and planning regimes:

"As you will undoubtedly appreciate, well considered licensing and planning decisions are vital to ensuring our public spaces can thrive and prosper. These decisions form a crucial part of local endeavours to create safe and welcoming night-time economies. Investing in local economies and public spaces is even more important as we continue the journey of recovery from the unprecedented global pandemic."

"We are all aware that there is more that can be done to make collaboration between the two regimes more effective in order to save problems – and costs – from impacting local resources further down the line. As such, in order to continue to facilitate ongoing discussions, we have further established two small virtual groups with expert stakeholders to enable these conversations to continue."

"We ask that you support this work by ensuring that all relevant local licensing officials have suitable training on matters of licensing and planning, including on the overall regimes and how the two regimes interact. We do not intend to mandate for a minimum standard or mandatory licensing training requirement - all local areas should be able to make their own decisions on what training is most valuable and necessary for their particular local needs, but we do encourage all areas to ensure that their local package is substantive. The Government will continue to support this by disseminating good practice and signposting new and updated training materials produced at a local level."

Training standard published by Local Government Association and Institute of Licensing:

The LGA and IoL have published a document designed to set out what the LGA and the IoL believe to be a basic level of licensing committee member training. It should be noted that whilst it does not constitute legal advice it is a helpful guidance document which signposts to additional opportunities for further development that members of licensing committees may wish to consider.

A link to the training document can be found here: <https://www.local.gov.uk/topics/licences-regulations-and-trading-standards/local-government-association-and-institute>

Number of licensed premises drop to "record low"

The Independent reported that *"Thousands of bars, restaurants and pubs across the UK are pulling down their shutters for the final time as out-of-control ground rents, produce costs and no-show bookings continue to plague the industry."*

There were more than 10 closures every day, according to industry data which revealed the number of licensed premises in Britain fell by 3.6 per cent from 103,682 to 99,916 in the year to September.

This marks the first time the total has dropped below 100,000 in the research's history, according to the latest figures from consultancy group CGA.

Gambling Act 2005

On 27th April 2023 the government published its white paper: "High Stakes: gambling reform for the digital age". The reform will concentrate on:

- A statutory levy on the industry to combat and treat gambling harm and addiction (how this is calculated is not specified).
- Working with the industry and stakeholders to create an independent gambling ombudsman, which must be credible with consumers and will adjudicate on complaints relating to social responsibility and gambling harm. The Government states that it aims to have the ombudsman established and operational within 12 months.
- Maximum stakes of £15.00 per online slot spin and £2.00 or £4.00 for those aged 18–24.
- "Unintrusive checks" (e.g. bankruptcy/CCJ search) on gamblers who lose more than £125 in 24 hours or £500 within a year.
- "Frictionless" affordability checks for those losing £1,000 in 24 hours or £2,000 over a period of 3 months – with lower triggers for those aged 18–24.
- Mandatory data sharing by operators for high-risk online customers.
- A review of the use of free bets, bonuses and wagering requirements, to ensure they are used in a socially responsible manner and do not encourage harmful or excessive gambling.

For land-based operators:

- Allowing some larger 1968 Act casinos to increase their gaming machine entitlement from 20 to 80 (at machine to table ratio of 5:1).
- Permitting casinos to offer sports betting.
- Taking steps to "free up" dormant 2005 Act casino licences and reallocation of these licences to other local authority areas.
- High-end casinos will be permitted to offer credit facilities to attract "high rollers" non-UK residents. Credit will be subject to thorough financial risk and anti-money laundering checks.

- Consultation on the introduction of cashless payments in casinos.

Competitions and free draws:

- Considering regulating free draws and competitions which have grown massively in popularity in recent years (particularly those with a free entry/skill element) in order to protect players, improve transparency and protect returns to good causes.

Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 in respect of Sex Establishment Licences

No further legislative changes/notable cases/industry updates.

Scrap Metal Dealers Act 2013

No further legislative changes/notable cases/industry updates.

Street Trading – London Local Authorities Act 1990

No further legislative changes/notable cases/industry updates.