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*REBALANCING THE LICENSING ACT – HOME OFFICE CONSULTATION*

*RESPONSE BY JOHN GAUNT & PARTNERS*

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## **Introduction**

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John Gaunt & Partners are a niche Licensing Practice – one of the largest in the United Kingdom – operating throughout England, Scotland and Wales. We act for a range of national operators and a large number of smaller operators.

We are very familiar with the operation of the Licensing Act 2003 and have made applications in respect of Premises Licences to most, if not all, of the Licensing Authorities within England and Wales.

We believe this gives us a unique insight into the operation of the Act and qualifies us to respond, in detail, to the consultation document issued on 28th July 2010.

## **Consultation Period**

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We must preface our comments by expressing a significant concern over the period of consultation, which runs for 6 weeks from 28th July to 8th September. The proposals within the consultation are some of the most far reaching reforms of the licensing system, other than the reforms within the 2003 Act itself. This short consultation period covers the traditional holiday season.

Appendix A to the consultation summarises the consultation criteria and we fail to see how a 6 week consultation, largely over the holiday month of August, fits within the criteria highlighted below, a matter of which we raised with the Home Office in writing on the 3rd August 2010, only to be advised that the consultation co-ordinator, Nigel Lawrence, was himself on holiday for 2 weeks.

### **Duration of consultation exercises - criteria**

*Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.*

- 2.1 Under normal circumstances, consultations should last for a minimum of 12 weeks. This should be factored into project plans for policy development work. Allowing at least 12 weeks will help enhance the quality of the responses. This is because many organisations will want to consult the people they represent or work with before drafting a response to Government and to do so takes time.

- 2.2 If a consultation exercise is to take place over a period when consultees are less able to respond, e.g. over the summer or Christmas break, or if the policy under consideration is particularly complex, consideration should be given to the feasibility of allowing a longer period for the consultation.
- 2.3 When timing is tight, for example when dealing with emergency measures, or international, legally-binding deadlines, or when the consultation needs to fit into fixed timetables such as the Budget cycle, consideration should be given to whether a formal, written, public consultation is the best way of seeking views. Where a formal consultation exercise is considered appropriate and there are good reasons for it to last for a shorter period (e.g. to seek views to inform the UK's negotiating position on EU proposals soon to be discussed in the Council of Ministers), the consultation document should be clear as to the reasons for the shortened consultation period and ministerial clearance (or equivalent, e.g. in non-Ministerial departments) for the shorter timeframe should be sought. In such circumstances it is important to consider the provision of additional means through which people can express their views.
- 2.4 When planning a consultation, it is important to take steps to raise awareness of the exercise among those who are likely to be interested. In particular, departments should consider ways to publicise consultations at the time of, or if possible before, the launch-date so that consultees can take advantage of the full consultation period to prepare considered responses.

Although there has been a subsequent exchange of correspondence with the Home Office on this point, no cogent reason for the fore-shortening of the consultation period has been forthcoming and it is certain that a significant number of affected persons will be disenfranchised from this process. Indeed a subsequent announcement from the Home Office that any changes to the Licensing Act 2003 will not be brought into force until 2012 makes the limited consultation more of a travesty. What is properly required is a thorough and considered review of the workings of the 2003 Act out of which balanced proposals for improvement might be developed.

We have had the opportunity to attend one of the consultation workshops, namely that held in Newcastle on 9th August 2010 and our observations are informed by the limited discussions which took place at that time.

We remain very concerned at the thrust of the proposals in general, which appear to be directed at the licence trade in general and not at those relatively few "irresponsible premises" who may contribute to problems within the night time economy. We note in particular Paragraph 2.06 of the consultation document, which states: -

*"All too often High Streets are filled on a Friday and Saturday night with revellers who are not encouraged to take responsibility for their own actions. They drink to excess and expect the taxpayer to meet the cost of their overindulgence. The Government wants a fundamental shift in responsibilities .....*

*The Government is committed to challenging the assumption that the only way to change people's behaviour is through **adding to rules and regulations (our emphasis)**. In future, solutions to address alcohol regulated problems will be found locally and by encouraging individuals to take responsibility for their own actions."*

Whilst we wholly applaud these sentiments, the reality is that the proposals within the consultation only add to the rules and regulations that apply or will apply to operators within the licence trade and none of which appear to be directed at those individuals themselves.

As the ministerial forward pointedly said "the majority of licensed premises are well run businesses which provide a valuable service to their local communities and the Government recognises the important role which pubs can play as part of the fabric of neighbourhoods and villages".

As a result of these proposals, if adopted, that responsible majority (which is an overwhelming majority) are to be disproportionately burdened.

The licensed trade would welcome more vigorous and targeted enforcement against those individuals referred to in paragraph 2.06 and the under aged themselves.

The consultation also appears flawed in that little or no weight is given to changes – and the effect of those changes – to the Licensing Act 2003 since its implementation in 2005 or to other enforcement activity. In particular we would note the provisions for summary review introduced by the Violent Crime Reduction Act 2006 (mentioned below), the general increased enforcement regime which operates under the 2003 Act, the very recent change to the offence of persistent sale to the under aged to 2 strikes (from 3) in a 3 month period (itself a relatively new offence), and the much increased use of closure notices under section 19 of the Criminal Justice and Police Act 2001.

Indeed it might be argued that there are more than adequate checks and balances in place within the existing legislation; what is required is better or more effective and targeted use of those enforcement powers.

## Consultation Questions

### **1. What do you think the impact would be of making relevant licensing authorities responsible authorities?**

This is a source of real concern. The proposal makes the Licensing Authority effectively both applicant and judge and raises issues with regard to natural justice, which issues are amplified if the separate proposals to reduce the rights of appeal were to be adopted (see below).

Article 6 of the Human Rights Act guarantees the right of applicants to a fair trial and provides as a minimum the following as of right:

- a) a fair and public hearing with a public judgment;
- b) an independent and impartial tribunal established by law;
- c) a reasoned judgment

The right to a fair hearing in article 6(1) is primarily concerned with procedural fairness.

Already a number of Council Departments (which self evidently work closely with the Licensing Authority) are Responsible Authorities, along with the Police and Fire Authorities. Councillors have recently been allowed to become interested parties under the Licensing Act 2003 and we can see no proper advantage in allowing the relevant Licensing Authority to become a Responsible Authority in its own right or to allow it to initiate a review application.

### **2. What impact do you think reducing the burden of proof on the Licensing Authorities will have?**

The 'necessary' promotion of the licensing objectives is a fundamental cornerstone to the Licensing Act 2003. Applicants for Premises Licences or the respondents to applications for review, already have significant evidential burdens when appearing before Licensing Panels. That is the reality of the position.

Further undermining the burden of proof on Licensing Authorities in making their adjudication, will severely disadvantage the hearing process and in our submission lead to more appeals where the burden of evidence is rightly different.

### **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?**

There is a current requirement to submit an operating schedule with the application and in our applications this particularises the likely impact on the locality, especially the positive effects. The opportunity for so commenting is there within the operating schedule, but the Section 182 Guidance could sensibly be amended to reinforce this point.

**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?**

We have had extensive experience of representations from the police, which are based upon false premises and do not withstand close scrutiny. The approach of the Police is not always either fair or proportionate. To adopt this proposal is likely to lead to increased legal challenge and an increased perception that justice is neither being done nor being seen to be done.

**5. How can Licensing Authorities encourage greater community and local resident involvement ?**

We strongly believe that this is the wrong question. The preliminary question should be whether there is a need for Local Authorities to encourage greater community and local residential involvement than exists at present. The local community is well engaged in the current process by reason of public notices and the right to make representations.

In respect of licence applications, these are already extensively advertised on the premises and indeed many Local Authorities have protocols which go beyond this to alert local residents and businesses to applications which have been made. This system works satisfactorily; nobody is currently disenfranchised (and no evidence is given within the consultation that such disenfranchisement actually exists) and no additional reinforcement is required.

In respect of Licensing Policies, Licensing Authorities are obliged to consult widely, but largely ineffectively, as lay understanding of such documents and the requirements of consultation is low.

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

Vicinity is an essential ingredient in determining impact of licensed premises on a business or resident. Most Licensing Authorities take a pragmatic and sensible view with regard to vicinity and this generally works in a proportionate way.

We have had many experiences of representations, which have been accepted by Licensing Authorities as coming from within the vicinity, which upon closer examination, do not bear scrutiny. Given the determination expressed elsewhere, for hearings to become less time consuming, to remove the concept of vicinity will do nothing to assist that process.

Further, by removing vicinity there would no doubt be an increase in the number of representations received but of more concern is the possibility of representations from anywhere (and totally unconnected with and unaffected by the subject premises).

**7. Are there any unintended consequences of designating Health Bodies as a Responsible Authority?**

**8. What are the implications in including the prevention of health harm as a licensing objective?**

Our Scottish experience suggests that neither the inclusion of health bodies as a Responsible Authority nor the inclusion of the prevention from health harm as a licensing objective have had a material impact on the licensing process and have brought no real added value. There is also concern about the nature of the data which a Health Authority might seek to introduce and how this can be site specific to an application and relevant to that application or premises. Health bodies do have the opportunity to participate in the licensing process now as an interested party, being a local business in appropriate cases. Furthermore, it is not clear what the implication on existing licences and existing licensed premises would be of the adoption of a new licensing objective retrospectively.

**9. What would be the effect of making community groups interested parties under the Licensing Act and which groups should be included?**

Many community groups are already engaged within the licensing process and are entitled to be so if they can show that they qualify under the existing guidelines.

**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?**

We strongly oppose this. In the first place, the number of Appeals from the licensing decisions is relatively few. A rehearing of the application before the Magistrates, albeit against the backdrop of the Guidance under Section 182 and the Local Licensing Policy, is an essential safeguard to operators of the premises. Licensing has always had a full and proper appeal process and there is no good reason for this to be removed. (Compare the planning process).

We have been party to a small number of Appeals where once the Appeal process has been commenced, the Licensing Authority have been the first to concede their original decision was in error and the Appeal compromised in a constructive and cost effective way. We feel that this opportunity would be lost. We also believe that this proposal contravenes the principles of natural justice and will be open to challenge (and will indeed be challenged).

We again refer you to our comments at 1 above in relation to Article 6(1) of the Human Rights Act.

**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?**

This is the default position already in respect of premises which are or may be involved in serious crime and disorder, under the summary / expedited review procedures contained in Section 53A/B/C of the 2003 Act. If this position were to

be extended to all decisions of the Licensing Authority in respect of reviews, then effectively this will operate to remove the right of appeal from possibly trading premises and as such would be disproportionate.

Whereas the Government may be properly concerned about "tactical" appeals, this is by no means common place and as we have noted above, it has not been unknown for either appeals to be successful (thereby proving that the original decision of the Licensing Committee was wrong) or for the Licensing Committee themselves to compromise an appeal in that knowledge.

Further, the impact of removing the right of appeal from trading premises may lead to staff not being remunerated, potential job losses and even the closure of businesses as they are not able to operate with sanctions enforced on them.

### **12. What is the likely impact of extending the flexibility of Early Morning Restriction Orders to reflect the needs of the local areas?**

As we are sure others will have pointed out, this will undermine the fundamental principles which underscore the Licensing Act. There appears to be no suggestion within the consultation that the enlargement of EMROs needs to be evidentially based – Licensing Authorities are to be given the "freedom to respond to the needs of their local community". Furthermore, in Paragraph 6.06 the suggestion is that an EMRO could be created as if it was felt to be 'beneficial' as opposed to necessary for the promotion of licensing objectives. In our view, even if the principle were to be accepted (which we do not) then for something potentially draconian as what is proposed, then it most certainly should be necessary for the promotion of the licensing objectives and not just beneficial.

We would also add that Cumulative Impact Policies (CIPs) already deal with the potential impact on the promotion of the licensing objectives of a significant number of licensed premises concentrated in one area.

CIPs are an enforcement measure to which the Home Office already possess evidence of their success from the recent Alcohol Enforcement Strategy Seminars.

As stated at paragraph 13.26 of the s.182 Guidance "There should be an evidential basis for the decision to include a special policy within the statement of licensing policy." Further paragraph 13.27 states "After considering the evidence and consulting those individuals and organisations listed in section 5(3) of the Act, a licensing authority may be satisfied that it is appropriate and necessary to include an approach to cumulative impact in the licensing policy statement."

If EMROs are to be enlarged then the procedure should at least mirror that of CIP's but we would argue that if an area is experiencing problems over the licensing objectives then a CIP should be implemented and then those premises which are causing problems should be taken to review and therefore the "good" operators will not suffer for the problems caused by others.

### **13. Do you have any concerns about repealing alcohol disorder zones?**

On the basis that no such zone has yet to be adopted, we believe that they can safely be removed.

**14. What are the consequences of removing the evidential requirement for Cumulative Impact Policies ?**

A significant number of these have been adopted on an evidential basis. The requirement for such evidence has not, to our knowledge, frustrated the adoption of a CIP by any Council. The evidential requirement should remain, but we would ask the Government to look at the evidential consequences where such a CIP is in place.

Paragraph 13.29 of the s. 182 Guidance states that 'the effect of adopting a special policy is to create a rebuttable presumption that applications for New Premises Licences or Club Premises Certificates or Variations that are likely to add to the existing cumulative impact will normally be refused, following relevant representations, unless the applicant can demonstrate in their operating schedule that there will be no negative cumulative impact on one or more of the licensing objectives'. Already, this is an evidential burden upon an applicant which is widely acknowledged as being very difficult to discharge.

**15. Do you agree that the late night levy should be limited to recovery to these additional costs?**

**Do you think that the Local Authority should be given some discretion on how much they can charge under the levy?**

We have fundamental concerns about this proposal. The consultation is not specific as to the time that the levy might be triggered, other than an example of midnight is offered, nor is there any indication as to criteria by which a Licensing Authority might deem such a levy to be necessary. These are important considerations which are not touched upon within the consultation. If a levy is to be adopted, it should be a targeted levy to those premises demonstrably responsible for any issues that the levy is intended to address. A levy should also take into account the problem of 'preloading' and the effect which off licensed sales may have on the on licensed trade.

The maximum amount of any levy should be centrally determined.

**16. Do you think it would be advantageous to offer such reductions for the late night levy?**

We believe that only those premises demonstrably responsible for issues which could give rise to the levy should be charged. Self evidently, those premises with a Best Bar None accreditation and indeed those premises involved in a Business Improvement District ought not to be targeted.

**17. Do you agree that the additional cost of these services should be funded by the late night levy?**

No.

**18. Do you believe that giving more autonomy to Local Authorities regarding closing times would be advantageous to cutting alcohol-related crime?**

No, there are already adequate powers within the Licensing Act 2003 to curtail the permitted hours for licensable activities for problematical premises through the review process.

**19/20. What would be the consequences of amending the legislation relating to TENs, as specified in the questionnaire ?**

Our experience of the TEN system is that it generally works well (but we support the previous proposal to extend the period for police objection to two working days) and we have had no particular complaint over any Temporary Event Notice submitted by us, which has led to an issue. The thrust of the proposals will fundamentally undermine the purpose of a Temporary Event Notice and particularly, we see no reason why the notification period should be longer for those venues already holding a Premises Licence.

If the Police have a concern about the conditions which apply to a Temporary Event Notice, then that is a matter which they can raise in their counter notice and Licensing Authorities should not have an inherent discretion to apply existing licence conditions to a TEN.

**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?**

**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 the first place, it should be noted that the offence of persistent underage sales is now two occurrences within a 3 month period, recently reduced from three such offences within a 3 month period. Most operators have in place robust systems to avoid sales to underage persons and where such sales occur, it is usually not a case of wilful determination to sell or a lack of educational training, but an error of judgement by the frontline member of staff. The existing 48 hour period works "well", is very salutary to the operator and staff affected and gives the opportunity for additional staff training where required. This period of voluntary closure as a minimum / maximum which should remain, failing which we anticipate that operators will be less willing to accept voluntary closure and will prefer to take their chances before the Magistrates, with consequential increased costs to all. An application for a review in such circumstances always remains an option for the enforcing authority to seek a longer closure period.

We would also add that the consultation document does not address the issue of the under-age drinkers themselves instead just targeting the premises involved. (Under police initiative Operation Babyface which was introduced in Portsmouth this year there has been an apparent decrease of 66% in underage drinking. The initiative involves venues reporting any customers attempting to enter the venue using fake ID. Police then collect the offenders, who must complete a course of

three two-hour sessions. We would argue that better education of those who are either purchasing or attempting to purchase alcohol in a scheme such as that above may have a greater impact on under age sales than more stringent regulation of those who are selling).

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

Review is already an option, which is exercised in appropriate cases on the application the Police or Trading Standards. We can see no benefit in extending this and were there to be an automatic review following "persistent sale" then we can see no circumstances in which an operator would accept a voluntary closure.

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

Licence fees have not increased since 2005 and the Elton Committee has reported and the previous Government never acted on its recommendations. Any licensing fee system should be centrally based and we are not aware of any evidence which suggests that Councils are inadequately funded in respect of licensing at the present time.

**26.Are you in favour of automatically revoking the Premises Licence if the annual fees have not been paid?**

Where fee collection is an issue and failure to pay follows a requirement to pay sent to the Premises Licence Holder by recorded delivery, then a possible revocation of the Premises Licence should follow, but there should be the opportunity to allow reinstatement of the licence following eventual payment on appropriate terms. (It should however be noted that it is not unknown for councils to send reminders for fees already paid!)

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

We do not believe that the first set of mandatory conditions have had any material effect on alcohol related crime, particularly because of problems of interpretation and application.

**28.Would you support the repeal of any or all of the mandatory conditions?**

As mentioned above, the mandatory conditions are not particularly well drafted, which render them significantly incapable of enforcement and in respect of the proposed age verification policy, undermines existing standards, such as Challenge 21 and Challenge 25. Given the inherent obligation on operators of licensed premises to operate those premises responsibly, we do not believe that

these conditions bring any added value and could safely be repealed. In the case of "problematical operators" the sanction of the review always remains.

**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?**

Yes - and we would willingly participate in a consultation seeking to simplify or deregulate the Licensing Act 2003, drawing on our pragmatic experience gained over a large number of applications over the past 5 years.

Dated: 1<sup>st</sup> September 2010

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