

**LICENSING COMMITTEE: 7 September 2010**

**Report of the Chief Strategic Planning and Environment Officer**

**GOVERNMENT CONSULTATION – REBALANCING THE LICENSING ACT.**

**1. Background**

1.1 The Government as part of its Coalition Agreement has set out a programme of reform around alcohol licensing to tackle the crime and anti-social behaviour associated with binge drinking in the night-time economy. In particular, the Government set out the following five commitments which state.

- We will overhaul the Licensing Act to give local authorities and the police much stronger powers to remove licences from, or refuse to grant licences to, any premises that are causing problems.
- We will allow councils and the police to shut down permanently any shop or bar found to be persistently selling alcohol to children.
- We will double the maximum fine for underage alcohol sales to £20,000.
- We will permit local councils to charge more for late-night licences to pay for additional policing.
- We will ban the sale of alcohol below cost price.

1.2 To take this forward, on 28 July 2010 the Home Office published a consultation entitled "Rebalancing the Licensing Act a consultation on empowering individuals, families and local communities to shape and determine local licensing". The intention is to legislate using the Police Reform and Social Responsibility Bill, which will be produced later this year and apply to England and Wales.

1.3 Responsibility for Alcohol licensing and enforcement was previously a shared responsibility between the Home Office and Department of Culture, Media and Sport but has now been moved entirely into the Home Office.

**2. Details of the Proposals.**

2.1 The government is concerned the original vision of a vibrant "café culture" has failed to materialise under the Licensing Act 2003 and intends to introduce more flexibility to enable local authorities and the police to clamp down on alcohol-related crime and disorder hot spots within local night-time economies. The consultation document identifies the government proposals as being to:

- a) Give licensing authorities the power to refuse licensing applications or call for a licensing review without requiring relevant representations from a responsible authority.
- b) Remove the need for licensing authorities to demonstrate their decisions on licences "are necessary" for (rather than of benefit to) the promotion of the licensing objectives.
- c) Reduce the evidential burden of proof required by licensing authorities in making decisions on licence applications and reviews.
- d) Increase the weight licensing authorities will have to give to relevant representations and objection notices from the Police.
- e) Simplify Cumulative Impact Policies to allow licensing authorities to have more control over outlet density.
- f) Increase the opportunities for local residents or their representative groups to be involved in licensing decisions without regard to their immediate proximity to premises.
- g) Enable more involvement of local health bodies in licensing decisions by designating health bodies as a responsible authority and seeking views on making health a licensing objective.
- h) Amend the process of appeal to avoid the costly practise of rehearing licensing decisions.
- i) Enable licensing authorities to have flexibility in restricting or extending opening hours to reflect community concerns or preferences.
- j) Repeal the unpopular power to establish Alcohol Disorder Zones and allowing licensing authorities to use a simple adjustment to the existing fee system to pay for any additional policing needed during late-night opening.
- k) Substantial overhaul of the system of Temporary Event Notices to give the police more time to object, enable all responsible authorities to object, increase the notification period and reduce the number that can be applied for by personal licence.
- l) Introduce tougher sentences for persistent underage sales.
- m) Trigger automatic licensing reviews following persistent underage sales
- n) Ban the sale of alcohol below cost price.
- o) Enable local authorities to increase licensing costs so that they are based on full cost.
- p) Enable licensing authorities to revoke licences due to non payment of fees.
- q) Consult on the impact of the Mandatory Licensing Conditions Order and whether the current conditions should be removed.

2.2 The consultation document also deals with the issue of banning below cost sales. It points out that there has been growing concern over the last few years about how cheaply some alcoholic drinks are being sold and the link between the availability of alcohol and incidents of drunken, rowdy behaviour. It states that the Government is committed to ensuring that local people are able to enjoy all parts of their community without feeling intimidated by those who have drunk too much alcohol. It also wants to reduce the burden on frontline services of dealing

with drunken behaviour. The review of alcohol pricing and taxation is to be taken forward separately by the Home Office and HM Treasury. The consultation points out that the definition of "cost" of an alcoholic product significantly differs. All retail businesses negotiate their own prices with suppliers. There may be differences between the off trade and the on trade in the definition of "below cost". The Government is also concerned about EU trade and competition laws and points out that most EU countries with similar policies have banned selling below "net invoice price". It points out that one option might be to specifically define an "average cost" and although this might be easier to enforce than determining the true cost of each product it could also be a barrier to trade. As an alternative, the Government is considering a mandatory licensing condition. This would make it a breach of the licence to sell alcohol below what it costs. In other words, no sale could be below the cost of purchase.

- 2.3 The consultation document proposes a series of questions for responders to address. Details of the questions and proposed responses are contained in Appendix A to the report. Members are requested to endorse the proposed responses.
- 2.4 The consultation period ends on 8 September 2010. The Home Office have confirmed that although the majority of the proposals in the consultation will be introduced via the Police Reform and Social Responsibility Bill - due to be introduced into Parliament in October - any changes to the Licensing Act 2003 will not be brought into force until 2012 at the earliest.

### **3. Implications of the Proposal for the Licensing Authority.**

- 3.1 The proposals to give licensing authorities greater powers to address problem premises by refusing and revoking licences directly rather than waiting for the issues to be engaged by responsible authorities or local residents is welcome. Reducing the evidential burden of proof of directly attributable problems and the ability to introduce beneficial requirements rather than only those which are "necessary" will also provide greater means of protection for local communities. However, currently local communities are reluctant to request reviews although they do want the problems they experience addressed. An additional proposal is to increase the weight that licensing authorities must give to police notices and objections. It is likely therefore that the licensing authority will undertake many more Licence Reviews than is currently the case.
- 3.2 The proposal to simplify the Cumulative Impact Policies and allow licensing authorities to have control over outlet density without the burden of establishing an evidential basis is welcome. Residents in close proximity to licensed premises often suffer levels of disturbance and low level nuisance which they tolerate and it goes unreported. This problem can be exacerbated and spread over a wider area by the close proximity of a number of licensed premises. The situation may not give rise to the extensive problems of crime disorder and nuisance that would

currently be necessary to justify the creation of a special saturation policy. However it would be of benefit for local residents if the authority could prevent the new licensed premises starting up in the area. Creating the policies would also benefit the licensed trade as they would have an indication of where new premises may not be acceptable. It is therefore likely that the authority will have to consider many more applications for the imposition of restrictions through the creation of Cumulative Impact Policies.

- 3.3 While the licensing authority works closely with the Health Authority in identifying evidence of alcohol related harm, the Health Service has no formal role in the licensing process and preventing harm to health is not a licensing objective under the current legislation. The involvement of the health services, which are required to deal with the consequences of alcohol related crime and disorder would benefit the process. However, as the excessive consumption of alcohol is intrinsically harmful to health, this would need to be carefully considered.
- 3.4 The proposal to increase the opportunities for local residents or their representative groups to be involved in licensing decisions is welcome and this authority has operated on the basis that their involvement does assist in making effective decisions. The proposal in respect of proximity to a premises could however be problematic. Those that live near licensed premises are likely to be most affected by its operation and therefore should have a powerful voice in the decision making process. However it is unlikely that individuals who do not live near the premises would be affected. If objections in principle from persons living many miles from a premises had to be considered this would greatly extend the determination process and could reduce the impact of valid representations from nearby residents.
- 3.5 Under the current system applicants who are refused have a right of appeal to the Magistrates Court. The court then rehears the matter and may consider fresh evidence that was not available to the licensing authority as it was not received during the statutory consultation period. The proposal in the document is to amend the process of appeal to avoid the costly practise of the court rehearing licensing decisions. However, because appeals currently take the form of a re-hearing an appeal does not involve criticism of the quality of the Licensing Committee hearing. There is never any mention of breaches of procedure as this point is not relevant for a re-hearing which is to hear the case on its merits. If the proposal is now that the Magistrates should remit cases to the Committee for re-determination it is more likely that appellants will now have every incentive at Court to disregard the merits and instead say that the Committee did not give them a fair hearing, there were procedural defects or whatever, and therefore the matter should go back to Committee. Providing licensing authorities with flexibility to restrict or extend opening hours to reflect community concerns or preferences is also welcome but conversely is likely to increase the likelihood of appeals being made.

- 3.6 The power to introduce Alcohol Disorder Zones has not been used by licensing authorities because it is expensive and bureaucratic in nature and the objectives can be achieved in much simpler ways. The proposal to remove the powers is welcome as is the proposal that a simple means of charging premises for any additional policing that may be necessitated by their operation during late-night opening. There is a wide range of powers the authority utilises to tackle late night drinking problems and it would be helpful if the definition of policing was extended to cover other necessary enforcement options. Putting in place the processes and procedures to enable charging of this nature will be an additional burden for the licensing authority.
- 3.7 The substantial overhaul of the Temporary Event Notification procedure is welcome. Many local residents can not understand why small scale events can go ahead without licensing authority approval or without any right of objection. However, many local events take place for the benefit of the community which are not organised by professionals and some relaxation of the requirements may therefore be appropriate in these circumstances, especially where the events do not involve the sale of alcohol.
- 3.8 The tougher sanctions and proposals for automatic review in respect of the sale of alcohol to children and young persons are welcome as is the proposal to limit the minimum price for alcohol as a means of reducing the problems caused by binge drinking.
- 3.9 Currently licence fees are set nationally and have not been updated since the introduction of the Licensing Act. The Elton Report in 2006 recommended a 7% increase but this was not implemented. The proposal to enable licensing authorities to increase fees in order to fully recover the cost of providing the licensing service is therefore welcome, there would seem to be no justification why local taxpayers should support the licensing trade. The proposal to enable licensing authorities to automatically revoke licences as a result of non payment of licensing fees mirrors the working of the Gambling Act 2005 which operates successfully, and is welcome.

#### **4. Achievability**

This report contains no equality personnel or property implications.

#### **5. Legal Implications**

- 5.1 All decisions taken by or on behalf of the Council must (a) be within the legal powers of the Council; (b) comply with any procedural requirement imposed by law; (c) be within the powers of the body or person exercising powers on behalf of the Council; (d) be undertaken in accordance with the procedural requirements imposed by the Council eg. standing orders and financial regulations; (e) be fully

and properly informed; (f) be properly motivated; (g) be taken having regard to the Council's fiduciary duty to its taxpayers; and (h) be reasonable and proper in all the circumstances.

- 5.2 The Government is proposing to make amendments to the legislation which will undoubtedly strengthen the legal position of licensing authorities. As the proposals are still at the consultation stage it is not yet possible to say with complete certainty what their final form will be.

## **6. Financial Implications.**

- 6.1 The licensing service is required to be self financing with all expenditure being met from fees and charges which are reviewed annually. However, the Licensing Act fees are set by the government nationally and the authority therefore has no power to change them. In the previous year the cost of providing the licensing service has been greater than the level of fees received.

- 6.2 The Government acknowledges in its document that its proposals will increase the burden on local licensing authorities and it is likely that there will be an need to increase licensing service staff to cope with the demand for the service although as this stage it is not possible to estimate the need for increased resources. The intention expressed in the consultation document to enable local authorities to increase licence fees based on a full cost recovery is therefore welcome.

- 6.2 The Licensing Act provides for annual fees to finance provision of the licensing service, however the non payment of the fee is only recoverable as a debt. The proposal to enable licensing authorities to revoke licences for non payment would greatly increase the effectiveness of the cost recovery process. The additional burden of processing licence revocations would be financed by the more effective collection of licensing income.

## **7. Recommendation**

- 7.1 It is recommended that the Committee considered and approves the responses to the consultation document outlined in Appendix A for submission to the Home Office.

**SEAN HANNABY** **6 August 2010**  
**CHIEF STRATEGIC PLANNING AND ENVIRONMENT OFFICER**

This report has been prepared in accordance with procedures approved by Corporate Managers.

Background Papers: None

**Cardiff Council**

**Rebalancing the Licensing Act**

**Consultation Question Responses**

• **Consultation Question 1: What do you think the impact would be of making relevant licensing authorities responsible authorities?**

Licensing authorities are at the hub of the licensing process seeing the views of all parties and being the contact agency for most people with concerns. It is therefore appropriate for a licensing authority to be a responsible authority in order to make appropriate representations and to initiate action where necessary, provided the action taken accorded with any expert evidence provided by the appropriate responsible authorities. The Gambling Act 2005 provides a precedent for this approach.

There are a range of offences which Licensing Officers can take action for under the Licensing Act 2003 and it seems somewhat anomalous that the Licensing Authority cannot request a Licence Review or make representations as is the current situation. This proposal would therefore be supported.

• **Consultation Question 2: What impact do you think reducing the burden of proof on licensing authorities will have?**

The approach taken by the licensing authority and its partner agencies has been to work with the trade to enable a premise to operate in accordance with the licensing objectives rather than to prevent businesses providing the service. It is important that decisions on the appropriateness of controls or limits are based on sound reasons and backed by evidence. However with applications for grant in particular it is difficult to evidence likely problems, as the premise has not previously operated. The relaxation of the burden to prove the problems that common sense identifies is likely to enable applications to be granted with necessary conditions to prevent likely problems, to the benefit of all parties.

• **Consultation Question 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?**

The applicant could be required to provide evidence of having consulted local residents and their representatives in the vicinity of the relevant premises. This would have the advantage of ensuring local residents, who are most likely to be affected by the operation of the premises, are engaged at an early stage and feel empowered by the process.

Applications should be automatically declared invalid where there has been no attempt to complete an operational plan risk assessing issues in respect of the licensing objectives.

• **Consultation Question 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?**

The proposal reflects the current approach taken in dealing with applications here in Cardiff. In the case of police representations applicants normally accept any proposed condition in which case the application is granted with the police conditions attached. Where the applicant does not accept the representations on the grounds that any proposed conditions are unnecessary or irrelevant the matter is considered at a hearing. Clearly, in the rare circumstances, where the police put an outright objection to an applications the applicant would normally wish to oppose the objection and have the issues considered by the licensing authority.

• **Consultation Question 5: How can licensing authorities encourage greater community and local resident involvement?**

Currently Cardiff Council supplements the statutory notification process by writing to residents in the immediate vicinity of any premise the subject of an application to advise them of the application and of their rights to comment. The information is also circulated to local ward councillors many of whom include the information in resident newsletters to seek the views of local residents. Engagement by individuals and their representatives has been of great benefit to the licensing objectives in determining applications.

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

Those who are in the vicinity of licensed premises are more likely to be effected by its operation and therefore should have the automatic right to make comments for consideration. Cardiff Council does not place an arbitrary distance on vicinity but permits anybody to make representations provided they are able to show that they would be affected by the operation regardless of their distance from it.

Removing the vicinity requirement is likely to encourage trade competitors to object and those with a belief that any sale of alcohol is wrong. If objections in principle from persons living many miles from a premises had to be considered this would greatly extend the determination process and could reduce the impact of valid representations from nearby residents who are most affected by the operation of the premises.

• **Consultation Question 7: Are there any unintended consequences of designating health bodies as a responsible authority?**

Dealing with the aftermath of a alcohol fuelled violent attack is often the responsibility of the health services and the information they could provide as a responsible authority would be very welcome and would inform the decision making process.

• **Consultation Question 8: What are the implications in including the prevention of health harm as a licensing objective?**

As it could be argued that the excessive consumption of alcohol is an inherently unhealthy activity, including public health as a licensing object could, if not limited, conceivably lead to requests for prohibition of alcohol sales. Clearly the management and policing of such a requirement would need to be carefully considered.

The licensing of late night takaways, cinemas, theatres and small entertainment venues may not benefit from including the prevention of health harm.

• **Consultation Question 9: What would be the effect of making community groups interested parties under the Licensing Act, and which groups should be included?**



The idea has merit in that some individuals are put off making representations because they fear intimidated by the public nature of the process or by the licensee and having a community group represent them could ensure that issues are addressed. However, rather than specify which type of community group should be able to respond perhaps this could be left to the licensing authority, perhaps with Section 182 guidance, and the test to applied would be the relevance of the representation to the licensing objectives.

• **Consultation Question 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?**

The rights of applicants and all those who make valid representations should be protected against negligent or unreasonable decisions and a right of appeal should exist. Currently the system is heavily weighted towards applicants and tightening the appeals process to reduce appeals and give local residents a stronger voice would benefit the licensing process. Local residents are more likely to engage with the local authority rather than the courts and remitting the appeal back to the licensing authority would be less likely to discourage their participation. However if the default position is to be remission of the application to the licensing authority, then appeals to the Court may concentrate less on the merits of the licensing application and more on alleged procedural defects at the original hearing. It could also encourage greater use of Judicial Review if the appellant was not content with the outcome of a second Committee decision.

• **Consultation Question 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.**

The appeals process can be abused by applicants to enable them to continue to operate despite the local authority ruling. It would encourage applicants to more rationally assess the likelihood of an appeal succeeding if the decision had immediate effect subject to any subsequent appeal court ruling. The Council Committee decision should stand and it may be appropriate that an appeal could only be asked for to challenge how the decision was arrived at and that it is not a new hearing.

• **Consultation Question 12: What is the likely impact of extending the flexibility of Early Morning Restriction Orders to reflect the needs of the local areas?**

24 hour licensing has not arisen as a result of the modernisation of licensing legislation implemented by the Licensing Act 2003. In Cardiff the general situation is that premises in residential areas open at 10.00 and close at 23.00 hours other than on Friday and Saturday when the terminal hour may be 01.00 hours. In the city centre entertainment zones nightclubs are authorised during the period 10.00 to 04.00 hours. In essence the only 24 hour operations are provided in very large supermarkets and in hotels to guests. Currently there has been no request for consideration of any Early Morning Restriction Orders, however the bringing consideration in line with the "beneficial" rather than "necessary" requirement would provided consistency.

• **Consultation Question 13: Do you have any concerns about repealing Alcohol Disorder Zones?**

No. Alcohol disorder zones have no benefits over the effective management of licensed premises and problems can be address with much less bureaucratic overheads.

• **Consultation Question 14: What are the consequences of removing the evidential requirement for Cumulative Impact Policies?**

Residents in close proximity to licensed premises often suffer levels of disturbance and low level nuisance which they tolerate and it goes unreported. This problem can be exacerbated and spread over a wider area by the close proximity of a number of licensed premises. The situation may not give rise to the extensive problems of crime disorder and nuisance that would currently be necessary to justify the creation of a special saturation policy. However it would be of benefit for local residents if the authority could prevent the new licensed premises starting up in the area. Creating the policies would also benefit the licensed trade as they would have an indication of where new premises may not be acceptable.

Removing the evidential requirement would enable cumulative impact areas to be much more effective. Currently common sense would indicate that adding further outlets selling alcohol in areas where there are many premises and extensive problems of alcohol fuelled disorder in the street, would exacerbate the problem. However, it is not always possible to prove that the problems arise from the operation of one individual premise within the zone in order to rationally refuse or take action by Licence Review. The problems occur on the street rather than in what are well managed premises, but the customers are attracted by the number of premises in the area which leads to the binge drinking issues.

This proposal may allow Local Councillors more power to control and shape their communities and night time economies based on a vision rather than a high evidential burden.

• **Consultation Question 15: Do you agree that the late night levy should be limited to recovery of these additional costs? Do you think that the local authority should be given some discretion on how much they can charge under the levy?**

Any late night levy should be related to the additional costs of providing services to control the problems arising from late night drinking. In addition to policing, providing public services can reduce violent incidents, so additional street lighting, litter and bottle collections, taxi marshals, late night pastors etc can impact positively on reducing crime and disorder and local authorities should have some discretion of the amount charged for the levy. As examples, investigation of public nuisance due to noise breakout from premises with a late night licence or the test purchasing of alcohol from off licences by trading standards officers are examples where the levy could be used to recover the additional resources that have to be provided by the local authority.

• **Consultation Question 16: Do you think it would be advantageous to offer such reductions for the late night levy?**

Local authorities should be given discretion to vary the levy to take account of premises which take part in effective awards schemes, radionet systems, training initiatives etc.

• **Consultation Question 17: Do you agree that the additional costs of these services should be funded by the late night levy?**

Yes, see response to Q15.

• **Consultation Question 18: Do you believe that giving more autonomy to local authorities regarding closing times would be advantageous to cutting alcohol-related crime?**

Yes. Local operators want a level playing field and local residents often want some consistency of decision making. It would therefore be appropriate for local authorities to introduce standardised closing times to suit local circumstances in specified locations.

• Consultation Question 19: What would be the consequences of amending the legislation relating to TENs so that:

a. All the responsible authorities can object to a TEN on all of the licensing objectives?

The size of the event may not always be an effective indicator of the level of nuisance or disturbance it may cause, enabling all responsible authorities to input into the process would be of benefit.

It is a weak link in the enforcement currently that Responsible Authorities cannot object as they would for a Licence application.

b. The police (and other responsible authorities) have five working days to object to a TEN?

Extending the period would enable more effective consideration.

c. The notification period for a TEN is increased, and is longer for those venues already holding a premises licence?

Many local events take place for the benefit of the community which are organised by local citizens who are not professionals and some relaxation of the notice requirements may therefore be appropriate in these circumstances, especially where the events do not involve the sale of alcohol. It is appropriate for the period to be longer where trade professionals are involved.

d. Licensing authorities have the discretion to apply existing licence conditions to a TEN?

This would be appropriate, licence conditions are imposed in the interests of the licensing objectives and the use of a TEN can negate these protections for local communities.

• Consultation Question 20: What would be the consequences of:

a. Reducing the number of TENs that can be applied for by a personal licence holder to 12 per year?

None known.

b. Restricting the number of TENs that could be applied for in the same vicinity (e.g. a field)?

None known.

• Consultation Question 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?

Yes.

• Consultation Question 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?

28 Days.

- Consultation Question 23: What do you think the impact will be of making licence reviews automatic for those found to be persistently selling alcohol to children?

Will assist in deterring the offence.

- Consultation Question 24: For the purpose of this consultation we are interested in expert views on the following.

- a. Simple and effective ways to define the 'cost' of alcohol

N/A

- b. Effective ways to enforce a ban on below cost selling and their costs

N/A

- c. The feasibility of using the Mandatory Code of Practice to set a licence condition that no sale can be below cost, without defining cost.

N/A

- Consultation Question 25: Would you be in favour of increasing licence fees based on full cost recovery, and what impact would this have?

The authority is not recovering the cost of providing the licensing service which means that the licensed trade is being subsidised by the licensing authority. The proposal to enable licensing authorities to increase fees in order to fully recover the cost of providing the licensing service is therefore welcome, there would seem to be no justification why local citizens and businesses should support the licensed trade. The proposal to enable licensing authorities to automatically revoke licences as a result of non payment of licensing fees mirrors the working of the Gambling Act 2005 which operates successfully, and is welcome.

- Consultation Question 26: Are you in favour of automatically revoking the premises licence if the annual fees have not been paid?

The proposal to enable licensing authorities to automatically revoke licences as a result of non payment of licensing fees mirrors the working of the Gambling Act 2005 which operates successfully, and is welcome. The proposal would greatly increase the effectiveness of the cost recovery process. The additional burden of processing licence revocations would be financed by the more effective collection of licensing income.

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

No.

- Consultation Question 28: Would you support the repeal of any or all of the mandatory conditions?

No. Irresponsible promotions should be prevented. In attempting to define what is irresponsible the mandatory conditions provide useful guidance.

• Consultation Question 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?

The formal requirement to review the Statement of Licensing Policy at an arbitrary three year period is unnecessary and increases the burden on local licensing authorities without justification. Policy statements should be reviewed as necessary.

The Premises Licence Application Forms are unnecessarily complex and would benefit from review following experience gained from operating the systems. However, in the main the forms meet the purpose and now have the benefit of familiarity.