

**Committee:** EXTRAORDINARY MEETING OF  
LICENSING COMMITTEE

**Agenda Item**

**4**

**Date:** 26 AUGUST 2010

**Title:** GOVERNMENT CONSULTATION ON  
PROPOSED AMENDMENTS TO THE  
LICENSING ACT 2003

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Item for decision

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## Summary

1. This report is to inform members of a Government consultation on proposed reforms to the Licensing Act 2003 and to seek members' response thereto.

## Recommendations

2. That members determine what response (if any) they wish to make to the Government consultation.

## Financial Implications

3. None at this stage as this is a consultation document only.

## Background Papers

4. The following papers were referred to by the author in the preparation of this report:-
  - "Re-balancing the Licensing Act – a consultation on empowering individuals, families and local communities to shape and determine local licensing", an electronic link to which has already been supplied to members.

## Impact

5. None at this stage as this is a consultation document

## Situation

6. On the 28 July the Government published a consultation paper on proposed amendments to the Licensing Act 2003. Contrary to Government guidance on best practice for consultation, the consultation period is restricted to 6 weeks rather than 12. Members will wish to consider what response (if any) they wish to make to the consultation.

7. This report will set out the Government's questions posed by the consultation paper together with officer comment and will invite members to express a view for communication to the Government.
8. At present conditions will only be imposed on a licence and an application for a licence may only be refused if there are representations from responsible authorities or interested parties. On a review of a licence, additional conditions may be imposed or a licensable activity may be removed from the licence (permanently or temporarily for a period not exceeding 3 months) or a licence may be revoked. An application for a review may be triggered by responsible authorities or interested parties. The Government proposes that a licensing authority should itself be a responsible authority. Consultation question 1 is 'what do you think the impact would be of making relevant licensing authorities responsible authorities'.

Officer comment: Although there is a precedent for this within the Gambling Act 2005, I consider this would be a retrograde step. The licensing authority is effectively represented by the Licensing Committee and licensing officers. If the licensing authority were a responsible authority able to make representations on applications or to call for a review in its own right, this would in effect make the Licensing Committee judge and jury in its own cause which would be contrary to the rules of natural justice. The range of responsible authorities is already wide and includes the Police, the Fire & Emergency Service, the Child Protection Unit, Trading Standards, the Local Planning Authority and the Environmental Health Department of the local authority concerned. A recent amendment to the legislation also means that all elected members of the licensing authorities are automatically interested parties in their own right and are therefore able to make representations or call for a review of any licence. I consider this to be sufficient safeguard and that in the circumstances, it would not be necessary for a licensing authority to be a responsible authority.

9. Where there are objections to a licence or an application for a review licensing authorities may take such steps as are necessary to promote the licensing objectives. The Government is considering reducing the burden on licensing authorities to demonstrate that actions are necessary to enable them to consider what actions are most appropriate to promote the licensing objectives in their area. Decisions would however remain within the framework of promoting the licensing objectives. The Government is also considering changes to the application process to shift the onus onto applicants to consider and demonstrate how granting a licence will impact upon the local area and how they would mitigate any potential negative impacts. Consultation question 2 is 'what impact do you think reducing the burden of proof on licensing authorities will have'.

Officer comment: This suggestion is welcome. This authority has had few appeals and has not lost any on the basis that conditions were not 'necessary' for the promotion of the licensing objectives. However, I am aware of some High Court decisions where the requirement to demonstrate necessity has been a difficulty for local authorities.

Consultation question 3 follows on from the preceding paragraph and is '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'.

Officer comment: There is at present no requirement for an impact assessment to be carried out by an applicant for a licence. Although applicants ought to prepare their applications to accord with the licensing authority's licensing policy, the requirement for an impact assessment may well encourage applicants to consider in more detail what mitigation measures may be appropriate.

10. The Government is proposing strengthening the weight that licensing authorities must give to Police representations including those voiced by the Police at a hearing and to objection notices and to require the authority to accept all representations and notices and adopt all recommendations from the Police unless there is clear evidence that these are not relevant. Consultation question 4 is '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'.

Officer comment: This question effectively is in two parts. It creates the presumption that anyone making a representation is an interested party without the need for them to demonstrate that this is the case. This is likely to encourage representations from members of the public who could not be affected by the proposed activity from any premises. Such representation would then trigger a hearing before the Licensing Committee even though no one living or carrying on business within the vicinity of the premises raises any objection. I consider that there are no clear policy reasons why those not affected by the activities from any premises should be in the same position as interested parties. With regard to the suggestion that Police recommendations must be adopted unless there is clear evidence that they are not relevant, this effectively diminishes the role of the Licensing Committee as independent arbiters. For example on one recent review the Police made representations that they wished a licence to be revoked. The licence holder offered up conditions which, in the opinion of the Licensing Committee, would deal with the Police objections. However, that was not 'evidence' that the Police representations were not relevant. I do not believe that it is appropriate that the discretion of Licensing Committees should be fettered in this respect any more than the discretion of the Magistrates Courts was fettered prior to the transfer of licensing to local authorities.

11. The Government is considering expanding statutory guidance to encourage licensing authorities to consult more widely in the determination of a licensing policy statement. It is further considering removing the requirement for interested parties to show that they live or carry on business within the vicinity of subject premises. Consultation question 5 is 'How can licensing authorities encourage greater community and local resident involvement'.

Officer comment: This authority is currently consulting on its proposed revised licensing policy statement. Letters have been sent to all parishes, there has

been a press release and the revised policy is publicised on the council's website. In addition, letters have been sent to all statutory consultees and all licence holders within the district. To date only two replies have been received, one of which indicates that the responder has no comment to make, the other urging that licensing is returned to Magistrates. Although there was great interest in the consultation on the first licensing policy statement when the Act was new this interest has since faded and there has been no significant response in subsequent reviews of the policy. It is difficult for me to see how greater community and local resident involvement could be encouraged.

The next consultation question arising from this proposal is consultation question 6 'What would be the effect of removing the requirement for interested parties to show vicinity when making relevant representations'.

Officer comment: As intimated above this may lead to an increase in hearings for no apparent purpose. The council's licensing policy makes it quite clear that this authority regards anyone who may be affected by activities from the premises as living or carrying on business within the vicinity of them. I consider this to be an adequate safeguard.

12. The consultation then proposes that Primary Care Trusts (or their equivalent) should be included as a responsible authority under the Act. This will enable responsible authorities to make representations to local licensing authorities regarding the possible impact of new licensed premises on NHS resources. Such representations could cover the impact of new or existing licensed premises on resources (such as A & E Departments and ambulance services) or more generally the safety of the public within the night time economy. Consultation question 7 is 'Are there any unintended consequences of designating health bodies as a responsible authority'.

Officer comment: Although probably not relevant to the district of Uttlesford, I can see merit in Primary Care Trusts being responsible authorities in areas with a very active night time economy.

13. The Government propose adding the prevention of health harm as a fifth licensing objective. As an alternative it could be a discretionary power available to the authority where there is a particular local problem. It is suggested that such an objective may allow licensing authorities to take account of the density of licensed premises, hours of sale and links to local alcohol related illnesses and deaths. The consultation paper suggests this could mean restrictions on additional alcohol licences or hours of sale either within the authority as a whole or defined parts of it. It would also require, encouraging or requiring premises to discuss sensible drinking messages or to promote low or non-alcoholic drinks. The consultation paper acknowledges that this may have significant implications for businesses which may incur additional costs or burdens and also for their customers. Consultation question 8 is 'What are the implications of including the prevention of health harm as a licensing objective'.

Officer comment: I have insufficient knowledge of the degree of local problems to be able to offer advice to members as to whether these would justify a local approach as opposed to a national government initiative.

14. The Government is considering expanding the list of interested parties to include community bodies such as school governors, housing associations and registered social landlords which may make or wish to make collective representations rather than as individual citizens. Consultation question 9 is 'What would be the effect of making community groups interested parties under the Licensing Act and which groups should be included'.

Officer comment: At present those carrying on business in the vicinity of premises or bodies representing them are interested parties. The term 'carrying on business' is given a broad interpretation and would cover .... schools in the vicinity of any premises, housing associations and registered social landlords who have properties within the vicinity of any premises. Residents associations would be a body representing people living in the vicinity of premises. Parish councils are in a different situation in that they represent the community as a whole and not merely those living or carrying on business within the vicinity of any premises. For that reason I consider it appropriate that parish councils are limited to acting in a representative capacity if requested by interested parties to do so. In short, I consider that those bodies that the Government wishes to include in the definition of interested parties are already covered by the existing legislation.

15. The Government then consider the position with regard to appeals. At present appeals are to a Magistrates Court which hears the case afresh. However, the Magistrates Court are bound by the licensing authority's licensing policy as well as statutory guidance issued under the Act. On appeal the Magistrates Court may dismiss the appeal, substitute any other decision the licensing authority could have made or remit the case to the local authority to rehear and dispose of in accordance with the Court's direction. The Government is proposing that the default position for magistrates should be to remit the case back to the licensing authority to hear. The consultation paper states any proposal would include safeguards to ensure that Article 6 of the European Convention on Human Rights as to a fair trial is not compromised. Consultation question 10 is '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'.

Officer comment: Although an appeal is a re-hearing the case of *Stepney Borough Council v Joffe* (followed in a number of other cases) makes it quite clear that an appellate Court should not interfere with a decision of a lower tribunal merely because it is not satisfied that it is right but that it should do so only satisfied that the decision is wrong. Magistrates cannot reach a decision that the local authority's decision was wrong without holding a full hearing. Having held a full hearing, it seems to me to be disproportionate in terms of use of resources for magistrates to remit the matter to the local authority for a rehearing when the Magistrates Court could easily deal with the conditions to be imposed on a licence itself. In my view therefore such a proposal would increase the work of licensing authorities but without any corresponding

reduction in the work of Magistrates Court. Further, in determining any application for a licence the licensing authority is obliged to have regard to its licensing policy. This is a policy which the licensing authority has itself drawn up. In that circumstance I believe that the local authority cannot be an independent tribunal for the purposes of Article 6 ECHR. Indeed this principle has been established by the Courts in other areas of law where it has been held that the procedure is safeguarded by the right of appeal to an independent body or a right of judicial review. I would not therefore believe it is possible to devise a system whereby a final determination by a licensing authority is Human Rights Act compliant. If the proposal referred to at paragraph 8 above were adopted (licensing authorities being designated as responsible authorities) compliance with the ECHR would be impossible where the licensing authority has objected to an application or called for a review.

16. When there is a review of a licence a licensing authority may vary the conditions of the licence, remove a designated supervisor, suspend a licence for up to 3 months, suspend a licensable activity for up to 3 months or remove a licensable activity from the licence or revoke the licence. Such a decision does not take effect until the time for appeal (21 days) has elapsed. If an appeal is lodged within time the decision of the licensing authority does not take effect until such time as the appeal has been disposed of. The Government is concerned and there is evidence suggesting that some decisions are appealed against to ensure that premises are able to trade during a profitable period and that the appeal may be withdrawn once the period has passed. The Government suggests that the sanction imposed by the licensing authority should come into force when the determination is served and the sanction should remain in place unless and until an appeal to the Court is successful. Consultation question 11 is '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'.

Officer comment: Although the consultation paper does not refer to the options of removing a licensable activity from a licence or revoking a licence, if such sanctions were to be included in this proposal this could have a devastating effect on businesses which could effectively be closed permanently pending the outcome of an appeal decision which may well be in their favour. In general, I consider this proposal to be oppressive. There are already provisions in the legislation for closure orders and summary reviews of licences to deal with extreme situations and the proposal tips the balance unacceptably against licensees.

17. The consultation paper then turns to the issue of late night drinking. It states that as at 31 March 2009 nationally there were 7,178 premises holding licences to retail alcohol for up to 24 hours. Many of these were residential premises or off-licences. 845 nationwide were pubs, bars and nightclubs able to sell alcohol for consumption on the premises for up to 24 hours. There is no data to show how many of these premises actually open after midnight or between 3am and 6am. The consultation paper acknowledges that many of the premises do not actually sell alcohol during these hours but merely have authorisation to do so. Under the Crime and Security Act 2010 local authorities will have power to make early morning restriction orders restricting the sale of

alcohol between 3am and 6am. The commencement date for this provision has not yet been announced and the consultation paper indicates that the Government intends to amend the power to allow licensing authorities to decide which hours they wish to prevent premises from opening between midnight and 6am. An early morning restriction order will also be permitted if a licensing authority feels it would be 'beneficial' for the promotion of the licensing objectives rather than 'necessary'. Consultation question 12 is 'What is the likely impact of extending the flexibility of early morning restriction orders to reflect the needs of local areas'.

Officer comment: Early morning restriction orders reflect one of the drawbacks of the Licensing Act 2003 namely that the consumption of alcohol is not a licensable activity, only the sale. Even with an early morning restriction order it would be open to a licensee to allow bulk purchases immediately before 3am and permit customers to remain on the premises for as long as they wish. I would suggest that the response to this particular question should be that the existing powers of licensing authorities to restrict licensing hours would be sufficient if breach of a condition (namely a condition requiring premises to close at a certain hour) was enforceable by way of a prosecution.

18. The Environment Crime Reduction Act 2006 introduced a power for local authorities to designate alcohol disorder zones and to permit a levy to be charged on problem premises. To date no such zones have been applied for. Consultation question 13 is 'Do you have any concerns about appealing alcohol disorder zones'.

Officer comment: There seems to be little point in keeping these on the statute book if they are not being used.

19. Under the current legislation and guidance local authorities are permitted to have cumulative impact policies whereby the number of licensed premises can be restricted. At present there needs to be evidence that the number of licensed premises in an area is adversely impacting upon the licensing objectives. The Government is considering removing the evidential requirement for such policies. Consultation question 14 is 'What are the consequences of removing the evidential requirement for cumulative impact policies'.

Officer comment: This proposal runs the risk of re-introducing the Magistrates Court regime whereby those applying for licences would need to demonstrate a need for an additional licence. The Licensing Act should protect the interests of the public but without unnecessarily stifling competition within the trade.

20. The Government proposes enabling licensing authorities to charge a late night levy to help pay for the cost of policing the local night time economy where this is deemed necessary. This would only apply to premises which opened beyond a certain time. Consultation question 15 is 'Do you agree that the late night levy should be limited to recovery of additional policing costs? Do you

think that local authorities should be given some discretion on how much they can charge under the levy’.

Officer comment: This is unlikely to apply in the district of Uttlesford.

21. It is further suggested that if such a levy is introduced reductions may be given to premises involved in the schemes which reduce additional policing costs and which are deemed best practice. Consultation question 16 is ‘Do you think it would be advantageous to offer such reductions for the late night levy’.

Officer comment: As per question 15.

22. It is further suggested that other service costs (e.g. taxi marshalling or street cleaning) could be funded from the late night levy. Consultation question 17 is ‘Do you agree that the additional costs of these services should be funded by the late night levy’.

Officer comment: As per questions 15 and 16.

23. The consultation paper suggests that the Government will amend the guidance under the Act to permit licensing authorities to have greater autonomy concerning closing times (e.g. phasing of closing times, fixed closing times, zoning etc). Consultation question 18 is ‘do you believe that giving more autonomy to local authorities regarding closing times would be advantageous to cutting alcohol related crime’.

Officer comment: Under the legislation as drafted closing times cannot be enforced as the consumption of alcohol is not a licensable activity. Whilst zoning may be appropriate, to apply fixed closing times and staggered closing times across the district would not be consistent with the requirements of natural justice to deal with each case on its individual merits.

24. The consultation proposes making significant changes to temporary event notices. The Government has already amended the legislation with effect from October of this year to extend the time for the Police to respond to a TEN from 48 hours to 2 working days. The Government proposes making further changes to the TENs regime. A TEN overrides any conditions on a premises licence or club premises certificate. The Government proposes that the time for applying for a TEN when a premises licence is in force should be extended to one month and that the time for the Police to object to a TEN where a premises licence or club premises certificate is in force should be extended to 5 working days. Licensing authorities will have discretion to apply existing licensing conditions for the period of a TEN. The right to object which is currently restricted to the Police on the Crime and Disorder ground only would be extended to other responsible authorities and to the other licensing objectives. To prevent delays in notices coming to the attention of the Police, the licensing authority will be entitled to specify an exact address where TENs should be served upon the Police. The time for serving a TEN in respect of non-licensed premises will be extended to 15 working days. Personal licence holders will be restricted to 12 TENs per year as opposed to 50 at present and multiple TENs would be outlawed. Consultation question 19 is ‘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; (b) the Police (and other responsible authorities) have 5 working days to object to a TEN; (c) the notification period for a TEN is increased and is longer for those venues already holding a premises licence; (d) licensing authorities have the discretion to apply existing licence conditions to a TEN'.

Officer comment: (a) I have always considered the restrictions of objecting to a TEN are far too limited and welcome this initiative; (b) I can see no argument against extending the period for objection to 5 working days in the light of the extension of the notice period required; (c) my view is that 20 working days should be required for notice of any TEN. I cannot see a justification for a longer period being required for premises with premises licences as opposed to those without; (d) I would prefer to see this suggestion go further. If licensing authorities are to have a discretion to apply existing licence conditions to a TEN then this could only be done in the event that representations are received from responsible authorities as the proposals do not contain any provisions for objections to a TEN to be received from interested parties. I would suggest that existing licensing conditions for those premises with premises licences or club premises certificates should apply to all TENS save for where they are clearly inconsistent.

Consultation question 20 following on from the same proposals is '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; (b) restricting the number of TENs that could be applied for in the same facility (multiple TENs).

Officer comment: TENs apply to regulated entertainment and late night refreshment in addition to the sale and supply of alcohol. I find it difficult to see why a personal licence should be required for the first two of these licensable activities. There is no national register of TENs which means that the current limit of 50 TENs for a personal licence holder cannot be policed. A limit of 12 would mitigate against this by encouraging personal licence holders to limit their TENs to the immediate vicinity in which they carry on business. (b) This proposal could only have the effect of reducing public nuisance and is therefore to be welcomed.

25. The consultation paper expresses concern at the amount of alcohol being consumed by children. Underage sales is a criminal offence which can attract a penalty of up to £10,000 although the licence holder may be given an option of a voluntary 48 hour closure notice as an alternative to a prosecution (akin to a fixed penalty notice for excess speed, litter etc). The Government propose doubling the fine for persistent underage selling to £20,000. The Government is also considering amending the voluntary closure period to 7 days as a minimum with an upper limit to be determined. Consultation question 21 is 'Do you think 7 days is a suitable minimum for the period of voluntary closure that can be flexibly applied by Police for persistently underage selling'. Consultation question 22 is 'What do think would be an appropriate upper limit for the period of voluntary closure that can be flexibly applied by Police for persistent underage selling'.

Officer comment: Much depends upon the profitability of the business. For a small concern a 7 day closure may result in a disproportionate loss of income compared to a fine likely to be imposed by the Magistrates Court. A minimum period of 7 days may deter appropriate licence holders from accepting this offer. Members may consider that if under age sales are at a level that a closure for more than 7 days is considered appropriate this is really a matter where the responsible authorities should be seeking a review of the licence where the licensing authority has power to suspend a licence for up to 3 months.

26. The Government is considering ensuring that all premises found persistently selling alcohol to children will be subject to a review of the licence whether they have been subjected to a voluntary closure or prosecution. Consultation question 23 is 'What do you think the impact will be of making licensing reviews automatic for those found to be persistently selling alcohol to children'.

Officer comment: This proposal suggests that the responsible authorities are not properly doing their job by bringing appropriate cases before the Licensing Committee for reviews of the licences. Such a suggestion is contrary to the experience of this authority.

27. The Government is proposing controls which would prevent the sale of alcohol at below cost with a view to restricting binge drinking. Consultation question 24 is '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; (b) effective ways to enforce a ban on below cost selling and their costs; (c) the feasibility of using the mandatory code of practice to set a licensed condition that no sale can be below cost, without defining cost'.

Officer comment: I can conceive of no way that local authorities will have the resource or expertise to engage in enforcement of such a provision. If this were to be introduced I would suggest that Trading Standards are the best placed authority to regulate the activity and that the condition could be enforced by way of a prosecution and/or by seeking review of the licence.

28. The consultation paper then turns to regulatory matters including licence fees. A Government commissioned report in 2006 concluded there was a £43 million shortfall for the 3 year period 2004/5 to 2006/7 and recommended an increase in fees of 7% for the 3 year period 2007/8 to 2009/10. This was not implemented and the Government proposes enabling local authorities to increase licence fees so that they are based on full cost recovery. The Government also acknowledges that the tougher regime proposed by the consultation paper may lead to an increase in the number of licence reviews and an increase burden on licensing authorities which should be reflected in the level of fees. Consultation question 25 is 'Would you be in favour of increasing licence fees based on full cost recovery and what impact would this have'.

Officer comment: Yes! The impact would reduce the burden on the general fund.

29. Under the legislation a fee is payable on application for a licence and annually thereafter. However, there is no provision that a licence can be revoked in the event that the annual fee is not paid. All the local authority can do is to take civil proceedings for debt. This is undesirable as if as occasionally happens premises are abandoned and debts occur whilst the licence remains in place, there are instances of properties changing hands but the licence not being transferred leading to a dispute as to who is liable for the licence fee and for properties at the lower end of the fees scale cost recovery is not economic until the licence fee is at least 2 years in arrears. The Government proposes permitting automatic revocation if the annual fee is not paid. Consultation question 26 is 'Are you in favour of automatically revoking the premises licence if the annual fees have not been paid'.

Officer comment: Yes!

30. Members will be aware from a previous report of the new mandatory conditions to be attached to licences. These are a ban of irresponsible drinks promotions, a ban on dispensing alcohol directly into the mouths of customers, the requirement to ensure availability of free tap water, to require age verification policies and to require on-licence premises to offer small servings of beer, wine and sprits. The first three of these are in effect already, the last two coming into effect on the 1 October. The Government is considering repealing these mandatory conditions. Consultation question 27 asks 'Have the first set of mandatory conditions that came into force in April 2010 had a positive impact on preventing alcohol crime'. Consultation question 28 asks 'Would you support the repeal of any or all of the mandatory conditions'.

Officer comment: We have no experience upon which to base a response to the first question. I consider that the licensing authority has adequate powers under the Licensing Act either on application or upon review to deal with all of the mandatory conditions save for those requiring the supply of free tap water and the requirement for small measures of alcoholic beverages. These latter two conditions appear to me to be far more concerned with service provision than the licensing objectives. Drinks promotions, direct dispensation of alcohol and age verification can be adequately dealt with by conditions under the existing legislation should the need arise.

31. Finally, the consultation document seeks views on further de-regulation of the Licensing Act to reduce the administrative burden on businesses and licensing authorities. It is suggested that application forms for premises licences and TENs could be reduced in length and that the requirement for the licensing authority to determine and publish a statement of Licensing Policy every 3 years could be removed. Consultation question 29 is 'Would you support measures to de-regulate the Licensing Act and what sections of the Act in your view could be removed or simplified'.

Officer comment: There is an overriding need for there to be a new offence of breaching a condition attached to a licence. The current offence of 'carrying on a licensable activity other than in accordance with an authorisation' is confusing and open to interpretation. I agree that application forms (particularly for premises) are over lengthy and not easily comprehensible.

The requirement to determine and publish a statement of Licensing Policy every 3 years is unduly onerous (although the suggestion that this be abolished appears contrary to the earlier suggestion that authorities should consult more widely with regard to the policy). The provisions in the Act regarding the lapsing of licences on death or insolvency are confusing and unclear in the case of joint licence holders. The requirements are also over bureaucratic and timescales involved are unrealistic.

### **Risk Analysis**

32. There are no risks attached to this report.