

Briefing for licensing professionals: Decision-making and the use of evidence

This briefing includes key points from chapter 14 within the report: *The Licensing Act (2003): its uses and abuses 10 years on*

The decision-making process

Local authorities should be clear that the Act gives them a duty to have regard to the public interest in the performance of their licensing functions (see chapter 4), and that this should frame the fact that licensing authorities are required to:

determine what actions are appropriate for the promotion of the licensing objectives in their area (s 182 Guidance, para 9.41)

This could involve granting a licence, granting with conditions attached, or refusing the licence. The same evaluative process is required by the Act whether the premises is currently operating or not. In all cases decisions should be made not only on whether there is currently crime, public nuisance etc. present, but whether an application might lead to circumstances that could generate these, and therefore undermine the licensing objectives.

The use of evidence within licensing decisions

The guidance does not bind committees by strict rules of evidence, although some is needed. Evidence may, for example, come from the geographic location or the conduct of an operator, and there is reasonable discretion here. For new applications it is necessary to evaluate the impact that they may have on the objectives, and relevant evidence from the locality can be used to help with this. In most situations the best evidence is local information which can be seen as material fact and directly relevant to a specific case.

Being assertive with evidence

If a licensing committee thinks that any evidence submitted is either unclear or misleading, or if it has questions that remain unanswered, it has the power to be inquisitive and ask questions of any party at the hearing (see Reg 17 of the Hearings Regulations 2005). The High Court has held that the only parameter to this power is 'relevance and materiality' (*Murco Petroleum v Bristol* [2010] para 30).

Evidence and location: the 'premises by premises' approach

Almost all participants mentioned the 'premises by premises' approach, by which they meant that a venue should be considered in isolation from its local environment. There is however nothing in the Act, s 182 Guidance or case law that directly underpins this approach.

In contrast to the supposed 'premises by premises' approach, the Court of Appeal clearly directs committees to consider an application dynamically within its local context. In the *Hope and Glory* case, for example, the Court of Appeal details some of the wider considerations relevant to an application:

Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on. (*Hope and Glory [2011] para 42*)

All of these considerations involve a wider consideration of the geographic location in which the licenced venue sits, and how the application would impact upon this. In direct contrast to a supposed 'premises by premises approach,' the courts clearly direct licensing authorities to look at an application within its context.

Evidence, causality and judgment within licensing decisions

'Promoting the prevention' (see s 182 Guidance para 1.2+) of the objectives can be seen as actively working to create environments where the licensing objectives are less likely to be undermined. While decisions on this need to be evidenced, transparent and logical, by their nature they are often not clear-cut.

The Court of Appeal has made it clear that licensing decisions should involve 'an evaluative judgment' as opposed to a black and white pronouncement. Key to this is the way in which the issues and the evidence are dealt with. Although these are:

In a sense questions of fact, they are not question of the 'heads or tails' variety. They involve an evaluation of what is to be regarded as reasonably acceptable in the particular location... (this) is essentially a matter of judgment rather than a matter of pure fact. (*Hope and Glory [2011] para 42*)

Within this 'judgment' relevant evidence is of course essential, but licensing committees are not a court of law and operate to different evidential standards. The Court of Appeal is clear that licensing is an administrative function (*Hope and Glory v Westminster [2011] para 41*), to which a balance of probabilities applies. This means that licensing committees can come to decisions that, on the balance of probabilities, something is more likely than not to be the case. This is very different to the way in which criminal law operates, and far more discretionary.

The issue of causality is also altered by this approach; in licensing decisions causality also needs to be seen within 'an evaluative judgment', and not necessarily to be proved beyond reasonable doubt. This gives leeway to licensing committees to take a more discretionary and nuanced approach in their assessment of evidence and its link with a particular premises. This process does though need to be logical and transparent. This changes the manner in which evidence can be assessed, and there is no need to rely on large amounts of factual data in reaching a decision, despite the fact that many licensing committees feel the need to do this.

More details on this issue, including case studies, can be found in chapter 13 within the report: *The Licensing Act (2003): its uses and abuses 10 years on* (<http://bit.ly/la03report>)