


DRUG & ALCOHOL FINDINGS *Research analysis*

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▶ [The Licensing Act \(2003\): its uses and abuses 10 years on.](#)

Foster J.

London: Institute of Alcohol Studies, 2016.


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Seen as requiring an individualistic and 'premises by premises' approach and excluding health concerns, interviews with stakeholders and a revisiting of the 2003 Licensing Act in England and Wales suggest it could nevertheless be used to address health and to implement licensing policies and decisions based on likely overall local impact.

SUMMARY The focus of this report is the sale of alcohol under the Licensing Act 2003 (applicable in England and Wales) and the impact this has had on the public sector – the local authority bodies involved in licensing along with police and public health bodies. This account draws on the parts of the report which explained the Act and the research methodology used to explore its impact, before moving past the detailed findings to the author's general conclusions.

The 2003 Licensing Act

The Act made a number of practical improvements, including combining the alcohol, public entertainment and late-night refreshment licensing regimes, moving responsibility from licensing justices to local authorities, and introducing clearer standards for the granting, refusal and termination of licenses. While framed as a move away from regulation and towards a positive enabling process, issues of crime and disorder remained a central theme.

Its formulation was based upon a partial and industry-friendly evidence base, with research that contradicted this excluded by the Cabinet Office Strategy Unit. Ten years on, a number of key omissions in the Act remained contentious, including the cumulative impact of licensing decisions and areas of 'saturation' of alcohol outlets, lack of health involvement and of strategic oversight, and the licensing fees system.

At the heart of the Act are its introduction of a clear set of licensing objectives, setting out the issues to be taken into account while making decisions within the remit of the law:

- prevention of crime and disorder;
- public safety;
- prevention of public nuisance; and
- protection of children from harm.

While greatly reduced in scope compared with the discretion at one time given to magistrates, these objectives are arguably more precise in delineating the areas of public interest that licensing should and should not promote. Their use, however, is predominantly reactive; within the Act a licensing application is assumed to carry no risk unless a 'responsible authority' (such as the police or trading standards) or other persons (local persons, groups or councillors) expresses concern that the application may undermine one or more of the licensing objectives.

Both contemporary and more recent evidence demonstrates tensions and inconsistencies within the Act. Commentators have argued that these stem from the strong influence exerted by industry, and attempts to dress significant deregulation up as cultural modernisation, while using tough rhetoric on crime. These factors caused the 'New Labour' government of the time to frame the Act around a number of contradictory and



Key points

From summary and commentary

The 2003 Licensing Act set four clear licensing objectives mainly to do with crime and disorder (health was not among them) and permitted the extension of late-night drinking.

Alcohol trade power and influence has in many areas shifted the application of the law in a trade-friendly direction, largely due to local authorities' concerns over the expense of contesting appeals.

Despite limitations and concerns, existing powers could be used to address health consequences and to implement licensing policies and decisions based on likely overall local impact, not just established problems associated with particular premises.

unstable concepts, including the poorly evidenced idea that extended opening times would not just prevent violence, but reduce it by spurring a significant cultural change away from binge drinking and towards a relaxed, continental, café-style culture. Another unstable concept was the simplistic idea that market forces would always produce positive results, without any thought to the negative 'externalities' of the night-time economy, burdens largely met by the public sector and therefore having little impact on commercial interests.

Bologna in Birmingham, Madrid in Manchester, why not?

Office of the Deputy Prime Minister, 2003

The greatly increased focus on the personal responsibility of individual drinkers is also seen as problematic, given that at the same time the Act increased the overall availability of alcohol and reduced restrictions on alcohol-related businesses. New Labour's approach had the effect of removing from debate the constraining, and at times coercive, structural issues within the night-time economy, such as competition, price and physical geography. In their place, the wilful freedom of choice ('agency') and responsibility of individuals are put forward as the only realistic sources of problems. While the right to sell and the right to consume alcohol were to be shared equally, responsibility to avoid excess was to be slanted towards the consumer. Seen through the lens of crime, a reluctance to penalise the 'suppliers' of crime 'opportunities' contrasted with the enthusiasm with which their 'consumers' were to be punished.

The government's approach empowered business while leaving police and local authorities with limited ability to address many of the underlying causes of drink-related problems. Some commentators have described the focus on individual responsibility as twisting alcohol policy towards criminal justice issues and the 'management of drunkenness'. This could have been addressed to some extent by including health concerns, but the Act excluded all but acute alcohol-related injuries from debate. Long-term chronic conditions make up 75% of all alcohol-related hospital admissions, yet were not considered relevant to licensing and not addressed by the Act. Questions remain as to how or if medium- and longer-term health issues might feasibly be addressed by licensing, but there does seem to be far more scope than allowed originally within the Act.

Methodology

The impacts of the Act were investigated through interviews and workshops with people from all the key groups involved in licensing, including licensing officers, public health specialists, police, academics, and the licensed trade. Within these groups, efforts were made to ensure that a range of different voices were included, particularly in respect of views on public health within licensing, known to be a divisive issue. Participants were sought from local authorities known to have an interest in this issue, as well as from local authorities with less experience of it. For this reason, the sample was probably not representative of the position most local authorities take on the issue, as at the time of research only a limited number had made strong efforts to better incorporate public health within the licensing regime.

Two participants were from Scotland, where licensing law differs from the rest of the UK and the 2003 Act is not operative. The research stage of the project stopped after 36 interviews and three workshops, as by this point the sample was broad enough to have included a wide range of views from all the relevant groups.

The authors' conclusions

From the perspective of local authorities and the public sector, the influence of the licensed trade and the drinks industry in shaping licensing in their favour was a running theme in the research.

Fear of litigation

It was commonly recognised by interviewees that the power and influence of industry was important in shaping decision-making processes within the Act. Frequently referred to was how the legal 'clout' of sections within the licensed trade had influenced implementation of the Act, evident in the way licensing committees often make 'safe' decisions in order to avoid the expensive appeals process.

Even when all three members of a licensing sub-committee had agreed with a decision, the council solicitor was frequently successful in making them change their mind and grant the application. This was usually on the basis that evidence was insufficient to properly decline the application, even though councillors had originally judged they had enough information to make a fully informed decision. A police representative was clear that a number of these applications should not have been granted, and had aggravated problems in the night-time economy which police been left to sort out.

Many respondents reported that industry power had caused them significant problems. One, from a local authority in northern England, said: "It's a question of power – local communities want to be able to shape their environment, but at the moment aren't able to despite obvious alcohol problems, because of the power of the market and industry." This power and influence has had a significant impact, shifting the application of licensing in a trade-friendly direction in many areas across the

country.

Existing powers could be better used

While many participants called for changes to boost regulatory powers within the Act, there is probably significant scope for local authorities better to understand and utilise current powers. For example, while many saw the potential benefits of a specific health objective, they frequently did not seem to grasp the full extent of the current objectives and the way health-related concerns could be taken into account. In a licensing the context, when health-related issues are considered, at present these are limited to violence. In reality, other approaches are possible.

Other ways of using the existing objectives more expansively might include focusing on the less well-defined 'disorder' sub-objective rather than 'crime', a shift impeded by the fact that many police forces do not record disorder-related incidents. It should also be remembered that the 'protection of children from harm' objective entails moral and ethical issues. These issues are very rarely considered, and consideration of them cannot be based entirely on heavily factual evidence. However, some areas have used them creatively, for example, to restrict advertising and product-placement in shops and changing names which are sexually suggestive or might encourage excessive drinking.

A few participants argued that the Act had shifted the focus towards the crime and disorder objective at the expense of the others, particularly public nuisance and public safety. This was partly attributed to the overly evidential use of the Act, pushing decision-making towards a more black-and-white approach, as opposed to an evaluative process involving judgement.

Addition of a health objective could go some way to allowing for a more even application of the current objectives, but may not expand the range of health issues beyond those more innovative councils are already attempting to address. The risk-averse nature of many local authorities, and the contested legal environment in which they operate, mean that the potential application of all the current objectives is unlikely ever to be fully explored. An additional health objective could give local authorities the practical ability to do what they could, in theory, already do if current objectives were more fully exploited.

Decisions should not only be based on whether there is currently crime and disorder or other negative consequences, but whether an application might lead to a situation where these are exacerbated, undermining the achievement of licensing objectives. However, some local authorities are cautious or unsure about basing decisions on predictions of what might happen. When the evidential bar is raised towards the legalistic 'beyond reasonable doubt' criterion rather than the balance of probabilities (what the Act actually calls for), the process can become far more factual and black and white, precluding predictive judgements.

It is possible to imagine how the four licensing objectives could be used more effectively, in ways which would not necessarily displace consideration of crime and disorder, but perhaps entail a greater application of the public nuisance and public safety objectives, building on the harmful (but not necessarily violent) impact alcohol can have on people other than the drinker, and better deploying concerns over issues such as environmental health and child protection. For this to happen, decisions must be made in a more evaluative manner, and attention drawn to the way in which licensing impacts on the wellbeing of the wider community rather than just an individual premises, an approach allowed for by case law (see comments [below](#) regarding the 'premises by premises' approach).

The Act could be seen to have moved towards the management of drunkenness because it generally does not recognise well the way in which context and physical location contribute to problems. The primary focus has been on law and order and being able to identify problematic individuals. Case law has instead clarified that considerations should focus on what is suitable in a particular location. Greater attention to context and area-wide interactions could help better encompass the other objectives, and broaden the scope of licensing decisions.

Benefits of a strategic approach

The lack of strategic approaches to licensing, and the benefits reported by areas which have taken a strategic approach, emerged as a key theme. Some areas already use their statements of licensing policy as a key strategic document, linking them with other strategies and incorporating them into every licensing decision. Used in this manner to outline what is regarded as necessary for the promotion of the public good in a licensing context, some participants reported that these policies can have a significant impact, enhancing a local authority's ability to control licensing in its area. Statements of licensing policy enable local authorities to put into practice guidance indicating that one of the Act's wider aims is to provide a regulatory framework for alcohol which reflects the needs of local communities, empowering

local authorities to make and enforce decisions about the most appropriate licensing strategies for their areas.

Statements of licensing policy are not, however, typically used in this way. Guidance could be significantly clarified to promote a strategic approach, and while this is already encouraged, to promote coordination between statements and similar strategies across planning, crime prevention, and wellbeing. With or without the addition of an economic objective, much more could be done to incorporate economic concerns within statements, taking a long-term perspective and balancing economic growth with the negative impacts the night-time economy can have on public services.

In turn this raises the question of whether local authorities are equipped to balance the potential positive impacts of growth in their night-time economies with the possible negative impacts. In many cases they may not be, and doing this properly within the framework of an economic objective would probably require statements of licensing policy to be developed in a far more open and collaborative way, alongside other relevant strategies, before being disseminated for public consultation. That way all relevant parties, including those who may favour greater development and those who may oppose it, can fully contribute.

Some participants reported that many local authorities do not understand what they spend and receive in relation to the night-time economy, so additional help may be needed in this area. This could also lead to a situation where local authorities engage better with their licensed trade, fostering collaboration through championing best practice. The key problem is that there are so many different perspectives on what might constitute the 'public good' in regard to licensing, including a focus on economic development, versus regulatory control, health concerns, crime or disorder, or principles of free trade and individual freedom. Only a few local authorities have successfully managed the significant problem of reconciling these varied and competing concerns.

The case for an 'inquisitorial' system

While in principle the adversarial system allows for freedom of expression as alternative versions of the truth play out against each other, it also justifies lawyers suppressing and distorting unfavourable evidence. In exerting tight control over the information available to the courts, editing and moulding the evidence as they see fit, lawyers obliterate all semblance of the disinterested pursuit of knowledge. However, local authorities already have the ability to take an inquisitorial approach and to question information presented to them, though few do so. A more inquisitorial approach could lead to a situation where proceedings would be regarded as an attempt to get at the truth, with the lawyers on each side required to assist the investigator in obtaining the best available evidence.

Used carefully, the Act more or less makes this an option, allowing local authorities proactively to question individual decisions, as well as the way in which those decisions fit within their overall strategy. Such an approach would still require strong local evidence, but would make explicit the fact that licensing committees are making an informed, evaluative decision, with the scope to investigate key issues themselves. It could also remove or reduce the legalistic struggles which so often favour the licensed trade. It has been argued that adoption of an inquisitorial approach may help to remove some of the systematic skews which advantage corporate interests: "In an era in which the market ethos has attained an almost hegemonic status, it can easily be forgotten that the effective restraint of commercial ambitions is a prerequisite for the survival of vibrant and humane cities."

False assumptions limit application of the Act

The featured report dispelled a number of misconceptions around the Act, questioning received wisdom. It argued that:

- The Act should be clearly used in the public interest, with local authorities uniquely placed to determine what this is.
- The Act does not have to be overly permissive, but should be seen as a balancing regime.
- Large amounts of factual evidence are not needed; decisions can be made on the basis of clear and considered evaluative judgements.
- The Act does allow for a coherent strategic approach to licensing across a local authority area.
- It is entirely feasible to incorporate some health concerns into licensing if done thoughtfully on the basis of good local data.

All these possibilities for extended action have been 'spun' and influenced by the licensed trade, but the most obvious example is the slightly mythical requirement for taking a 'premises by premises' approach to licensing. Almost every participant interviewed for this project took it for granted that this was at the heart of the Act, and that because of this it was not possible properly to consider the way in which a licensed venue interacted with its local environment. Instead it was reported that the venue had to be looked at in isolation, something that local authority interviewees saw as a significant limitation on their work.

However, nothing in the Act, guidance, or case law, indicates this is actually the case. On the contrary, the Court of Appeal has directly encouraged local authorities to more widely consider how a licensed premises may impact on its local area, arguing that licensing decisions "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". Encouraging local authorities to reassess these points of tension and use the Act in a different way would require change to long-established ways of working, and while the threat of legal challenge might alter, it would remain.

The best remedy against being taken to appeal is making clear and rigorous decisions in the first place. A higher standard of decision-making could be achieved by clearer training and guidance for licensing committees and better use by local authorities of specialist legal advice. This would generate greater legal clarity and focus within licensing hearings, and narrow the gap in legal rigour between licensing committees and appeal hearings. While such legal advice might cost more up-front, it may well pay for itself by avoiding appeal costs, and also by ensuring that a council's statement of licensing policy is put together as effectively as possible, resulting (where this is used properly) in better and more well-informed decisions.

FINDINGS COMMENTARY When the [Licensing Act 2003](#) was implemented in 2005 it was billed as a mechanism for creating "a more European culture of bars and cafés for older people and families". In relaxing the opening hours of bars and nightclubs, it could theoretically remove the need for people to 'drink against the clock', and minimise public disorder generated by licensed premises closing at the same time. The Institute of Economic Affairs saw Tony Blair (then Prime Minister) as trying to "diversify the night-time economy, allow greater freedom of choice and improve public order".

In the run-up to the Act there were widespread fears that allowing '24-hour drinking' would lead to high levels of consumption, as well as more binge-drinking, violence, alcohol-related deaths, and visits to accident and emergency departments. However, UK evidence has been equivocal or lacking. Rates of crime and violent crime were falling before the Act was brought in, and continued to go down afterwards. Between 2004/05 and 2013/14, the number of violent crimes declined by 35% (according to crime surveys) and 17% (according to police records). In the 12 months after the Licensing Act, there was a 5% decline in violent crime compared to the year before in 30 police force areas in England and Wales.

What the featured report sees as the excessive and unhelpful influence of the licensed trade on licensing decisions is an instance at local level of the national policymaking process. A trend which favours trade interests, UK alcohol policy has largely gravitated towards interventions that focus on individual drinkers and licensees (in particular, the 'irresponsible few'), and the environmental conditions that foster or contain crime and disorder, as opposed to interventions that tackle the health and social harms of alcohol across the whole drinking population by substantially curtailing consumption.

For more on licensing including later developments not covered by the featured report see the Effectiveness Bank [hot topic](#) on controlling alcohol-related crime and disorder.

Thanks for their comments on this entry in draft to research author Jon Foster of the [Institute of Alcohol Studies](#) in London, England. Commentators bear no responsibility for the text including the interpretations and any remaining errors.

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