

The Heavy Hand of Light Touch Bureaucracy

An idiosyncratic critique

It is difficult to believe, now, that in introducing the White Paper, which preceded the Licensing Act 2003, the Government asserted: “*A light-touch bureaucracy would be applied to the licensing of the sale of alcohol.*” The heavy-handed regime that was eventually enacted has become a shantytown of primary legislation, subordinate legislation, guidance and a host of other regulatory provisions. As a result of the repeated amendment of the 2003 Act, we have “amended guidance”, “further guidance”, and “additional guidance” by the cart-load: the plethora of guidance on discreet, if not arcane, pockets of licensing is too voluminous to list, even by title only. There are also circulars, (many of which are accompanied by bespoke guidance); policies (ditto); strategies (thankfully, with guidance); initiatives (which would not be complete without guidance); and consultations (upon which there is, of course, an abundance of guidance).

And one should not forget the “Factsheets”. Nor the “Principles”. Then there are the “Codes”. Somewhere in the fog of it all I am sure I have seen “principles to be applied in determining principles to be applied.”

Any of the above is potentially relevant to, and may be cited in, a licensing hearing. The boast of the decision-maker is: “*We had regard to (such and such)...*” And the complaint on an appeal is: “*The Committee, however, failed to have regard to (this and that)...*” There is so much to choose from, it is not difficult to find support for practically any submission.

The bureaucracy inherent in the quagmire of print cannot in a sane world be described as “light touch”. In my frustration I have sometimes likened it more to a Monty Python’s foot than to a hand (heavy or otherwise); and although the comparison is perhaps more amusing orally than in writing, the analogy is not without merit.

Before the so-called ‘simplification’ of licensing (I am talking of the entirety of it: liquor, entertainment, gambling, etc.) in the early 2000’s, the go-to handbook - ‘Paterson’s Licensing Acts’ - was a single volume, of some 1,800 pages. It contained everything that a practitioner or court needed to know. Under the simplified regimes it became necessary to split the book into *two* volumes, comprising nearly 6,000 pages, in order for Paterson’s to cover the burgeoning bulk – or, at least, the most important parts: it was not possible to cram-in the lot. And to accommodate that vast number of pages, the thickness of paper had to be reduced to such an extent that on any given page the print on both sides was always visible.

The forest has grown and grown. The ever-increasing quantity of material has made it utterly impossible to publish Paterson’s even in two volumes, at least, in a user-friendly format. This year’s Paterson’s has taken the step of pruning-out all but the most essential and most-applied legislation, subordinate legislation, etc., etc. – that have spread like Japanese Knotweed throughout licensing law (with much the same effect) – and a single-volume Paterson’s now refers the reader to a hard-disk that goes with the book, and gives links to a host of Internet pages, leaving the reader to

navigate his own way through the bewildering jungle to whatever micro-management provision he is looking for.

And to my bemusement, rather than work towards the reduction of, or at least the simplification of, the regulatory burden, the various administrations *du jour* are forever announcing additional controls. They appear to be hell-bent on predicting every last permutation of eventualities, and creating a rule to govern it; and in consequence licensing applications are becoming tick-box, and decision-making is often more an exercise in identifying the relevant rule than the exercise of judgment. In this brave new world of the second millennium (and not only in alcohol licensing) I fear that everything undesirable will be made criminal, and everything desirable will be made mandatory. All human activity will fall to be determined as being either 'desirable' or 'undesirable' and will be regulated accordingly.

What is needed, of course, is existing law to be enforced, rather than new laws passed – especially those enacted to address headline-grabbing incident.¹ It seems to me there is a marked reluctance to employ existing controls; and there is sometimes a troubling ignorance of them. On the weekend of 14/15 of June 2014 there was an illegal 'rave' at an abandoned Post Office depot in Croydon. The following Monday a 15 year-old boy who had attended it died in hospital having drunk beer laced with ketamine. The Rave could have been stopped by the police: it wasn't. Variations on this theme are commonplace. Less shocking – only, perhaps, because no fatality is involved – I have seen drunken youths pour out of *licensed* premises in the early hours of the morning and run the entire gamut of vile things that drunken youths do, in full view of police sitting in a patrol car opposite, and suffer no consequences: no arrest, no fixed penalty notice, no warning – nothing. Recently, I was shown a letter written by a licensing authority to a complaining resident, which defensively (and wrongly) stated "*there is little the licensing authority can do to prevent a high density of licensed premises*" and the resultant problems they cause. In reality, the authority can do whatever it thinks appropriate to prevent crime and disorder and nuisance in its area, subject only to irrationality and proportionality: this is an extremely wide discretion, and even a harsh exercise of it is unlikely to be interfered with by the High Court.

Particularly worrying in liquor-licensing is that the focus of such enforcement as we do see is fixed upon the holders of licences, whilst little or nothing is being done about those who are actually causing the problems experienced, whether on Friday and Saturday nights in our town and city centres or otherwise. It is as though motorway speeding were being addressed by prosecuting car-showrooms.

The growing public frustration at what appears to be an acceptance amongst the authorities that there will always be the drunk and disorderly on our streets is at last beginning to find a voice. There is a request on the e-petitions (Home Office) website in the following terms: "*Laws to deal with public drunkenness already exist but there is unwillingness to deal with the problem. Punishments can be increased but if the law is not being enforced in the first place there is no point of increasing the punishment.*" It has been rejected: the reasons given are – "*The police, not the*

¹ The ill-fated Early Morning Restriction Order legislation, one might think dreamed up to appease the popular press reports of alcohol-fuelled carnage on our town and city streets, was so hastily (and poorly) drafted that not even Blackpool felt able to make use of it.

Government are responsible for enforcing the law. You need to include a clear statement explaining what action you would like the Government to take on this issue. Your e-petition will then be considered for publication.”

A Freedom of Information request made in 2011 discovered that in 2001 there were 20,096 arrests in the Metropolitan Police area for ‘drunk and disorderly’: but in 2010 there were only 5,472 arrests. It can hardly be thought that in that ten-year period the incidence of drunkenness in public places had decreased. Moreover, we do not have the figures for how many of those 5,472 arrests led to prosecution and punishment: I put in a FOI request for them, but the information was refused on the ground that it would be too costly to produce. It can confidently be predicted, however, that a very much smaller figure than the number of those arrested ever reaches a magistrates’ court.

Some time ago, the Coalition Government announced that the maximum fine for being drunk and disorderly in a public place would be increased from £1000 to £4,000. I am not aware of that increase taking place – perhaps for good reason: what good would it do to increase the punishment if so few offenders are taken to court and actually punished? The promised increase might just as well have been four-fold. Again and again we see licences of pubs and clubs revoked; but when premises close because of the behaviour of their customers, the customers move on and cause the same problems elsewhere. And why shouldn’t they? Too often their drunken conduct is not even reprimanded, let alone punished.

There is a marked contrast between the current scenario and the way things were in my early days at the Bar. Attending magistrates’ courts in London daily (as I did, to make bail applications) I heard the court officer call out, before any other criminal cases were heard: “*The overnight drunks list*”. Into the dock, one after another, came a half-dozen, of all ages and walks of life, unkempt from their cells, to suffer the shame of a public plea of guilty and the payment of a fine. There would be some, no doubt, regulars who did not care one jot about what should have been humiliating, and on whom (because they were indigent) only a small fine was imposed; but there were many others, I would judge them the majority, the young men in suits who had to explain to their bosses their lateness for work, the older men in suits who had to explain to their wives exactly what had happened the night before – these and an army like them were without doubt mortified. The possibility that they would ever again allow themselves to get into that position must have been slim indeed.

Those working behind the bar must, of course, also take their fair share of the blame: they have a responsibility not to sell alcohol to persons who are inebriated. The condition of the drunks staggering out of our pubs and clubs, the shortness of time before they are vomiting on the pavement or urinating in nearby doorways, has no other explanation than that they were given drink when they were well and truly ‘over the limit’. A controlled study was conducted by Liverpool John Moore’s University into the scale of bar-sales to drunks. The method involved student actors from Liverpool Screen School attempting to buy alcohol while acting extremely drunk in 73 randomly selected pubs, clubs and bars in a city in North West England. The actors were served alcohol, without any hesitation, in over 80% of the venues tested. More disturbing still, on almost one in five occasions bar-tenders tried to persuade the actor to take a double rather than a single measure.

To sell alcohol to a drunk is an offence under the Licensing Act. Just as with ‘drunk and disorderly’, however, I have seen a marked decline in any prosecutions. I made another Freedom of Information Act request asking for the numbers so prosecuted: it was disclosed that between 2010 and 2015 there were as few as seven prosecutions for selling alcohol to someone who was inebriated, with only one prosecution in 2013. It is hardly likely that in the Metropolitan Police District of Greater London only one barman sold alcohol to a drunk in 2013. Such sales are surely at the heart of the problem, but tackling them has drifted beyond the outer margins of solution. There used to be undercover police or local authority officers who went into licensed premises that had a bad reputation, and saw for themselves these sales taking place; and they would prosecute accordingly. No more. Lack of resources is the standard excuse: but my mind keeps returning to the three police officers I saw sitting in the patrol car opposite the club and its anti-social patrons. It is the *efficient* use of resources, rather than the lack of them, that someone needs to address.

But to return to the main theme of this talk, I am making a call for action to be taken *under existing laws*, rather than a rush to new legislation, new offences, new regulation. We do not need increased fines for offences that are rarely prosecuted: we need action, against the offenders. We have ‘Partnerships’ (between licensees and police and local authorities); we have no end of ‘Initiatives’; we have ‘Alcohol Reduction Strategies’; we have ‘Action Plans’; and the Licensing Act is ‘rebalanced’ so often I am quite dizzy looking at it. All are laudable, no doubt: but what impact do they have on the source of the problems? Precious little, I fear. The triumphant statistics showing reductions in anti-social behaviour are out of kilter with experience and observation. So the problems continue and multiply – and we are given another tranche of ‘action plans’ and ‘initiatives’. I don’t wish to belittle the efforts being made, but I am reminded of Hamlet: “What do you read my Lord?” - “Words, words, words.”

A Force Licensing Inspector from Manchester gave the following evidence at a recent licensing hearing -

“My experience (includes)... a report commissioned for the Tonight Programme on young people’s drinking culture (Broadcast Thursday 17th April 2014) and the drinking habits of my own 22 year old son and 19 year old daughter. The evidence drawn from these sources is that young people go out with the intention of getting drunk.”

That is my and a great many others’ experience too. There has been a lamentable failure in our responsible authorities to acknowledge it, and we suffer the consequences.

The Licensing Act 2003 came into force over ten years ago. It is high time we accepted that it has failed us. The 1964 Licensing Act worked: only a few minor adjustments (principally the 11:00 pm terminal hour for pubs and bars) were required to bring it up to date. Licensing justices had an unfettered discretion to do what was right - but the Act was repealed in its entirety. The new legislation ushered in a bran-new regime, with a bran-new procedure, for hearings conducted by a bran-new tribunal, applying bran-new principles. Decades of experience and wisdom were thrown away. Rather than airbrush-out the past we should learn from it and rescue the

best of what was lost. The task has begun, but is far from completed. The Licensing Act 2003 was amended in 2011 and the word “appropriate” replaced “necessary” as the test for the validity of enforcement: an extremely high hurdle in the way of solving problems was replaced by an extremely low one; but the true empowerment of that substitution is yet to be recognised by a large number of licensing authorities, who have more administrative control of licensed premises at their disposal than they would seem to believe.

We simply do not need more regulation: we need less. We need broad discretion instead of rigid micro-management. We need a light touch that is not so heavy it shoots off the scales.

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