

## **‘Careering out of Control’: Decision-Making in Contested Cases under The Licensing Act 2003\***

*Local authority sub-committees, when hearing and determining licence applications, have traditionally followed court-like procedures and have been regarded as acting quasi-judicially. The Licensing Act 2003 introduced important changes in the licensing of alcohol, entertainment and late night refreshment, one of which was that licensing hearings would be ‘discussion led’ by sub-committees and it was not envisaged by the Government that sub-committees would perform a quasi-judicial role. This article, based on empirical research conducted primarily in one licensing authority area (with supplementary material from a second licensing authority area), considers how authorities have embraced the new decision-making framework under the 2003 Act. It looks at decision-making in hearings in contested cases and examines, in particular, the extent to which sub-committees have departed from their traditionally adopted court-like format.*

### 1 INTRODUCTION

Licensing schemes regulating a range of activities are administered by various bodies, most notably local authorities, who normally discharge their licensing functions through committees and sub-committees. Since the Licensing Act 2003 (2003 Act), local authorities have been responsible for licensing, within an integrated scheme, the following activities: sale by retail of alcohol or supply of alcohol by a bona fide members’ club to

club members<sup>1</sup> (responsibility for which was previously entrusted to licensing justices), provision of various forms of entertainment (principally music and dancing, indoor sports events, films and plays) and provision of late night refreshment (LNR).<sup>2</sup> The 2003 Act, which has a wide impact on society,<sup>3</sup> requires each authority to set up a licensing committee (s 6) to discharge the authority's licensing functions under the Act (s 7) and the committee can (and almost invariably does) arrange for the discharge of any functions through one or more sub-committees established by it (s 9(1) and s 10(1)(a)). These functions include the holding of hearings before (the licensing committee or) a sub-committee in contested cases, unless all parties agree that the holding of a hearing is unnecessary.<sup>4</sup>

When making decisions in licensing hearings under the previous law, local authorities (for

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<sup>1</sup> There is supply here because all club members jointly own club property, including the alcohol stock.

There is therefore no sale when a member orders alcohol but a release to him of proprietary rights which he has in respect of the alcohol, even where payment is made: *Graff v Evans* (1882) 9 QBD 373.

<sup>2</sup> I.e. hot food or hot drinks provided from 11.00 pm to 5.00 am: s 1(5) and schedule 2, para 1(1).

<sup>3</sup> There is large proportion of the leisure industry (employing over three million people) regulated by it, there are some 216,200 licences and certificates in force authorising activities under it (DCMS National Statistics Bulletin, Alcohol, Entertainment and Late Night Refreshment Licensing, England and Wales, April 2009 - March 2010, p 8), and many millions of customers frequenting premises which provide the activities.

<sup>4</sup> Section 10(4) precludes these functions being discharged by officers.

entertainment and LNR) and justices (for sale or supply of alcohol) were both widely regarded as exercising quasi-judicial functions. As Turner J observed in *R v LB of Wandsworth ex p Darker*, where a local authority was considering a sex establishment licence application: ‘It is, I believe, generally accepted that proceedings before a sub-committee such as this are in their nature quasi-judicial’.<sup>5</sup> Further, it was well established that a court-like procedure would be followed in hearings. As Parker J observed in *R v RA Manchester Legal Aid Committee ex p Brand & Co*:

‘As far as ... licensing is concerned, whatever doubts there were in the early stages of the proceedings - and there were many doubts - since the case of *Rex v. Woodhouse; Ex parte Ryder* [1906] 2 KB 501 it is quite clear that every proceeding of magistrates ... in granting new or renewing old licences is in the nature of a court ... and the procedures in granting licences under the Cinematograph Act [by local authorities for films] ... appear to me to stand exactly on the same footing as the proceedings of magistrates ... dealing with the licences for public houses.’<sup>6</sup>

Under the 2003 Act, there has been a significant departure from the previous position. First, the role which the sub-committee is performing and the decision being reached have been recognised as an administrative rather than a quasi-judicial one. It is apparent that this was the Government’s intention on introducing the legislation, as can be seen from its response to a committee report on the Evening Economy and Urban Renaissance in 2003:

‘Under the 2003 Act, where relevant representations [objections] are received by the licensing authority, the authority is bound to hold a hearing to consider them. In holding such a hearing, the licensing authority will not be performing a judicial or even quasi-judicial role, but instead will be

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<sup>5</sup> 1999 WL 478089; CO/3257/97.

<sup>6</sup> [1952] 2 QB 413, 426.

engaged in a balancing exercise in the public interest on the basis of what is necessary for the licensing objectives.’<sup>7</sup>

The Court of Appeal in *The Queen on the Application of Hope, Glory Public House Ltd v City of Westminster Magistrates’ Court*<sup>8</sup> has recently confirmed that the function of the licensing authority under the 2003 Act is an administrative one. Toulson LJ stated:

As Mr Matthias [counsel for the respondents] rightly submitted, the licensing function of a licensing authority is an administrative function ... The licensing authority has a duty, in accordance with the rule of law, to behave fairly in the decision-making procedure, but the decision itself is not a judicial or quasi-judicial act. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires. (See the judgment of Lord Hoffmann in *Alconbury* at para 74.)<sup>9</sup>

Secondly, it appears doubtful whether a court-like procedure should be followed in hearings under the 2003 Act, for reg 23 of the Licensing Act 2003 (Hearings) Regulations 2005, SI 2005/44 (hereafter ‘Regulations’) provides for the hearing ‘to take the form of a discussion led by the authority’, with cross-examination not permitted unless the authority considers that cross-examination is required to enable it to consider the representations,

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<sup>7</sup> *The Government Response to the Office of the Deputy Prime Minister Housing, Planning, Local Government and the Regions Committee’s Report on the Evening Economy and Urban Renaissance*, Cm 5971 (2003), 16.

<sup>8</sup> [2011] EWCA Civ 31.

<sup>9</sup> *Ibid*, [41]. Lord Hoffmann in *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [74] had stated, in respect of the Secretary of State’s decision-making powers to determine planning applications: ‘The administrator may have a duty, in accordance with the rule of law, to behave fairly (“quasi-judicially”) in the decision-making procedure. But the decision itself is not a judicial or quasi-judicial act. It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires’.

application or notice (see 2 below). A ‘discussion led’ hearing seems to envisage a departure from traditional adversarial court-like proceedings and, while much has been written on the 2003 Act itself,<sup>10</sup> little attention has been focused on the decision-making process, including the format and nature of hearings. It is these aspects which the article examines. Following consideration of the decision-making framework set out in the Act (section 2), matters addressed include how hearings are conducted (section 3), the appropriateness of a discussion-led format for hearings (section 4), whether parties are able to effectively present their case in hearings (section 5), and sub-committee decision-making and the role and input of the sub-committee’s legal advisor (section 6).

The article is based on a research project undertaken primarily in one licensing authority area, a semi-rural authority with a handful of towns, to ascertain how authorities have adapted to and embraced the new framework when discharging their licensing functions under the 2003 Act.<sup>11</sup> The focus has been on the primary form of authorisation under the 2003 Act, premises licences, which can be obtained in the main by those carrying on a business that involves use of the premises for licensable activities.<sup>12</sup> In the cases studied,

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<sup>10</sup> This is both in established works and new books e.g. Paterson’s Licensing Acts, published annually; C Manchester, S Poppleston and J Allen, *Alcohol and Entertainment Licensing Law*, 2<sup>nd</sup> ed., (London: Routledge-Cavendish, 2008), and P Kolvin (ed), *Licensed Premises: Law & Practice*, (Haywards Heath: Tottel Publishing, 2004).

<sup>11</sup> The 2003 Act did not have immediate effect and there was a period of transition to 24 November 2005 before it came fully into force.

<sup>12</sup> The other two authorisations are a club premises certificate, for bona fide members’ clubs run by members for the benefit of members provided certain criteria are met (see ss 62-64); and a temporary event notice, which can be given by a ‘premises user’ to the authority when temporary or occasional licensable

licensable activities often included sale or supply of alcohol and in such cases all sales or supplies must be made or authorised by an individual holding a personal licence and there must be a ‘designated premises supervisor’ (DPS) for the premises who holds a personal licence (and who can, but need not be, the premises licence holder).<sup>13</sup> These requirements are confined to sale or supply of alcohol under a premises licence (s 111(1)).

The research was undertaken in two stages. Initially, a selection of case files was examined, with cases drawn from a one year period. The year selected was from December 2005 to November 2006, the first year the Act was fully in force. During this year there were 188 applications in connection with premises, covering new licence applications, variation and transfer applications, and applications to vary the DPS in cases where alcohol was sold or supplied on the premises.<sup>14</sup> There has subsequently been a reduced number of applications year on year, with 152 in 2006-7, 135 in 2007-8, 122 in 2008-9 and 117 in

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activities are taking place provided certain qualifications, including ones relating to duration and numbers present, are met (see s 98 and s 100).

<sup>13</sup> These are mandatory conditions which must be attached to the premises licence (s 19). The main purpose of the DPS is “to ensure that there is always one specified individual ... who can be readily identified for the premises where a premises licence is in force”: *Guidance issued under section 182 Licensing Act 2003*, October 2010, para 10.44 (Guidance). An exception can be made to these requirements for community premises (see s 25A).

<sup>14</sup> During this year only, existing licences were converted into new licences, in some cases with variations of the existing licensable activities, and these conversions (135) and variations (110) are not included in the figures.

2009-10 (the latest year for which figures are available).<sup>15</sup> Rather than select a truly random sample from the applications received, it was decided to focus upon three types of cases: those with no ‘relevant representations’ (objections) from ‘interested parties’ and ‘responsible authorities’<sup>16</sup> (RAs); those with representations but where the case did not proceed to a hearing; and those with representations that proceeded to a hearing. It is this last-mentioned category which is of particular importance for the purposes of this article. This was done so that analysis could be conducted on a range of cases, from simple to complex, with each of the parties providing an array of views on the process. Cases were selected from the one year period (based on the date the application was lodged with the authority) and it was envisaged that 10 cases of each type would be randomly selected for inclusion in the sample.

Due to the size of the authority, however, there were not 10 hearings held in this year (or in any other year). All of the hearings held in the December 2005 to November 2006 period (the proceedings of which had been audio recorded on CD by the authority), which totalled seven, were therefore included in the sample. In addition to these hearings, an opportunity

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<sup>15</sup> Nationally over the period (March-April) 2009-10 there were 33,908 premises applications, which include new premises licences, variations and transfers (but not applications to vary the DPS) – see *Alcohol, Entertainment and Late Night Refreshment Licensing Statistics, 2009-2010*. These statistics, and those for the preceding three years, can be accessed on the Department of Culture, Media and Sport’s website: [http://www.culture.gov.uk/what\\_we\\_do/research\\_and\\_statistics/4865.aspx](http://www.culture.gov.uk/what_we_do/research_and_statistics/4865.aspx)

<sup>16</sup> ‘Interested parties’ are those living or involved in a business in the vicinity of the premises (or, in either case, a body representing them) and local councillors; ‘responsible authorities’ are various agencies (e.g. the police, local authority environmental health departments and trading standards departments) with statutory responsibilities and expertise in particular areas. For a detailed explanation, see s 13(3) and (4).

arose during the fieldwork period to observe two hearings in the authority as they took place. After the selection of cases, a preliminary analysis was conducted to check for broad themes and issues. Utilising this data, semi-structured interviews were designed and conducted with a range of persons participating in the process. These included licensing officers (LOs), who are actively involved in all aspects of the licensing process; premises operators applying for premises licences; interested parties and RAs (see n16 above) who can make relevant representations on applications; solicitors to the authority and applicants' legal advisors (including both solicitors and licensing consultants); and councillors on the licensing committee who, normally sitting as a sub-committee of three, make decisions in contested cases. An opportunity subsequently arose at a second authority to conduct similar interviews with several of the participants mentioned above<sup>17</sup> and to attend some hearings there, and information gleaned here was fed into the research study.

## 2 DECISION-MAKING FRAMEWORK UNDER THE 2003 ACT

The decision-making framework differs significantly from the way in which local authority licensing schemes have traditionally operated. First, applicants for premises licences draw up their own operating schedule indicating how they propose to carry out licensable activities at their premises, reflecting the 2003 Act's underlying market-based approach to regulation. Secondly, a licensing authority, under s 4(1), is required to discharge its

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<sup>17</sup> These included licensing officers, RAs and councillors but did not include applicants, their legal advisors or interested parties.

licensing functions under the Act, which will include determining applications, with a view to promoting specified licensing objectives. These objectives, under s 4(2), are (a) the prevention of crime and disorder; (b) public safety; (c) the prevention of public nuisance; and (d) the protection of children from harm.<sup>18</sup> Thirdly, ‘relevant representations’ need to be about the likely effect of grant on the promotion of the licensing objectives (s 18(6)(a)) and submission is confined to ‘interested parties’ and ‘responsible authorities’ (the meanings of which have been mentioned in n 16). The authority must grant the application if no relevant representations are received and, if they are, hold a hearing to determine the application, having regard to the representations, according to what the authority considers necessary to promote the licensing objectives (s 18(2)-(4)).

In cases where a hearing is held, matters are regulated by the Licensing Act 2003 (Hearings) Regulations 2005<sup>19</sup> (hereafter ‘Regulations’), which contain various provisions for the conduct of a hearing. These include:

- the authority explaining to parties to the hearing the procedure which it proposes to follow at the hearing (reg 22);

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<sup>18</sup> An authority, under s 4(3), is also required to have regard to (a) its ‘Licensing Statement’ published under s 5, and (b) any guidance issued by the Secretary of State under s 182. The Licensing Statement, often referred to as the Statement of Licensing Policy (SLP), sets out the authority’s policy in respect of the discharge of licensing functions and, since each authority needs to draw up its own policy, this ensures that the discharge of licensing functions remains a matter determined at local level. However, there is the introduction of an element of central control through the issue of Guidance by the Secretary of State, to which a licensing authority must have regard when discharging licensing functions, and this will include the drawing up of and keeping under review its Licensing Statement.

<sup>19</sup> SI 2005/44.

- the hearing taking the form of a discussion led by the authority, with cross-examination not permitted unless the authority considers that cross-examination is required to enable the authority to consider the representations, application or notice (reg 23);
- the parties being allowed an equal maximum period of time in which to present their case (reg 24); and
- provision for enabling any person attending the hearing who, in the opinion of the authority, is behaving in a disruptive manner to be required to leave the hearing (reg 25).

Apart from these provisions, however, the authority retains its traditional discretion to determine the procedure to be followed at the hearing (reg 21) and to consider any logically probative evidence that goes to proving a relevant issue, for it is generally accepted that the strict rules of evidence applying in court proceedings need not be observed at licensing hearings.<sup>20</sup> However, differing weight will inevitably be attached depending on the nature of evidence e.g. evidence given directly in the proceedings is likely to be accorded greater weight than hearsay evidence. Further, the authority can take into account its own local knowledge when reaching decisions.<sup>21</sup>

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<sup>20</sup> See *Kavanagh v Chief Constable of Devon and Cornwall* [1974] QB 624 and *Westminster City Council v Zestfair Ltd* (1989) 153 JP 613.

<sup>21</sup> See *Daniel Thwaites plc v Wirral Borough Magistrates' Court* [2008] EWHC 838 (Admin), where Black J stated (at [55]) that it 'is clear from the [statutory] Guidance [issued under s 182 of the 2003 Act] that drawing on local knowledge, at least the local knowledge of local licensing authorities, is an important feature of the Act's approach'. This follows the approach taken by courts under earlier legislation – see *R v Howard ex p Farnham Licensing Justices* [1902] 2 KB 363 (liquor licensing).

### 3 HOW HEARINGS ARE CONDUCTED

Licensing hearings, although less formal, have traditionally had some affinity with court proceedings, in which there is examination and cross-examination of parties and witnesses. The Regulations, however, with their requirement in reg 23 for the hearing to be discussion led by the authority, seem to envisage a different approach being taken under the 2003 Act. How different that approach should be compared to traditional licensing hearings remains unclear, since no further indication as to what might be required is provided either by the Regulations themselves or by the Secretary of State's Guidance issued under s 182 of the 2003 Act (to which authorities, under s 4(3)(b), must have regard when discharging licensing functions). When undertaking the research project, it was apparent from interviews with licensing officers and others (e.g. legal officers) with experience of attending hearings that, although hearings under the 2003 Act had a degree of informality, the approach taken was not perceived by them as markedly more informal or significantly different from other licensing hearings. One licensing officer, when asked whether there was much difference between general licensing sub-committee hearings and 2003 Act sub-committee hearings, indicated that it was 'largely the same process' and acknowledged that both ran on 'fairly traditional, adversarial type, roughly speaking court-like procedures'. The perception of 2003 Act hearings as being akin to a court type process was also shared by others attending. As one applicant remarked: 'It was quite formal I have to say ... I felt very much put on the stand as it were ... it was quite intimidating and ... there were a group of the complainants [objectors] all there ... it was just like going to court.'

This degree of formality was not, however, off-putting to all parties. One objector, for instance, when asked if the hearing was too formal, answered that he expected a degree of formality given the nature of the proceedings: ‘These things have to be quite formal, it’s like going to court I suppose, that’s how it’s supposed to be.’ Similarly, a different objector responded to the same question by stating that ‘[i]t was about right and it wasn’t too scary’. However, this objector shows how residents will be more or less inhibited by formal processes depending upon prior experience – ‘[i]t might have been a little bit daunting, I guess, for anybody who was not used to that kind of scenario’ – and given her prior experience as a magistrate, it was evident that she was less likely to find the process inhibiting.

This adoption of court-like procedures, notwithstanding the Regulations, appeared to be structurally inbuilt into the authority’s process, as can be seen from the extract reproduced below from its guide for committee members on the correct procedure to be adopted:

#### 5 The Hearing

Applicant’s evidence in chief

#### QUESTIONS TO THE APPLICANT

##### **By members**

Does any member of the committee wish to ask the applicant a question?

May I remind the members to confine themselves to questions and refrain from expressing opinions or making statements?

##### **By objectors**

Do the objectors wish to put any questions to the applicant?

This is an opportunity to cross-examine the Applicant and to probe and test the evidence of the Applicant.

You will have an opportunity later on to make representations and put your case.

**By police, fire officer etc**

**Notes**

**Evidence in chief of the objectors**

I will now ask the spokesperson of the objectors to give their evidence

**QUESTIONS TO THE OBJECTORS**

**By Members**

Do any of the Members wish to put questions to the objectors?

**By the Applicant**

Does the Applicant wish to put any questions to the Objectors?

This extract gives no indication that cross examination is exceptional and permitted only 'to enable the authority to consider the representations, application or notice' (reg 23), but conveys the impression that it is a routine and everyday component of how hearings are conducted in this authority. While another document given to the parties explaining the procedure to be adopted states that questions will only be allowed 'if given permission by the Chairperson', we can see how the procedural notes that the committee utilise expect questions to be routine. This document is designed to be used as a 'crib sheet', with a space for notes for the committee at the end of each section. Indeed, in a document seen in the sample, a handwritten copy of the decision came at the end of the document, evidencing the fact that this is utilised by the committee to structure the hearing.

Further evidence of the routine use of cross examination can be found in the hearings themselves. Taking one hearing from the sample, the following extracts provide a good example of how objectors are invited to cross examine applicants, and how their contributions are structured and controlled by the committee and legal officer to comply

with a preferred quasi-court procedure. The first extract is the applicant presenting her case (which in a court-like process would be giving her evidence in chief):

‘On behalf of [a body] I applied for the premises licence to be able to continue with our entertainment programme in both [venues]. As this is a one off application and for life basically; what I have tried to do is [to] incorporate and look into the future for anything we may wish to do in future years without having to re-licence and re-apply. So therefore [I] have been quite open-minded about the type of thing we may be looking to do in the future, equally balancing the type of entertainment that is in keeping with the facility, the venue and the working hours and the opening hours of the [venue]. It seems sensible to apply for one application as the site is virtually one site ... The activities in the [venue] will be during opening hours and the type of things for our education programme, for our music in our [venue], for our street entertainment, that type of thing. For the [outside space] it is an open site so realistically we are looking to promote entertainment in the ... spring to summer time. It would not be practical to do things in the winter ... [but] we would not wish to restrict ourselves too much if we were approached by a local community group to support an open event. We would wish to be able to do that type of thing and incorporate that facility ... It’s a facility that the [body] wish to use to promote cultural activities. It’s a perfect setting, definitely an advantage to the [venue] and so that is the reason for extending the premises application, to be able to deliver our programme of entertainment and I think that really concludes the application.’

What follows is a series of questions by an objector who questions the applicant on the failure of the mediation that had taken place earlier and other details in the application.<sup>22</sup>

We can see in these questions that the objector is questioning the applicant on the

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<sup>22</sup> Neither the 2003 Act nor any secondary legislation makes specific provision for mediation, although in practice informal mediation by licensing officers to see if **the** applicant and interested parties and/or RAs can reach agreement on concerns raised is not uncommon. Authorities’ Statements of Licensing Policy may make reference to mediation and how this might be undertaken.

mechanics of the application and why there was a failure to agree potential limits to the application and thereby avoid a hearing. These questions are allowed by the committee, presumably as they relate to the application process and to particular details concerning the reasons for the application (and are therefore linked to the applicant's presentation of her case). Understanding this exchange as a quasi-courtroom process, we can see that the objector is not presenting her case, for there is no clear statement from the objector on the reasons for her objection. At best, there is an implication of excessive noise as the reason, but essentially the objector seems to be conducting a cross-examination of the applicant:

**Objector:** Yes, I'm [an objector] from [an address]. We attended the mediation meeting [with the applicant at] which we residents thought we would all come to some sort of an understanding and an agreement of what we were all happy with but I understand that you thought that my notes were inaccurate or that I misunderstood. Can you explain to me in what way you thought my notes on that meeting were inaccurate?

**Applicant:** Yes, I can. At the mediation meeting, yes, we did have a long conversation about various things and I agreed to restrict the amount of events to 40 per year for the [outside space]. At that mediation meeting everyone appeared to be happy with the type of activities that we had in mind for the [indoor venue] so it was the [outside space] that we were concentrating on. I agreed to write to you all, which I did, and a date ... was given for the residents and people to send reports and objections in to agree the detail of that meeting. What I couldn't agree to in your notes of that meeting was [that] I do not recall ever saying that I would monitor the sound levels because, as I have put in previous correspondence to you, I am not at liberty to do that. I do not have the ability to be able to do that and what does seem to be the sticking point with this application is the noise level.

**Objector:** One of them, yes. Do you agree that the monitoring of sound levels was discussed?

**Applicant:** It was discussed. Yes, it was discussed.

**Objector:** Was it then that the Pollution Control Officer agreed to monitor the sound levels at that meeting?

**Applicant:** No, I don't believe he did. My recollection of that is, if there was an occasion whereby complaints were received, he would then contact the organiser, in which case myself, to ask whether a similar event would be taking place so that he could then make the decision whether to monitor or not and I would not be party to that information. I would be treated no different to any other licence holder. I would not be aware, would not have any advanced notice, that's my recollection.

**Objector:** So you don't recollect agreeing to inform Pollution Control when a particularly noisy event might be taking place in the [open space].

**Applicant:** No, not specific, I don't.

**Objector:** We all agree that you agreed to limit the number of events in the [open space] to 40 or less. The [particular event] is only four occasions; what sort of other performances do you envisage for the other things going on in the [open space]?

**Applicant:** It may be that a school might approach us and want to use it for performing arts or music, something like that. It may be that [an organisation] may wish to use it. Only yesterday we were approached by one of the local churches who were asking about using it, so that type of community local event. I am not anticipating any commercial type of event.'

In the light of the above, it is difficult to resist the conclusion that cross-examination, rather than being allowed (in accordance with reg 23) only to enable the authority to consider representations or the application, was routinely permitted in the same way as it would be in court or in quasi-judicial proceedings where a court-like procedure is being followed.

In a second hearing from the sample, an objector attempts to explain why the application causes them a problem, which is not strictly cross-examination on the application but the

chair asks if ‘these are questions’ and, in order to remain ‘on topic’, the objector is forced to ask a question about the failure of mediation and what was discussed. The following extract demonstrates how the chair ensures that what takes place is ‘cross-examination’ and not the simple making of statements akin to examination in chief. In short, we can see a very much court-like interaction of question and answer where contributions must remain ‘on topic’ and within the permitted format.

**Chair:** Do we have any other questions?

**Objector:** Yes, my name is [...] and we live opposite the [open space] in [a street]. We look straight down on to them and can see the [particular part of the open space] from the back and we can see along [a different part] as well. As we have said in our reply, we are still worried about the control of noise because it doesn’t seem that [the applicant is] able, perhaps, or capable of insisting on some reduction in the amplification of noise. It is always the production that we talk about and I believe we have asked people, it needs simply turning the noise down. We cannot sit in our gardens in August.

**Chair:** Could I just, these are questions, at this point?

**Objector:** Sorry, yes, but could you reply to that [name of applicant] because in fact they did not come out at the meeting.

**Applicant:** Can you repeat the actual question?

**Objector:** Yes, that we asked for some guarantee, and no guarantee was given, of reduction of noise and no guarantee is given.

**Applicant:** We discussed at the mediation meeting, we discussed turn[ing] the volume down and I recall that [a person’s] reply to that was it wouldn’t make any difference. He didn’t go into very much technical detail but he certainly implied that it wouldn’t particularly be noticed and I think

that [the Pollution Control Officer] also made some comments about noise monitoring at the time and what was reasonable and wasn't reasonable.'

Here again, cross-examination seemed to be routinely permitted and indeed encouraged, rather than being allowed only when it was thought to be necessary to consider the application.

#### 4 THE APPROPRIATENESS OF A DISCUSSION LED HEARING

Little, if any, discussion or debate seems to have preceded inclusion in the Regulations of the provision for hearings to be discussion led. Although this is a form of a hearing used in other fields such as planning (the wording of reg 23 is similar to reg 11 of the Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002, SI 2684, for hearings by an inspector), this is a significant change from how hearings have previously been conducted by local authorities when determining licence applications. However, this provision may be seen as reflecting the emphasis under the 2003 Act on partnership working to promote the licensing objectives, with all those having an interest or involvement in the licensing process ('stakeholders') working together in partnership towards a mutually acceptable outcome.<sup>23</sup> What is in the public interest thus emerges from dialogue between participants in the licensing process, rather than being determined by the

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<sup>23</sup> This emphasis can be seen in statements contained in the Guidance issued under s 182 – see, e.g. para 5.103 of the Guidance issued in 2004 (now para 11.9 of the latest version): "It is important to recognise that the promotion of the licensing objectives relies heavily on a partnership between licence holders, authorised persons, interested parties and responsible authorities in pursuit of common aims".

licensing authority under traditional ‘command and control’ style regulation,<sup>24</sup> and a discussion led hearing rather than a court-type adversarial process might better facilitate the attainment of a consensual ‘public interest’ outcome.

However, this may depend on the extent, if any, to which efforts have been made by or on behalf of the parties involved to achieve a mutually acceptable outcome ahead of the hearing. If little or no efforts have been made, then a discussion led hearing may be appropriate to attain such an outcome. But if mediation has already taken place and has been unsuccessful, it is less clear that a discussion led hearing is then appropriate. If pre-hearing attempts at mediation have failed, a consensual approach may have reached its natural end. There comes a point at which it becomes apparent that negotiation and persuasion cannot deliver an agreed solution and that point may have been reached ahead of a hearing once informal negotiation with a responsible authority or interested party and a mediation meeting organised by a licensing officer have taken place. Any hearing that subsequently takes place is therefore much more likely to be effective if it proceeds along traditional lines, with examination and cross-examination of applicant and objectors taking place.

The Regulations prescribe a discussion led hearing in all cases, irrespective of the extent to which any prior mediation has taken place. This might be seen as a significant weakness, for it fails to take account of informal negotiation and mediation taking place ahead of a

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<sup>24</sup> Under this traditional style regulation, central government provides a broad framework within which local authorities seek to control and direct the activities in question in accordance with what, in their view, the public interest requires. For further details of different models of regulation, see B Morgan and K Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge, CUP, 2007).

hearing. It is true that the Act contains no provisions requiring negotiation or mediation but, given the emphasis on partnership working and consensual resolution, it ought to have been apparent that such actions would commonly occur in the pre-hearing stage. Perhaps a better approach would have been for the Regulations not to prescribe a discussion led approach but to leave the approach to be taken to fall within the authority's general discretion under reg 21 to determine the procedure to be followed (see 2 above). A preference for a discussion led approach in appropriate cases (where mediation has not taken place either at all or to any significant degree) could be encouraged through inclusion of a provision to this effect in the Guidance but this would leave it open to authorities to follow a traditional adversarial approach when it is already clear a consensual resolution cannot be achieved.

## 5 EFFECTIVENESS OF PARTIES' PRESENTATION OF THEIR CASE

### **(a) Unstructured nature of the hearing**

There was a sense amongst participants with experience of the legal process that, unlike in the case of court proceedings, hearings lacked a coherent structure and were not particularly conducive to parties, such as objectors, getting across the points that they wished to raise. Thus, as one legal officer observed:

'I've felt a few times that it's kind of careering out of control because there isn't really much of a structure, whereas in the magistrates' court it's very clear, if you have a trial you know exactly how it's going to proceed ...

... because it's a bit less formal, in a way that works against them [objectors], because they've almost got to kind of shout out and say "can I have my say now?" whereas if you've got a criminal trial in the magistrates' court, the prosecutor calls the witnesses in order and they go into the witness box, take the oath, they have ample time for their say, whereas in a way our objectors, we're asking them to shout out and be almost like councillors. They're having to do their own advocacy in a way and we have found sometimes they want to object, they've turned up, but they become very tongue-tied when it actually comes to it.'<sup>25</sup>

One hearing in particular evidences this view of them as being unstructured, although in this case it was the applicant rather than the objector who was inhibited from being able to make an effective contribution. As is usual, the hearing opened with the report of the licensing officer. The chair invited questions on the report, the first two of which were on details of the report and procedural matters (such as the placing of the advertisement in the local press outlining the application), and the next 'question' from an objector was simply a statement as to the perceived problem with the application:

'I don't actually object to the application per se, my issue with it is the wide, total open-endedness of the application and there were 15 events last year and what I, what we, would like to see at my property, is that it doesn't expand into 30 events a year. I would request a condition that maybe we limit the number of additional events to say, three, over the next five years. I would also request a condition that no more than three events in any one year run past 8:00 pm. The open-endedness of the times of the application from 8:00 am to 10:00 pm could actually mean that the mix of current events that were held last year could change so that all 15 ended at 10 o'clock and I don't think that would be reasonable... One more condition [is needed] and that from my point of view would be to restrict music in any one day to a maximum of six hours... '

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<sup>25</sup> Similarly, a police licensing officer remarked: 'Compared with a proper trial it's really amateurish ... It was like there was no real structure.'

This process continued with different objectors asking different ‘questions’ that were really questions, if they were questions at all, to the applicant, rather than the licensing officer. Indeed, they could be better characterised as evidence in chief of the objectors. Another extract from an objector in respect of the same application equally illustrates the point:

‘The licence would give [the applicant] carte blanche as they think fit between the hours of 8:00 am and 10:00 pm on any day, seven days a week and the possibility of music, live music, possibly amplified, at unsocial times from 8:00 am to 10:00 pm. This could be classed as noise nuisance under, I believe, the 1990 Environmental Health Act and the council should seriously consider reasonable times on noise from music and amplifiers and the effect on local residents, some of who work night duties. In truth noise has been scientifically proven to affect peoples’ health and stress levels ...’

The objector was thereafter allowed to continue through a whole host of points. What appears to have happened here was that objectors initially asked questions of the licensing officer that were appropriate, since they related either to his report or procedural matters that need to be monitored by the licensing officer, and other objectors must have therefore taken this stage of the proceedings as being a point where they were allowed to speak. This would explain the two ‘questions’ quoted above. It must be remembered here that the applicant, at this point, had not been offered an opportunity to present his case at the hearing. Indeed, while the applicant did address some of the issues raised by objectors after each spoke, at no time was the applicant asked by the committee to speak to the application. From this point onwards, the hearing descended into a series of arguments on particular points with no overarching structure. While there were discussions as to whether some complaints related to the licensing objectives and were therefore relevant, the appropriate format for the hearing, laid out in the guide for the committee, was not

followed. The consequence of this was that, while objectors were able to air grievances, the applicant was not given the opportunity to provide evidence in chief. Although in one sense the hearing may be seen as ‘discussion led’, as required by reg 23, ‘discussion’ was rather random and there was no structured consideration of relevant issues as might be expected in quasi-judicial proceedings where a court-like procedure is being followed.

### **(b) The provision of advocacy**

Where parties were not legally represented, which was the position in most of the cases considered, they generally had to rely on their own efforts, largely unassisted, when presenting their case. Although the information they were seeking to convey may be important for the sub-committee when determining the application, it was apparent that neither officers nor members saw their role at the hearing as including provision of assistance when parties were putting their case. Licensing officers, although frequently providing help and assistance at the pre-hearing stage, did not do so at hearings and largely confined themselves to presenting their case report to the sub-committee.<sup>26</sup> As one

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<sup>26</sup> Reports in the two authorities were always neutral on the merits of the application, although practice seems to differ on this. In some authorities licensing officers’ reports do contain a recommendation to the committee but in the two authorities studied this was not the case. In one report, for example, the sub-committee’s attention was drawn to two different policy objectives at stake, one of which was stricter conditions on noise in areas that have denser residential accommodation, and the other of which was the need to encourage and promote a broad range of entertainment for the wider cultural benefit of the community. Although each pointed to a different outcome, the report gave no ‘steer’ to the committee.

licensing officer observed: 'I'm more than happy to advise somebody and, say, point them in the right direction before proceedings start, but then actually in the hearing I would feel very uncomfortable about jumping in and saying "you should be saying this, you should be doing that"'. Similar sentiments were expressed by another licensing officer:

'The licensing officer's job really is to supply the background of the administration process and then ... they [objectors at hearings] have to put their case and make their case accordingly ... the weakness in that is that there's no-one to lead them in terms of drawing out the key terms of the evidence there. Unless the chairman picks that up, or one of the members of the sub-committee wants to tease it out, it really doesn't perhaps do it justice.'

Sub-committee chairmen or members, it seems, were similarly not inclined to adopt an interventionist approach to assist unrepresented parties, at least beyond seeking clarification on some particular matter, as can be seen from the following observations of a sub-committee chair:

**Interviewer:** [I]f there's something you're not sure about of objectors or applicants, or you think they might need some assistance to get some ideas out, would you be more pro-active and say "what about this?" or "would you like to explain this further?" Do you see that as your role or do you think that's too interventionist?

**Interviewee:** I think if they weren't very clear in the way they told us about a specific, yes we would clarify that, but I don't feel it's our role ... as it were to put their case for them. I mean that would be wrong. But well I personally think it's wrong, but as I say, you do, if they have not made something, you think "well I don't know quite what the hell they're trying to get at" you're right, we sort of say "do you mean so-and-so?" or whatever.'

As seen in one of the extracts (see 3 above), sub-committee members, instead of assisting an unrepresented party, may well impose the sub-committee's preferred structure by either

not allowing questions or (as in the case of the extract above) asking for statements to be rephrased as ‘relevant’ questions. Further, objectors may be told simply that their objections are not relevant as they do not speak to the licensing objectives, with no attempt to offer any further explanation. In one hearing, for example, there was a long contribution from an objector on a number of issues including litter and parking but it was simply pointed out by the sub-committee that, ‘[y]es, it is a problem and that unfortunately is not a matter for yourself [to put forward as a relevant objection]’.<sup>27</sup> Similarly, there were examples in hearings where objectors who refused to summarise their observations were not allowed by sub-committees to continue. This occurred, for example, in one hearing where an objector, when beginning to make a contribution (towards the end of the hearing), found that objectors were allocated only 10 minutes in total to speak, rather than 10 minutes per objector, and declined to summarise his objection when it was pointed out to him that the objectors had already been talking for over 10 minutes:

**Chair:** Could you just summarise what you want to say because 10 minutes is a long time?

**Objector:** I think not, I think not.

**Chair:** So you don’t wish to add anything further.’

As the objector was not willing to summarise, the sub-committee essentially indicated that it was not prepared to hear him.

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<sup>27</sup> While residents may find this frustrating, professionals within the hearing would like chairs and legal officers to be more demanding in keeping observations within the terms of the licensing objectives. In the words of a licensing consultant, ‘[t]hey’re listening to what residents say and, you know, when it’s... irrelevant, and you know that they’re going to take [it] into account and sometimes you just want the legal [officer] to just say, you know, “I’m sorry, we shouldn’t be talking about that.”’

The imposition of such a ‘guillotine’ is based on reg 24 of the Regulations, which provides that ‘[t]he authority must allow the parties an equal maximum period of time in which to exercise their rights provided for in regulation 16’ (i.e. making representations and providing supporting information). This is a controversial aspect of hearings on which strong views were expressed. Thus one licensing officer stated: ‘if [the parties are] not given the time to say what they want to say then how can that be fair?’ Similarly, a solicitor complained that, ‘how under the terms of natural justice ... can you deal with potentially losing your licence, your livelihood, in three minutes?’<sup>28</sup> Again, a number of objectors expressed dissatisfaction e.g. one resident remarked: ‘yes, you shorten the proceedings, but some vital points may get left out’.

Assistance to unrepresented parties, alternatively, might be provided by a legal officer present at licensing hearings. A legal officer was present at hearings in each of the two authorities, although it was evident that any assistance provided to unrepresented parties was likely to be focused on procedural matters - as one legal officer put it, ‘the most important thing is checking that procedurally everything is correct as the hearing goes through’ - rather than substantive issues relating to their case:<sup>29</sup>

**‘Interviewer:** Are you particularly pro-active ... in the sense of if you see an unrepresented applicant who, for want of a better phrase, seems to be drowning and seems to be not quite

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<sup>28</sup> Reg 24 does not prescribe any period of time, only that equal time is allowed. The period of time is a matter for the licensing authority. It might be 10 minutes or, as in the instance referred to, three minutes.

<sup>29</sup> Assistance from the legal officer would be in addition to any information on procedure that might be contained in the authority’s Licensing Statement published under s 5 or supplied with the agenda to the hearing.

understanding the process ... would you be interventionist in the sense of stopping the applicant and asking them questions or asking them to clarify certain points?

**Interviewee:** If needs be, yes, not all the time. Sometimes you do get an applicant where they're drowning but members will have the gist of what they're saying and plus I would probably go up and speak to the applicant who's unrepresented in the first place, explain the procedure, if the applicant wants sort of, you know, advice on the procedure or what they should say, they can always ask me through a chairman. So I'm not that pro-active ... but it depends, you know, on the circumstances.'

The position might be contrasted here with that pertaining in magistrates' courts where the legal advisor, traditionally known as the justices' clerk, is under a duty to assist unrepresented parties<sup>30</sup> and in court cases where judges would generally consider that they have a responsibility to assist an unrepresented party to put their case. In the licensing hearings in the research study, however, applicants or interested parties seemed to be largely 'on their own', with no particular person in the hearing to whom they could look for assistance. As one licensing officer observed, 'I do feel that if the applicant isn't represented, or the interested parties aren't, they're left to bloody sink or swim'.

In order to show the extent of this isolation, it is worth comparing two different hearings. In the first, the applicant is not represented and, as a result, fails to fully introduce his application. After the licensing officer's presentation of his report, the applicant, who is seeking an extension in hours, is called by the chair to 'make his application':

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<sup>30</sup> The Consolidated Criminal Practice Direction, 2006 WL 1887076, V.55.9 provides: 'The legal adviser is under a duty to assist unrepresented parties to present their case, but must do so without appearing to become an advocate for the party concerned.'

**Chair:** Just, if you could explain to the committee the application you're making, if you could just summarise it for the committee?

**Applicant:** The gentleman [the licensing officer] explained everything, so [it is] for half an hour during the week and an hour at the weekends and I don't know what else to say.

**Chair:** So that is your application Mr. [applicant]?

**Applicant:** Yes Ma'am.'

The applicant appears 'tongue tied', not knowing what to say, and simply reiterates the increase in hours sought. No explanation is provided as to why extended hours are required and, additionally, no attempt is made to address the letters of objection, copies of which he will have received.

In the second hearing, the applicant was a licensing consultant, who, for reasons of convenience for a pub operating company, acted as an applicant rather than a legal representative.<sup>31</sup> In the extracts below, we can see how the consultant expertly builds a case. First, the applicant, after a brief introduction about the pub operating company, immediately presents the company as being reasonable and prepared to negotiate with a responsible authority:

'First of all, which I am not actually sure whether you are aware of, I did liaise with the police about this application and I did agree to withdraw some of the hours. It's only actually half an

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<sup>31</sup> In effect, the 'applicant' was the representative of a pub operating company who were re-opening premises after a refurbishment. The licensing consultant acted as the applicant and was nominated as the DPS, with the expectation of subsequent transfer. So, while the applicant was not technically represented, given her role was as a representative for others, we can treat this case as an example of an applicant who received representation.

hour on a Friday and a Saturday night. We were asking for 1am on the time of sale of alcohol and we've agreed to reduce that on a Friday and Saturday night to 12:30 ... [and will] turn the switch off half an hour before the last sale of alcohol which gives you a natural winding down period ... half an hour is plenty to ask people to leave in order to close the premises, so what I propose to do in the light of the half an hour change to the Friday and Saturday night, I'll reduce the entertainment. In the light of these objections, I'll reduce the entertainment for about half an hour as well and so I just want to let you know that the hours are different so that entertainment will be midnight.'

Secondly, the applicant speaks to the objections. In essence, she attempts to minimise the objections by highlighting how previous problems were 'in the past'. Cleverly, the applicant takes a potential disadvantage (the premises are in a densely populated area, thereby meaning that noise nuisance could be more likely) and turns it into an advantage (there have been few objections from such a densely populated area):

'I'm not here to talk about the past ... the people that now own these premises have not yet opened it and, if there was noise nuisance previously, then I have no knowledge of that. I think the biggest, the most significant thing that you can think about is the fact that environment health aren't here today to complain and I think if it had been a really big issue, the responsible persons would be here today and obviously they are not ... if you want to look at the picture, you can see it's quite densely populated [and] you've only had two ladies objecting to this application ... I think that needs to be taken into consideration in quite a highly populated area and the representations were obviously made against the previous premises [occupants] as I mentioned. The fact that it is being closed gives it a breathing time as well. It gives it time to die down if there had been problems previously.'

Thirdly, the applicant questions the veracity of the complaints and indicates that responsible authorities have the power to deal with any problems after the granting of the licence. The implication obviously is that the licence can be granted in full and any

problems dealt with subsequently through an application for review of the licence (under which an authority has various powers, including revocation of the licence):

‘They [the objectors] are complaining of noise and the volume of music and all I can say to that is, again, I don't know if that was true. The allegation put in my mind isn't substantiated because Environmental Health aren't here. One lady actually does refer to contacting Environmental Health in the past. Well, I've not been notified and usually I'm notified if there'd been any complaints. From my perspective, there are no complaints told from the police and Environmental Health. So, that's all I really would say about the objections that they're not substantiated and I would say 99% of them are quite irrelevant of what has been said in the representations ... I don't really have a lot else to say except to say that the Licensing Act gives added power to all the responsible authorities [to seek a review of the licence]. They've already got all the existing legislation. They've absolutely bundles of it to deal with these things. The Environmental Health has got the [statutory] noise protection [provisions]. Police have got power to close down the premises.’

Whatever the efficacy of these interventions, they are undoubtedly more professional and likely to create a more favourable impact than simply accepting the licensing officer's report, as the unrepresented applicant did in the first hearing above. If unrepresented parties are to effectively present their case, it is evident that some assistance is likely to be required, whether this is from the legal officer in accordance with the approach taken by legal advisors in magistrates' courts or from some other person present or attending. Others who might provide this support include the licensing officer, who is present and perhaps best placed to expand on, clarify or assist in the presentation of points raised by an unrepresented party, during or after a party is presenting his case and/or at the end of the proceedings before the sub-committee retires. If the licensing officer had an opportunity to contribute, this might help to ensure that significant points do not go

unaddressed. This might improve the quality of information before the sub-committee and, in turn, enable it to make better-informed decisions. However, licensing officers in the two authorities do not feel able to accept this responsibility to avoid possible accusations of bias in that they might be seen as supporting or siding with a particular party (although officers are not themselves involved in or present at the decision-making). Further, they may feel inhibited from taking a more active role in hearings, since these are essentially under the governance of the sub-committee hearing the application. If officers were to accept this responsibility, at the very least, it would probably require some encouragement from chairs of sub-committees if they were to provide any level of assistance to unrepresented parties. Alternatively, assistance might be provided by a local ward councillor attending and ‘representing’ constituents in the hearing. It continues to be the case that ward councillors can make representations on behalf of their constituents, although by s 33 of the Policing and Crime Act 2009 the definition of ‘interested parties’ has been extended to include any member of the licensing authority, so all councillors (whether or not they are ward councillors in respect of the premises) are now able to make representations in their own right.

## 6 SUB-COMMITTEE DECISION-MAKING AND THE ROLE AND INPUT OF THE SUB-COMMITTEE’S LEGAL ADVISOR

Whether or not hearings are conducted as discussion led or follow a court-like procedure, decision-making itself at the end of proceedings may well proceed on similar lines. It is

difficult to say with any certainty, since decisions are made *in camera*. Interviews, however, with sub-committee chairmen, and also legal officers who retired with the sub-committee and were present to advise on legal matters during the sub-committee's deliberations,<sup>32</sup> provide some insight into the decision-making process in licensing hearings. In each authority the approach of chairmen at the outset was not to take the lead on promulgating discussion but to invite other sub-committee members, who (like the chair) may well have formed a preliminary view from the hearing as to what the outcome should be, to express their views. Thus a chair in one authority, when asked whether 'you might be more likely to let another member of the committee take the lead to start with', indicated that 'the normal procedure is that we do', whilst a chair from the other authority stated: 'I think perhaps I would say "Right, who's going to kick off?" or something like that and that just got it rolling'. This approach was confirmed by interviews with legal officers who were present. As one legal officer put it: 'Somebody just kicks off really and starts discussing it ... but the person that starts off isn't necessarily the chair. Quite often it's not the chair'. The member who 'kicks off' on an application, as the legal officer went onto say, is 'somebody [who] will have a strong view on it and ... quite often they'll carry everybody with them'. In such cases decisions therefore might well emerge from the lead taken by a particular sub-committee member who has initiated discussion rather than through the chair exercising any prominent role in the decision-making process or steering discussion in a particular direction. As one sub-committee chair stated:

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<sup>32</sup> Practice in other authorities may differ and legal officers do not always retire with the sub-committee. Legal officers may advise on legal matters before the sub-committee retires and/or attend whilst the decision is being made only if requested to do so to provide legal advice on a particular matter.

‘they [sub-committee members] come up with the proposals and it’ll come from the floor, “I propose that these hours are accepted” or “I propose we don’t accept these hours.”’ He gets a seconder ... and we vote on it ... the chairman has a vote but I don’t, normally I don’t make any comments about [it], the floor does the meeting, you know; the floor actually makes the decision as far as I’m concerned.’

Decisions made must promote the licensing objectives and the onus is on the sub-committee itself, in particular, the chair, to ensure that discussion and any actions proposed are in accordance with the licensing objectives and no irrelevant considerations are introduced. Legal officers essentially saw their role as non-interventionist, allowing the sub-committee for the most part to proceed with its deliberations. Interventions would be largely confined to responding to questions raised on legal (though not substantive) points and advising, where applicable, as to the lawfulness of certain (contemplated) actions. The expectation was that the sub-committee itself would reach its decision in accordance with the licensing objectives, with the legal officer keeping the sub-committee ‘on track’ as and when necessary.<sup>33</sup> Thus one legal officer observed:

**‘Interviewee:** They’ll ask me quite a lot of questions. “Can we do this, can we do that?” I’ll react and say “well that’s entirely up to you, you ... [indicate] what you feel and then I’ll give you legal advice on your decision there. I’ll then try to amend your decision, help you so that it’s, you know, strong enough and appeal-proof in a way, but I can’t really say what you can or you can’t do, unless if it’s illegal I’ll let you know, here it’s going to be challenged, but it’s entirely up to you chairman” ...

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<sup>33</sup> This was certainly the view of at least one committee chair who stated: ‘I strictly believe that legal officers should say nothing until ... asked ... I don’t like the legal officer just to jump up and say “you can’t do this or you can’t do that” ... [the legal officer’s] got to go to the chair just like everybody else’.

... you'll always get some members who are ignorant of the objectives and just say what they want to say, and then hopefully I'll expect the chairman or somebody else to say "Ah, no but it's not within the licensing objectives". And if they don't, then I will.

**Interviewer:** Right, OK. Are committee members receptive to that? Or do they feel a bit resentful if they think "well this ought to be taken into account but ... [you are] saying to us we can't do this".

**Interviewee:** Yes, they'll be resentful, "What are we here for? What's the point of us being here if you are saying we can only stick to these licensing objectives, what's the point?" Then again I'd refer it to the chairman, the chairperson, to really sort of take the lead now. "That's my advice, that's the objectives, you know that very well", but it's his come on to sort them out.'

Another legal officer stated:

'[C]ertainly if I really thought they were making a bogus point, or if they said something racist, if they said "we've got enough Pakis [Pakistanis] working in this town" or something I'd say "hang on a minute" and I have done that sort of thing, not such a bad example as that, but if I think they're really going down the wrong road, even though it's *in camera*, I would step in and say "hang on". But I do take a back seat.'

Similarly, the expectation was that the sub-committee would formulate, at least in draft form, reasons for its decision, with legal officers able and willing to assisting in producing a final version:

**Interviewee:** So, let them have a discussion, and draft your reasons for me, I'll look at it, tidying it up, just draft anything, why you're deciding this.

**Interviewer:** So would you draft the reasons or would the committee chairman?

**Interviewee:** No I would want them to at least dictate to me, then I would tidy it up.'

The degree of ‘assistance’ provided, however, may well vary. It may amount to ‘tidying up’, although rather more may be required, as can be seen from the following extract from a different legal officer:

‘[I]t’s the role of the legal officer to assist, I think, with the reasons because it’s my experience really that the members will come to a decision, sometimes on slightly kind of emotional grounds, or they didn’t like the applicant or whatever, but then you have got to have reasons and quite often they’re relying on the legal advisor very heavily for those reasons. Sometimes they don’t, sometimes they’ve drafted them, but quite often it’s up to the legal advisor to help them with the reasons.’

When the sub-committee is ready to deliver its reasoned decision orally to the parties, it returns to the hearing room (or the parties return, if they have left and the sub-committee has remained in the hearing room).<sup>34</sup> The reasoned decision may well be written out or typed to avoid any mistakes being made with oral delivery and, once the decision has been given, this is likely to conclude the hearing. Unless there is an appeal against the decision (and there were none within the cases selected), members of the sub-committee are unlikely to have any further involvement in the case<sup>35</sup> and notification of the decision will subsequently be given in writing to the parties.<sup>36</sup>

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<sup>34</sup> Practice differed between the two authorities. In one authority, the sub-committee retired to another room to consider its decision but in the other the sub-committee remained in the room and everyone else was required to leave.

<sup>35</sup> Interestingly, in cases where hearings were attended by residents as interested parties and a decision was made to grant the application, the practice of one sub-committee chair was to approach the residents after the hearing to draw to their attention their right to subsequently object (by way of seeking a review) in the event of problems occurring: ‘What I have done in the past, whether I’m right or wrong, I’ve gone to see

A number of findings emerged from the conduct of hearings in our study of contested cases for applications for premises licences under the 2003 Act. It was evident that a traditional court-like procedure was followed in hearings, despite the requirement in reg 23 of the Regulations that the hearing ‘shall take the form of a discussion led by the authority’. This perhaps reflects the inappropriateness of the prescribed format where failed prior mediation has taken place and the more appropriate traditional court-like procedure for such cases (see 4 above). It may also reflect unwillingness on the part of sub-committees to depart from established procedures followed prior to the 2003 Act (in cases of public entertainment and LNR) and which continue to be followed in hearings in other licensing cases falling outside the 2003 Act. It was apparent both from observing hearings and from

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them after and said “look I understand your problem, but as the thing stood at the moment we didn’t have a great deal of choice other than to grant it, but if you feel that your quality of life is being [affected], if you say in six months time you find that you are being disturbed at night and the rest of it, then you’ve every right to object”. This was certainly not a general practice within the authority, as can be seen from the following statement by another chair in the authority: ‘No, I would never have done [that] ... as a chairman I never get involved after’.

<sup>36</sup> Unless the 2003 Act makes provision for the period within which notification is given, reg 28(1) of the Regulations requires notification by the authority ‘forthwith on making its determination’ and reg 34(1) requires any notices to be given in writing (although notices can be submitted electronically provided certain requirements, contained in reg 34(2), are met).

interviews with licensing officers that, in general, hearings were not markedly more informal or significantly different from traditional local authority licensing hearings in which a court-like procedure was adopted. In short, this seemed to be both an instance of where the ‘law in the books’ did not closely correspond with the ‘law in action’ and where previous long-established practices continued largely unchanged despite a formal change in the law.

Notwithstanding the adoption of a formal quasi-courtroom procedure, however, it was apparent there were problems with the structure of hearings, with respondents involved in the process observing that hearings could be ‘amateurish’ or ‘careering out of control’. In particular, hearings were not conducive to parties being able to present their cases effectively. There was what might be termed an ‘advocacy gap’ when it comes to participants, in particular residents making objections, being able to contribute effectively to the hearing process. In the first instance objectors may find that their objections are ruled out ahead of the hearing if they are not confined or related to the relevant licensing objectives. Even if this hurdle is overcome, we have seen above how remarks not pertaining to the licensing objectives are ‘filtered out’ in hearings and the presence or absence of legal representation or some assistance from professionals involved in the process may be highly significant when it comes to contributing effectively or otherwise. Given the usual absence of legal representation, there are other professionals in the process who might bridge the ‘advocacy gap’ by providing assistance but it was evident that those involved did not see this as part of their role. In both authorities, neither committee chairs nor legal officers saw it as part of their role to be interventionist in eliciting information from parties at the hearing. Similarly, licensing officers, although pro-active in the stages leading up to a hearing, did not see it as part of their role to be pro-active when cases

reached the hearing stage by providing assistance to unrepresented parties to ensure that all relevant information was brought to the attention of the sub-committee when such parties were presenting their case.<sup>37</sup> The licensing officer's written report, which would be presented to the sub-committee ahead of and (orally) at the commencement of the hearing, may well cover at the general level most, if not all, of the relevant information but understandably there would be points of detail (e.g. particular incidents at premises) to which reference was not made in the report. Although these could well have been within the knowledge of licensing officers and may have assisted the sub-committee in making a better-informed decision, the information might nevertheless remain dormant for its emergence would essentially be dependent on the ability (or lack of it) of those seeking to articulate its content and demonstrate its importance. The overriding impression from hearings therefore was of parties for the most part being 'on their own' and it is worth reiterating here the remarks of one licensing officer that 'if the applicant isn't represented, or the interested parties aren't, they're left to bloody sink or swim'.

With regard to decision-making following the hearing, this seemed to proceed very much on democratic lines, with ordinary sub-committee members having a prominent voice and generally taking the lead on initiating discussion. Neither the chair nor the legal officer appeared to exercise significant influence in steering discussion in any particular direction. Primary responsibility for the formulation of reasons for decisions lay with sub-committees, in particular the chair, with a variable level of input from legal advisors. This

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<sup>37</sup> As one licensing officer put it, 'the licensing officer's job really is to supply the background of the administration process'.

seemed to range from ‘tidying up’ reasons to cases where the sub-committee was ‘relying on the legal advisor very heavily for those reasons’.

In sum, the research study indicated that in both authorities sub-committees were following a court-like procedure, with a traditional (adversarial) format, rather than hearings taking the form of a (consensual) discussion led by the authority, as required by the Regulations. Certainly, consensual discussion did occur but, crucially, this was in the early part of the application process where negotiation and mediation took place to avoid the need for hearings, although there is no legal requirement in the 2003 Act itself, the Regulations or any other secondary legislation made under the Act for this to occur. If a consensual approach through mediation cannot produce an agreed outcome ahead of a hearing, continuing this approach in a hearing through a discussion led format is unlikely to do so and this calls into question the suitability of that format for hearings in all cases. A discussion led format for hearings is not flawed in principle but it is hard to see how it can operate effectively in cases where discussion and mediation have already shown that an agreed resolution cannot be achieved. It would be better if the Regulations reflected this reality rather than prescribing a ‘one size fits all’ format when it is evident that ‘one size’ does not ‘fit’ all cases.