

Cumulative impact: controlling availability

The change from cumulative impact policies to cumulative impact areas puts cumulative impact on a statutory basis and changes how licensing authorities must consider new applications, as Professor Roy Light explains

For some 600 years, licensing provisions have sought to regulate the availability of alcohol in a number of ways, one of which is to restrict the number of outlets - historically through the concept of "need"¹ and more recently by way of "cumulative impact".

Over the years licensing provisions have been tightened and relaxed, swinging between liberalisation and constraint, in line with prevailing public opinion and government policy. The latest period of liberalisation gained momentum after the Second World War. By the end of the twentieth century the number of licensed premises had expanded dramatically, they were no longer required to close in the afternoons and more late night / early morning licences had been granted. The gaps left in towns and city centres, as companies such as banks and building societies relocated, were filled by clubs and bars. Off-licence numbers also increased and in a time of economic boom there was cash available to go out and have fun.

This latest liberalising period culminated in the passing of the Licensing Act 2003.² Yet even before the Act came into force in 2005 the pendulum had swung back towards constraint. The promised laissez faire approach to alcohol availability (and a Continental cafe culture) quickly evaporated as we were propelled through a period of liberal constraint into a severe bout of legislative repentance. Cheap alcohol, increased availability, so-called binge drinking³ and town / city centre crime and disorder presaged calls for minimum pricing, tough enforcement and even a return to the concept of "need" as a basic criterion in licence applications.

The liberalising aims of the Licensing Act appeared out of step with current thinking. Unease at the ill-effects of alcohol had become increasingly apparent and by the end

of the century, alcohol-related crime and disorder had become a cause for concern, particularly in and around town and city centres. This continued into the 21st century with anxiety being expressed over the possible adverse social implications of the new law.⁴ The pendulum had swung against liberalisation and in effect against the 2003 Act. This resulted in the Home Office launching various measures, one of which was cumulative impact policies. Not included in the 2003 Act, cumulative impact policies were introduced by the statutory guidance published to accompany the Act.

The cumulative impact provisions were the subject of much debate and amendment and that debate continues. For example, from the House of Lords Select Committee on the Licensing Act 2003:⁵

We heard a diverse range of opinions on CIPs over the course of the inquiry. Many local authorities and police forces believe them to be useful instruments, with Staffordshire Police for example arguing that "Cumulative Impact Policies are used effectively within Staffordshire and have assisted greatly in limiting the detrimental effect of excessive licensed premises within specific areas" (para.405).

The Sunderland Health and Wellbeing Board claimed that the higher level of scrutiny they require from new applicants has resulted in a higher quality of licensed premises. In their view, CIPs encouraged applicants to consider more seriously "how best to 'upgrade' the quality of their application", discouraging more disreputable "vertical drinking establishments", in favour of "more upmarket restaurants and wine bars" (para.406).

A number of industry representatives we have heard from opposed CIPs on principle. CAMRA described them as "blunt instruments", which are "inappropriate in areas where there are still too many pubs closing every week." Admiral Taverns argued that they should be "the exception rather than the norm as they restrict development and initiative and can allow stale ideas to become un-challenged" (para.407).

4 See, for example Plant, M & Plant, M (2006) Binge Britain: Alcohol and the national response, OUP.

5 House of Lords Select Committee on the Licensing Act 2003; post-legislative scrutiny, Report of Session 2016-17 - published 4 April 2017 - HL Paper 146, paras.402-12.

Cumulative impact policies

Section 182 of the 2003 Act provides that the Secretary of State must issue, and from time to time revise, guidance:

To aid licensing authorities in carrying out their functions under the 2003 Act and to ensure the spread of best practice and greater consistency of approach. This does not mean that we are intent on eroding local discretion. On the contrary, the legislation is fundamentally based on local decision-making informed by local knowledge and local people.⁶

The guidance was published in July 2004 and cumulative impact policies (CIPs) became part of the new licensing regime. Cumulative impact was justified by reference to the potential impact on the promotion of the licensing objectives of a significant number of licensed premises concentrated in one area.⁷ The guidance sought to draw a distinction between "need" as relating to commercial viability and "cumulative impact" as referring to a density or concentration of premises in a particular area as a cause of crime, disorder or public nuisance.

The guidance on CIPs stated that if a licensing authority identifies an area of cumulative impact as a cause of crime, disorder or public nuisance and evidence is available to support this view, for example from a Crime and Disorder Reduction Partnership, then the authority may specify that area in its local licensing statement. This would raise a rebuttable presumption that applications for new premises licences ... will be refused, if relevant representations to that effect are received.⁸

Cumulative impact areas

Cumulative impact policies operated (and proliferated) for some 13 years until replaced by cumulative impact areas (CIAs) which were introduced into the 2003 Act at s 5A by s 141 of the Policing and Crime Act 2017.⁹ Section 5 of the 2003 Act (statement of licensing policy) is amended so that in determining or revising its policy, a licensing authority must have regard to any cumulative impact assessments published by it under section 5A; must summarise any CIAs published under s.5A; and must explain how the authority has discharged its duty in this respect. The provisions took effect on 6 April 2018 and revised statutory guidance containing major revision on cumulative impact was published in April

6 DCMS (2004) Guidance issued under Section 182 of the Licensing Act 2003.

7 Ibid para.3.13.

8 Ibid para.3.19.

9 Policing and Crime Act 2017 (Commencement No. 8) Regulations 2018.

2018.¹⁰

The change from CIPs to CIAs is not simply one of name but puts cumulative impact on a statutory basis and significantly reforms the way in which licensing authorities must consider and monitor cumulative impact measures. Putting CIPs on a statutory footing aims to:

provide greater clarity and legal certainty about their use ... When introducing the proposed changes in the House of Lords, Baroness Chisholm of Owlpen said the system needed reforming because "not all licensing authorities are making effective or consistent use of" CIPs. In addition, the licensed trade had "concerns about the transparency of the process for putting a CIP in place and the quality of evidence used as the basis for some."¹¹

The Home Office Impact Assessment on the proposal noted:

We will also aim to ensure that LAs use robust and up to date evidence to support the implementation and retention of CIPs in their area ... Under the present arrangements CIPs can be implemented on relatively weak grounds and remain in place for a number of years based on limited or outdated evidence. This can lead to disproportionate restrictions on new business and potentially an associated impact on communities where a CIP places restrictions.¹²

Publishing a CIA

Authorities wishing to publish a CIA must revise their local statement of licensing policy to that effect and specify the areas and types of premises to which it will apply, as well as the evidence on which it bases the assessment.¹³

By s 5A of the Act, before the authority publishes a CIA it must consult with the police, fire & rescue services, local health board, premises, club premises and personal licence holders, and businesses and residents in the area. It must provide to those consulted:

- (1) The reasons why it is considering publishing a cumulative impact assessment.
- (2) A general indication of the part or parts of its area which it is considering describing in the assessment.

10 Revised Guidance issued under section 182 of the Licensing Act 2003, April 2018, London: Home Office (paras. 14.19-14.48).

11 Alcohol: cumulative impact assessments, House of Commons Briefing Paper Number 07269, 2 May 2017.

12 Putting Cumulative Impact Policies on a statutory footing, IA No: HO 0253 (1/11/2016).

13 CIAs do not apply to TENS however it is open to the police and environmental health authority (as relevant persons) to refer to evidence published within in a CIA when objecting to a TEN (Guidance para.14.27).

1 A commonly cited reason for refusal of a licence application until need was abandoned in 1999 was the existence within the area of sufficient licences to meet demand so that the applicant had failed to show that there was a need for another licence.

2 For a more detailed account see Light R (2005) "The Licensing Act 2003: liberal constraint?" *Modern Law Review* 68(2) 268-285.

3 Originally meaning a prolonged drinking session of two days or more during which other, normal activities were abandoned, today the term is generally understood to refer to a single session of immoderate alcohol consumption or drinking to get drunk.

Cumulative impact zones

(3) Whether it considers that the assessment will relate to all relevant authorisations or only to relevant authorisations of a particular kind.

The statutory guidance makes clear the steps that a licensing authority should take when considering whether to introduce a CIA:

(1) Identify concern about crime and disorder; public safety; public nuisance; or protection of children from harm in a particular location.

(2) Consider whether there is good evidence that crime and disorder or nuisance are occurring, or whether there are activities which pose a threat to public safety or the protection of children from harm.

(3) If there is evidence such problems are occurring, identify whether these problems are being caused by the customers of licensed premises, or that the risk of cumulative impact is imminent.

(4) Identify the boundaries of the area where problems are occurring (this can involve mapping where the problems occur and identifying specific streets or localities where such problems arise).

(5) Consult those specified in s 5(3) of the 2003 Act, and (6) Subject to the outcome of the consultation, include and publish details of the special policy in the licensing policy statement.¹⁴

The authority must consider the nature and extent of any cumulative impact and the evidence to support it before it goes to consultation and give this information to those being consulted so that they are able to give an informed response. The Home Office guidance concludes:

After considering the available evidence and consulting those individuals and organisations listed in section 5(3) of the 2003 Act and any others, a licensing authority may be satisfied that it is appropriate to publish a CIA (para.14.33).

Consultation

The Supreme Court decision in *Haringey* 2014¹⁵ is the leading authority on how local authorities should carry out consultations. It held that if there is a method laid down by legislation, as there is in the Licensing Act, it must be followed; and where there is a duty to consult it is not enough to go through the motions. The authority should give sufficient reasons for any proposal to allow a consultee to give an intelligent consideration and response to what is being proposed. There is an obligation to let consultees know what the proposal is and exactly why it is under positive

¹⁴ *Ibid* para.14.34.

¹⁵ *R (on the application of Moseley (in substitution of Stirling Deceased)) (AP) v London Borough of Haringey* [2014] UKSC 56.

consideration ... telling them enough (which may be a good deal) to enable them to make an intelligent response. Adequate time must be given for consideration and response.

The Cabinet Office published *Consultation principles: guidance* in 2008 which was last updated on 19 March 2018. The guidance is for government departments and is accepted to be equally relevant to local authorities. It states: "Be clear what questions you are asking. Consultations should be informative. Give enough information to ensure that those consulted understand the issues and can give informed responses."

The Act and statutory guidance make clear the steps that a licensing authority should take when considering whether to publish a CIA. They are more prescriptive than was previously the case. If the steps are not followed properly, and / or sufficient evidence adduced, the lawfulness of the CIA may be open to challenge.

Reviewing a CIA

Licensing authorities must within three years of publishing a CIA review it to assess whether it remains of the opinion set out in the assessment. While it should have been the case that CIPs were reviewed on a regular basis the guidance now lays down the process to be followed which includes a full consultation. If the authority is of the opinion that the CIA should be retained it must publish the evidence upon which it bases that view – *this is likely to involve the collation of fresh or updated evidence*.¹⁶ If an authority fails properly to review its CIA within three years the CIA may be open to challenge.

What of the 200-plus CIPs that have been introduced around the country pre-April 2018? There are no transitional provisions that apply to CIPs as they were not in the 2003 Act but as the guidance provides:

*However, any existing CIPs should be reviewed at the earliest practical opportunity to ensure they comply with the legislation. It is recommended that the review should take place within three years of the commencement of the legislation on CIAs or when the licensing policy statement is next due for review, whichever is sooner. This will ensure that any CIPs in place before the commencement of the provisions on CIAs adhere to the principles in the legislation (in particular concerning relevant evidence and consultation).*¹⁷

CIPs will therefore continue as before but should be reviewed as soon as is practicable and in any event within three years or when the licensing policy is reviewed. Prudence would suggest that "as soon as is practicable" would be wise so that any challenge to the CIP may be met

¹⁶ Guidance, para.14.36.

¹⁷ Guidance, para.14.36.

(this is particularly the case if the authority has not reviewed the CIP for some time).

Effectiveness of CIPs / CIAs

Throughout the history of alcohol regulation it is apparent that efforts have been made to strike a balance between the wish to support the expansion and development of retail alcohol outlets, in line with changing patterns of life and demand, against any increased risks to the population from alcohol-related harm or disorder. CIPs and the new CIA provisions continue that endeavour.

The latest figures show there are 223 CIPs which are accounted for by 107 licensing authorities, with the number in any given authority ranging from one to eight. In the year to the end of March 2017 there were 9,778 applications for new premises licences with 1,124 applications (11%) in relation to premises within CIPs. Of the 9,175 decisions on applications in that year 97% (8,937) were granted and 3% (238) were refused. Of the 9,175 decisions, 1,061 were in cumulative impact areas with 94% granted and 6% refused. There was a

slightly larger difference in relation to variation applications with 98% granted and 2% refused; while of those in CIPs 93% were granted and 7% refused.

The effectiveness of CIPs is clearly more complex and problematic than these figures suggest. For example, we do not know the nature of the premises and licensable activities concerned, the hours granted or the conditions added. And there may well be regional variations. Yet it is plain that CIPs do not operate as bar in the majority of cases.

The Home Office rationale for CIAs is that:

Providing greater transparency and legal certainty on the required process through legislation should help to improve consistency in decision making and garner support from all sides.

Whether CIAs deliver these benefits remains to be seen.

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