

Is appropriate necessary?

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## INTRODUCTION

In this article, I deal with a major change to the test for licensing intervention introduced by the Police Reform and Social Responsibility Act 2011. Whereas the Licensing Act 2003 permitted regulatory interventions only where necessary, the new legislation lowered the legislative threshold to “appropriate”. Here, I consider the legal and philosophical basis of the necessity test, and the implications and lawfulness of the new lower threshold.

## THE NECESSITY TEST

The necessity test underpinned all of the regulatory powers under the Licensing Act 2003. The word “necessary” appeared in the Act on more than forty occasions. The political philosophy which underpinned the test might be characterised as neo-liberal in origin, that is to say that business should be allowed complete freedom to operate and develop except to the extent that regulation is required in order to protect some defined elements of the public interest. The test was also consistent with concepts of necessity and proportionality emanating from the European Convention on Human Rights, which was incorporated into our law by the Human Rights Act in 1998. For example, Article 1 of the First Protocol of the Convention stressed the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. The same approach was taken in ensuing regulatory legislation. Section 21 of the Legislative and Regulatory Reform Act provided that any persons exercising a function to which that section applied should have regard to the principle that regulatory activities should be targeted only at cases in which action is needed. Similar sentiments were expressed in section 5 of the Regulatory Enforcement and Sanctions Act 2008, which obliged the Local Better Regulation Office to secure that local authorities so that regulatory activities should be targeted at cases in which action is needed. This, then, is what came to be known as “light touch” regulation.

As expressed in guidance, in many licensing policies and by practitioners in their day to day work, this meant that before imposing any form of regulatory intervention, be it a condition on a new licence or revocation of an existing licence, the authority should ask itself whether the intervention was both necessary and proportionate, in the sense that no lesser step would suffice in order to promote the licensing objectives. This is not, it will be noted, some kind of constraint upon what kind of evidence may be admitted by the licensing authority, or a measuring device of the quantum of evidence which is necessary before intervention is justified. Properly understood, it is a test which sets the threshold for regulatory intervention itself. Put in another way, it controls the exercise of the discretion, and forces the licensing authority before imposing the sanction to ask itself: is this really necessary? Would a lesser step suffice?

## TRANSMOGRIFICATION

The consultation exercise preceding the Police Reform and Social Responsibility Bill<sup>1</sup> posited, without analysis or rigorous evidence, that the presumption in favour of grant under Licensing Act 2003 made it difficult for local authorities to turn down applications. It stated that the necessity test placed a “significant evidential burden” on licensing authorities, and that the Government was considering amending the Act “to reduce the burden on licensing authorities from the requirement to prove that their actions are ‘necessary’ to empowering them to consider more widely what actions are most appropriate to promote the licensing objectives in their area.”

The amending provisions in the Police Reform and Social Responsibility Bill were entitled “Reducing the evidential burden on licensing authorities”. This is of course a misnomer: the Act does not place an evidential burden on authorities; rather it sets a test for the exercise of their discretion.

At the Committee stage in the House of Commons, the Home Office Minister James Brokenshire was challenged to justify the loosening of the test and the commensurate broadening of powers of licensing authorities to impose regulatory burdens even where these were not necessary. He stated that the Government’s “sense” was that local authorities had been defensive about imposing regulatory requirements for fear that upon appeal their actions would not be regarded as necessary.<sup>2</sup> He considered that a wider discretion was necessary in order to “enable communities to assert themselves properly”, stating:

A decision that is “appropriate” for the promotion of the licensing objectives provides some flexibility to consider the effects of the decision on the promotion of the objectives. It may therefore be decided to take steps that are suitable for, rather than necessary to, the promotion of the objectives. It provides an element to deal with that reluctance or resistance, to enable local communities to assert themselves properly in relation to this particular approach.

The Minister was therefore comfortable about regulation being imposed even when it is not necessary. Indeed, that was the very inspiration for the change.

The Minister was also challenged on whether imposing regulation on an existing business in the absence of any necessity for such intervention was compliant with the European Convention on Human Rights. He stated that the Government’s legal advice was that the measure was compliant because of legal rights of appeal.<sup>3</sup> With respect, it is difficult to understand that position, because rights of appeal might resolve procedural issues such as bias, but they cannot resolve any substantive non-compliance of a legal test with fundamental human rights. If a test which permits an authority to impose regulation in the absence of necessity breaches the European

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<sup>1</sup> Rebalancing the Licensing Act: a consultation on empowering individuals, families and local communities to shape and determine local licensing (Home Office, 2010).

<sup>2</sup> HC Debates 10<sup>th</sup> February 2011 Col 549.

<sup>3</sup> Ibid Col. 552.

Convention, that cannot be cured by permitting an appeal to a court which is governed by the same test.

Be that as it may, the appropriateness test has replaced the necessity test throughout the Licensing Act 2003, including for the grant and review of premises licences and club premises certificates, for personal licences and for temporary event notices.<sup>4</sup>

## NATIONAL GUIDANCE

As presaged in the Parliamentary debates, the Government has sought to elucidate the appropriateness test through amended national Guidance. This states:

9.38 Licensing authorities are best placed to determine what actions are appropriate for the promotion of the licensing objectives in their areas. All licensing determinations should be considered on a case-by-case basis. They should take into account any representations or objections that have been received from responsible authorities or other persons, and representations made by the applicant or premises user as the case may be.

9.39 The authority's determination should be evidence-based, justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve.

So far, so helpful. But what is the threshold for appropriateness? The Guidance continues:

9.40 Determination of whether an action or step is appropriate for the promotion of the licensing objectives requires an assessment of what action or step would be suitable to achieve that end. Whilst this does not therefore require a licensing authority to decide that no lesser step will achieve the aim, the authority should aim to consider the potential burden that the condition would impose on the premises licence holder (such as the financial burden due to restrictions on licensable activities) as well as the potential benefit in terms of the promotion of the licensing objectives. However, it is imperative that the authority ensures that the factors which form the basis of its determination are limited to consideration of the promotion of the objectives and nothing outside those parameters. ... [T]he licensing authority should consider wider issues such as other conditions already in place to mitigate potential negative impact on the promotion of the licensing objectives and the track record of the business. .. The licensing authority is expected to come to its determination based on an assessment of the evidence on both the risks and benefits either for or against making the determination.

It will immediately be seen that the Guidance equates appropriateness and suitability, while expressly discarding the test that "no lesser step will suffice." This latter test is, however, one way of expressing the principle of proportionality which is avowedly retained. What, then, does proportionality bring to the party? Further guidance is given on the issue of proportionality in Chapter 10 of the Guidance:

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<sup>4</sup> Sections 109-111 Police Reform and Social Responsibility Act 2011.

## Proportionality

10.14 The 2003 Act requires that licensing conditions should be tailored to the size, type, location and characteristics and activities taking place at the premises concerned. Conditions should be determined on a case-by-case basis and standardised conditions which ignore these individual aspects should be avoided.

10.15 Licensing authorities and other responsible authorities should be alive to the indirect costs that can arise because of conditions. These could be a deterrent to holding events that are valuable to the community or for the funding of good and important causes. Licensing authorities should therefore ensure that any conditions they impose are only those which are appropriate for the promotion of the licensing objectives. Consideration should also be given to wider issues such as conditions already in place that address the potential negative impact on the promotion of the licensing objectives and the track record of the business.

The role of proportionality here seems to involve a consideration of the costs of imposing the proposed step, which may be the direct costs upon the licensee of compliance, e.g. of employing extra door staff, and the indirect costs upon the community, e.g. of being unable to attend an event for which there is demand. This appears to widen the scope of the inquiry in a way which cuts across the grain of what the Government apparently intended by the legislative change. Rather than asking simply whether a step is necessary to promote the licensing objectives, the authority would now need to carry out a cost benefit exercise in which the costs of the measure – which may be economic or qualitative – are weighed against the benefits of the measure, which are almost certain to be subjective. If this is the true nature of the exercise, the Guidance is self-contradictory because in the same breath it advises: “However, it is imperative that the authority ensures that the factors which form the basis of its determination are limited to consideration of the promotion of the objectives and nothing outside those parameters.” If that is right, then questions of the cost of the measure and the benefit to the community may not be taken into account.

## CRITIQUE

From the foregoing discussion, it will be seen that far from making the test simpler and broadening the ability of authorities to intervene, the change has made the test confusing and legally suspect. There are five areas which merit comment.

The first is the supposition that the necessity test imposed a constraint on authorities which caused them to fight shy of imposing effective regulation. There is no evidence for this. The root of the supposition is that the necessity test imposed a threshold which was too high in the ordinary run of cases. Not so. The necessity test was not predicated on proof that if the step was not imposed the feared consequence would certainly or even be likely to happen. It was simply predicated on evidence that the required step was necessary to promote the licensing objectives. In the same way that a smoke detector may be thought necessary in a home without needing to prove that in its absence the house will burn to the ground, so a search arch might be considered necessary in a nightclub without proof that without it someone will be stabbed. It is

simply a necessary precaution. And, if it is necessary, it should be imposed. Therefore, the threshold was not so high that it required to be lowered at all.<sup>5</sup>

Second, assuming that the threshold did need to be lowered, “appropriate” is not a valuable test. Indeed, it is not a test at all, let alone an objective one. In the context of licensing, it is vacuous. It means no more than that the licensing authority should do what it thinks right. It is most unlikely that any authority would do otherwise. It provides no ascertainable measure against which the justifiability of the regulatory intervention may be gauged.

Third, if it results in regulation being imposed on licensees which is unnecessary, it has the potential to do great damage. If, for example, a door supervision requirement is imposed with which the publican does not have the economic means to comply, s/he may well be moved to ask whether the authority thinks it necessary to impose it. If the answer is no, the publican may well ask why then it was imposed, and rue the day that a discretion was conferred to impose unnecessary measures.

Fourth, the legal basis of the dilution is at best unclear and at worst unfounded. Treating a licence as a property right,<sup>6</sup> Article 1 Protocol 1 of the European Convention on Human Rights clearly operates to permit control of the use of property where this is necessary. In this case, control has been sanctioned even where it is unnecessary. If the only way to comply with the Convention is to interpret “appropriate” as “necessary” then the shift has achieved nothing other than to raise expectation (of communities) and alarm (of licensees) in equal measure. If, however, regulatory intervention is imposed merely where it is considered appropriate, without its being necessary, then there is a real argument that the intervention is non-compliant with the human rights obligations of the State.<sup>7</sup>

Fifth, similarly, the Provision of Services Regulations 2009, which implement the Services Directive<sup>8</sup> require that authorisation schemes for the provision of services must be based on criteria which preclude the competent authority from exercising its power of assessment in an arbitrary manner. Further, the criteria must be (a) non-discriminatory, (b) justified by an overriding reason relating to the public interest, (c) proportionate to that public interest objective, (d) clear and unambiguous, (e) objective, (f) made public in advance, and (g) transparent and accessible. While one might say that the licensing objectives meet the test of being non-discriminatory, justified, clear, objective and transparent, the ability to use them to prevent activities

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<sup>5</sup> Support in the case law for an interpretation of the necessity test as requiring something short of indispensability may be found in *R (Clays Lane Housing Co-operative Limited) v The Housing Corporation* [2005] 1 WLR 2229, in which the Court of Appeal held that, depending on the context, necessary may be interpreted as meaning merely “reasonably necessary”. See also *Pascoe v First Secretary of State* [2007] 1 WLR 885 @ [70] and *Handyside v United Kingdom* (1976) 1 EHRR 737 @ [48].

<sup>6</sup> *Tre Traktor v Sweden* (1989) 13 EHRR 309; *Catscratch Limited v City of Glasgow Licensing Board* [2001] LLR 610.

<sup>7</sup> Limitation of space prevents further elaboration here, but further reference may be made to the different formulations of the proportionality test in *Samaroo v Secretary of State for the Home Department* [2001] EWCA 1139, *Lough v First Secretary of State* [2007] EWCA [2004] 1 WLR 2557, *McCarthy v First Secretary of State* [2007] EWCA Civ 510 and *R (Clays Lane Housing) v Housing Corporation* [2005] 1 WLR 2229.

<sup>8</sup> Directive 2006/123/EC on services in the internal market.

taking place or to impose constraints even where this is not necessary would appear to encourage behaviour which is arbitrary, disproportionate and unjustified by an overriding reason relating to the public interest. Therefore, there is an argument that the test, or conceivably its application in individual cases, may breach domestic and European law.

Sixth, if the solution to these difficulties is to broaden the picture as is seemingly suggested by the Guidance, so as to encompass the cost of the measures and the benefit of the proposal, the effect is arguably to convert the licensing authority from a regulator with a defined, narrow but important role to that of an economic and cultural arbiter, a role which it is likely to be ill-equipped or at least untrained to perform.

## RESOLUTION

Some trenchant criticisms of the test governing licensing disputes have been set out in the previous section. The criticism is in essence that in an attempt to broaden the discretion of licensing authorities, Parliament has succeeded in giving a discretion to impose unnecessary regulation in a manner which will create uncertainty and a possible breach of domestic, European and human rights law.

It is suggested that there may be a route out of the imbroglio for licensing authorities, without needing to await adjudication on the new provisions in the High Court. While the range of possible responses under the necessity test was relatively narrow, the range of potential responses under the appropriateness test is relatively large. In any given case, there may not be many steps which are really necessary, but there are many more arguably appropriate means of promoting the licensing objectives. These may range from steps which are merely good practice to steps which are genuinely necessary in the circumstances of the case. However, acting sensibly, a licensing authority may consider it inappropriate to impose draconian regulation on an operator unless it is genuinely necessary to do so. In this way, while the legal test remains “appropriate”, the discretion will not be exercised to impose burdensome regulation unless there is a demonstrable necessity. The term necessity may not imply that the measure is indispensable, merely that it is “reasonably necessary”. But for an authority to impose a burden on a business if it is not even reasonably necessary to do so invites criticism that this is a paradigm of disproportion.

This may be demonstrated by a simple example. Imagine a case in which a review is brought because customers of a nightclub have been disturbing local residents on their departure. By the time the case gets to a hearing of the Licensing Sub-Committee, the problem has been cured through the adoption of a competent, well-thought through dispersal policy. The licensee says that a curtailment of hours is no longer necessary because the problem has been solved. The applicants for the review, however, continue to press for an earlier terminal hour, arguing that they do not need to show that the step is necessary. It is submitted that the licensing authority would be quite at liberty to find that a condition of a dispersal policy is appropriate, but that an earlier terminal hour is not appropriate because it is not reasonably necessary.

It is accepted that the resolution of the problem has a tendency to conflate the appropriateness test and necessity test, when the Government clearly wanted to impose a diluted test. There is much truth in that. However, the reason for this is that,

in holding the balance between local communities and local businesses, it is unlikely to be considered appropriate to regulate more than is reasonably necessary to meet the objectives of the regulation. While adoption of this solution may well reduce the gap between appropriate and necessary to a semantic one, it will have the virtue of legality, fairness, justice and common sense.