University of the
West of England

Controlling Supply: The Concept of 'Need' in Liquor Licensing

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SUMMARY

Background

1. The primary liquor licensing legislation is now some 35 Years old (Licensing Act 1964). Dated and unnecessarily technical, complex and cumbersome, it faces mounting criticism.

2. A central concern is the concept of need, which operates to control the number of licensed outlets. While for supporters of need this is said to limit alcohol-related harm and disorder; for others, need is seen to operates to restrict entry into the licensed trade and to protect the business interests of existing licensees.

3. Need does not appear in the legislation, but its use by licensing tribunals is older than Parliament itself - although its application has varied considerably over the years. Put simply, increases in alcohol-related problems have led to stricter controls on numbers of outlets, while social and commercial pressures for liberalisation have prompted relaxation of controls.

4. Since the second world war England and Wales has been moving towards liberalisation. This process was temporarily arrested in the mid-eighties with strong concerns over alcohol-related problems being expressed by criminal justice practitioners and health professionals. The last five years have seen the impetus for relaxation once again gathering pace, while the concerns of the mid-eighties appear no longer to be articulated.

5. Significant recent developments have taken place:

- The Home Office Working Group on Licence Transfers (1996) recommended that need be abandoned.
- A government review of liquor licensing was set up in May 1998, with a White Paper promised for Spring 2000.
- The Better Regulation Task Force Report, published July 1998, suggested that the administration of liquor licensing be moved from licensing justices to local authorities.
- The Justices' Clerks' Society in early 1999 published its good practice guide, which, among many other things, required licensing committees effectively to abandon need - or risk loss of the jurisdiction.

Law

- The government appears committed to abandoning need, but this will require primary legislation - the House of Lords decision in *Sharpe v Wakefield,* that 'it is within the power and even the duty of magistrates to consider the wants of the area', is still good law.

- The *Good Practice Guide,* while recognising this fact, encourages licensing committees to limit need to a considerations of whether premises would become so numerous as to produce problems of disturbance and disorder.

Practitioner survey

- Considerable experience and a high degree of specialisation were demonstrated among respondents.
- Concern was expressed by lawyers at a lack of consistency in licensing policy and practice around the country.
- Lawyers were keen to abandon need, which they saw as unfairly limiting entry to the trade and restricting competition.
- Police were not in favour of abandoning need, expressing concern over possible increases in alcohol-related crime and disorder.
- Some lawyers expressed the view that committees sometimes hid behind need when refusing an application.

Policy Document analysis

- Policy documents for 372 licensing districts were received; ranging in length from two to 48 pages.
- Analysis revealed that although most contained a need criterion there were wide variations in how need was described.
- Of those policies not mentioning need nearly all referred to alcohol-related problems.
- Evidential methods of proving need also varied between committees.

Interview data

- 48 interviews were conducted with chairmen of licensing committees - of 53 approached, two declined to take part, one was unavailable due to illness and two proved impossible to contact.
- For 87% of respondents need was a relevant criterion, although for half of these its influence was recognised as declining.
- Wide variations exist in both the scope of the concept and the weight accorded to various methods of proving need.
- More than half of respondents would not be happy to dispense with need.
- Most of those familiar with the *Good Practice Guide* expressed support - and were aware of the threat of loss of jurisdiction.

Key Recommendations

- A greater element of consistency needs to be introduced into liquor licensing. The *Good Practice Guide* promises to do this - it is essential that its adoption and implementation are monitored to assess its success.

- The *Guide* puts the onus on the police to object to an application and produce evidence in support if there is a risk of disorder/disturbance flowing from a grant. Police responses need to be sought and the police role monitored.
- The system appears to be moving towards easier entry to the licensed trade with a counter-balance of more rigorous enforcement and a wider range of sanctions; this again has implications for policing which need to be examined.
- Liberalisation of licensing in the form of extended licensing hours (in Scotland as well as in England and Wales) has been researched in order to assess any increase in alcohol-related harm - abandonment of need will result in a similar increase in the availability of alcohol and must be kept under review.
- The Department of Health White Paper, *Saving Lives: our healthier nation* (July 1999) with its emphasis on 'joined up thinking', includes the planning of a national alcohol strategy for publication in the Spring 2000 - this must be 'joined up' with the Licensing Review due at the same time and the implications of liberalisation.

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We also extend our thanks to the practitioners who responded to our survey as well as the Clerks to the Justices and their staff who provided us with copies of their Licensing Guidelines and to those who negotiated and arranged interviews with licensing magistrates on our behalf. Last but not least we offer special thanks to the Chairmen of the licensing benches who gave up some of their valuable time to be interviewed and provided us with an illuminating perspective on the concept of need in liquor licensing in England and Wales.

Roy Light
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October 1999

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1 Introduction

Applications for liquor licences have by the Licensing Act 1964 to satisfy three criteria: the applicant is not disqualified for holding a licence (s.9(6)), is a fit and proper person (s.3(1)) and (for on-licences only) that the premises are structurally adapted to the type of licence required (s.4(2)). Licensing justices have a wide discretion to grant licences under the 1964 Act and factors other than those mentioned in the Act are routinely taken into account when considering applications, including the need/demand for the proposed outlet. Provided this discretion is exercised judicially, the High Court will not interfere with their decisions.

While it is not necessary for the justices to find need or demand in order to grant a licence (the concept appears nowhere in the legislation), justices may refuse an application (subject to the case law considered below) if they find that there is no need/demand for the premises applying to be licensed. So that even the most fit and proper of persons may be refused a licence for the most suitable of premises.

At first instance before the licensing justices, and on appeal to the Crown Court, the question of need/demand is a commonly contested issue and is often given as grounds for a refusal. The concept is one of the most contentious issues in licensing and the least easily defined. Despite this, as with much of liquor licensing, there appears to be a dearth of research. It is hoped that this study will go some way towards remedying this deficiency.

Background

This research builds upon two previous studies of liquor licensing conducted at UWE, Bristol: the first (funded by Alcohol Concern) an exploration of alcohol-server training initiatives (O'Brien & Light 1993), the second (funded by the AERC) a study of the 'fit and proper person' criterion (Light & O'Brien 1995). Parts of the format for the present study will be familiar to those who have had sight of the previous reports. Indeed, for the purposes of clarity and exposition, some general background information is repeated.

Aims of the Research

The fragmented development, lack of definition and *ad hoc* nature of the concept of need/demand is responsible for the expenditure of much court time and legal argument. This research aims to assist with the basic question of whether the concept should be abandoned; and, if so, what, if anything, should replace it? The study aims to present a full exposition of the principles surrounding need/demand, both legal and practical, together with a national survey of licensing committees to determine its current use and definition.

Methodology

The study is limited to England and Wales. Relevant practitioners and agencies (eg clerks to licensing justices, magistrates, police licensing officers, solicitors/barristers specialising in licensing matters) were consulted to inform the substantive part of the project. A postal survey was then conducted to canvas in a more systematic way the views of licensing practitioners on the question of need. These data were collected to assist with the design of the questionnaire to be used for interviewing the sample of licensing justices.

A review of the historical development of the concept, the case law and the statutory provisions was followed by the collection of two sets of empirical data - a review of area guidelines and a sample of interviews with licensing justices. For the first data set, each licensing committee was sent a written request for details of any guidelines which they had formulated, together with a copy, if published. The second set of data was gathered by way of a semi-structured questionnaire which was designed for use with a random sample of chairmen from 50 licensing committees. It was decided to seek to interview chairmen as they would likely have a degree of experience in the work of their committee.

The interviews were conducted by means of a telephone survey rather than by personal visits. This was considered to be a better use of resources as the time and cost involved in visits to each of those selected for interview would have been substantial - as can be seen from the locations of the interviewees displayed in Figure 1. The interviews were tape recorded with the subjects permission and then transcribed.

During the course of our study the Justices' Clerks' Society issued fresh guidelines for licensing justices, including a policy document intended to be adopted by all licensing committees. This was published after we had collected and analysed the then current policy documents from around the country and just as we began the interviews with licensing chairmen. To complicate matters further, the JCS had organised what they termed 'a road show' which was held in a number of parts of the country at which licensing clerks and justices were introduced to the new guidelines. This meant that some of our interviewees would have been exposed to the roadshow, while some would not.

Figure 1

Structure of the Report

Chapter 2 charts the historical development of the concept of need in liquor licensing in England and Wales, bringing matters up to date as at August 1999. This is followed in Chapter 3 by an outline of the relevant case law and the findings from a small study of licensing practitioners. Chapter 4 contains the findings from the analysis of policy documents, while Chapter 5 presents the findings from the interviews with chairmen of licensing benches. The Report concludes with a review of the concept of need in light of the research findings.

2 Development of the concept

Regulation of the sale of alcohol, by local bodies such as the manorial courts, predates Parliament itself. Historically, licensing provisions have sought to regulate quality and price, the manner of sale/consumption and the availability of alcohol. The last of these, availability, is regulated in three ways: statutory control of licensed hours and persons permitted to purchase alcohol, together with justices' discretion as to the number of outlets, through the mechanism of need/demand.

The policy of restricting the number of retail outlets for intoxicating liquor to the minimum regarded as necessary for the legitimate needs of the population is older than the licensing law itself, although its application by the licensing authorities, and its overt support by central government has varied considerably from time to time. (Erroll (1972), para.14,p.295)

The brief overview which follows is in no way a definitive history of need/demand in English liquor licensing law, rather it hopes to set the scene for the research and to highlight any significant landmarks which have a bearing on the operation of the concept today. The history is characterised by successive moves between the tightening and the relaxation of controls (for a more detailed early account see Home Department 1932, Appendix 2, Webb & Webb 1963, Williams & Brake 1980).

Early days

Formalising controls

While earlier references no doubt exist, for present purposes we content ourselves with noting that mention of what can be termed need/demand is found in a late fifteenth century statute governing the conduct of alehouses. Here, two justices could withdraw from alehouses in their district permission to sell intoxicating liquor ('suppress' the licence) if they felt the alehouse was considered unnecessary.[i]

This was followed in 1552 by the introduction of a statutory system for the licensing of alehouses.[ii] Any two justices had full discretion in the issuing of new licences (which were subject to annual renewal) and a commonly cited reason for refusal was the existence within the area of sufficient licences to meet demand. Those licensed were required to enter into a bond for the maintenance of good order. This statute is considered to be the first 'licensing act' and the basis of the present system.

The Privy Council regularly issued Proclamations to the justices urging a restriction of the numbers granted and a suppression of unnecessary licences. For example, a report by the Mayor and aldermen of Ripon in Yorkshire to the Privy Council found the number of alehouses in the town to be so great that they reduced them by half (Webb & Webb 1963).

Loosening controls

However, during the Civil War these Proclamations ceased and were not revived after the Restoration of Charles II in 1660. Thereafter, a mixture of social and commercial factors, together with a loss of interest by the Privy Council and Assize Courts (which previously had overseen the system), led to a relaxation of controls.

In 1690 distilling, hitherto a monopoly of Royal patentees, was thrown open (the retailing of spirits was free of all licensing requirements and attracted a very low rate of excise duty); and justices became less restrictive in issuing alehouse licences - any two justices were empowered to issue a licence regardless of their knowledge of the area and applicant. Such licences were freely issued and seldom withdrawn. The number of licensed premises multiplied rapidly and there was a huge increase in alcohol consumption. Gin shops and coffee houses (often gin shops under another name) flourished and regulation of the behaviour of licensees appeared to be virtually non-existent. It was not uncommon for gin to be given in lieu of wages or to be handed out free in chandlers and brothels. Gin shops famously advertised that their customers could get 'drunk for a penny, dead drunk for twopence and straw for nothing'.

Suppression and restraint

An Act of 1729[iii] introduced important reforms. No longer could any two justices grant a licence, that now could only be effected at licensing meetings of justices (Brewster Sessions); which would allow a proper consideration of both the local need for the new licence and the character of the licensee - it also allowed local policies to be developed and applied.

It was not until the second half of the eighteenth century that concern over the deleterious effects of alcohol consumption produced further statutory measures aimed at controlling the 'demon drink'. (Although as with the earlier Act, these were either ignored or met with rioting - perhaps not surprisingly, in the absence of pure water supplies and with tea and coffee available only to the wealthy.) Thus there was a period of attempted restraint, with increased supervision and control of licensed premises as well as increased excise duty, but levels of consumption remained high. However, towards the end of the century both public attitudes to alcohol and the practice of the licensing justices began to harden. The Webbs (1963) attribute much of this change to a campaign against vice and immorality, led by John Wesley and William Wilberforce, which prompted a Royal Proclamation on the subject; a copy of which was sent to all Benches in 1787. Justices started to adopt a stricter view of their duties, refusing renewals to unsatisfactory publicans; and consulting local opinion about the number of licences to be granted:

Each county began to recognise that too many alehouses had been licensed which had become from want of regulation and supervision 'haunts of idleness', nurseries of sottishness' and 'seminaries of crime'. Benches resolved to grant no new licence but where the convenience of the public absolutely required it or until the present number had been considerably reduced. (Home Department 1932, para.37)

Large numbers of licences were suppressed without compensation. For example, in Devonport (population 24,000) the justices reduced the number of public houses from 200 to 100 (Webb & Webb 1963).

Free trade

However, the early years of the nineteenth century saw this process once again reversed. In 1817 the Parliamentary Committee on the State of the Police in the Metropolis strongly recommended a free trade in liquor with no licensing controls (corruption in some Benches was given as a rationale). Public opinion backed the report. So that although the Alehouse Act 1828 provided that publicans' licences were to be granted by justices annually at Brewster Sessions to persons considered to be fit and proper, under the Beerhouse Act 1830 justices lost their power to refuse a licence to a beerhouse. A householder could apply for a licence from the Excise at a cost of two guineas which would enable him to sell beer in his dwelling house for consumption both on and off the premises. There was no need to obtain a justices' licence, and the character of the applicant was not taken into account. The number of beerhouses (‘Tom and Jerry shops' as they were called - if anyone knows why, perhaps they could let us know) soared (some 30,000 new beerhouses appeared):

Houses of this description sprung up in every corner of the land, by the roadside, in every city, town and village ... have become the resort of individuals of depraved, abandoned and desperate character, (who are) encouraged in but too many cases by the loose principles of those who have adopted this trade. (*Bristol Journal*, 25 October 1834)

As Sidney Smith put it: 'The new beer bill has begun its operations. Everybody is drunk. Those who are not singing are sprawling. The Sovereign people are in a beastly state'. 'Indescribable orgies occurred, accompanied by gambling, brutal amusements and licentiousness' (see House of Commons 1833).

Legislative repentance

Not surprisingly, the number of badly managed beerhouses prompted further legislation - the Beerhouse Act 1834 requiring beerhouse keepers to obtain a certificate of character signed by six householders. Also, in 1834, a Select Committee was appointed to:

enquire into the Extent, Causes and consequences of the prevailing Vice of Intoxication among the labouring Classes of the United Kingdom in order to ascertain whether any Legislative Measures can be devised to prevent the further spread of so great a National Evil. (House of Commons 1834)

The Committee concluded that there were too many public houses and that spirits were too cheap and easily available. It then went on to examine the health and social cost of excessive consumption and recommended a series of tough measures aimed at controlling alcohol and its method of sale, including limitations on the number of licences. While the Beerhouse Act 1840 provided that new licences were only to be granted to the occupier of the premises to be licensed, and subsequent legislation dealt with the licensing of foreign wines, no major changes were introduced until pressure was exerted by the temperance societies (first established in England in 1830).

This led to the passing of the Wine and BeerHouse Act 1869 which brought beerhouses back into the licensed system and made it necessary to obtain a justices' licence before a new beerhouse could be opened - the justices were given absolute discretion for on-licences, but not off-licences which could be refused only on specific grounds not including need. A number of other Acts followed, culminating in the Licensing Act 1872 (much stronger measures had been proposed, but lost, in the Licensing Bill 1871, including the matching of licences with the number of local inhabitants - suggested as one licence per 1,000 persons). The Act provided that with some minor exceptions a justices' licence was required for the retail sale of all alcohol and abolished the right of appeal against the refusal of a new licence (restored in 1910).

The Licensing Act 1904 gave licensing justices absolute discretion in respect of all types of licensed premises and, in order further to facilitate the reduction of licensed premises, introduced the provision of financial compensation to existing on-licence holders who were refused renewal on grounds other than for misconduct. During their passage through Parliament and in operation thereafter, these provisions created major difficulties and met, in any event, with mixed success (see further House of Commons 1932).

The Victorian obsession with alcohol and the work of the temperance movement saw the number of licences fall dramatically. The temperance movement found added support during the war years of 1914-18 for 'Drink is doing more damage in the War than all the German submarines put together' (Lloyd George in a speech on 28 February 1915) . However, 'moderation' rather than prohibition was to be the key. This approach continued post-war, with the Royal Commission on Licensing:

The reader will find, also, historical evidence, if such be needed, for certain basis truths, the neglect of which must prejudice any attempt at licensing reform: for example, that undue relaxation of control produces intolerable social evils; that legislative regulation that goes too far beyond current public opinion is simply not administered; and that cheapness of intoxicants is always a powerful stimulant to intoxication. (Home Department 1932, para.11)

However, the Royal Commission felt able to report the end of the drink problem and to state that drunkenness had 'gone out of fashion'.[iv] By the outbreak of the second world war the number of on-licences had fallen by a further 20 percent.

Modern times

Restrictions continue

By the end of the second world war (during which many licensed premises had been damaged or destroyed) the British approach to liquor and liquor licensing could best be described as restrictive. The post-war years saw the consolidation of policy and practice for local licensing committees and the development of local policy statements. The legality of these policies was considered in *R v Torquay Licensing Justices ex parte Brockman* [1951] 2 KB 784 where it was held that licensing justices may have a policy, but it must be made public and the justices have a duty to consider each application on its merits to see whether it falls within the policy which they have laid down.

As the post-war austerity of the fifties gave way to the liberality of the 'swinging sixties' and the affluence of 'never had it so good' politics a consensus emerged in favour of a liberalisation of liquor licensing. The post-war years had seen the temperance movement recede and the Parliamentary debates on the 1960 Licensing Bill ' showed how far opinion had moved from treating the question of drinking as a moral issue to deciding matters of social convenience' (Lee (1985)). Although the number of full on-licences continued to decline year-on-year, off-licences, having been relatively stable throughout the century, began to increase from the start of the sixties - for example, in 1960 there were 26,670; by 1970 this had increased to 27,910.

Towards liberalisation - relaxing controls

The Licensing Act 1961 heralded the commencement of a more relaxed legislative attitude towards liquor licensing. The Act introduced specific restaurant and residential hotel licences, which justices could only refuse on specific grounds laid down in the statute (previously, such premises would be considered for standard on-licences with conditions) and allowed unrestricted appeals to Quarter Sessions against justices' refusals of off-licences.

It soon became clear that:

Quarter Sessions were not always prepared to support decisions of licensing justices to refuse an application for an off-licence simply on the grounds that there were already sufficient facilities in the area. After a number of cases in which the decisions of justices had been overruled it became increasingly rare for applications to be refused simply on the grounds that a "need" did not exist. (Erroll 1972, para.2.21)

The Act also extended permitted hours for off-licences (from 9.5 to 15 hours); which, together with the abolition of retail price maintenance in 1966/67, encouraged grocery chains and supermarkets to start selling alcohol - leading to a large increase in the number of off-licences (which by 1980 had reached 37,252).

In the meantime, the range of disparate licensing provisions was largely brought together and consolidated in the Licensing Act 1964. The Act, with some amendment, remains in force today, some 35 years later.

The 1970s saw increased pressure for relaxation of liquor licensing provisions. Baggott (1990) cites four major spurs to change: the election of a Conservative government in 1970, favourably disposed to licensing reform; the brewers, a strong pressure group (which had made significant political contributions to the Conservative Party in the three years before the election), and expressed itself 'broadly in favour of a more relaxed licensing system'; and the tourist industry, which saw benefits from liberalisation, particularly of licensed hours. Lastly, public opinion:

... the general climate of public opinion in the late sixties and early seventies ... was highly conducive to liberal reforms of this kind. This was demonstrated by the successful passage of liberal measures on moral issues such as abortion and homosexuality during this period. The government believed that in view of this climate of opinion, liberal licensing reforms would also be supported by the general public. (Baggott (1990), p.118)

December 1972 saw publication of the most wide-ranging and comprehensive review of liquor licensing yet undertaken in England and Wales. The *Report of the Departmental Committee on Liquor Licensing*, chaired by Lord Erroll of Hale, ran to 324 pages and contained a host of recommendations.[v] Announced in December 1970, by the then Home Secretary Reginald Maudling, the Committee was given wide terms of reference 'to make a thorough examination of the law on liquor licensing as a whole, and to make whatever recommendations you think fit'.[vi] The enquiry was widely welcomed. There was general agreement that the licensing provisions were outdated, 'so complex that few lawyers, policemen or publicans claim to understand them' and unnecessarily restrictive in many respects'. Yet concerns were also voiced that 'Should its sale be wholly unrestricted in England, we might well see the return of the gin palace and alcoholism on the scale experienced by our continental neighbours'[vii] .

The spur to the setting up of the Erroll committee was the Monopolies Commission report in 1969 on the supply of beer, which concluded that the tied house system operated by the Brewery suppliers worked against the public interest as: 'licensed outlets are individually and collectively protected from free competition by the restriction of the establishment of new competitors in the licensed trade.' The Commission recommended 'a substantial relaxation to the licensing law' so that a licence (both on and off) would be granted to those whose character and premises met certain minimum standards:

This recommendation clearly had important social implications which the Commission were unable to consider. Our own appointment was intended to fill this gap. (This) also coincided with a more general expression of unease about the operation of the liquor licensing law, particularly on the part of tourist and consumer organisations. (Erroll (1972) para.3, p.1)

Most modern commentators would concur with the view advanced by the Erroll Committee that a balance needed to be struck 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.

The Erroll report concluded that, as society condoned the moderate use of alcohol, any legislation controlling availability 'will have to ensure that the response to public demand does not fall below a minimum level of acceptability', but that changes to keep step with consumer demand 'should not be on such a scale as to bring about any significant increase in alcohol consumption'. Further, the Committee stressed that while it did not subscribe to the view that there was 'an alcohol problem', account should be taken 'of more immediate problems such as drunkenness, public order, amenity and public safety' (para.6.12).

Within that framework Erroll moved on to consider possible reforms of the existing legislative provisions. Some 100 recommendations were made, touching on virtually all areas of liquor licensing. The central recommendations fell to be discussed under five heads: 'the case for controls', 'the question of need', 'a new licensing system', 'hours of drinking' and 'the law and young people' (see further Light 1997).

Arguments that freedom and simplicity demand that all controls be removed from the retailing of alcohol were not accepted by the Committee which quoted with approval the words of RA Butler during the Second Reading of the Licensing Bill 1961, that the aim of licensing law was 'to strike a balance between the restraints which are still necessary to prevent abuse or social mischief and the legitimate demand for individual freedom of choice and behaviour in an adult and responsible society' (*Hansard* 28.11.60, col.33). Beyond the view that the system of licensing should remain, lay the task of deciding the nature and extent of the controls imposed. Traditionally, three issues fell to be addressed; the licensee, the premises and the question of 'need'. The report supported the *status quo* as regards regulation of licensees ('fit and proper') and premises ('suitable') - each of which continue largely unaltered today; but, after 'rang(ing) as wide as possible in assessing the relevant arguments' (para.8.02), recommended the abandonment of the need criterion.

Few would disagree that the issue of need is 'one of the most important matters which this Committee has had to consider' (8.01). Agreement, however, would likely be more divided on the Committee's conclusions and recommendations:

- The legitimate purposes of licensing control can be achieved without the ambiguities and complexities resulting from the present absolute discretionary power of the justices. It is not part of the licensing justices' functions to assess whether there exists a market demand for any proposed new facilities, or to protect existing licence holders against competition (para. 8.32).

- We RECOMMEND that the licensing justices' present absolute discretion in respect of on-licences be replaced by specified grounds on which applications for the grant and renewal of licences may be refused ... which do not allow them to apply a test of "need". (para.8.37).

- We RECOMMEND that the justices' present absolute discretion in respect of the grant or refusal of off-licences be replaced by specified grounds for the refusal of applications (para.8.45).

The strongest views in favour of retention of need came from trade organisations such as the Brewers' Society and the National Federation of Licensed Victuallers, as well as the temperance organisations. For the former, the view of a liquor licence as a valuable scarce commodity comes through strongly, but explicit arguments were based on an overprovision leading to weaker establishments cutting corners and encouraging sales in order to survive.

The (now defunct) Consumer Council led the advocates of abolition of the justices' absolute discretion, arguing that it prevented new operators entering the business and stopped new types of premises opening. They were supported by the tourist authorities and a number of major restaurant, hotel and leisure operators and organisations.

The Magistrates' Association made no recommendations for change, while the Justices' Clerks' Society took a middle line arguing that different historical periods and different geographical areas demanded different approaches to the question of 'need'. In some areas there may be so many licences as to require a limit and in others so few as to require more. But they were opposed to the justices' discretion being restricted and 'put in a straight jacket'.

The Committee approached its analysis under five heads:

(a) Is there any consistency of approach among justices on the application of the "need" criterion? Having taken evidence from a number of clerks and justices the conclusion was that 'the present situation does not make for the degree of certainty in the administration of the law which potential applicants for a licence are entitled to expect' (para.8.23).

(b) Has the scope and use of the justices' discretion led to undue complexity in the law? Based mainly, but not exclusively, on the existence of Part IV, seaman's canteens and registered club licences, it was thought that even if historical anachronisms were removed the complexities would persist (para.8.26).

(c) How far is the justices' power to restrict the number of licensed premises actually used? The absence of reliable statistics greatly hampered attempts to answer this question. Nevertheless, the Committee felt able to estimate that some 8% of applications were refused on need, but had no information either on the reasons behind those decisions or on whether the requirement to show need was dissuading applications to come forward in the first place.

(d) Does the justices' absolute discretion serve any useful purpose in present circumstances? The Committee considered four issues: first, *Market Forces*. As this section of the report forms the central plank of the Committee's recommendation for the removal of the justices' absolute discretion it is worth repeating here in full:

It would appear to us that, in some areas, the justices, have very little else in mind other than to check that there is a genuine demand for any proposed new facilities. In our view this is an entirely inappropriate function for licensing justices. An assessment of market demand would normally be made by the applicant for a licence and, in present circumstances, it is unlikely that anyone would go into business in a particular area carelessly or without adequate market research. If an applicant is wrong about demand it is his capital that is at risk and he will bear the consequences. The argument that, during the competitive process, he will inflict damage on the standards of other public houses or be compelled to reduce his own, raises questions which are dealt with below. Our own impression, however, is that some justices, in considering new applications, attempt to apply need criteria without giving sufficient thought to their reasons for doing so. It is one thing to object to market forces determining the overall number of licensed premises; it is quite another to use the justices for determining what these market forces are. In so far as the justices' absolute discretion is used for this purpose, we think it unnecessary and inappropriate. (para.8.32)

The second section, *The protection of the public against nuisance and disorder*, recognises as a legitimate consideration the generation by increased numbers of on-licences of 'noise, amenity and disorder', but that a ground for refusal should be drafted to take in these specific matters.

Thirdly, *The possible "proliferation" of licensed premises is considered*. The Committee viewed this 'as an argument not about numbers but about standards' and doubted whether the licensing justices' absolute discretion was necessary to stop proliferation 'as it is an expensive exercise to build a public house from scratch, or even to convert existing premises' (para.8.32). Lastly, *Protection against the excesses of competition* is dismissed by the Committee as an unacceptable attempt to protect existing trade and is, in the Committee's view, in any event, also based on the standards argument already discussed.

(e) Does the application of the "need" criterion deter potential entrants to the licensed trade? The Committee answered this in the affirmative:

the uncertainty caused by the varying standards applied by licensing justices and the restrictive attitudes encouraged by the historical background to the present law exercise a generally inhibiting effect on the provision of new and different types of licensed facility. (para.8.33).

Taking into account all of the foregoing, the Committee reached the general conclusion that:

the application of the test of 'need' to new applications for on-licences is out of date and unnecessary. 'Need' itself is a meaningless expression which has little or no commercial or economic significance - the only relevant commercial consideration is ... market

demand. A licensing authority is hardly qualified to assess whether such a demand exists, and we see no reason why any licensing process should interfere with the ordinary operation of market forces. (para.8.34)
We therefore recommend, in principle, that the justices' present absolute discretion in respect of certain on-licences be replaced by specified grounds on which applications for and renewal of licences should be refused. (para.8.37)

For some commentators, this section of the Erroll report made it 'plain how crucial was the composition of the committee and how persuasive had been the members with commercial marketing predilections' (Williams & Brake (1980) p.166).

On the question of off-licences, today's licensing practitioners would no doubt be rather surprised to read that:

it is now relatively rare for off-licence applications to be refused on (need) ... Licensing justices ... are increasingly unlikely ... to take into account the number of existing off-licences in the area and their proximity to the premises of an applicant. (para.8.38)

The Committee was particularly critical of the application of need to off-licence applications: noting that 'the reasons for doing so are even more obscure ... than in the case of on-licences'. The Committee referred with approval to the actions of Quarter Sessions in frequently overturning decisions based on need - the court having apparently taken the view that need had been used:

too blatantly as a means of protecting the interests of existing licence holders; that the problem of maintaining standards of public order in off-licences are not nearly so great as in the case of on-licences; and that the public interest demands more, rather than less competition. (para.8.39)

The evidence received by the Committee was overwhelming against the justices' absolute discretion in the case of off-licences - this came not only from expected sources such as grocers and supermarket organisations, but also from the Licensing Committee of the Magistrates' Association (recommended off-licences be put on same basis as restaurant licences), the Justices' Clerks Society and the Bar Council (off-licences to be granted as of right subject to conditions of character and suitability of premises). The only supporters of need for off-licence applications came from organisations representing the specialist off-licences (which further suggested that appeals from refusals should be abolished).

The Committee accepted the need to ensure responsible retailing at off-licences, but felt that this could be achieved 'by more closely defined grounds for refusal' (8.42). The Committee, not surprisingly, were unimpressed by the plea from the specialist off-licences to protect their trade interests. In the absence of any research to support the claims of increased consumption from increased outlets the Committee proposed that need should be abolished to recognise 'what is, in any case, current practice' (para.8.44).

Liberalisation lost

The Erroll report was not well received. This is not surprising, for ignoring its own concern at the lack of adequate research and its own reference to the adverse social implications of increased consumption:

The intentions of the Erroll Committee were succinctly expressed by Sheila Black, a member of the committee. Writing in the *Financial Times* (6 December 1972) she said "We all knew that what we wanted basically, was total freedom for all, to drink when and where they liked". (Williams & Brake (1980) p.169)

In particular, the medical lobby strongly opposed the liberalising recommendations, criticising them as based on commercial rather than public health considerations - 'From the public health point of view the report's main proposals must be condemned as untimely' (*British Medical Journal* 16 December 1972). Williams & Brake cite a paper from a group of ten psychiatrists and researchers at the Addiction Research Unit (Institute of Psychiatry, University of London) as 'the most detailed and devastating appraisal of the Erroll Report'. On the question of need they had this to say:

The committee's decision to abolish the justices' absolute discretion is felt by us to be symptomatic of a vital change in emphasis in relation to liquor licensing which the recommendations taken as a whole represent. The likely resultant expansion in the number of outlets ... is, we feel, treated too lightly by the committee, while the committee's rejection of contra-arguments without comment or evidence is a matter for concern. (quoted in Williams & Brake (1980) p.173)

Erroll was a businessman who had previously served as a minister for trade and as Williams & Brake (1980) observed:

The obvious criticisms of the membership of the committee were that there was only one woman, that consumer interests seemed to outweigh historical and sociological considerations, that there was no one with experience in the medical diagnosis and treatment of alcoholism, and that ... there should have been a social historian. In attempting to appoint a thoroughly independent committee, the Home Secretary lost sight of the need for expertise in the essential areas for consideration. (p.148)

It was also significant that licensees were generally against the reforms as they 'believed that Erroll's proposals would lead to increased competition and longer working hours' (Baggott 1990, p.119). For some the recommendations did not go far enough, but were merely 'tinkering', which left 'the licensed trade and the legal profession linked in a senseless formalised gavotte, danced to a theme which is essentially the same, even if the variations are now different'.[viii] The Erroll Committee's main recommendations were not implemented.

The emerging public health lobby quickly coalesced into an alliance of organisations concerned with alcohol-related harms, such as drink-drive casualties, accidents at work, drownings, liver cirrhosis and other medical conditions; as well as crime and disorder (see, for example, DHSS 1977, Royal College of Psychiatrists 1986, Royal College of Surgeons 1991). Groups such as *Alcohol Concern* and *Action Against Abuse*, linked up with health care professionals, temperance led organisations, alcohol/addiction workers, criminal justice practitioners and others to put paid to any early prospects for the liberalisation of liquor licensing (although the total number of off- and on-licences still increased from 105,436 in 1970 to 128,054 in 1980).

Links were made between *per capita* consumption and alcohol-related harm, utilising ‘consumption theory’; which claims a correlation between the overall level of alcohol consumption in a society and all indices of alcohol-related harm. With *per capita* consumption governed by availability and price (and to a lesser extent advertising), arguments against increased numbers of licences were mounted and maintained into the 1990s (for an up-to-date review of the literature see Alcohol Concern 1999, Baggott 1999).

The post-Erroll period saw a number of influential official and quasi-official investigations into liquor licensing (eg Justices' Clerks Society (1983)) and alcohol policy, together with increased Parliamentary activity on alcohol-related issues (eg reform of drink-driving legislation), together with a rapidly expanding research literature on alcohol-related issues.

What pressure remained for reform centred almost exclusively on extending licensed hours, which, despite mid/late-eighties concerns over alcohol-related crime and disorder (eg at soccer matches and by 'lager louts' - see Light 1994), were introduced in 1988. Other matters (including need/demand) seem to have attracted little attention. As Baggott (1990) observes:

Another issue, which has not really been touched on in recent debates, is the question of outlet proliferation. Yet this is widely believed by many in both the drinks industry and the alcohol misuse lobby to be a major factor in the growth of Britain's drink problem. The number of outlets ... has increased dramatically in recent years ... One reason ... has been that many licensing authorities have either been unable or unwilling to restrict the number of licences granted ... (p.130).

The issue though had not gone away. For example, at its 1981 conference, the Justices' Clerks' Society debated alcohol-related concerns and the licensing laws as well as setting up a working party to look further at the questions raised. Matters were then revisited at the 1982 conference. In the published document that followed, it was recommended that positive statutory criteria should be enacted which had to be satisfied before a licence could be granted: (1) applicant fit and proper, (2) premises suitable and (3):

that the licence is necessary having regard to the demand for the time being in the locality for the facilities afforded by the premises if licensed and to the number and types of licensed premises for the time being available to meet that demand. (Justices' Clerks Society (1983) para.3.2.4)[ix]

Also, there appear to have been active discussions on liquor licensing reform at the DTI and Home Office, while trade organisations continued to campaign for change. For example, in 1991 the Brewers' Society submitted to the Home Office a seven point plan for licensing reform, which included under the heading of 'Consistency of approach', the proposal that guidelines be produced by the Home Office 'which would ensure a far greater degree of standardisation and consistency in the way licensing justices go about their business than exists at present'.[x] And in 1992, in response to the DTI review of licensing controls, the Institute of Directors proposed radical reform by abolition of some 50 licences including liquor stating that:
This licence has restricted business opportunities available to small retailers and potential restaurateurs ... the requirement to prove need should be abolished as it is an unnecessary restraint of trade.[xi]

Towards liberalisation - reprising the debates

Matters were publicly revisited by the Home Office in its March 1993 consultation paper which considered 'three proposals for reform': removal of justices' absolute discretion, introduction of children's certificates and introduction of 'a new category of licence, for continental cafe-style premises'.

On the first of these proposals: 'a major question raised is whether or not an application should continue to be capable of being refused on the ground of (lack of) need' (para.1.1). The aim of such a reform would be that:

The codification of the grounds for refusal of applications for on (and off) licences would make the system clearer and more consistent. This would be in the interests both of current licensees and potential new entrants to the market.

The paper laid out the arguments against retention of the need criterion as ‘lack of clarity' and 'inconsistency'; while retention was said to have as its major advantage the ability to provide 'flexibility' in responding locally to changes in public order or nuisance considerations. It was recognised that:

There would be proper concern if the supplanting of this discretion by specified grounds for refusal were to lead to unforeseen loopholes in the law, allowing undesirable premises to operate regardless of the view of the justices or of others, including the police and local residents, who look to the licensing system to safeguard legitimate interests. (para.1.11)

The paper therefore sought views on two matters. First, could all of the grounds for refusal be codified in a statute? This had been done in Scotland, as a result of the Clayson Committee recommendations, as follows: (a) applicant, etc not fit and proper; (b) premises not suitable or convenient ... having regard to location, character and condition, nature and extent of proposed use ... and persons likely to resort to the premises; (c) ... likely to cause undue public nuisance, or a threat to public order and safety; (d) that, having regard to the number of licensed premises in the locality at the time the application is considered and the number of premises in respect of which the provisional grant of a new licence is in force, the board is satisfied that the grant of the application would result in the over-provision of licensed premises in the locality.

The second question, of course, is the all important one: should a criterion as in (d) above be introduced? If answered in the affirmative, the paper recommended adoption of (d) above. (Although justifiable criticism has been aimed at this particular definition (Phillips (1993) p.14.)

Arguments against retaining need are put as follows: it is contrary to policy that committees should 'aim to make semi-commercial judgements about the level of demand'; the need criterion is an unnecessary protection to existing retail outlets and a barrier to entry to the market; abolition and increased competition 'might reasonably be expected to result in a better quality of service to customers, including, possibly, lower prices'; 'the licensing system is not an effective means to limit alcohol consumption', as many outlets are already available and increased numbers may 'affect the point of consumption, with little or no effect on volume'; more outlets my reduce disorder and nuisance, as they will be less crowded and would not need to be aimed at 'heavy-drinking by young adult males'.

Arguments for retention are said to be that need can: 'help to avoid undue risk of nuisance and disorder ... and undue stimulation of ... consumption'; be used to avoid a concentration or cluster of premises leading to problems; guard against increased consumption and public health problems. The position is summarised thus:

abolition (of need) could lead to increased competition, resulting in improvement in quality of service and, possibly, lower prices. Opponents argue that this could be at the expense of risk of disorder and nuisance, and the devaluation of efforts to emphasise the health risks of alcohol misuse. (para.1.31)

The Consultation Paper prompted several hundred responses. Among these, the Justices' Clerks' Society favoured retention (stressing justices' local knowledge and that supplying alcohol is different from other foods/consumables), while the Brewers' Society, National Association of Licensed House Managers and CAMRA, wished to replace current provisions with the Scottish 'over-provision' criterion, while the Association of Licensed Multiple Retailers proposed no refusal on grounds of 'over-provision' as this is to 'second-guess commercial decisions'.

The deliberations of the subsequent working party which considered the issues in the light of responses to the Consultation Paper appear to have been inconclusive with no further official utterance forthcoming; the only legislative change being the introduction of children's' certificates.

However, while legislative reform of the substantive law was not forthcoming, efforts were maintained (eg in the form of a *Good Practice Guide*) to ensure that licensing committees dealt with their work 'effectively, efficiently and economically, having regard to the requirements of the law as well as the reasonable expectations of the parties' (Justices' Clerks' Society (1994)). The *Guide* advised that need could be the subject of a policy, which should be published along with the committee's preference as to how need should be proved. Further, 'Committees should give reasons for the policy so that applicants can endeavour to deal with the problems the policy addresses in some other way' (para.10.9, *ibid*).

Goodbye to need?

Part way through our research we attended a conference at which the head of liquor licensing at the Home Office gave a paper on the matters being considered by the Home Office review. He did not mention need. Asked why need was not to be considered by the review we were told that the matter had already been debated and the view reached that need should be abandoned. The forum was the Home Office Working Group on Licence Transfers.

This Group had been set up in 1995 to look at ways of streamlining licence transfers. The opportunity was taken to look at the issue of need as framed in the 1993 Home Office consultation paper. A 'Note by the Home Office' was sent to members of the Working Group outlining the issues and stating:

The 1993 Home Office consultation paper on selected reforms to the liquor licensing system discussed the possible replacement of the licensing justices' present absolute discretion over the grant of applications for full on-licences and off-licences by specifying in statute the only grounds on which such applications should be refused. There was a very broad measure of agreement among respondents in favour of this proposition, and for the proposition that the model for such a system should be section 17(1) of the Licensing (Scotland) Act. However, opinions differed over whether the justices should continue to be able to refuse an application for a licence on the grounds of lack of "need" or, as applies under section 17(1)(d) of the Scottish codified system, "over-provision". (Home Office, Note WGLT95(8), A Division, September 1995)

Summarising the arguments as, on the one hand, need or over-provision being better left to market forces against, on the other, over-concentration in popular locations leading to risk of public order problems or to public safety, together with promotional practices encouraging excessive consumption in order to survive, the Note indicated that the former would be covered by other sections of the Scottish code (see Appendix 1) and that the realities of business finance would mean the latter would be rare.

Initial responses from members of the Working Group were that there should be no test of 'commercial need' ie whether a consumer demand for the additional premises and the effect on existing outlets, but that 'justices ought to be able to take account of the "over-concentration" of licensed premises in order to safeguard against undue nuisance or threat to public order". Positions were reserved pending further consultation with member organisations and written comments were invited for the next meeting (Home Office Note WGLT95(10), A Division, December 1995).

At its last meeting, the Minutes from the Working Group's Meeting (7 March 1996), at item 15. read 'Members had submitted written comments on paper WGLT95(10) and these showed agreement that any system of codified grounds for refusal should not include a test of "need"' (underlined in original). (Home Office, March 1996). The end of need?

Government Review of Liquor Licensing 1998

In May 1998, the Home Office minister, George Howarth announced that ‘the time is right to blow away the cobwebs in British life by modernising the licensing system’. He was responding to widespread criticism of ‘Victorian’ outdated legislation. As one commentator put it: ‘reading the Licensing Acts is like being drawn into some ancient, dark, cobweb strewn labyrinth controlling access to a dangerous beast’ (CWPCCG 1998, p.20). The minister was keen to stress it was ‘Paramount ... to balance the rights of business and consumers with residents’ rights to be free from disorder and violence, or other kinds of disturbance’. The setting-up of the review was widely welcomed. But no time scale was set for the review, and the Brewers and Licensed Retailers Association put it: ‘it would be nice to bring our licensing laws into the twentieth century while there is still some of the twentieth century left’. This clearly is not going to happen.

In any event, for the purposes of our research the review may have nothing to offer; as need is not to be considered, having already been dealt with by the 1996 Working Group (above). To our knowledge the recommendation by the Working Group on need has not been aired publicly and many will be expecting the review to deal with the matter. For example, for one commentator That’s one of the elements of licensing reform that George Howarth is going to have to struggle with. In due course ... *(Licensing Review, 34*, 2).

Better Regulation Task Force Report

July 1998 saw publication of the Government's Better Regulation Task Force Report *Licensing Legislation*.[xii] The report proposed a radical overhaul of the licensing laws to be replaced by a simpler and more flexible system. The 'inconsistency' of the present laws was criticised, as depending on the judgment of local magistrates. It was recommended that local authorities should make licensing decisions based on national guidelines and that the role of the justices should be to hear appeals from local authority decisions. The issue of need/demand was not directly addressed in the 'Key Recommendation' unless it is included in the rather arcane recommendation which reads 'Develop conditions at national level which focus on the objectives of regulation that will have universal application' (p.3). But we are told that:

Regulation should not be used - except through truly extreme constraints - to influence the volume and frequency with which the individual drinks. Nor should it be used to manage demand through judgements by licensing authorities over the need for additional providers. (p.7)

The lessons of the Erroll Committee do not appear to have been used to inform the composition or content of the Task Force report. The working group which carried out the review comprised a senior police officer, a local authority environmental services manager, a senior director with a major retailer and a business consultant. The full membership of the Task Force (which approved the report) is almost exclusively commercially orientated, with a dearth of public health, medical or sociologically grounded members. This group of people would no doubt be well qualified to enquire into the matters contained in the Task Force terms of reference:

To advise the Government on action which improves the effectiveness and credibility of government regulation by ensuring that it is necessary, fair and affordable, and simple to understand and administer, taking particular account of the needs of small businesses and ordinary people.

The group consulted 36 organisations; the drinks industry (13), leisure industry (3), licensing solicitors (3), business/retail (2), consumers' groups (2), neighbourhood/community (3), Justices' Clerks' Society and Magistrates' Association, Association of Chief Police Officers - Scotland, National Council for Voluntary Organisations, Alcohol Concern, the Portman Group (funded by the drinks industry), Local Government Association, Royal Borough of Kensington & Chelsea, Clerk to the Justices and the Parliamentary Beer Club. As a cross-section of society with something to say about alcohol and liquor licensing this may be viewed as containing only a limited perspective.

Nevertheless, the report caused quite a stir in the licensing world (not least amongst licensing justices and their clerks), the transfer of control from the justices to the local authority generating the most publicity and debate.

Good Practice Guide

The Task Force suggestion of transfer of licensing to local authorities (which is one of the options currently under consideration by the government review) has been taken seriously by the Magistrates' Association and the Justices' Clerks' Society. In October 1998 a statement was sent to all members of the Justices' Clerks' society, Chairmen of licensing committees and issued with the current copy of *The Magistrate*. Under the heading 'The future is in your hands', it had this to say:

The Task Force recommends that the Magistrates' Association and the Justices' Clerks' Society continue to publish guidance. Unfortunately however experience shows that not all committees follow it ... If licensing responsibility is to remain in the courts all committees must demonstrate a constructive response in dealing with the criticisms laid out in the Task Force review. This may be painful for committees who believe deeply in the validity of the practices condemned by the Task Force. The alternative is quite simple. Unless licensing committees review their licensing practices and we put our house in order there will be no licensing committees in the next century.

The Justices' Clerks' Society and the Magistrates' Association had been working for some time on a redrafted *Good Practice Guide* and this was eventually published in early 1999 (for a review see Coulson 1999). A substantial document, covering most areas of liquor licensing (111 pages, including appendices), the *Guide* intends to introduce more consistency between committees and to reduce the complexity of the system. Additionally, it contains some radical proposals and originally intended to 'abolish' the concept of need/demand. After consultation it was conceded that the caselaw on the topic (in particular the House of Lords decision in *Sharp v* Wakefield) precluded this. The final draft has stepped back from this position and is considered below in Chapter 3.

The JCS has distributed copies of the *Guide* to licensing committees around the country intending that its provisions be adopted in place of current local policy guidelines. And it is clear that some committees quickly embraced its provisions; as did the Crown Court in licensing appeals. To facilitate understanding and discussion of the *Guide*, the JCS organised a series of 'roadshows' around the country to which justices and their clerks were invited.

Notes

3 Law and practice

Members of licensing committees frequently find it difficult to be clear in their minds about the extent to which they are able to have regard to need or demand when considering applications for the grant of new justices' licences. The difficulties experienced are entirely understandable since the Licensing Act 1964 does not refer to the subject. (Pain, 1987, p.26)

Law

The legislative provisions and case law reviewed in Chapter 2 sought to locate the concept of need historically. This chapter examines its practical application before courts and licensing committees in England and Wales.

Justices' discretion

As stated above, licensing justices may grant a licence to any person they consider to be 'fit and proper' to hold such a licence, provided that person is not disqualified for holding one under the Licensing Act 1964 or any other statute. This discretion is largely unfettered save that justices must reach decisions by exercising their discretion judicially (*R v Boteler* (1864) - 'according to the rules of reason and justice and not private opinion'). Each case must be considered on its merits and licensing justices should not pass a general resolution that they will not grant any new licence or lay down beforehand any general rule fettering their discretion (*R v Silvester* (1862); *R v Walsall JJ* (1854)).

Lord Halsbury in *Sharpe v Wakefield* (1891) 55 J.P.197; [1891] A.C. 173. laid down a guiding principle when he held that the justices' discretion must be exercised 'according to the rules of reason and justice, not according to private opinion ... not arbitrary, vague and fanciful, but legal and regular'.

In recent years many licensing committees have laid down general rules and policies as guidelines. The development of local policies has been said both to enable a committee to use the licensing laws to the best advantage of their division, by recognising particular local conditions and to assist those who are preparing and presenting applications, as they give an indication of the matters which will concern the justices when exercising their discretion as to the grant of a licence.

Problems have arisen where committees appear to have put local policies on a par with, and sometimes above, the statutory provisions. Here the higher courts have had to intervene to remind committees that a local policy can be no more than a useful tool for the effective implementation of the law. While recognising the practice of formulating local policies the courts have added the qualifications that the justices should state their policy publicly and must apply their minds to and consider properly the merits of each particular case before them in order that they may decide whether the general policy is to

be applied in that particular case (*R v Torquay Licensing JJ, ex parte Brockman* (1951); *R v Chester Crown Court, ex parte Pascoe and Jones* (1987)).

Need

It is clear from the authorities that need is a factor which justices are entitled to take into account when exercising their discretion. For example, in *R v Lancashire Justices, Re Tyson's Appeal* (1870) R6QB97 it was held that justices may and indeed ought to take into consideration the number of licensed houses in the neighbourhood and refuse a certificate if of the view that an additional beerhouse was unnecessary or undesirable in the interest of the public:

The certificate may be refused though the applicant is of good character, though his house is not disorderly, though he has not forfeited or been adjudged unworthy of a licence, and though he and his house are duly qualified ... The discretion of the justices ... is ... unlimited.

And in *Hargreaves v Dawson and Others* [1871] QB 24 LT 428 a licence was refused on the ground that the applicant had not shown the necessity for such a house in the neighbourhood; similarly, in *R v Smith* (1878) 48 LJMC 38 it was affirmed that justices may refuse a licence on the grounds that a neighbourhood is sufficiently supplied by existing public houses.

The leading authority remains *Sharpe v Wakefield* [1886-90] All.E.R.,652 in which the House of Lords had this to say:

... it is within the power and is even the duty of the magistrates to consider the wants of a neighbourhood with reference both to its population, means of inspection by proper authorities, and so forth.(Lord Halsbury 653, A-B)

If an application is made for a licence to sell drink on premises not before licensed it is certain that the magistrates may refuse it, and may refuse for the reason and for no other than that they think the neighbourhood does not need it - that none is needed or none in addition to the houses already licensed. (Lord Bramwell 655, D)

It was long ago decided, I think rightly decided, that the justices were ... entitled and bound to consider the needs of the neighbourhood on an application for a licence to a person seeking to keep a house for the sale of exisable liquors. (Lord Hannen 657, I)

Nothing in any subsequent legislation has affected the view that need is a proper consideration for the justices in the exercise of their discretion, which has continued to be affirmed by the superior courts. For example, in *R v Chester Quarter Sessions ex parte Murray* [1966] Brewing Trade Rev 287 it was held that need may relate purely to a consideration of physical need without reference to the advantages to potential customers of being able to use a proposed new outlet. On the question of the needs of the potential customers:

It is something, like many other matters, which they are entitled to take into consideration, but having taken them into consideration and given them such weight as they think right, they can then refuse to be influenced by them. (Lord Parker at p.300).

Despite its age, *Sharpe v Wakefield* remains good law, and as a decision of the House of Lords is of the highest authority. It has not be weakened by any of the methods used for avoiding an unpopular, although still binding, authority - there appear to be no reported judgments in which attempt has been made to distinguish the case so as to be confined to its own particular facts; nor does it appears ever to have been disapproved. (This view was taken in *Consterdine (supra.)*)

Mead and Consterdine

Applicants and their advocates, dismayed at refusals based simply on (lack of) need and the concept's continued resilience, despite recommendations such as those contained in the Erroll report, recruited an apparent ally in 1991 in the form of the Divisional Court judgment in *R v Sheffield Justices ex p. Mead* (1992) 8 LR 19 (QBD - Hutchinson J). The *Mead* case was seized upon and vigorously argued by applicants (particularly in the Crown Court) when questions of need were in issue.

Although running only to 19 pages, it is an extremely difficult judgment to follow, jumping as it does between a number of lower court pronouncements. Stripping the judgment to its bare essentials the case is usually cited as authority for a number of legal submissions:

- in applying the provisions of a local policy (including need) to a case it is necessary to look at the aims of the policy consideration in question;
- evidence must then be adduced by those seeking to rely on the policy:
- to demonstrate how its operation has secured those aims; and
- to show how the grant of the application in question would prejudice such aims.

Photocopied transcripts of the judgment presented to a licensing committee, or indeed to the Crown Court, were often rather unwelcome by the tribunal, particularly as some advocates attempted first to prove need, and only when such attempt appeared to be floundering would they then, often in their closing remarks, introduce *Mead.*

Nevertheless, the judgment could make things extremely difficult, especially for the licensing justices, in an appeal against a refusal based on need. How was the Respondent to the appeal to show the reason for the policy, the fact that it was working, and that the granting of the current licence would prejudice that aim? There were fears that the chairman of the licensing justices or the clerk to the justices would need to be called to answer these questions. This was generally avoided by inviting the Crown Court to accept that the purpose of the policy was to avoid alcohol-related problems and that its success could be shown by reference to the annual police report to the licensing justices and the chairman's response. More difficult was showing that the policy's aims would be prejudiced if the licence was granted, even where reliable evidence from the police could be adduced.

However, *Mead* is no longer the force that it was by virtue of the subsequent Divisional Court decision in *R v Sheffield Crown Court ex parte Consterdine* (1998) 34 LR 19 (QBD - Turner J). While not departing from *Mead's* central point - that consideration must be given as to whether the granting of the licence would damage the objective of the policy (if not the application should succeed) - *Consterdine* reversed the burden of proof.
In distinguishing *Mead* it was held that in the absence of any evidence that there was a significant drink-related problem in the city centre (the tribunal) was entitled to assume that not only was the policy properly formulated, but also that it was because of the effects of the policy that there was an absence of public order problems. It was for those seeking an exception to the policy (ie in this case not being required to prove need) to show that a further licence would not create problems of the type which the policy was designed to obviate (see further Clowes 1998).

So which of these authorities is to be preferred? Although leave to appeal was granted in *Consterdine*, a fresh application was successfully made before the justices so that the appeal was withdrawn. We therefore have two competing Divisional Court decisions. However, the balance of opinion would seem to favour *Consterdine* as being the better authority, for: '... in accordance with long established legal principle, the burden of proving that an exception should be made must lie with the party which is seeking to justify that exception' (Turner J at p.20).

The Good Practice Guide 1999

As discussed in Chapter 2, the complexities and geographical inconsistencies in the application of liquor licensing had prompted the Justices' Clerks' Society and the Magistrates' Association to produce a new good practice guide for licensing committees. Initially intended to scrap the need criterion altogether, the argument was accepted that legally it is not possible to 'abolish' need, which must remain a consideration in licensing matters (*Sharpe v Wakefield* (*ibid*)).

Having said that, the weight attached to such considerations is a matter for individual committees. This argue the authors of the *Good Practice Guide,* whilst recognising *Sharpe v Wakefield,* allows need effectively to be abolished. However, it remains to be seen how widely the *Guide* is adopted, how the 'need' provisions are interpreted by committees, and the view taken by the higher courts on the issue.
Sections of the *Guide* which relate to need can be found in Chapter 5 where they are put to chairmen of licensing committees for comment.

Operation in practice

For any licensing practitioner the first port of call in any application is the policy document for the committee in question. What does it say about need? Is there a view expressed on how need should be demonstrated? Matters are at the time of writing further complicated by the introduction of the *Good Practice Guide* - has the committee adopted its provisions or do they still rely on their original policy document? Changes of policy are generally introduced at the annual licensing sessions held in February of each year. The Guidelines appeared too late to be adopted for 1999.

A call to the clerk may provide an answer to whether the committee has adopted the *Guide*, but a request for guidance to the justices at the start of the hearing is often needed. In the space of a single week in July 1999 the author received the following replies from four committees around the country: 'partly'; 'no'; 'yes, absolutely'; embarrassed silence (but told later by clerk 'they've only just come out and we've been told to introduce them from February 2000').

Having established as best as can be the position of the particular committee on need, evidence may then be adduced accordingly. Such evidence may seek to show that there is a general need in the area for the additional outlet, or from a particular group of people, or for a particular type of premises.

As with all areas of contentious legal practice technical and specialised rules and procedures have evolved. So that particular strategies and mechanisms in relation to the gathering and presentation of evidence of need; as well as complementary systems of challenge to such evidence have been developed. (There are many traps for the unwary/uninitiated, so that while applicants and objectors can and do act in person, most employ lawyers.)

Evidence of need is presented in a number of ways. A radius map can be produced showing other outlets in the area; and, even if there are many, it can be argued that the proposed premises offer something not already provided (eg, in the case of an off-licence more generous opening hours, a wider range, a different type of shopping format; for a public house, a particular theme or a cosy family atmosphere with children's facilities). This evidence is sometimes presented by a licensing surveyor who may also provide details of local licensed premises which have closed and any local population increases, for example, new housing developments in the area. Further, experts may be employed to conduct market research to test local opinion on the proposed licensed premises. Petitions can be used to gather the names of those in favour (and against) the granting of the licence and local residents called to give evidence in support of or objecting to the application.

Practitioner perspective

Whilst the central research population for the study is chairmen to the licensing justices, it was thought useful to canvas opinion from licensing practitioners on the issue of need. This was intended both to provide background data for the study and assist in the design of the research instrument to be used with the licensing justices.

Simple postal questionnaires were sent to some 120 practitioners, mainly specialist licensing lawyers who had expressed an interest in the research, or were identified from a legal directory, together with a smaller number of police licensing officers.

Response rate/experience

The response rate was disappointing - at the cut-off point (some two months after the letters were sent) 40 replies had been received, a response rate of 34 percent. See Table 3.1

Table 3.1

Respondents by occupation

		% of total
Solicitors	23	58
Barristers	10*	25
Police licensing offices	7	17

(*Two barristers, involved only in gaming licences, were unable to comment. Thus 38 replies have been analysed.)

The low response rate was anticipated - licensing practitioners have received a number of such requests over recent years, all of which have resulted in little or no change to either law or practice (see further Chapter 2). The data collected are though still very useful for, as can be seen from Table 3.2, they represent the views of a number of practitioners, with significant experience, who sit on the other side of the bench, as it were, from the licensing justices whose views and comments are analysed later in this report.

Table 3.2

Respondents' experience (years)	
<5	3
5-10	4
11-15	4
16-20	12
21-25	10
> 25	4
Not specified	1
Total	38

The extent of the practical experience possessed by the sample is illustrated by the proportion of their practice time which is devoted to liquor licensing. As can be seen from Table 3.3, for those providing a response this is 23 percent, while some 39 percent spend all or nearly all their time on liquor licensing (76-100 percent) - an indication of the specialised nature of the subject.

Although this is a limited survey, simply conducted and with a poor response rate, it does provide data from some very experienced licensing practitioners, and while it cannot be advanced as in any way definitive the responses were useful in helping to formulate the questionnaire used for the interviews with licensing chairmen.

Table 3.3

Proportion of time spent on liquor licensing matters

	Number	% of total
Up to 25%	8	21
26-50%	9	24
51-75%	4	11
76-100%	15	39
Not stated	2	5
Total	38	100

Responses

Respondents were asked for their views on the concept of 'need' or 'demand' in liquor licensing; their opinion on its retention or abolition; and their reasons for any view expressed.

Should need/demand be abolished?

It was thought useful to analyse the responses by occupation to provide a comparison of views and an indication of variance, if any, between lawyers and the police (see

Table 3.4).

Table 3.4

Should Need/Demand be abolished?

	Solicitors/Barristers	Police Licensing Officers	Total
	(n=31)	(n=7)	(n=38)
Abolish	23 (74%)	2 (29%)	25 (66%)
Retain	8 (26%)	4 (57%)	12 (32%)
No view given		1 (14%)	1(2%)

As can be seen from Table 3.4 of the total number of respondents some two-thirds (66%) expressed the view that need should be abolished, while just under a third (32%) favoured its retention. Six of the abolitionists stressed that while they considered need should go, that public order considerations should be taken into account when considering the grant of a licence.

Of the respondents who favoured retention of need, six were conditional in their endorsement of the concept, four stating that they favoured retention only where it was relevant to public order considerations; a further two expressing the view that need should not be the overriding consideration. As one respondent put it:

Demand should be retained ... to avoid an over proliferation of licensed outlets (resulting in) drunkenness, public nuisance, inducements to purchase alcohol and the risk that existing operators with squeezed margins and profits would risk breaking the law in order to achieve sales.

Those who responded thus fell into three groups:

- simple abolitionists
  50%

- public order considerations relevant (whether abolitionist or retentionist) 32%
- simple retentionists 13%

Of course, more detailed responses may well have produced some shifts in the above groupings. Nevertheless, what can be seen from this admittedly crude data is that there appears to be little support for the bare concept of need. Not surprisingly, perhaps, five of the six police respondents fell into the middle category who mentioned public order considerations. It is interesting to compare these findings with the JCS Guidelines' provisions and the views of the licensing justices (see chapter 5).

Lack of consistency

For many respondents there was perceived to be a lack of consistency in the application of the question of need between different licensing benches. This was seen as 'a major problem' and a cause of 'frustration' as even between adjoining divisions there could be inconsistencies between both policy documents and licensing committee approaches. Respondents felt the concept should be 'standardised', 'uniform and a consistent requirement throughout the country' so that 'if (need) is to be retained it must be on a nationally agreed criterion.'. For one respondent:

It is to be hoped that the *Good Practice Guide* supported by the Justices' Clerks Society will be adopted and bring elements of consistency that have been missing from licensing law for many years. If not, then my argument would be for a specialist licensing tribunal, akin to the Industrial Tribunal.

Although a contrary view was also expressed: 'I feel (need) should be interpreted on a local basis because not all areas or situations will allow for the same needs and requirements'**.**

Market Forces

Some respondents expressed the view that it was not for the licensing committee to decide on the number of licences in an area. They felt that 'market forces should determine the amount of licensed premises that can survive', so that whether there was a need for the additional outlet would be decided by the customers and whether the premises succeeded commercially. This position was based on the notion that 'proof of demand is now outdated and is inconsistent with current legislation relating to freedom of competition' and the view that 'this is a planning issue as opposed to a liquor licensing issue'. These sentiments were echoed by others, one of whom expressed the view that 'Magistrates are ill-equipped to assess need/demand. Why should their view take precedence over that of the applicant who may be investing millions in the project?'

But not all were in agreement, one respondent being concerned that 'for some people this may be too drastic a change to contemplate.' While for another, 'the sale of alcohol should not be left to free market forces. Especially in residential areas, the sale and supply of alcohol should be controlled.'

Beyond the basic question of consistency of approach was the assertion by a number of licensing lawyers that magistrates sometimes do not wish to grant a licence, but have no proper reason to put forward for the refusal and use need as a shield behind which to hide. For example, 'Licensing justices often use need as a catch all reason for refusing to grant a licence'; 'It is a means by which a licensing committee can hide in refusing a new grant'. And again:

It is often used by licensing justices to refuse applications for new licences when the real reason is incapable of justification. Put another way, if the justices feel the application is a good one then the licence will be granted irrespective of need.

4 The policy survey

Background

Applications for liquor licences are considered by licensing justices sitting in committee within a number of discrete licensing districts throughout England and Wales (which, other than metropolitan areas, correspond to the petty sessional divisions). Most districts have formulated and published licensing policy guidelines. A review of these documents provides valuable data on the application and definition of need around the country.

As each district has a 'Clerk to the Licensing Justices', who is responsible for advising the justices, it was thought that these would be the appropriate people from whom to request a copy of any published policy guidelines.

Some Clerks advise more than one district; so that there is no direct correlation between the number of licensing districts and the number of office bases of the Clerks. According to available information (Justices' Clerks' Society handbook and list of members 1997-98 with amendments) there are 389 licensing districts and 242 office bases of Clerks to the Licensing Justices in England and Wales. (As at 1 December 1998 - the numbers are subject to fluctuation due to ongoing amalgamation of districts). In October 1998 a letter was sent to each Licensing Clerk's office base introducing ourselves, outlining the nature of the project and requesting a copy of the policy document for the districts for which they were responsible .

Response Rate

The original letter, sent to 248 offices, produced 198 replies with six returned as the offices had closed; a follow-up letter to non-responders a month later produced a further 37. Seven offices did not respond. Thus we received replies from 235 of the existing 242 offices, producing an excellent response rate of 97%. No refusals were received, although it is possible that some or all of the non-replies were in fact refusals.

The response breakdown can be seen from Table 4.1.

Table 4.1 Response rate

Offices contacted	248
Office closed	6
No response	7
Replies received	235

Policies received

As stated above, some offices were responsible for more than one district, so that the number of policies received exceeded 235, as can be seen from table 4.2

Table 4.2 Policies received

Replies received	235
No written policy	7.5*
Not sent (updating)	2
Offices sending policy (ies)	226

*Matters are not straightforward. Here, for example, a single office covered two licensing districts, only one of which had a policy. Other offices supplied policies for more than one district, resulting in the 226 offices sending policies covering 372 licensing districts. A further complication lays in the fact that neighbouring licensing districts may share a common policy; while a number of Clerks indicated moves towards bringing into line policies for which they have responsibility and the introduction of a county-wide policy. Beyond this, other districts have broadly similar policies - in some cases the only difference being the name on the front page.

What this means is that although policies were received for 372 districts, they were covered by only 218 different policy documents. We therefore had to decide whether to base our research on a sample of 372 or 218. The argument for 372 would primarily be based upon the fact that 372 districts were applying a policy whether shared or not; while for 218 it could be said that this was the spread of variation which exists in the country's licensing policies. We decided to do both.

Policies ranged in length from two to 48 pages; the earliest was dated 4 February 1994, the latest 1 January 1999 (received as an update).

Need

The policies were analysed for wording which indicated that need was a relevant criterion for licence applications. As can be seen from Table 4.3, the vast majority of policies contained wording which, explicitly or by implication, pointed towards need as a factor in considering applications for new justices' licences.. One policy specified need as a relevant consideration only in contested applications (as this figure is not statistically significant we have included it in the 'Yes' column).

Table 4.3

Need criterion in policy

	n=218	**n=372**
Yes	188 (86%)	325 (87%)
No	30 (14%)	47 (13%)

Policies without a need criterion fell into two types; those which were silent on the matter and those which specifically stated that evidence of need was not required (see Table 4.4). It may, of course, be the case that those policies silent on need do operate a need criterion, but for some reason have omitted it from the document (but see *R v Torquay Licensing Justices*, chapter 3). What can be said from this data is that the policy documents revealed need not to be a relevant criterion in between 3% to 13% of licensing districts.

Table 4.4

No need criterion?

	n=218	**n=372**
Need not mentioned	24 (11%)	36 (10%)
Evidence of need not required	6 (3%)	11 (3%)*
Total	30 (14%)	47 (13%)

(*Of these, three required radius maps be submitted, a fourth in contested cases only, and for a fifth submission of a radius map was said to be optional.)

Alcohol-related problems

However, it should be noted (particularly in view of the *Good Practice Guide* approach to the issue of need) that some of the policies referred to in Table 4.4 above, which did not require evidence of need referred instead to alcohol-related problems (Table 4.5).

Table 4.5

Alcohol-related problems where 'no need'

Terminology used policies	**Different policies containing phrase**	**Total of containing phrase**
Evidence of need not required	6	11
BUT regard had to alcohol-related problems	5	6
No need/demand mentioned	24	36
BUT regard had to alcohol-related problems	16	19

So while at first sight, it appeared that a small but significant number of policies made no mention of need, most of these had looked behind the reason for need being in their policy and identified issues around alcohol-related problems as more relevant than a bare expression of need in terms of numbers or availability (the decision in *Mead* no doubt being a consideration - see chapter 3).

Further, just over 80 percent of policies provided that alcohol-related problems would be taken into account, such as public order, noise and nuisance, when considering an application (Table 4.6).

Table 4.6

Alcohol-related problems considered

(n=218)	(n=372)
174	304

Identifying need

Reading through the policies it soon became apparent that there existed a wide variety of words and phrases which could be related to need. These ranged from simply stating that one of the factors to which the committee would have regard was 'need' to phrases such as 'applicants must produce evidence of a genuine public demand not capable of being met by existing outlets in the area'. Others contained wording which, while not mentioning need or demand explicitly, clearly required the matters to be considered. Phrases identified as referring to a need criterion are shown in Table 4.7. It should be said that policies sometimes contained more than one of these phrases (so that the total numbers contained in Table 4.7 exceed the number of documents considered).

Table 4.7

Phrases reflecting a need criterion

	(n =218)	(n =372)
Over provision	5	16
Whether area adequately served	3	3
Need	119	176
Need considered if area saturated	1	1
Need considered if contested application	1	1
Whether further outlet desirable	8	12
Mere inconvenience is not enough	4	8
Reasonable demand/Genuine public demand/Unsatisfied demand	78	151
Local demand/Views of locals	28	45
Views of the community as a whole	1	1
Would grant swamp area/undermine character	2	11
Licence must enhance local community	2	2
Applicants decision to invest is evidence of need but not conclusive	1	1

Regard to existing licensed premises in area	127	211
Evidence of public benefit required	3	5
Whether high concentration of licensed premises in the area	15	25
Absence of need relevant where high concentration of licensed premises in area	3	3
Committee feels number of licences sufficient	12	20

Evidence of need

Having identified a need criterion in a policy, how can this be satisfied before the committee (or the Crown Court on an appeal)? As discussed in chapter 3, advocates have developed methods of adducing evidence of need (in the case of applicants for licences) or the absence of need (in the case of objectors) and these have in many cases found their way into policy documents.

Radius Maps

As can be seen from Table 4.8, most policies (some 80%) made mention of radius maps, with a large majority indicating it would be advisable to submit one. While this may be to facilitate consideration of existing licensed premises within the radius, it can also be used to provide other information concerning the area within which the proposed outlet is situated. For example:

... the Committee expects a one quarter mile radius map to show the density of licensed premises and any vulnerable facilities within the same area, e.g. schools. The Committee also uses this as a guide to what constitutes the local area.

Table 4.8

Radius Maps

	(n =218)	**(n =372)**
Should be submitted/accompany/expected	132	221
Will assist/be helpful	19	42
Applicant may find most appropriate way to show need	5	5
Optional	6	16
Not required	6	13
Only required in contested cases	2	3
Not required committee may request	1	2
Some divisions may require	1	10

If the first three categories in Table 4.8 are taken together, we see that for some 72 percent of policies it is either required or advisable to submit a radius map. In only some three to four percent of policies is there a statement that radius maps are not

required. We have, of course, no data for the roughly 20 percent percent of policies which were silent on the matter - presumably, this may mean that radius maps are optional for applicants appearing before those committees.

Petitions

Licensing committees seemed not much bothered by petitions, with only some 23 percent making mention of them (Table 4.9). Of these, some 20 percent positively discouraged their use, with only one policy, shared by five committees, welcoming petitions to demonstrate evidence of unsatisfied demand. For the others, petitions would be received if a party to the hearing wished to produce one; a position quite possibly shared by policies which remained silent on petitions.

Table 4.9

Petitions

Terminology phrase	**containing phrase (n =218)**	**containing (n =372)**
Petitions will not be received	5	6
Petitions not encouraged/given no weight	4	8
Petitions given little weight	1	1
Petitions will be received if wishes to produce	40	67
Petitions welcomed to show unsatisfied demand	1	5
Total	51 (23%)	87 (23%)

The apparently ambivalent attitude to petitions is reinforced by the fact that of the policies making mention of petitions, the majority also required one or more signatories to attend court as a witness at the application hearing (Table 4.10).

Table 4.10

Signatories required

	(n =218)	**(n =372)**
One	1	5
At least two	17	30
At least three	7	14
Four or more	3	6
No more than two	1	1
No more than three	1	1
At least six	2	2
A number of signatories required	1	5
Total	33	64

Market Research

While petitions may be viewed as an imprecise and unscientific method of gauging need, it is generally assumed among licensing practitioners that market research (particularly if carried out by a reputable independent company) is a much more acceptable indicator of need (but see further chapter 5). Yet market research was referred to in only a few of the policy documents (Table 4.11). (Interestingly, the policy document which welcomed petitions as evidence of unsatisfied demand also welcomed market research.)

As petitions are cheap and easy to produce, while market research is expensive, the former appear in applications much more frequently than do the latter. It is, therefore, perhaps not surprising that market research is mentioned in far fewer policies (Table 4.11). Indeed, if market research evidence was to be required, for many applicants this would represent an onerous financial burden.

Table 4.11

Market Research

Terminology	**containing phrase (n =218)**	**containing phrase (n =372)**
Market research welcomed to show unsatisfied demand	1	5
If applicant wishes to produce	2	2
Total	3	7

Market forces

A small number of policies made reference to the role played by market forces in licensing applications (Table 4.12). Of these, only one advanced the proposition that 'The Committee accepts the view that market forces should determine the viability of the licensed premises'.

Table 4. 12

Market Forces

	(n=218)	**(n=372)**
Market forces cannot regulate	10	13
Market forces shall determine	1	1
The should be a balance between regulation and sufficient provision	6	16

5 Interview data

Need has been so discredited a new word has to be found. It will still be taken into account, whether it is done by the magistrates or the local authority but it may not be exactly as it is defined at the moment.

Whatever the evidence put before a licensing committee, and however persuasive the arguments adduced for or against the grant, the final word on need (subject to appeal or judicial review) lays with the licensing justices. Yet little is known of the way in which they approach the concept and the evidence presented to them - for unlike advocates and occasionally clerks, the justices do not make public pronouncements on the subject (aside from any reasons given in judgments in particular applications).

In an attempt to fill this gap, and obtain data on need from this centrally important source, interviews were conducted with a random selection of licensing justices. It was intended to conduct 50 interviews - chairmen of licensing committees were chosen as, in view of the likely breadth of their experience, they should provide the fullest data. Fifty-three potential respondents were randomly identified (to allow for some refusals): in the event, 48 interviews were conducted (an excellent response rate of 91%). Two chairmen declined to take part, one was unavailable due to illness and a further two proved impossible to contact.

Having identified our research base, initial contact was sought by writing to the Clerk to the Licensing Justices for the petty sessional divisions whose chairman had been selected for interview. The letter explained the purpose of the interview and set out the aims of the research. In some cases a reply was received almost immediately stating that the chairman had been asked and had agreed to be interviewed. In other cases telephone contact needed to be made with the office to the Clerk repeating the request. The process proved time consuming and as a result the interviews were spread over the period May to July 1999. All of the court officials and chairmen were, without exception, extremely helpful; with the degree of reluctance experienced in our last study (Light & O'Brien 1995, p.21-2) noticeably absent.

The interviewees

Table 5.1 gives a breakdown of the length of time that respondents had spent on the bench; the period on the licensing committee; and for how long they had chaired the committee.

As can be seen from the table most interviewees were very experienced magistrates, with 98 percent of them having more than six 6 years experience on the bench. They also possessed a formidable amount of experience as licensing justices, 81 percent having six years or more experience; indicating substantial knowledge of the practice and procedure of licensing committees.

Table 5.1

Experience in years

	On bench	On licensing bench	As Chairman
0-5	1 (2%)	9 (19%)	45 (93.7%)
6-10	5 (10%)	20 (42%)	2 (4.2%)
11-15	15 (31%)	13 (27%)	1 (2.1%)
16-20	18 (38%)	5 (10%)	0
21-25	6 (13%)	1 (2%)	0
26-30	2 (4%)	0	0
31-35	1 (2%)	0	0
Total	48 (100%)	48 (100%)	48 (100%)

The interviews

Interviews were conducted by means of a telephone survey. A semi-structured questionnaire was used to establish a basic framework for the data collection. The interviews were tape recorded with the respondent's permission and the tapes transcribed.

The data fall into five sections: the concept of need; evidence of need; decision making on need; the *Good Practice Guide's* provisions on need; other issues about need.

The concept of need

What is need?

Respondents were asked what they understood by the terms need and demand in liquor licensing and if they considered each to mean the same thing. Their responses appear in Table 5.2. Two chairmen responded by saying that neither term was used by their committee, the expressions 'overprovision' and 'oversupply' being utilised.

Table 5.2

Need v Demand

	(n=46)
Same concept	39 (85%)
Different concept	7 (15%)

As can be seen from the table, the majority of respondents considered the concepts to represent the same thing. For the others, these was broad agreement expressed as to how need and demand differed. As one chairman put it: 'Need would be, perhaps, if there is a shortage of a particular outlet in an area. That doesn't necessarily mean that there would be a demand for it'. So that demand was considered to refer to what people wanted (presumably whether they needed it or not), while need referred to something that was otherwise not available (presumably whether anyone wanted it or not). For some a distinction could be drawn between 'Demand (which) is what people want and need (which) is a community need'.

Need/demand criterion applied?

When asked whether their committee considered need (however defined) in hearing licensing applications, the response was as expected and fitted well with the findings from the policy survey (Table 4.3) which produced virtually identical percentages. This correlation not only helps support the validity of our research findings, but also indicates that the justices do indeed work from their published policy documents.

Table 5.3

Need criterion applied ?

	(n=48)
Yes	42 (87%)
No	6 (13%)

Of particular interest was the fact that of the 42 respondents from committees which utilised need, almost half qualified their answer in a way which suggested that although still applied, the influence of need is on the wane. For example, nine chairman said that 'It is not a high priority' (and/or) 'as important as it used to be' and a further five referred to the effect of the *Good Practice Guide* in eliminating need ('we are not a trade protection society') or changing its emphasis ('whether the premises are so numerous as to cause problems of noise and disorder').

Of the six respondents from committees which did not take account of need, quite different justifications were given. Two were of the opinion that 'If we refuse on need it is overturned by the Crown Court', while for the third, 'I don't think it is our job to say that 79 outlets is fine, but that 80 is one too many'. For the other three, 'we no longer consider it because of the *Good Practice Guide*'.

Reason for use/non use of need

A wide range of responses was received from chairmen asked to account for their committee's position on need. These do not lend themselves to tabulation or general review, so are simply listed below (figures in brackets represent the number of respondents making such comment):

There would be a free for all/over saturation/law & order problems. (21)

We consider market forces or whether the business is a viable proposition. (6)

It is overturned by judges at Crown Court. (3)

We no longer consider it because of the *Good Practice Guidelines.* (3)

We rarely consider it as there is little demand. (2)

We concentrate on suitability of premises/ whether the
applicant is a fit and proper person and disorder problems. (2)

We let the public decide. (2)

Our Clerk has advised us that we should take it into account. (1)

Because we've always taken it into account. (1)

People's livelihoods would be spread too thin if we didn't consider it. (1)

There is no point in having a licence if there is no need or demand. (1)

We rarely find a case where there is an absolute need for it. We wouldn't refuse a licence because we couldn't see the need, but we certainly wouldn't give a licence because there was a demand. (1)

In a rural area, with a lack of transport, there is a need. (1)

We are helping to create a wider range of choice for people. (1)

Use of need to justify a refusal

It was clear from speaking to licensing practitioners that a general feeling existed that need was sometimes used to justify a refusal where a committee did not want to grant an application, but had no reason for the refusal. Two of the examples given are outlined here.

First, an application for a convenience store off-licence in a village, where there is only one other outlet, a specialist off-licence opening restricted hours, but opposed by a number of people from the village. There is no doubt that the applicant is 'fit and proper' and all aspects of the premises, staff training, etc are accepted as of the highest standard. The police are happy with the application, but a number of local people attend (including the existing licensee) and say that they do not want a convenience store in their village. The objectors put forward no evidence of nuisance, trouble or disorder saying only that if they want to buy alcohol they can do so from the existing store. The application is turned down, the reason given 'failure to prove need'.

It could be argued in this example, that the committee are perfectly entitled to turn the application down on the grounds of lack of need. But, argue the practitioners, this represents abuse of use of the concept.

A second example is the licensing of stores on petrol forecourts. Here we were given examples where evidence needed to allow such a store to be licensed was overwhelming, all aspects of the application were in order, but the justices, not liking the idea of licensing such premises, invoked lack of need to refuse the application.

To be fair to our respondents, the question which we put to them may not have made clear that we were asking them whether they ever used need, as it were, improperly. As such it is worth repeating the question here: 'How useful a concept do you find need/demand? Is it useful to justify your turning down an application when you feel it shouldn't be granted?' The responses can be seen in Table 5.4

Table 5.4

Would use it to justify	23 (48%)
Would not use it	23 (48%)
No response given	2 (4%)

Of those who said that they would use need to justify refusal of an application, the majority added that they would only use it if there was genuinely no need for an additional licence. So the most that can be said on this issue is that it may be that justices will invoke need, where otherwise they would not, in the case of an application they felt should not succeed. Whether such a course of action is a proper use of their discretion is clearly a matter for debate.

Evidence of need

As mentioned above, a number of methods have been developed in order to present evidence to committees on the question of need. All of these methods are admissible, although it was clear from some of the policy documents, for example, that petitions would not be accepted. It is submitted that any evidence which is relevant (and petitions are) is admissible and should not be excluded. Of course what weight the committee attached to the evidence would be a matter for them.

Respondents were asked to consider each of the methods of proof and to rate their importance in evidential terms. The responses appear in Table 5.5.

Table 5.5

	Very Important	Important	Slightly Important	Not Important
Radius Maps	6	24	9	9
Market Research	4	12	16	16
Petitions	6	19	16	7
Witnesses	22	23	2	1
Trade Objectors	4	14	21	9
Police Objections	40	7	1	
Letters	4	17	23	4

These findings are very interesting, for while the importance attached to the police view may have been foreseeable, that attached to witnesses is higher than expected and the views on market research surprising, ranking lower than letters.

A number of respondents mentioned other evidence which they would consider and we are disappointed that we did not think to include these; especially as one, the evidence of the applicant, is a glaring omission (for two respondents very important evidence). Other chairmen referred to the local authority (very important (3), important (1), slightly important (1)) and local counsellors (important (1)).

Radius Maps

That 19 percent of respondents ranked radius maps as not important fits roughly with the policy data shown in chapter 4 (Table 4.7). For just over 80 percent radius plans had some importance and half thought them important:

Because our area is so vast it means that we have magistrates who are not familiar necessarily with the area for that application, so it does help those who are not familiar with that particular area to know where all the licensed outlets are.

I find them very useful because you can see at a glance where the other outlets are and it does give you, if you know the area which we do here, some idea how many people live in a specific area.

On the other hand:

Historically we regarded them as important. Whether they will be so important now with the new concept of not dealing with need ... they will be useful but not essential.

Most of the outlets are known by us anyway by our own local knowledge and no I don't rate them very highly at all.

Market Research

As mentioned above, the results for market research were surprising, for each respondent regarding this evidence as very important: 'It gives you the answers as to whether there is a need and demand', four times as many felt it not to be important; their comments indicating a cautious approach to market research:

I am always cautious about market research, because if you ask the right question you get the answer you want and I think the problem is that you approach somebody in the street, you don't get a random sample, because there will be a number of people who will refuse to be interviewed. So you are only going to get a sample of people who are prepared to be interviewed.

We like to know what questions have been asked in the market research and that they are not loaded.

Any statistics can be manipulated.

I don't think they are always genuine.

Petitions

Responses here were quite well balanced across the rankings, roughly equal numbers putting petitions as very important and not important; the same balance being apparent between important and slightly important. Clearly, the quality of the petition in terms of the way it was collected, the wording and the nature of the signatures are important in assessing what weight will be given to it:

The ones we get are engineered and people are encouraged to sign who may not live near.

Customers are often bamboozled into signing.

You have to check that the same signatures don't occur on several pages.

I treat them as a non-event because quite often you see the same names down two or three times.

For some committees a properly conducted petition is looked on in a more positive way:

The public are saying something to us.

Anybody who has gone to the trouble and feels strongly enough to take up a petition must be looked at very seriously.

Witnesses

Ninety-four per cent of respondents viewed the evidence of witnesses as very important or important, with only one chairman expressing the view that such evidence was unimportant. For the lawyer, such evidence carries considerable weight as it can be exposed to cross-examination, but this was not mentioned by any of the respondents who clearly took the view that 'If you have witnesses coming to court they must feel quite strongly one way or the other', so that 'If someone has taken the trouble to come, then personally I would take more notice of it'.

Trade Objectors

Despite the generally accepted view that the Licensing Act is not a piece of trade protection legislation, some one third of respondents considered the evidence of trade objectors to be important or very important:

They are in business to make a living and I think they should be considered.

They are looking at their own livelihood and I think we have to bear that in mind.

However, for some two-thirds of chairman the apparent conflict of interest would make such evidence only slightly important or not important:

I would be very wary of them because they are looking at their own needs. They are objecting because of financial situations.

One has to consider they are trying to protect their own trade and magistrates are not in the position to protect trade.

We are not there to support someone's livelihood.

Police Objections

As expected, police objections on the grounds of need figured most strongly in the minds of the respondents, with 83 per cent considering such evidence as very important and nobody ranking it as unimportant:

Our police object very rarely so when they do make comments we view them as very serious comments and take notice of them.

Quite clearly, police objections were related to questions of trouble, crime and disorder, such issues being of great concern to the justices:

You have to rely more and more on the police giving evidence both on need and order, need being seen by the higher courts more and more as tied to law and order. Law and order and saturation seem to go hand in hand.

A tension was identified between the police role and the extent to which it is being exercised in relation to licence applications. A number of respondents perceived resource difficulties as precluding the police from being as active in licensing matters both as they used to be and as the chairmen would now like them to be:

They have limited resources and limited personnel but we don't get the input into the licensing hearing that we used to get a few years ago.

I wish there were more of them, but the police tend not to object because of funding, as it is costly.

Letters

Letters ranked just behind petitions and slightly in front of trade objectors (although not for everyone 'They are more important than petitions, and they are all read'). While they may represent the views of local people, they were given much less weight than witnesses attending in person to give evidence, for: '... we want to see them in court. Anybody can write letters and on hearsay evidence we wouldn't take too much notice.

Balanced against that is the comment from one of the respondents who placed letters as very important saying:

You have to be realistic. Often these people may have to give up a day's work to attend a hearing, so letters are important.

Decision making on need

To try to learn something of the way in which respondents took decisions on need a basic set of facts relating to an off-licence application was presented to the respondents who were asked whether, on what they had heard, they would grant or refuse the application. Clearly this is an artificial and much simplified process, but reflects the sort of exercise which may be carried out in a training programme. The facts were these:

In a residential area there is a rank of six shops. A specialist off-licence at one end and a small licensed supermarket at the other. There is a convenience store in the middle which is applying for a licence. There are no police objections and the premises are suitable with a good security system. The applicant is a fit and proper person and staff training is good. All other relevant issues are fully complied with. The supermarket and the specialist off-licence object on the grounds that there is no need for another off-licence in that row of shops. Would you grant a licence?

One respondent said that the committee would need to consider other factors before making a decision, including problems of disorder in the area and the opening hours of the proposed licensed premises. Of the rest, 38 (79%) said that they would grant the licence, nine (19%) said that they would refuse the application. Comments made by those who would grant fell into three categories; those who felt it would be tantamount to a restraint of trade not to grant, others who felt need was satisfied (presumably as a different type of outlet), and some who felt it would in any event be allowed on appeal:

... it would be a restraint of trade not to allow them to have a licence.

It's not our place to restrict trade. It may well be that we would take a private view that this chap is an absolute mug but that is up to him.

I think possibly there is a need in the immediate area.
We would grant it. There isn't a need for it but as I have explained, say we turned it down it would go to the Crown Court and the judge would grant it.

Those who said that they would refuse the application based their decision on lack of need. In this group too some had an eye on appeals:

We would probably decide there was no need if there were already two outlets in a bunch of six shops.

I wouldn't grant it because I think two is enough, although it could be overturned on appeal.

There was evidence of a change of attitude among licensing committees and also an indication that all members of a committee might not be in agreement on matters of need:.

Nowadays I probably would. In the old days I wouldn't have done.

Historically we wouldn't, but now almost certainly we would.

I would grant it but I would have to fight a couple of members of my committee, but it would get through.

The *Good Practice Guide*

Awareness

The next section of the interview dealt with the recently published *Good Practice Guide*. Respondents were asked whether they were aware of the *Guide* and if they with their colleagues had had the opportunity to consider its contents. As can be seen from Table 5.6 most had knowledge of the *Guide* with half having considered its contents.

Table 5.6

	Aware of *Guide?*	Considered contents?
Yes	46 (96%)	24 (50%)
No	2 (4%)	16 (33%)
Considered briefly		8 (17%)

Adoption

Various stages and degrees of commitment to the *Guide* were apparent from comments made by respondents:

We have adopted it as our good practice recently.

Yes and we are going to use it.

My committee are keen to take this forward. Our current guidelines are in fact very close to the new format.

My recommendation to my bench is that we adopt it whole heartedly.

We will probably go along with its recommendations.

Some of the recommendations I think are irrelevant, some are relevant, some are pedantic. We have agreed with the chairmen of XXX licensing committee that we will update policy statements and incorporate some of the recommendations in it. However, we will pick out relevant factors that apply to our particular area.

Assessment

As already mentioned, the *Guide* contains radical proposals for reform of the need criterion. This section of the interview sought to gauge specifically respondents views on these. In order to be sure that respondents were clear as to which sections of the *Guide* they were being asked to comment upon the relevant sections were read out and dealt with individually. The findings are laid out below.

(1) ... when considering the question of need, the committee should mainly be concerned with the issues of public safety, and the protection of the public against nuisance and disorder and should ensure that the premises in the area should not become so numerous as to produce problems of noise and disorder.

This section represents the cornerstone of the *Guide's* proposals and its authors will be heartened to hear that almost all of our respondents (46 (96%)) expressed agreement. However, things are not that simple. For while some expressed unconditional agreement: 'I think that is what is going to be defined as need in the future and it will be necessary for magistrates to conform with that'. Others saw this as only part of what they should be considering: 'We would agree with that, but we would also look at the other issue of need as well as just looking at the public order aspect of it.

(2) ... the issue of sufficiency of licences should carry little or no weight in determining applications for new licences.

There was less conformity on this section. And while 30 (63%) respondents expressed agreement, there were reservations:

Ambiguous, but I agree.

I personally would have some reservations, but we have accepted it.

Yes, there must come a point where there are too many though.

Some comments from those who disagreed with the section are:

I think saturation is a point that the higher courts are already looking at. There have been cases where saturation has been considered a reason not to grant licences and therefore I don't actually fully agree with the *Good Practice Guide* on that, because I think saturation must be looked at in areas which actually then lead, of course, to disorder. The two go hand in hand.

I don't agree with that. I would not include in my policy document. It isn't constructive.

(3) The number of premises in the area will not be so numerous as to lead to problems of noise and disturbance or disorder.

As with (1) above, a high degree of agreement was expressed with 44 (92%) respondents in accord with this section. Few comments were offered. The need for evidence and the possibility of revocation of 'premises that are causing problems' were mentioned by two chairmen who supported the section; while for the small number who did not (8%):

This is largely a matter for the planning authority and the enforcing authorities. I don't think we should make value judgements about numeracy (*sic*) with the limited information we have from the application.

Licence holders will say that in law it is not their responsibility for noise outside their premises as people go to and from. It is a police problem rather than a magistrates' problem. We couldn't refuse on the grounds that someone might be slamming a door at midnight. The publicans themselves cannot be held liable either.

(4) As the committee will rely on its own local knowledge of the area there is no need for the applicant to provide evidence of premises already licensed on an application for the grant of a new justices' licence.

Twenty (42%) respondents expressed agreement, making this the only section of the *Guide* with which a majority of respondents (58%) expressed disagreement - not surprising, given that some two-thirds of respondents considered radius plans as important/very important as evidence of need (Table 5.5)? For many, a major concern was that the Guide had failed to recognise the loss of the 'local knowledge' which they saw taking place:

... benches are being amalgamated ... There will be occasions when none of them have got any experience of the location.

I think a radius map is useful and licensing committees are not as local as they once were. The Lord Chancellor's direction is to have fewer, larger benches covering a bigger geographical area.

I think we should have them (radius maps) and it does jog your memory and no one can know everything about any given area.

I strongly disagree with that. Until the last two years or so the licensing committee regularly went out days and nights particularly in the summer period to inspect various problems and visited a total of about 100 premises per year. The licensee would welcome our visits. This has now been withdrawn and without exception every licensing member of all three committees thinks that this is to the detriment of the licensing committees. Therefore we want all the information every time.

Some chairmen were adamant that they would continue to require radius maps:

We would not cross them off our policy documents and we will not remove the need for them.

I would object. I find them essential centred on the actual premises with 1/3 mile or kilometre equivalent and I would prefer a 12/50 map to get the actual positioning of the premises and a larger map to show the premises so that we could substantially cover up to 1/2 mile.

Even for those who agreed with the suggestion that radius maps should no longer be required, reservations were made:

They do sometimes help to jog the memory...but we wouldn't insist upon them ... would only need them in exceptional circumstances.

This is true on our bench where we know everybody, but this would be more difficult in the urban areas.

I agree there is no need for it and we would probably visit the place anyway.
(5) The committee does not consider it relevant, when considering an application for the grant of a licence, to have regard to the need to protect the interest of existing licence holders nor to restrict competition.

There was almost full agreement (96%) with the sentiments expressed in this section of the *Guide*, most committees already operating such a policy. As some of these respondents put it: 'It is not our duty to look after their interests', 'It is up to existing licence holders to protect themselves', 'We are not here to restrict competition'.

Dispensing with need

Having taken the chairmen through the provisions of the *Guide* they were then asked 'how do you feel about dispensing with the requirement for need?'. Twenty-two respondents said that they were happy to dispense with need, 26 (54%) were not. A selection of comments, both for and against speak for themselves:

Looking solely at need and demand, which is your remit, I think it is becoming a dead duck. The emphasis certainly in this committee is always on good public order.

Eventually when there is a new policy I am sure we ourselves won't be emphasising so much on need. It is the general trend.

Need is less of a concern than it was. It is difficult to sell off the idea after so many years, but undoubtedly the main concern is public order, public safety and public nuisance.

I quite like what they have said about safety and public nuisance and I think that it is a better criterion than need because it is clearer, but it needs to be spelt out a bit better.

Need has been so discredited a new word has to be found. It will still be taken into account, whether it is done by the magistrates or the local authority but it may not be exactly as it is defined at the moment.

There must be need in the new format. Need as it used to be is wrong, but if it's need that is likely to create a disturbance for the public, then yes it must be considered. We would not consider the old need, but if the amount of premises were too numerous and could possibly create a problem with noise and disturbance, then we would have to consider that.

I think it is a pity they have dispensed with it. They are really falling short on the knowledge and expertise of the licensing justices. I don't think the situation has improved now that the question of need has gone.

I don't think we can totally dispense with some consideration of need or demand. We could just open the floodgates and question why we have licensing at all. I think we have to take account of the area, the local people, the public nuisance aspect, so in a sense need does come into it. Definition of need is very difficult.

I disagree with that. That's a good way to become unpopular with the rest of the licensing trade and other objectors who live in the area - people would say 'what on earth do you bother to sit for if you don't consider need?'

Public nuisance, threat to public order and safety considerations

Respondents were then asked how they felt about relying solely on considerations of nuisance, disorder and public safety rather than need when considering applications. Thirty (63%) of chairmen expressed themselves happy to do this. While most considered such considerations to be important (see above), 18 respondents felt that need should still be an important consideration. A few mentioned that 'It is very difficult to refuse applications. You have to look long and hard to be able to refuse one'.

Consistent policy on need

When asked whether they considered that all licensing divisions should have a consistent policy on need, only three respondents said no - because: '... every area has its own particular problems', '... every area differs. The needs are different. We have a lot of unemployed. The social composition of areas is different'.

Thirty-three (69%) respondents favoured a consistent policy on need, with the threat from the Task Force report evident:

Anyone making an application should be able to go to any licensing committee in the country and know what they have to do to satisfy that committee in order to obtain a licence. It should be consistent and not a lottery.

If we don't have a consistent approach ... licensing will pass over to the local authorities. They (the drinks industry) wanted the end of licensing panels and licensing committees because there was such inconsistency.

I firmly believe that if magistrates don't take a sensible, pragmatic view of licensing laws it will be taken away from the magistrates and be given to the local authority, which is not necessarily the best way of dealing with this matter.

The remaining quarter of the sample expressed themselves to be in favour of consistency, but stressed the need for regional variations. A desire to retain some discretion was also expressed:

It is important that we should all try to take on board what the Justices' Clerks' Society said and try to have uniformity. I think we ought to be consistent but I don't want to be straight-jacketed. I want to be left with some discretion.

There would probably have to be variations within the policy for the various types of areas. This is because you have rural areas, cities and towns. Generally it should have a broad framework.

Discussion

Historically, the regulation of liquor licensing has been placed in the hands of local justices, with one of the matters considered relevant by the justices being whether there is a ‘need’ for the proposed outlet. Further, as the Erroll report put it:

The policy of restricting the number of retail outlets for intoxicating liquor to the minimum regarded as necessary for the legitimate needs of the population is older than the licensing law itself, although its application by the licensing authorities, and its overt support by central government has varied considerably from time to time. (Erroll (1972), para.14,p.295)

While many of the policy documents analysed in chapter 4 were not explicitly regulatory, some stated clearly that ‘The Committee exists: (among other things) To regulate the number of licensed outlets’.

What is generally not addressed is why the number of outlets should be regulated by the licensing justices rather than being left to the planning authority. If, as is generally assumed, the aim is to avoid problems of nuisance, noise and disorder, why do many policies specifically mention such matters, then go on to state that ‘need’ must be shown?

From the historical outline in chapter 2 it can be seen that public, official and licensing committee approaches to the question of need have indeed varied over time.

Simply put, alcohol-related problems led to increased restrictions, while social and commercial pressures for liberalisation produced relaxation of controls. Examples of the former occurred in the 1780s (led by a campaign against vice and immorality) and the 1980s (‘lager louts’ and public health concerns), while examples of commercial/social pressures prompting relaxation can be seen in both the 1660s and the 1960s.

While the 1970s and the Erroll report continued the move towards relaxation, resistance in the 1980s from public health and criminal justice practitioners effectively stopped further significant liberalisation. However, a new wave of pressure for reform became apparent in the 1990s, with the prospect of deregulation, an increasingly sophisticated body of licensing practitioners, the seeming reluctance of the Crown Court and Divisional Court to support justices’ refusals based simply on need, social expectations of a more European approach to licensing and a fast expanding leisure/drinks industry.

Need

It is clear that the question of need has for many years been a major feature of deliberations before licensing justices. And it does seem that for many committees the concept has been elevated into a self-contained and self-justifying principle. So that an application for a new justices' licence may be refused simply because there are already sufficient licensed premises in the area - no evidence being necessary that any adverse consequences possibly may flow from granting the application. (Objectors often being existing traders appearing to protect their business interests.)

In order to prove need, applicants are then obliged to resort to arguing that they are going to provide something new, not already being offered in the area, and that this is what people want. Witnesses are called to say we want/need this new facility; others, called by objectors, say we do not want/need it. Petitions are produced for and against and ever finer distinctions are drawn between existing and proposed premises - 'we have a better range', 'more generous opening hours', 'a family atmosphere', 'a theme bar', 'a cafe bar', 'a venue for those aged over 25', etc.

As discussed in chapter 3, the Divisional Court decisions in *Mead* and *Consterdine* meant that the need criterion could no longer rely on a self-contained definition but that the reasons for its inclusion in a policy document now had to be considered (at least on appeal before the Crown Court). Driven by these cases, commercial pressures and increasing criticism, not to mention the Task Force report, the *Good Practice Guide* was published in early 1999 and so far as need is concerned proposed radical reform. It should also be noted that the current government review is said not to be considering need, because the 1996 Working Group has already deliberated on the matter and recommended that it no longer be a criterion for refusal of a licence.

Analysis of need

Here we adopt the approach used by the Erroll committee, by asking the same questions as those posed in their report. This provides a useful framework for our analysis as well as the opportunity to compare our findings with those of Erroll some 27 years ago.

(a) is there any consistency of approach among justices on the application of the "need" criterion? For the practitioners surveyed in chapter 3 the answer was emphatically 'no'. The lack of consistency being seen as 'a major problem'. A look at Table 4.6 supports this view - some 18 phrases reflecting a need criterion being identified in the policy document analysis, and a similar diversity displayed in relation to evidence of need (radius plans, petitions, etc).

The interviews with licensing chairmen produced similar results (thus indicating adherence to policy documents). Publication of the *Good Practice Guide* during the course of the interviews made it difficult properly to analyse the responses on the pre-Guide position in their committee. However, it can be seen from Table 5.5 that very different views are apparent on the relative merits of methods used to prove need.

Looking at Table 5.5 an applicant may see that market research is generally considered to be unimportant and witnesses as very important, when presenting evidence of need before committees. This applicant may then arrive before a committee armed with a dozen witnesses and no market research to find that they are before a committee which rates market research highly and witnesses as not important.

The justification offered for different considerations obtaining among committees is, of course, the desire to respond to local conditions. And the proper course for any applicant is to look carefully at the policy document for the relevant district. But as committees have sought to make their policy document comprehensive they have grown in length and are now criticised for being overlong and complicated.

Further, as seen from Tables 3.2 and 3.3, licensing practitioners are a specialised breed. While general practitioners may do some licensing in their local area, most is conducted by those who practise nationally - to have to maintain a library of over 300 policy documents and keeping up-to-date with new editions is seen as onerous by many practitioners.

Despite the move towards ‘county’ and ‘area’ policies Erroll‘s finding of inconsistency remains true today. The *Good Practice Guide* if adopted nationally should introduce consistency, at least at a definitional level. The position at the time of writing is, of course, even less certain - as applicants not only need to be aware of the relevant local policy, but have further to discover whether the *Guide* has been adopted, wholly or in part, by the committee before whom they are appearing - this position hopefully will be resolved following the February 2000 brewster sessions (some committees have, at the time of writing, already revised their local guidelines).

(b) Has the scope and use of the justices’ discretion led to undue complexity in the law? Erroll thought not. However, the development of the complex and sophisticated (sometimes ludicrous) methods of proving (and refuting) need outlined in this report means that undue complexity now most certainly does exists. There is a small army of experts who travel the country producing radius maps, demographic analyses, licensing surveys, market research studies, etc. What effect, if any, the *Guide* will have on such matters remains to be seen.

(c) How far is the justices’ power to restrict the number of licensed premises actually used? Erroll was unable properly to answer the questions of how often need was used and why, but estimated some eight percent of applications were refused on need. Unfortunately, it is difficult to analyse the data from our interviews due to the effect of the *Guide*. However, as can be seen from Table 5.3 nearly 90 percent of respondents applied a need criterion and the comments offered as to why need was applied are instructive. Also, roughly 50 percent of respondents said that they would use need to refuse an application they felt should not be granted (Table 5.4) - practitioner respondents clearly felt that justices sometimes ‘hid’ behind need in order to refuse an application (chapter 3) - although as mentioned already this question may have not been well enough phrased to be fully understandable to all chairmen.

(d) Does the justices' absolute discretion serve any useful purpose in present circumstances? Erroll was concerned that justices should not involve themselves in matters relating to market forces and trade competition. The data collected in our study show that generally (chapter 5), the justices recognise such considerations to be outside of their remit (but see Table 5.5 on 'trade objectors'). Practitioner respondents held strong views that the number of outlets should be left to market forces and that it was not for the justices to deliberate upon such matters (chapter 3).

For Erroll, public protection 'against nuisance and disorder' was a legitimate consideration for licensing committees. Our data supports this view (chapters 3, Table 4.5, chapter 5), as does the *Good Practice Guide*. And there is no doubt that justices do take seriously such matters, thus the importance of police objections (Table 5.5).

The future of need

Historically, we are in a period characterised by relaxation of licensing restrictions. The Home Office working party has recommended that need is abandoned, and while there appears to be little prospect of amending legislation (2002 seems to be the earliest forecast), the Justices' Clerks' Society and Magistrates' Association have published guidelines which, if adopted nationally, will have the effect of limiting need to a consideration of alcohol-related problems of noise and disorder - effectively abandoning it in its self-contained, current form.

The results from our small practitioner survey show lawyers to be happy with this development, the police less so (Table 3.4). So far as the licensing chairmen are concerned, while not all were fully conversant with the Guide, it was generally welcomed, with respondents almost unanimous that issues of nuisance and disorder should be considered in applications for new licences, while matters of trade protection should not. Less agreement was shown on the provision that sufficiency of licences should carry little weight and more than half of the respondents expressed themselves to be unhappy at the prospect of dispensing with need.

These findings are important, for at the time of writing it is not clear how widely the Guide will be taken up, or whether it will be amended 'to suit local conditions'. It may also be the case that if the threat of loss of the jurisdiction, recommended by the Task Force recedes, support for the *Guide* will diminish.

Maintaining the balance

The tension visible throughout the history of the need criterion in liquor licensing has been in balancing the freedom to sell and consume alcohol with the concern to limit harmful social effects of alcohol consumption. The number of outlets has increased over recent years: and if adopted, the effect of the Guide will fuel a further increase. How is the balance to be maintained?

Adopting the Guide?

If adopted nationally, the *Guide* will have the effect of removing the justices' unfettered discretion in licensing matters, abandoning as it does the simple need criterion. The progress of the *Guide* needs to be monitored and its application analysed.

Noise, nuisance and disorder

Licensing committees will always look carefully at the possibility of a grant causing or contributing to alcohol-related problems in the area. For the *Guide* there must be 'a real rather than a fanciful risk of disturbance or disorder ... and where there is a real risk ... committees should expect the police to object to the grant of a licence rather than to merely make representations' (JCS 1999, para.3.28). There appears to be full agreement from our data that disturbance/disorder is a justified concern for licensing committees.

Police role

While the police have long had an interest and role in licensing, with their views carrying much weight before committees (Table 5.5), the *Guide* underlines the fact that:

We consider the police have an important role in licensing to ensure that where there is an identified risk of public disorder or to community safety it is drawn to the attention of the committee (*ibid*).

It is essential that the police view be sought on this provision and their agreement secured (although this may, of course, already have been done) and further, that there is some degree of consistency around the country in the way in which this role is carried out - otherwise the same charge of inconsistency may be levelled.

Market forces

The economic realities of the business world mean that the costs involved in setting-up and licensing a new outlet will restrict the number of premises. While this may be true, it ignores the fact that 'a saturation of outlets can reduce the costs of obtaining alcohol by reducing travel time ... and ... produce competitive pressures that lead to falling prices and increased consumption (Baggott 1999, p.11). Also, corners may be cut by businesses fighting to survive in a more crowded market place (the answer here is revocation - see below). This may be a particular problem where a large, well-funded newcomer opens among smaller older established businesses. Patterns of retail trade and any undesirable developments need to be monitored.

Enforcement and revocation

The corollary of a more liberal regime for the granting of licences is more rigorous enforcement of licensing restrictions and a tougher approach to revocation of licences. These matters currently are being considered by the government's licensing review. Among the options are tougher enforcement. It is recognised that there is often a reluctance to impose revocation because of the financial consequences and effects on employment and livelihoods, so that a wider range of sanctions is under considerations, including warnings, cautions, fines, suspension of licence, restricted hours, etc.

A major problem seems to be that while the *Guide* has the potential to relax entry to the licensed trade, any legislation on enforcement/sanctions may be a long way off. Further, what is the police view on the prospect of increased enforcement and revocation proceedings? For the latter, solid evidence will need to be presented of the alleged breaches and the causative link between the premises subject to revocation proceedings (particularly for any Crown Court appeals).

Government review

Despite the Home Office working party already having deliberated on the question of need, and recommending its abandonment, it is to be hoped that the government review will include a consideration of need, particularly in light of the *Guide* which has been published since the working group reported.

Public health perspective

The Royal College of Physicians were of the view that 'the law should require the licensing justices to balance the commercial demand for such a licence against the risk that such a licence poses to public order, safety and health' (Royal College of Physicians 1991, p.91). While current debates have considered the first two of these, the third, public health, seems largely to have been ignored. While recognising the difficulty justices would have in taking public health considerations into account when considering licence applications, nevertheless, it is important not to loose sight of the wider social and public health implications which may flow from increased availability of alcohol.

In its recent *Proposals for a National Alcohol Strategy for England*, Alcohol Concern had this to say:

Licensing continues to be needed to regulate the sale and consumption of alcohol because of its intoxicating and addictive properties, its potential to damage heath and contribute to nuisance and disorder. Determining within a legal framework the ages, times and location of purchase and consumption, the three primary aims of licensing should be to protect the young, to prevent disturbance and disorder, and to control excessive consumption in the interests of health and safety. (Alcohol Concern 1999, para.4.2.)

The White Paper from the Department of Heath *Saving Lives: our healthier nation,* published in July 1999, promises ‘joined up thinking’ to tackle the problems of ill heath. Part of the strategy is a national alcohol policy to be published in the Spring 2000. This takes in alcohol-related crime and disorder. There is also the Crime and Disorder Bill which intends that addressing alcohol-related problems be included in local plans. In some areas this is already in operation, most notably, perhaps, in Cardiff, where an evaluation is about to start - we await the results with interest.

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GROUNDS FOR REFUSAL SPECIFIED IN SCOTTISH LICENSING LAW

1. Under the Licensing (Scotland) Act 1976, as amended, Scottish licensing boards are required to refuse an application for the grant of a new licence if they consider one or more of the grounds specified in the Act applies. Otherwise, the application is to be granted.

2. The grounds for refusal are specified in section 17(1) of the 1976 Act and are:

   (a) that the applicant, or the person on whose behalf or for whose benefit the applicant will manage the premises or, in the case of an applicant to which section 11 of the Act applies (application by other than a person), the applicant or the employee or agent named in the application is not a fit and proper person to be the holder of a licence;

   (b) that the premises to which an application relates are not suitable or convenient for the sale of alcoholic liquor having regard to their location, their character and condition, the nature and extent of the proposed use of the premises, and the persons likely to resort to the premises;

   (c) that the use of the premises for the sale of alcoholic liquor is likely to cause undue public nuisance, or a threat to public order and safety;

   (d) that, having regard to the number of licensed premises in the locality at the time the application is considered and the number of premises in respect of which the provisional grant of a new license is in force, the board is satisfied that the grant of the application would result in the over-provision of licensed premises in the locality.

3. Under the law in Scotland, an application for a new licence, including one or the provisional grant of such a licence, may be refused on any of the grounds above. An application for the renewal of an existing licence may be refused only on grounds (a) to (c); and an application for the permanent transfer of a licence only on ground (a). There is no separate provision in Scottish law permitting the removal of an existing licence to new premises.

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[i]. 11 Henry VII c.2(1494)
[ii]. 5&6 Edward VI. c.25(1552)
[iii]. 2 Geo.11 c.28,s.11, 1729.
[iv]. See further Weir (1984).
[v]. This section is a modified version of Light (1997)
[vi]. A second departmental committee was set up in Scotland, under Dr Christopher Clayton, which reported some eight months later.
[vii]. Leader, *Justice of the Peace, 135*, 24-5.
[viii]. Leader, *The Solicitors' Journal, 116*, 929.

[ix]. Although it is interesting to note that the 'Statement of Policy' given as an example at Annex 'C' contains mention of public safety, disorder and nuisance, as well as 'amenity effects ... on the surrounding neighborhood; but no mention of need/demand.
[x]. Reported in *Licensing Review*, no.6, July 1991, p.6.
[xi]. Reported in *Licensing Review*, no.11, October 1992, p.4.
[xii]. Copies available from Better Regulation Task Force, Room 67a/3, Cabinet Office, Horse Guards Road, London SW1P 3AL (0171 270 6601).