Health Promotion Directorate | Te Whatu Ora

DLC Network Webinar

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Involving Community in the Alcohol Licensing Process

Presented By:

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Health Promotion Directorate |Te Whatu Ora. DLC Network Webinar 21 JUNE 2023
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Introduction

1. The *purpose* of this paper is to identify why community involvement is central to successful *reform* of alcohol licensing in New Zealand. The *object* of this paper is to help achieve greater community involvement in the process so that the *purpose* and *object* of the 2012 are realised.

2. Most *community* participation in alcohol licensing hearings comes from objectors. Sometimes an agency will call *community* folk as witnesses but not often. More often than not objectors from the *community* are lay folk unfamiliar with your DLC licensing process. My purpose in focussing on this topic is that Parliament deliberately set out to redress the failed liberalisation experiment of the 1989 Act when enacting the current 2012 Act. The focus is returning power to the *community*.

3. The *community* is central now to alcohol licensing. This is apparent in:

    - sections 3 & 4 (purpose/object)
    - sections 102/128/140 (objections)
    - sections 104/120/130/144 (DLC = decision maker)
    - sections 186-193 (composition of DLCs)
    - Local Alcohol Policies (LAPs) – but as you don't get involved in those unless they exist, LAPs are a rabbit hole I don't intend to fall into in this paper/presentation

4. In 2018 I unsuccessfully endeavoured to persuade the Authority and the High Court that section 3 was significant to DLC applications[1]. Recently[2] the Supreme Court has affirmed the conclusion of the Court of Appeal that section 3 and section 4 must be read together.[3]

> *"[83] When applying the statutory test, the Licensing Authority must address s 4 which sets out the object of the 2012 Act. We do not, however, see that as excluding s 3 which explains the purpose of the Act. We read these sections together. The Act introduces a reasonable system of control on the sale and supply of alcohol that seeks to achieve closely related outcomes; that alcohol is sold, supplied and consumed safely and responsibly and harm from excessive and inappropriate drinking is minimised. The word "reasonable" is in s 3 and it is sensible to treat "unreasonable" for the purposes of ss 4 and 81(4) as being, in effect, the obverse of that. As well, the objects of safe and responsible "sale, supply, and consumption of alcohol" and minimisation of "the harm caused by the excessive or inappropriate consumption of alcohol" referred to in s 4(1)(a) and (b) are not opposites to be balanced against each other. Rather they pull in the same direction. This is because supply and sale of alcohol that is safe and responsible will tend to minimise alcohol-related harm."*
>
> *"[84] We agree with the Court of Appeal (and with the Licensing Authority) that a precautionary approach is open and that, in any event, a restriction may be justified on the basis of there being a reasonable likelihood that it will reduce alcohol-related*

[1] *Shady Lady Lighting Ltd* [2018] NZARLA 198 *Lower Hutt Liquormart v Shady Lady Lighting* [2018] NZHC 3100.
[2] 5 May 2023.
[3] *Woolworths NZ v Auckland Council* [2023] NZSC 45.

harm, a point that we discuss in greater depth shortly. This is consistent with a line of cases that starts with the judgment of the Court of Appeal in My Noodle Ltd v Queenstown Lakes District Council under the 1989 Act and carries on through decisions issued under the 2012 Act.66 It is, as well, consistent with our reading of ss 3 and 4."

5. What this means for you is that you are now entitled to ask yourself, *"Will the grant of this application reasonably benefit the community as a whole as well as being consistent with the object of the Act?".* I have already received a DLC decision recognising this[4], when refusing to grant a new licence for a tavern on a site where there had been a tavern for several years.[5]

6. The significance of the centrality of *community* folk to alcohol licensing will be further reinforced in April 2024 when it is anticipated that the current *Community Participation Amendment Bill* will take effect for DLC hearings.[6]

7. Your role is, as we all know, inquisitorial and evaluative. A DLC hearing is not an adversarial process – even though currently it may look like it is. Key issues for a DLC to evaluate are:

    - What is the role and risk profile of this applicant currently/or in the future in relation to the *safe and responsible*:
        - *sale;* and
        - *supply;* and
        - *consumption of alcohol* in the *locality*/**community** where the premises are located? and
        - what does this applicant do/or propose to do, to *minimise alcohol-related harm* in the *locality*/**community** where the premises are located? and
        - is the *locality*/**community** a *vulnerable* one?[7]
        - in addition to the relevant statutory criteria.

    It is reasonable to assume that actually local folks who live in the **community**/*locality* surrounding the premises, or whose children go to school nearby, are the most likely to be knowledgeable about these section 3 and 4 factual matters. Especially if the application is a renewal or a new applicant for an existing licensed premises. It is also frequently the case that residents are aware of prior licenses in the area and the impact they had.[8]

8. After all, the Tri-agencies are often:

    - reactive
    - under-resourced
    - over committed

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4 FNDLC *Castle Management Paihia Ltd* 01/ON/NZDLCFN/015/001/MIN [2023] (6 June 2023) at 111 and 161.
5 The applicant was trading on a temporary authority.
6 It is expected there will be a lengthy delay from enactment to commencement (for the DLC provisions at least) to enable DLC training to occur.
7 In the *Nishchay* sense.
8 See for example *Shady Lady Lighting* objectors' evidence.

- not always out and about inspecting *licensed premises* after business hours, and certainly not usually after midnight (unless they are Police in a CBD)

In short, their (agencies') experiential evidence may be limited to spot visits, irregular inspections, sporadic complaints. Residents living in the locality on the other hand experience the operation of the licensed premises daily, or, in the case of a new entrant, can describe what happens in their neighbourhood on a day-to-day basis.

9. It is very much in your interests to hear from the **community** what goes on in their **community** where the subject premises are located.

10. You too (in the main, although not always) are local folk, or appointed because of your knowledge of licensing matters. Hopefully both. You are independent decision-makers for the local council and are a committee of that council. You are expected to apply the law and precedents to the factual circumstances existing in **your communities** and assess the risks associated with granting an application and the benefits of refusing an application against the statutory criteria. **Community** folk are a prime source of information for you.

11. Even where an existing licence has been sold and a new entrant appears – so that sections 102(4) and (4A) apply – ***suitability*** (as the sole objection criterion) actually extends to how the premises have been operated. This indirectly encompasses:

- section 3's *community benefit*; and
- section 4's *object*; and
- section 105(1)(d) and (j) *(hours/systems/training/staffing)*; and
- the effect of the business on the *amenity and good order of the locality*.[9]

*So, who is the **community**?*

12. The starting point is usually physical proximity/geography. A person residing or working within a radius of 1.2 kilometres of the premises will have **status** to object.[10]

13. Other folk who may be affected (adversely) by the business at the premises. In this respect remember that both section 4(2)(b) [object section] and section 5 [definition of *alcohol-related harm*] refer specifically to *harm* in ***the community***. So, who might these folk *in the community* be, that you, as a DLC, should be pro-actively seeking to involve? Here are some suggestions:

- schools – BOTs/Principals;[11]
- early childhood centres;
- churches, mosques, temples;
- residents associations;
- the local iwi/hapū – Kuia/Kaumātua;
- the Māori Wardens Associations;

[9] Re *A Karambayev Ltd* [2013] NZARLA PH 1214 at [16]-[22]. (NB sometimes this case is reported as "*Barcode*")
[10] I ignore the exceptional cases of rivers and SHs separating a resident from a premises.
[11] *Nishchay* was a BOT/Principal/Staff led community opposition.

- you might include licensees or their organisations;
- councillors;[12]
- a Licensing Trust;
- HNZ/Clubs NZ;
- the Council?
- FENZ;
- Local Boards and Community Boards;
- GPs;
- Charities running social welfare or drug/alcohol addiction facilities – e.g. in Newtown/Miramar Wellington the Salvation Army object from time to time.

14. In the following session next week I will canvass how you might pro-actively encourage this active **community** participation. What is certain is that the public notification and site notice procedures are woefully inadequate in a technological and community participative process which is wanting grass roots involvement.

Novel ways to improve Community Participation

15. I am going to discuss your several toolkits in my next session next week. Suffice it to say that there is more than enough power in the Sale & Supply of Alcohol legislation for you to exercise more proactive powers,[13] to ensure and encourage more **community** participation.

16. *Vulnerable community* proactive notifications – there is nothing to stop a DLC from issuing a Minute or Direction to the Secretariat (or the applicant)[14] defining an affected locality/**community** and requiring ***a letterbox drop*** outlining the details of the application, where it can be inspected, and how a resident or business could support or object to the application.

17. Likewise – a Minute or Direction to the Secretariat to send a copy of the application and the same information to local:

    - schools;
    - early childhood centres;
    - G.Ps;
    - residents' associations;
    - iwi/hapū/Māori Wardens.

18. As a DLC you could require the Secretariat to **send a Hearing Guideline** from your territorial authority or from the HPA to all objectors outlining:

    - the DLC process, including hearings;
    - what evidence and submissions were;

[12] Some councillors take an active personal role – Mr Utikere in PN.
[13] Sections 188 and 203(9).
[14] Preferably the Secretariat.

- how to make any special needs known.[15]

19. Every public hearing should be preceded by a **Directions Conference** at which all parties are entitled to, and invited to, attend.[16] This could be in person or electronically. It probably needs to be fixed for a time out of core business hours or times where parents are dropping off or collecting school children or cooking dinner, or travelling to and from work. I suppose the other option is a lunchtime window.

19.1 The Agenda for a PHC will include:

- explanation of process;
- exploration of possible hearing dates (availability);
- exploration of times of day/days of week availability;
- explanation of what *evidence* is as opposed to what *submission* is;
- identification of the controversies and non-contentious issues;
- questions from attendees;
- ascertainment of special needs:
  - (i) interpreter?
  - (ii) electronic attendance rather than physical attendance?
  - (iii) other disability?[17]
  - (iv) suppression?
- timetabling pre-filing of evidence. This should start at least six weeks before the hearing for the applicant and 14 days or 21 days thereafter for agencies and objectors so there is at least 2-3 weeks after the last evidence is filed for everyone to absorb it all;
- timetabling of parties, and witnesses during the hearing (fixing order);
- timetabling closing submissions as well as fixing sequencing of closing submissions.

20. Despite the best endeavours of DLCs, some lay objectors are likely to turn up on the day of the hearing not having filed evidence and not having brought any written evidence. Section 204(3) entitles them as of right to:

- *appear*; and
- *be heard* – this means produce submissions orally or in writing; and
- *call and examine* their own witnesses (including themselves) – this refers to evidence in chief; and
- *cross-examine* any other witnesses,

[15] English second language; physical disability.
[16] Pre Hearing conference = *PHC*.
[17] In *Nishchay* there was a resident who was illiterate but who was an important witness – that can be accommodated seamlessly and privately without humiliation.

either personally or by counsel.[18] If this happens, be alive to the possibility of adjournment if the applicant can demonstrate prejudice.

21. Every PHC should make it clear that if any person who is a party has any subsequent issues to be resolved before the hearing they can raise them through the Secretary – who will share that with all parties and the Committee – who will decide how to dispose of the matter. Likewise, if any party wants the Committee to summons any witness. [This is called reserving leave to apply further if necessary].

Improving Community Involvement during the hearing

22. The cardinal rule is always *natural justice* – particularly to the applicant, but also to anyone else likely or possibly affected adversely by your decision – so this is likely to include agencies and objectors.

23. Prior to the commencement of the hearing – say 5-15 minutes beforehand – get your hearings advisor/secretary to informally welcome everyone and demonstrate or explain (again) what will happen and where and when. Simply pointing out where the witness table is useful, to put objectors from the community at ease.

24. Once the Committee enters:

- Chair introduces Committee;
- Chair outlines process;
- Chair might ascertain if any media are present;
- Chair calls and records appearances starting with applicant, then agencies, then objectors;
- My recommendation is that the Chair calls out the name of every person who filed an objection (irrespective of whether they have filed evidence or pre-warned they intend to appear) as they have all the s 204(3) rights at the hearing;
- Chair ascertains parties/witnesses availability/order/confirms pre-arranged priorities and ascertains if there are any party/witness time constraints;
- Chair should indicate whether the Committee has already taken a view, or intends to do so. As a Committee you do not want any parties present – or you must invite every party. All or none.

25. The batting order of parties/witnesses should be reconfirmed.

25.1 Applicant opening.

25.2 Applicant's witnesses:

- evidence in chief;
- order of cross examination.

25.3 Then either agencies one by one followed by objectors or objectors followed by agencies.

[18] Counsel = practicing barrister or solicitor. An advocate or a company director needs your permission to represent another person. The test is – will you be assisted by this person? - *Alicious* v *LNDLU* (ARLA).

26. Before calling on the applicant, ensure there are no other outstanding issues or questions, e.g.:

- suppression? Or
- challenges to pre-circulated evidence?

27. Remember, every party has a right of cross-examination. Every party has the right to examine their own witnesses. This latter right entitles a party to lead updating or rebuttal evidence in chief in response to other evidence, in addition to pre-filed evidence if they wish. Some expert/experienced witnesses appear on the day with a new document summarising and highlighting the key points of their written pre-filed briefs.[19] This is helpful and permissible under the Evidence Act.

28. My emphasis on every party is deliberate. I have been counsel for objectors where the Chair has failed to afford me the opportunity to cross examine the applicant's witness. I have represented other parties and seen Committees fail to afford cross examination opportunities to lay objectors. That is simply wrong. It breaches the statute and the NZBORA s 27.

29. It is the same for opening and closing submissions. The right *to be heard* in s 204(3) is specifically and separately a right to present submissions – both opening and closing. Objectors are understandably aggrieved by a process which allows the applicant's lawyer and the agencies or their representatives to open and close but does not treat them similarly. This applies whether the submissions are at the hearing or subsequently in writing (for closings). Fairness and natural justice and reasonableness require all parties to be treated the same.

30. Of course, evidentially, and for closing submissions, the orthodox position is that applicants have the last word – ie go last. So, rarely, an applicant might seek to adduce fresh evidence in reply/rebuttal after all the agencies and objectors' evidence if evidence was given by those parties that was not put to the applicant or took them by surprise.

Conclusion

31. The critical thing for community folk is the need to be heard. Not only to be listened to and heard, but respected. Incidentally, *"cross examination"* does NOT mean question crossly or aggressively or loudly. You are responsible for maintaining decorum and order and respect.[20] This is an objector's view point of the 100 year old judicial maxim from Hewart LCJ – *"Justice should not only be done but should manifestly and undoubtedly be seen to be done."* (1923). Whilst the legislation remains in its current form you need to protect *community* witnesses from any attempt at intimidation or ridicule by counsel or other parties. It is not hard to do. Many DLC chairs now-a-days emphasise the absolute need for courtesy and respect at the outset of the Hearing.

32. The Sale of Liquor Act 1989 was a failed experiment in liberalising alcohol regulation. It swung the pendulum from the 1962 Act to the completely opposite end of the spectrum, [from a quantitative licensing regime where new pubs and bottle stores were almost impossible to obtain licences for because the statutory tests were *"necessary and desirable"* to an Act in which licences were easy to get and difficult to lose.] **The 2012 Act is significant reform and rebalance with the emphasis back on communities and community decision making and community LAPs**. Certain well organised commercial interests have frustrated the Parliamentary intent through their perpetual

[19] The Wellington MOH Dr Stephen Palmer frequently does this.
[20] As counsel it is my practice when a witness evades my question to repeat it **more quietly**, prefaced by *"I will ask you this question again".*

litigation. The current Community Participation Bill will address that frustration by swinging the legislative pendulum in quite a new direction. In the meantime, **my presentation seeks to encourage and facilitate greater community participation under the current rules of engagement**. Adopting these pro-active practices will prepare you well for 2024.

33. This paper has consciously been extremely light on judicial case references – deliberately. However, if any registrants want judicial authority for the propositions advanced herein, you can contact me at 021 430 462 or Alastair.sherriff@buddlefindlay.com.

Good luck

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