



AGENDA ITEM: 8

**LICENSING & GAMBLING
COMMITTEE:**

5 FEBRUARY 2013

Report of: Assistant Director Community Services

Relevant Managing Director: Managing Director (People and Places)

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SUBJECT: LICENSING ACT 2003 - EARLY MORNING RESTRICTION ORDERS

Wards affected: Borough wide

1.0 PURPOSE OF REPORT

1.1 To determine a formal request to consider an Early Morning Restriction Order for the Ormskirk area.

2.0 RECOMMENDATIONS

2.1 That the Committee resolve to consider or dismiss a request for an Early Morning Restriction Order for the Ormskirk area submitted by Councillor Owens.

2.2 That if the Committee agree to consider the request detailed in paragraph 2.1, the Assistant Director Community Services be instructed to gather preliminary evidence in respect of a proposed Early Morning Restriction Order for the Ormskirk area, including the views of partner agencies and available alternative options, for presentation to the Licensing and Gambling Committee.

3.0 BACKGROUND

3.1 Members will be aware that the Police and Social Responsibility Act 2011 amended the Licensing Act 2003 (the 2003 Act) on the 31 October 2012. One of these amendments was to create Sections 172A to 172E in the 2003 Act, which gives the Council, acting in its role as Licensing Authority (the Authority), the power to create an Early Morning Restriction Order (EMRO).

3.2 An EMRO enables the Authority to prohibit the sale of alcohol for a specific time period between the hours of 00:00 and 06:00 in the whole or in part of the Borough.

- 3.3 The Home Office Statutory Guidance issued under Section 182 of the 2003 Act (the Guidance) states that an EMRO is designed to address recurring problems such as high levels of alcohol related crime and disorder in specific areas at specific times; serious public nuisance; and other instances of alcohol related anti-social behaviour which is not directly attributable to specific premises.
- 3.4 Once established, the supply of alcohol in contravention of an EMRO would be an 'unauthorised licensable activity' which is an offence under Section 136 of the 2003 Act and could result in a closure notice (and subsequent Closure Order under the Criminal Justice and Police Act 2001) or review of the respective licence / certificate on crime prevention grounds.
- 3.5 Accordingly, an EMRO:
- Applies to the supply of alcohol authorised by Premises Licences, Club Premises Certificates and Temporary Event Notices (TEN);
 - Can apply for any period beginning at or after 00:00 and ending at or before 06:00. It does not have to apply on every day of the week and can apply for different time periods on different days of the week;
 - Can apply for a limited or unlimited period (for example, an EMRO could be introduced to cover a specific event);
 - Can apply to the whole or any part of the Borough, but can exclude premises which have clearly demonstrated to the Authority that it does not contribute to the problems that form the basis for a proposed EMRO;
 - Will not apply to any premises on New Year's Eve (defined as 00:00 to 06:00 on 1 January every year);
 - Will not apply to the supply of alcohol to residents by accommodation providers between 00:00 and 06:00, provided the alcohol is sold through mini-bars and/or room service; and
 - Will not apply to a relaxation of licensing hours by virtue of an order made under Section 172 of the 2003 Act (e.g. Jubilee celebrations).

Outline of the EMRO implementation procedure

- 3.6 The implementation of an EMRO is dictated by the 2003 Act, the Licensing Act 2003 (Early Morning Restriction Orders) Regulations 2012 and the Guidance. A proposed EMRO must be advertised for at least 42 days on the Council's website and in a local newspaper. A notice of the proposal must also be sent to all affected people in the EMRO area and be displayed in the area generally. The Authority should also inform responsible authorities and neighbouring licensing authorities.
- 3.7 During the 42 day consultation period, the Authority may receive relevant representations in relation to any aspect of a proposed EMRO. If one or more relevant representations are received, a hearing of the Licensing and Gambling Committee (the Committee) must be held to consider them. It should be noted that Guidance expects that such hearings may take place over several days.
- 3.8 The hearing process is similar to that for a Premises Licence application; however, Members should note the following in relation to a hearing about a proposed EMRO:

- The hearing must commence within 30 working days following the last day of the consultation period;
- To allow any third party to attend, the hearing does not have to take place on consecutive working days if this is considered it to be in the public interest;
- The Authority must give its determination within 10 working days of the conclusion of the hearing; and
- The Authority is not required to notify those making representations of its determination so that the determination may be put before Full Council to decide whether or not to make the EMRO.

3.9 As a result of the hearing, the Committee has three options:

- To decide that the proposed EMRO is appropriate for promotion of the licensing objectives;
- To decide that the proposed EMRO is not appropriate for the promotion of the objectives and therefore that the process should end;
- To decide that the proposed EMRO should be modified. However, the consultation and determination process must be completed again.

3.10 If the Committee is satisfied that the proposed EMRO is appropriate for the promotion of the licensing objectives, its determination must be put to full Council for final approval and implementation.

3.11 No later than 7 days after the day on which the EMRO is made, the Authority must send a notice to all affected persons and display a notice in the EMRO area. Notice must also be given to neighbouring licensing authorities and the Secretary of State. Details of the EMRO must be maintained on the Council's website and the Council's Statement of Licensing Policy should also be revised, which would include a further period of public consultation.

4.0 CURRENT POSITION

4.1 A formal request to consider an EMRO for the Ormskirk area was received from Councillor Owens on 18 November 2012. This request is attached at Appendix 1 to this report, which details the reasons for the request and provides examples of the problems experienced in the area.

4.2 If the Committee resolves to consider this request, it is recommended that more detailed preliminary evidence, opinions and options are obtained so the Committee can make an informed decision whether to propose an EMRO.

5.0 ISSUES

5.1 Members will be familiar with the four statutory licensing objectives under the 2003 Act, which are:

- The prevention of crime and disorder;
- Public safety;
- The prevention of public nuisance; and
- The protection of children from harm.

- 5.2 If the Committee resolves to consider the request detailed at paragraph 2.1, the Guidance states that an EMRO should only be contemplated when there is sufficient evidence. Accordingly, the Committee should be satisfied that it has sufficient evidence to demonstrate that its decision is appropriate for the promotion of the licensing objectives. The Committee should consider evidence from partners, including responsible authorities and the Community Safety Partnership, alongside evidence from Council Members and Officers, to determine whether an EMRO would be appropriate for the promotion of the licensing objectives.
- 5.3 The Guidance provides a non-exhaustive list of matters that should be considered as part of the evidential argument for an EMRO:
- Local crime and disorder statistics, including statistics on specific types of crime and crime hotspots;
 - Statistics on local anti-social behaviour offences;
 - Health-related statistics such as alcohol-related emergency attendances and hospital admissions;
 - Environmental health complaints, particularly in relation to litter and noise;
 - Complaints recorded by the Council, which may include complaints raised by local residents or residents' associations;
 - Residents' questionnaires;
 - Evidence from local Councillors;
 - Trends in licence applications, particularly trends in applications by types of premises and terminal hours;
 - Changes in terminal hours of premises;
 - Premises' capacities at different times of night and the expected concentrations of drinkers who will be expected to be leaving premises at different times; and
 - Evidence obtained through local consultation.
- 5.4 The Guidance further suggests that the Authority should consider the general balance between the promotion of the licensing objectives and the burdens on the licensed trade.
- 5.5 Notwithstanding the above paragraphs, the Guidance also makes it clear that an EMRO is ultimately a weapon of last resort and other options should be considered before the implementation of an EMRO. The evidential burden will rest with the Authority to prove that it has exhausted all other options, which would include:
- Review the licence of any particular troublesome premises;
 - Planning controls;
 - Encouraging business lead initiatives - i.e. "best practice guide";
 - Positive measures to create a safe and clean town centre environment in partnership with local businesses, transport operators and other departments of the Council;
 - CCTV;
 - Designation of places where alcohol may not be consumed publicly and the confiscation of alcohol in such areas;

- Police enforcement of the general law concerning disorder and anti-social behaviour, including the issuing of fixed penalty notices;
- Prosecution of drunks causing offence;
- Prosecution for sale of alcohol to a drunk individual under Section 141 of the 2003 Act;
- Late Night Levy;
- Police powers to close down instantly for up to 24 hours (extendable to 48 hours) any licensed premises in respect of which a TEN has effect on grounds of disorder, the likelihood of disorder, or noise emanating from the premises causing a nuisance;
- Introduction of a Cumulative Impact Policy.

- 5.6 In light of some of these options, the co-operation and support from Lancashire Constabulary (the Police) will be necessary.
- 5.7 The evidential burden on the Authority could therefore potentially have two aspects. Firstly, the Authority will need to prove that the problem in the first instance warrants the use of an EMRO; and therefore support from the Police will be important. Secondly, that all other options have been tried and have failed in solving the problem.
- 5.8 Informal evidence of a significant number of low level nuisance / crime incidents has already been submitted to the Licensing Service by Councillor Owens and the principle of an EMRO is supported by the New Way Tenants and Residents Association. However, this information forms only part of the evidence detailed at paragraph 5.3. Furthermore, Members should be convinced that the options detailed in paragraph 5.5 have been considered and have been unsuccessful.
- 5.9 The Committee should note that the Guidance is explicit in stating that an EMRO is a “powerful tool” and it would therefore seem that the scale of the issue would need to be severe nuisance for an EMRO to be implemented. Several other local authorities are at varying stages EMRO development, but it should be noted that the majority of these are currently city authorities. By way of example, Norwich City Council is seeking an EMRO in response to rising crime since licensed premises opening hours were extended to 06:00 in 2009. In this case, violent crime was quoted to have increased by 10.6% and common assault increased by 64.8%, compared to the three-year period before 2009. The resultant proposed EMRO seeks to limit alcohol sales to 02:30 or 03:00 on weekdays and 03:30 or 04:00 at weekends.
- 5.10 The Committee may also wish to consider whether any potential stigma may be attached to the proposed EMRO area, given that the Guidance makes it clear that an EMRO is a weapon of last resort. There is also a perceived risk that an EMRO could reduce the attraction of not only the area affected by the EMRO but wider areas of the Borough. An EMRO also has the potential to drive away trade to neighbouring towns and cities that do not have restricted hours for alcohol sales. An EMRO could therefore affect local trade, the late night economy and reduce employment opportunities, the impact of which could spread beyond the night time economy and have a detrimental effect on the general local economy in the area.

- 5.11 Not to proceed in accordance with the Guidance would leave the Council open to legal challenge and could raise public expectations that the evidential base and/or the opinions received may not be able to support. Accordingly, it is proposed that the Committee be provided with more detailed preliminary evidence, opinions and options if it wishes to consider proposing an EMRO for the Ormskirk area. Members should also note that the collation of such information would take a significant amount of Officer time and should not expect a further report for at least four months.

6.0 SUSTAINABILITY IMPLICATIONS/COMMUNITY STRATEGY

- 6.1 The 2003 Act legislation has the potential to impact upon the Community Strategy. The contents of this report have the following links with the Community Strategy: Community Safety (issues A and E); Economy and Employment (issue D).

7.0 FINANCIAL AND RESOURCE IMPLICATIONS

- 7.1 The recommendations contained in this report can be met within existing resources. However, no budget has been allocated for the costs associated with the implementation and/or enforcement of an EMRO. These matters will be the subject of future reports, if the Committee is mindful to propose an EMRO.

8.0 RISK ASSESSMENT

- 8.1 Outside of the hearing process outlined in this report, Judicial Review is the only method by which an EMRO could be successfully challenged. There is no appeals process, as the Authority has the power to revoke an EMRO under Section 172D(1) of the 2003 Act. Nevertheless, the cost implications of a Judicial Review should be considered, but Members should note that there are currently no legal cases to take guidance from on this matter.
- 8.2 By way of indication as to potential legal challenge, it is known that some licensing solicitors indicate that whilst Judicial Reviews can be costly, this is not necessarily the case if licensed premises act collectively and all contribute towards the legal costs of employing a specialist legal team. This is advocated as being commercially more beneficial than having to cope with the effects of an EMRO and the perceived damage it could do to licensed premises and the late night economy.
- 8.3 It is also known that some licensing solicitors are advising affected licensees to act swiftly and collectively against any indication of an intention to introduce an EMRO. Licensed premises and their representatives are therefore encouraged to express a strong willingness to challenge any decision to introduce an EMRO. Strength in numbers is perceived to give licensed premises the best chance to succeed, as this will also allow licensed premises to put forward a strong case for the Authority to consider trade friendly alternatives to tackle perceived problems with the late night economy. For example, the best practice schemes referred to above, Purple Flag scheme, taxi marshalls, street pastors, street ambassadors etc.

- 8.4 Furthermore, some licensing solicitors also appear to advocate the potential to challenge the legality of the power of an EMRO itself under human rights legislation, whereas others would seek to challenge a local authority on procedural grounds. This is because an unsuccessful challenge may also be perceived to be beneficial if the commercial gains from delaying the effects of an EMRO outweigh the cost of the challenge. However, again there are currently no legal cases to take guidance from on this matter.
- 8.5 The Council would not be the first local authority to consider an EMRO, as several local authorities including Norwich City Council, Derby City Council and the City of London Corporation are at varying stages of development. Nevertheless, Members should consider the balance between the promotion of the licensing objectives and the burdens of the licensed trade, before any measures are taken.

Background Documents

The following background documents (as defined in Section 100D (5) of the Local Government Act 1972) have been relied on to a material extent in preparing this Report.

Home Office Amended Guidance issued under Section 182 of the Licensing Act 2003: October 2012

Equality Impact Assessment

There is a significant direct impact on members of the public, employees, elected members and / or stakeholders. Therefore an Equality Impact Assessment is required. A formal equality impact assessment is attached as an Appendix to this report, the results of which have been taken into account in the Recommendations contained within this report.

Appendices

- 1 Formal request to consider an EMRO. Received from Councillor Owens: 18 November 2012.
- 2 Equality Impact Assessment.

Appendix 1

Formal request to consider an EMRO. Received from Councillor Owens: 18 November 2012

I am writing to formally request that the council consider implementing an Early Morning Restriction Order (EMRO) in Ormskirk.

You will be aware that the legal framework changed on 31 October 2012 and that additional flexibility has been provided with regards to EMROs. In particular, the evidential basis has altered and the requirement in relation to the licensing objectives is now to show that the action is “appropriate” rather than “necessary” as previously. I further note from the published Home Office guidance that significantly there is no right of appeal to the magistrates court in relation to an EMRO and that furthermore the guidance emphasises that evidence can be supplied by ward councillors.

Since late September our night-time noise and nuisance incident reporting system has received almost 90 complaints from more than 30 local residents in Derby Ward in several distinct locations. I am aware that residents in other parts of town e.g. Station Road have also logged complaints with the local police.

Very many of these complaints clearly relate to people on foot returning home at/after the current closing times of town centre licensed premises and I have forwarded some of these complaints to you. I will forward to you at the appropriate point the detailed complaints log as evidence for the consideration of the EMRO.

Section 16.9 of the guidance states: “If the licensing authority has identified a problem in a specific area attributable to the supply of alcohol at two or more premises in that area, and has sufficient evidence to demonstrate that it is appropriate for the promotion of the licensing objectives, it can propose making an EMRO.” Two of the licensing objectives in my opinion– the prevention of crime and disorder; and the prevention of public nuisance, would be promoted in Ormskirk by the introduction of an EMRO.

The guidance advises that other measures might be appropriate and I understand that many elements of good practice are already followed in Ormskirk. This has regrettably not prevented residents contacting me in the early hours complaining of exhaustion after being repeatedly awoken in the early hours in the middle of the working week. Some of these residents work in safety critical jobs and it is therefore of particular concern that this level of public nuisance persists.

I have thought long and hard before making this request. I do not do so lightly. I am aware of the economic benefits of the night time economy. However that must be set against the economic cost from criminal damage and the lost productivity and risks to safety of tired residents struggling through a day’s work following repeatedly being woken at night.

I note that any move to implement an EMRO must involve proper consultation and I strongly welcome that. We must try to strike a balance that allows a night time economy to flourish while protecting the amenity of local residents. My initial thoughts are that an EMRO which closes premises at midnight on weeknights (4 or 5 nights a week) while allowing hours at weekends to be determined by individual license applications might strike such a balance. However, I have written today to my contact

in the Ormskirk licensed trade to meet with interested parties again informally as I did earlier this year. Of course, the council will, in considering my request for an EMRO, decide on the more official informal and formal consultation that will be required. However, I remain of the view that the problem can no longer be tackled by good practice initiatives alone.

Appendix 2

Equality Impact Assessment - process for services, policies, projects and strategies

1.	<p>Using information that you have gathered from service monitoring, surveys, consultation, and other sources such as anecdotal information fed back by members of staff, in your opinion, could your service/policy/strategy/decision (including decisions to cut or change a service or policy) disadvantage, or have a potentially disproportionately negative effect on, any of the following groups of people:</p> <p><i>People of different ages – including young and older people</i> <i>People with a disability;</i> <i>People of different races/ethnicities/nationalities;</i> <i>Men; Women;</i> <i>People of different religions/beliefs;</i> <i>People of different sexual orientations;</i> <i>People who are or have identified as transgender;</i> <i>People who are married or in a civil partnership;</i> <i>Women who are pregnant or on maternity leave or men whose partners are pregnant or on maternity leave;</i> <i>People living in areas of deprivation or who are financially disadvantaged.</i></p>	<p><i>No. Whilst the matter contained in this report applies equally to all activities and premises prescribed within the area. If an EMRO is proposed, a full public consultation will be undertaken to ascertain any issues.</i></p>
2.	<p>What sources of information have you used to come to this decision?</p>	<p><i>The legislation requires that a period of public consultation be conducted, which will ascertain any inequality issues.</i></p>
3.	<p>How have you tried to involve people/groups in developing your service/policy/strategy or in making your decision (including decisions to cut or change a service or policy)?</p>	<p><i>If agreed, a proposed EMRO will be subject to a period of public consultation, the results of which will be brought back to the Licensing and Gambling Committee for determination.</i></p>
4.	<p>Could your service/policy/strategy or decision (including decisions to cut or change a service or policy) help or hamper our ability to meet our duties under the Equality Act 2010? Duties are to:-</p> <p><i>Eliminate discrimination, harassment and victimisation;</i></p> <p><i>Advance equality of opportunity (removing or minimising disadvantage, meeting the needs of</i></p>	<p><i>No. If approved, the proposed EMRO would apply equally to those activities required under relevant legislation within the proposed EMRO area.</i></p>

<p><i>people);</i></p> <p><i>Foster good relations between people who share a protected characteristic and those who do not share it.</i></p>	
<p>5. What actions will you take to address any issues raised in your answers above?</p>	<p><i>If agreed, a proposed EMRO will be subject to a period of public consultation, the results of which will be brought back to the Licensing and Gambling Committee for determination.</i></p>