Live music in small venues

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Under current law the performance of live music is regarded as "regulated entertainment" and must therefore be authorised by a premises licence, a club premises certificate or a "temporary event notice". There are certain exemptions under the *Licensing Act 2003*, for example music for the purposes of or purposes incidental to religious services or meetings or at places of public religious worship, and the performance of live music or the playing of recorded music if it is incidental to some other activity which is not itself regulated entertainment. Until 2005 there was an exemption known as the "two-in-a-bar" rule. This was a disapplication under the previous licensing law of the need for a public entertainment licence in certain situations, such as two performers singing or playing music, at premises where a justices' licence was in force.

In May 2009 the Culture Select Committee recommended that the Government should exempt venues with a capacity of 200 persons or fewer from the need to obtain a licence for the performance of live music. The Committee also recommended the reintroduction of a "two-in-a-bar" exemption for non-amplified music. In its response, the former Government rejected these recommendations. However, in October 2009, the former Government indicated that it was now minded to consider an exemption for live music in small venues with a capacity of less than 100 and would launch a public consultation on the issue.

This note describes the old "two-in-a-bar" exemption, summarises the proceedings in Parliament which led to its removal and refers to the introduction into the House of Lords of Private Members' Bills designed to restore this particular exemption and create others. It also considers evidence for the impact of new licensing laws on the provision of live music and suggestions for a "de minimis" exemption. The note describes the recent simplification of the process for making "minor" variations to a premises licence and concludes with a summary of developments since the 2010 General election. In March 2011 the Government indicated its willingness to give qualified support to Lord Clement-Jones's *Live Music Bill [HL] 2010-12*.

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1 Introduction

Under current law the performance of live music is regarded as “regulated entertainment” and must therefore be authorised either by a premises licence or a “temporary event notice”. There are certain exemptions under the *Licensing Act 2003*, for example music for the purposes of or purposes incidental to religious services or meetings or at places of public religious worship, and the performance of live music or the playing of recorded music if it is incidental to some other activity which is not itself regulated entertainment. Until 2005 there was an exemption known as the “two-in-a-bar” rule. This was a disapplication under the previous licensing law of the need for a public entertainment licence in certain situations, such as two performers singing or playing music, at premises where a justices' licence was in force. Since 2005 there have been calls to reinstate the exemption, in the wake of claims that its discontinuation has been injurious to small-scale live music-making.

2 The “two-in-a-bar” rule

Under legislation which was in force until 2005, a pub which provided music and dancing required two separate licences: a licence to sell liquor under the *Licensing Act 1964* - granted by the local licensing justices - and a public entertainments licence under the *Local Government (Miscellaneous Provisions) Act* 1982 (outside London) - which would be granted

by the local authority - to allow music and dancing on the premises. However, section 182 of the 1964 Act stated:

> No statutory regulations for music and dancing shall apply to licensed premises so as to require any licence for the provision in the premises … of public entertainment by way of music and singing only which is provided solely by the reproduction of recorded sound, or by not more than two performers, or sometimes in one of those ways and sometimes in the other.

In short, pubs did not need a public entertainments licence for live performances by up to two musicians. This was colloquially known as the “two-in-a-bar rule”. However, a licence was required when three or more musicians participated together, or if a succession of musicians performed individually during the course of an entertainment.[1]

The former Government's plans to change the licensing regime were set out in the white paper, *Time for Reform: Proposals for the Modernisation of our Licensing Laws.*[2] Among the many proposals was a single integrated licensing scheme covering both liquor sales and public entertainments. The basic licence would include conditions governing these. The white paper stated (paragraph 83):

> (…) the current exemption from public entertainment licensing which allows two musicians to perform in on-licensed premises should end (because discos or one or two musicians with powerful amplifiers can make more noise and so generate more nuisance than three without), and be subsumed into the broad permission granted under the basic licence.

This point was included in a written answer by Dr Kim Howells (then Minister for Tourism, Film and Broadcasting):

> **Miss McIntosh:** To ask the Secretary of State for Culture, Media and Sport (1) what recent representations she has received concerning the licensing of premises for public entertainment; and if she will make a statement;
>
> (2) what plans she has to change the law on the licensing of premises for public entertainment, with regard to the number of performers allowed to perform at unlicensed premises.
>
> **Dr. Howells:** I have received a number of representations recently from hon. Members on behalf of their constituents and from performers of live music calling for the abolition of the exemption which provides for up to two musicians to perform live in public houses without a public entertainment licence. These include a number of similar letters sent to me as part of a campaign. I have also received representations arguing that all live music should be exempt from licensing, that some licence fees are excessive, that some conditions attached by local authorities are disproportionate and that the current licensing regime deters spontaneous singing in public houses.
>
> Our plans for the modernisation of the licensing regimes were set out clearly in the White Paper "Time for Reform" (Cm. 4696) published on 10 April 2000. We proposed that the current exemption from public entertainment licensing that allows two musicians to perform live in premises licensed for the sale of alcohol should end. This is because one or two live musicians using powerful microphones and amplifiers can

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1 The point about sequentiality was confirmed in case law: *Toye v Suffolk Borough Council* [2002] EWHC 292 (Admin), cited in *Paterson's Licensing Acts 2003*, p4.; cf. "' Two in a bar' is put to the test in High Court"; "Sing-alongs bite the dust"; *Morning Advertiser*, 28 February 2002

2 HCm 4696H, April 2000

> make more noise and so generate more nuisance for local residents than three without. Alcohol and public entertainment licensing will be integrated into a single scheme. This would remove at a stroke a considerable amount of existing red tape and reduce the licensing costs which currently deter many venues from providing live music and dancing. The reforms will be implemented by means of primary legislation to be brought forward as soon as parliamentary time permits.[3]

A number of commentators at the time suggested that the former Government's white paper proposals, while aiming to reduce licensing burdens in respect of entertainments, could have the opposite effect. The reason for this was that, by removing the then current exemption for two or fewer musicians, *all* entertainment would be covered.[4]

3 The *Licensing Bill 2002-03*

In his 1998 foreword to Jeremy Phillips' *Licensing Law Guide*, John Saunders commented:

> Most of the higher courts which have had to grapple with the details of the licensing laws have found them to be badly drafted and incomprehensibly worded, whose true intent is buried in the mists of time. The clamour for reform seems to increase in volume every day, but when will the government find the will and the time to tear up the Licensing Act 1964?

The former Government did indeed bring forward a wholesale reform of licensing legislation in the *Licensing Bill 2002-03*. The main purpose of the Bill and resultant Act was to combine the alcohol and entertainment licensing regimes into a unified regime administered by the local authority. In principle, it would therefore be no harder (and no costlier when applying for the licence) for a public house to offer alcohol and entertainment than to sell alcohol alone, since the different activities would be authorised on a single licence.

One feature of the Bill was to remove the "two-in-a-bar" exemption. This proved controversial during the Bill's passage, and various attempts were made to insert an exemption along similar lines.

A small premises exemption was introduced into the Bill as an Opposition amendment during third reading in the Lords on 11 March 2003:[5]

> *Small premises*
>
> 12 (1) The provision of entertainment is not to be regarded as the provision of regulated entertainment for the purposes of this Act, where—
>
> (a) the number of persons attending the entertainment at any one time does not exceed 250, and
>
> (b) the entertainment terminates no later than 11.30 pm on the same day.
>
> (2) The provision of entertainment facilities solely for the purposes of the entertainment in sub-paragraph (1) above is not to be regarded as the provision of regulated entertainment for the purposes of this Act.

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3 HC Deb 23 April 2002 cc153-4W

4 Association of British Theatre Technicians, District Surveyors Association and Local Government Licensing Forum, *Model national standard conditions for places of entertainment and associated guidance*, 2002 – cited in Colin Manchester's paper at the 5th Annual Liquor Licensing Conference (CLT Conferences, 20 May 2002); cf. "Minister's plans may trap him in musical snares", *Morning Advertiser*, 13 December 2001

5 HL Deb 11 March 2003 c1284

A Government amendment in the subsequent Commons committee stage on 1 April 2003 removed this paragraph.[6]

During report stage, the then Opposition attempted, but failed, to re-introduce a small events exemption; this was similar to the one referred to above, but restricted to live music (probably to allay concerns over small cinemas screening films with an adult theme). Such a small events clause *was* successfully put back (a Government defeat) following Lords consideration of the Commons amendments on 19 June 2003.[7] The Government tabled a compromise amendment relating to dancing and live music in pubs etc. – where the venue has a capacity of 200 persons and where other situations apply. This is the exemption now contained in section 177 of the resultant Act, which is further discussed below.

An amendment during the Lords report stage exempted from licensing requirements the playing of unamplified music incidental to certain other activities. This was paragraph 11 of Schedule 1. The paragraph was subsequently removed during the Commons committee stage on 1 April 2003.[8] In its place, paragraph 7 of Schedule 1 was amended to exempt all music (including recorded music), unamplified or otherwise, incidental to certain other activities (such as the serving of alcohol in a pub).[9] How this would work in practice would of course turn on the interpretation of "incidental" – a point much discussed in the standing committee.[10]

During the passage of the Bill and subsequently, the former Government was consistent in its stated reasons for opposing the "two-in-a-bar" exemption. This is the current response given on the website of the Department for Culture, Media and Sport (DCMS):

> The Government believed this rule encouraged public houses to put on only one or two entertainers all night, or face the full cost of a public entertainment licence. This was extremely limiting and acted as a disincentive to a more diverse music provision. The Licensing Act aims to remove this disincentive and provide for all kinds of live music to be on equal footing whether one, two, five or ten performers are involved.[11]

Those who sought to reinstate the exemption, or some form of concession for small-scale music events, argued that the former Government was seeking to over-regulate an activity which did not generally give rise to crime and disorder problems, and such regulation would inevitably stifle creativity. Baroness Buscombe, moving an amendment to exempt, small premises, said:

> Our amendment could lead to a renaissance of live music and other small-scale entertainments. It sits with the Department for Culture, Media and Sport's goal of increasing participation in and access to the performing arts and using the performing arts to tackle social exclusion. It would include events that are, for example, advertised and, therefore, not necessarily just incidental to whatever else is going on.[12]

The Bill twice "ping-ponged" between Lords and Commons on the issue of an exemption for small gigs. The exemption was supported by both the main Opposition parties. Eventually, a

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6 SC Deb (D) 1 April 2003 cc72-86
7 HL Deb 19 June 2003 cc944-53
8 SC Deb (D) 1 April 2003 c72
9 SC Deb (D) 1 April 2003 cc66-72
10 ibid.
11 H"Regulated entertainment"H Q&A
12 HHL Deb 11 March 2003 c1278

compromise was reached when the then Government offered what became section 177 (discussed in section 5, below) and an exemption for morris and similar dancing.

4 Impact of the new Act

The *Licensing Act 2003* came into force on 24 November 2005. In considering a licence application, framing conditions for the licence and deciding whether those conditions have been adhered to, the local authority must have regard at all times to the four “licensing objectives” set out at the beginning of the Act (s4):

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

The performance of live music was categorised as “regulated entertainment” for the purposes of the Act, so must be covered by some form of licence - either a premises licence or a Temporary Event Notice ("TEN"). At the time of transition to the new regime there was much concern that the new law would adversely affect live music, because people, fearing expense or bureaucracy or both, would not seek either to apply for a new licence for previously unlicensed premises or to add music authorisation to the permitted activities on their existing licence. There was, for example, an e-petition on the Prime Minister's website which complained that "music and dance should not be restricted by burdensome licensing regulations" and attracted almost 80,000 signatures.[13]

4.1 Live Music Forum: 2004

To counter this perception, DCMS set up in 2004 the Live Music Forum, headed by sometime rock musician Feargal Sharkey. In 2004, the Forum published a "baseline study" of the existing live music scene in England and Wales, which reflects the state of affairs under the old licensing regime. Among its findings were the following:[14]

- Almost half of all venues (47%) have staged at least one live music event in the last 12 months, with 19% staging six or more in the last three months.
- One third (33%) of those who do stage live music feel that that the changes to the Licensing Act with regard to live music will have a positive impact across their industry, while 45% think the changes will make no difference.
- Two-thirds (64%) of licensees who do currently stage live music and know at least a little about the Act claim it will make no difference to the number of events they put on. 7% say that they will put on more events while 11% say they will put on fewer.

4.2 Further music research

In 2006 the Department commissioned additional live music research, focusing in greater detail on the experiences of smaller venues in dealing with the application process during the

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[13] Hhttp://petitions.number10.gov.uk/licensing/H. Government response at Hhttp://www.number10.gov.uk/Page12238H

[14] DCMS, H*A survey of live music staged in England and Wales in 2003/4: research conducted for DCMS*H, September 2004, p5

Act's transitional period. The results of this survey, conducted by Ipsos-MORI, are on the DCMS website.[15] The survey concentrated on smaller establishments, where music might be performed before up to 500 people, such as: pubs, wine bars and night clubs, hotels and inns, student unions, restaurants and cafes, members' clubs, and places of worship and community halls. From the Executive Summary (pp8-11) we learn that:

> 2.1.3 Across the broad range of establishments taking part in this survey, the proportion with authority to stage live music under the new licensing regime is very similar to the proportion of establishments which used to stage live music, either through a Public Entertainment Licence (PEL) or under other authorisations, such as 2-in-a-bar (60%). Just over three in five establishments (61%) have this authorisation under the new licensing regime. A further 2% have staged live music under some other authorisation (e.g. giving a Temporary Event Notice).

Overall, 55% of establishments reported that they found the application process "easy" and 27% found it "difficult" (*ibid*, 2.1.10).

Subsequently, DCMS commissioned BMRB Social Research to conduct a survey of live music staged in England and Wales. The survey was conducted between July and September 2007 covering live music put on in the previous 12 months. It also examined perceptions of the impact the new Act had had on the willingness and ability of secondary venues to stage live music. Key findings included the following:[16]

- The 2007 survey findings show that there has been a five percentage point decrease in the provision of live music in secondary live music venues in England and Wales since the baseline survey was conducted in 2004.
- This decrease in the provision of live music was reflected in a decrease in the proportion of venues that had staged live music regularly: 15 per cent of venues in the 2007 survey had staged live music regularly, compared with 19 per cent in 2004.
- While there has been a decrease in the provision of live music since 2004, this is largely explained by the decrease in provision in restaurants and cafes and in church halls and community centres, which between them account for just under 40 per cent of all venues in the survey population
- If restaurants and cafes and church halls and community centres are excluded from the base of venues, the proportion of secondary live music venues putting on live music in the previous 12 months is in line with that recorded in 2004 (49 per cent in 2007 and 48 per cent in 2004), as is the mean number of live music events staged across all venues (12 in 2007 and 13 in 2004).
- In other types of venue, provision has been broadly stable, with the exception of small clubs, where provision has increased since 2004.
- Most secondary live music venues (72 per cent) felt the Act had made no difference to the ease of staging live music. Nine per cent felt the Act had made it easier for live music to be staged while the same proportion felt the Act had made it more difficult to stage live music.

[15] DCMS/Live Music Forum, *HLicensing Act 2003: the experience of smaller establishments in applying for live music authorisationH*, December 2006

[16] DCMS/BMRB, H*A survey of live music in England and WalesH*, December 2009, pp10-11

4.3 Live Music Forum: 2007

The Live Music Forum survey was repeated in 2007, when the Act had been fully operational for over a year, with the intention of providing a measure of the Act's impact on the incidence of live music performance. [17] A press notice summarised the Forum's findings:

> Some very small scale live music events have had to be cancelled or had unnecessary restrictions placed on them following the introduction of the new licensing laws, according to the independent Live Music Forum's report published today.
>
> The Forum states that the lack of clarity in the legislation coupled with some over zealous local authorities is to blame and recommends that small music venues and those putting on acoustic gigs should therefore not have to acquire a licence to stage live music.
>
> The Forum, set up in January 2004 and chaired by Feargal Sharkey, was tasked by the Government to ensure as many venues as possible took advantage of the new licensing laws, to monitor the Licensing Act's impact on live music, and make recommendations to Government on how it might further bolster the UK's live music industry.
>
> Overall, the Forum has found that the Licensing Act has had a neutral effect on the UK's live music scene. Indeed, the new laws have delivered many benefits – for example, by removing the separate fee for live music and the annual renewal process.
>
> But while larger venues have seen the benefits of the new laws, some particularly small establishments have experienced difficulties.
>
> In its report, the Forum makes 28 recommendations. Among them it says the Government should:
>
> - define 'incidental music' to exempt small venues (less than 100 capacity) from needing a licence for live music, as well as performances that aren't the main attraction at a venue;
> - exempt venues putting on acoustic music from the need to obtain a licence;
> - ensure that existing music venues aren't liable to pay for noise-related issues if new homes are built nearby – the building developer should pay;
> - collaborate with the music industry and the National Union of Students to establish a new Live Music Network; and
> - encourage more local councils to set up rehearsal spaces for local musicians.
>
> The Forum found that the vast majority of local councils were very helpful when dealing with applications for live music. But Forum members did identify several instances where they felt councils had acted unreasonably and placed unnecessary conditions on licences which have restricted the number of live events.[18]

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[17] Live Music ForumH, *Findings and RecommendationsH*, 4 July 2007

[18] DCMS press notice 080/07, H*The Live Music Forum delivers its verdict – "small scale live music events impacted on by new licensing laws" – SharkeyH*, July 2007

4.4 Recent statistics

The BMRB survey of 2007 (referred to in section 4.2 above) was the last detailed survey of live music provision in England and Wales. Subsequently, the licensing statistics no longer allow a breakdown of live music provision by venue type – a fact confirmed by Lord Davies of Oldham in a reply to questions tabled by Lord Clement-Jones.[19] DCMS licensing statistics for 2007-8 suggested that about 40% of all licensed premises have a live music permission, or about 55% of premises with an "on-licence" for the sale of alcohol.[20] The estimated total for premises licences with live music provisions was 84,500 in 2009 and 85,900 in 2010 (an estimated 2% increase). There were 10,800 club premises certificates with provisions for live music in 2010 (an estimated fall of under 1% on 2009). Overall, the estimated total number of live music licences or certificates was 96,700 as at March 31st 2010.[21] However, just because a venue's licence has an authorisation for live music it does not mean that it can lawfully host live music. This is because if there are live music conditions on the licence, having live music is legal only if those conditions are implemented. For example, councils may require the fitting of noise limiters as a condition, an added cost which may act as a disincentive to the licensee. A case reported in Worcestershire in 2009 shows also how local authorities can and do make use of means other than the *Licensing Act* to regulate noise from live music in pubs. In this case the authority served a noise abatement notice on the licensees under the *Environmental Protection Act 1990*.[22]

5 Section 177

What is now section 177 of the 2003 Act was added at a late stage in the passage of the Bill in July 2003. As stated above, the Bill had "ping-ponged" between Lords and Commons on the issue of an exemption for small-scale music events and was passed eventually after agreement on the compromise solution proposed by the former Government and embodied in section 177. The DCMS website offers a summary:[23]

> Section 177 of the Licensing Act provides that where:
>
> - a premises licence or club premises certificate authorises the supply of alcohol for consumption on the premises and the provision of "music entertainment" (dance or live amplified or unamplified music)
> - the relevant premises are used primarily for the consumption of alcohol on the premises
> - and the premises have a capacity limit of 200
>
> then any licensing authority imposed conditions relating to the provision of the music entertainment will be suspended. This is subject to the exception of where the conditions were imposed as being necessary for public safety or the prevention of crime and disorder.
>
> In addition, where:

[19] HHL Deb 5 October 2009 cc399-400WA

[20] DCMS, H*Alcohol, entertainment and late night refreshment licensing, April 2007 - March 2008H*, October 2008

[21] DCMS, H*Alcohol, entertainment and late night refreshment licensing, April 2009 - March 2010H*, September 2010

[22] H"Licensee couple to quit over live music row",H *The Publican*, 9 July 2009

[23] H"Regulated entertainment", Q&A

- a premises licence or club premises certificate authorises the provision of music entertainment, which consists of the performance of unamplified, live music; and
- the premises have a capacity limit of 200

then during the hours of 8am and midnight if the premises are being used for the provision of that music entertainment but, no other regulated entertainment, any licensing authority imposed conditions on the licence which relate to the provision of the music entertainment will be suspended.

These suspensions can be removed in relation to any condition of a premises licence or club premises certificate following a review of the licence or certificate when further conditions may also be added to the licence or certificate.

These provisions will apply to any premises so long as the criteria set out in section 177 of the Act are fulfilled.

A textbook on licensing law describes this section as "probably the most tortuous provision within the *Licensing Act 2003*".[24] The Live Music Forum was of similar opinion and recommended that the section be deleted:

> 3.75 Section 177 of the Act provides, under certain circumstances, flexibility for unamplified live music. From what we have been told by both licensing officers and applicants, the current wording contained in the Act is convoluted and in many respects impenetrable. As a result of the complexity of language used we have yet to find a single example where this concession has been used either by licensing officers or venue owners.
>
> 3.76 If our understanding is correct, then the process would be as follows:
>
> (a) the venue would need to have a capacity of not more than 200 people;
>
> (b) the applicant would need to have appeared before a licensing committee, at a licensing hearing, and had conditions relating to live music attached to the premises licence at that hearing by that licensing committee;
>
> (c) if the premises were then to operate between the hours of 8:00am and midnight, and were it to be providing unamplified live music;
>
> (d) then any conditions, relating to live music, attached to the premises licence, except those relating to public safety or the prevention of crime and disorder, by the licensing committee, at that licensing hearing, would have no effect and could simply be ignored by the venue operator.
>
> 3.77 This would appear to be a quite extraordinarily complicated and wasteful process simply to arrive at, what is, ultimately, an exemption.[25]

6 A "de minimis" exemption?

After publishing its final report the Forum was disbanded. In its response to the Forum's report the former Government appeared to react positively to recommendations to remove small-scale and unamplified music-making from licensing requirements:

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[24] Philip Kolvin, *Licensed premises: law and practice*, 2004, p181

[25] Live Music ForumH, *Findings and RecommendationsH*, July 2007, p33

19. We accept the spirit of these recommendations and will explore options for allowing certain low risk live music performances to be exempt from licensing requirements, in addition to the existing exemption for incidental music. This is unlikely to result in a blanket exemption, but we will look at finding a meaningful way to exempt those events that are self evidently of low risk to the licensing objectives. This is likely to be pursued through the *de minimis* exemption route on which we plan to consult next year, but we will also explore other options.[26]

In 2007 and 2008 there were a number of indications that the former Government was considering amendments to the Act, designed to exempt low-impact or so-called "*de minimis*" licensable activities, including live music. In April 2009 Lord Clement-Jones asked about progress:

Lord Clement-Jones: To ask Her Majesty's Government further to the Written Answer by Lord Davies of Oldham on 24 March (WA 122), whether the Written Answer by Lord Davies of Oldham on 13 October 2008 saying "We hope to publish a consultation document in the autumn, and subject to the outcome, to have the exemptions in place by spring 2009" still applies, except as to timing; and, if so, what are the reasons for delay. [HL2658]

The Parliamentary Under-Secretary of State for Communications, Technology and Broadcasting (Lord Carter of Barnes): The Department for Culture, Media and Sport continues to consider how best to encourage live music, including the possibility of workable exemptions from the Licensing Act 2003. This is a difficult issue to resolve as any exemption would need to maintain necessary public protections in accordance with the licensing objectives. We will consult on any proposed exemption before implementation.[27]

In an oral exchange between these two peers, Lord Carter was more expansive on the former Government's dilemma:

[T]he Government recognise that there is evidence to suggest that small-scale informal gigs may have been negatively affected by the Act. (…) However, I have been reliably informed—and I pressed officials on this point—that it proved impossible to agree on exemptions that would deliver an increase in live music but still protect the rights of local residents. It is not the case that the Government have turned their eye to this question, but rather that we have sought to find a balance of interest. On this basis, the Government have agreed with the Musicians' Union and the LACORS to explore other ways of encouraging live music.[28]

Whatever form such an exemption might take, it is clear that there was no intention of re-creating the "two-in-a-bar rule":

Lord Colwyn: To ask Her Majesty's Government why they concluded that the exemption under the Licensing Act 1964 for live music by one or two performers was a source of public nuisance. [HL4465]

Lord Carter of Barnes: The provision in the Licensing Act 1964 known as the "two in a bar rule", was created before the widespread use of modern amplification. It was widely misunderstood, unpopular with musicians and not widely used. Feedback from local authorities' representatives and members of the public, however, showed that two performers with amplification can create a significant level of public nuisance. It was

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[26] DCMS, H*Government 's response to the Live Music Forum's report*H, December 2007

[27] HHL Deb 20 April 2009 c351WA

[28] HHL Deb 15 June 2009 cc932-3

abolished partly for this reason. Additionally, musicians' representatives argued that, given that an amplified duo could make a great deal of noise, it discriminated unfairly and irrationally against the majority of musicians, who perform in larger groups.[29]

7 The Culture, Media and Sport Committee report

In May 2009 the Culture, Media and Sport Committee, as part of its inquiry into the operation of the *Licensing Act 2003*, considered the Act's impact on live music.[30] As well as calling witnesses of their own, the Committee re-examined the evidence already published and came to the conclusion that "while the upper and middle end of the live music scene is still flourishing, live music in smaller venues is in fact decreasing". The Committee reported:

> 88. A number of the venues who now need a licence to host music performance would previously have been able to host small music events without the need for a Public Entertainment Licence, as no licence was required for a non-amplified performance of live music by up to two musicians (the so called "two-in-a-bar rule"). The trade bodies of the beer and pub trade indicated that many did not include music in their application at the time of transition to the new licensing regime as they felt concerned enough about obtaining a licence without adding extra conditions to it, and are now put off by the need to either apply for a new licence or a licence variation as both processes are costly and time consuming.
>
> 89. This situation is of concern to all those who want to encourage live music, as smaller and secondary venues are very important to the long term health of the music industry, playing an important part in the development of new artists and minority genres of music and adding to general diversity of cultural entertainment available to the public. The Live Music Forum concluded that it did not believe that the licensing of non-amplified performances for audiences of under 100 people was necessary or proportionate, a conclusion supported by music industry representatives in evidence to us. John Smith, General Secretary of the Musicians Union, explained the efforts made by the music industry during the passage of the Bill to gain an exemption for small venues: "We lobbied quite hard on an exemption for small venues and we said with a capacity of up to 200 and it almost got there".
>
> 90. In contrast representatives of the pub and bar trade told us that they would support the reintroduction of the two-in-a-bar exemption. (…)

Accordingly, the Committee concluded:

> **We recommend that the Government should exempt venues with a capacity of 200 persons or fewer from the need to obtain a licence for the performance of live music. We further recommend the reintroduction of the "two-in-a-bar" exemption enabling venues of any size to put on a performance of non-amplified music by one or two musicians without the need for a licence. We believe that these two exemptions would encourage the performance of live music without impacting negatively on any of the four licensing objectives under the Act.**

In its response, the former Government rejected both recommendations, arguing that there is no direct correlation between size of audience or number of performers and potential for noise nuisance or disorder:

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29 HHL Deb 1 July 2009 c62WA

30 Culture, Media and Sport Committee, H*The Licensing Act 2003*H, 14 May 2009, HC 492 2008-09, section 5

DCMS has considered exemptions for small venues, but has not been able to reach agreement on exemptions that will deliver an increase in live music whilst still retaining essential protections for local residents.[31]

The former Government's position was strongly criticised by UK Music, whose Chief Executive Feargal Sharkey commented:

> "Once again Government has tried to establish links between live music, noise nuisance and disorder yet once again it has failed to provide any evidence to substantiate its own allegations."[32]

Both the performers' unions, the Musicians' Union and Equity, expressed disappointment at the Government position. The Assistant General Secretary of Equity asserted that a small venues exemption would be "simple, easy to implement, and by-and-large cost free" and would bring "a significant increase in the number of venues hosting live entertainment – a benefit to artists and audiences in these recessionary times."[33]

A DCMS spokesman responded:

> "The old 'two in a bar' rule showed how blanket exemptions can be unhelpful. A duo playing loudly and attracting a large crowd might not require a licence, whereas an a cappella trio would. New laws that will make it much easier and cheaper for licensees to host live music are about to come into force, and there is already an underused exemption for incidental live music which we will promoting and educating licensees about in the coming months."[34]

8 The minor variations process

The above quotation from the DCMS spokesman alludes to the "underused" section 177 exemption.[35] It is also a reminder that, running parallel to the arguments over "de minimis" exemptions, there has been a separate development concerning "minor variations".

In November 2007 the former Government consulted on policy options for introducing a new, simplified process for making minor variations to premises licences and club premises certificates. This was followed, in August 2008, by a further consultation on the draft Legislative Reform Order that would amend the *Licensing Act* to introduce the new processes, the supporting statutory Guidance, appropriate fees and application forms.[36] The draft Order itself (in its final version) was laid before Parliament in March 2009.[37]

Section 34 of the 2003 Act sets out the basic procedure for varying premises licences. An application is required for any change to the licence as issued, including changes to physical features shown on the premises plan. There is a fee of between £100 and £1905 depending on rateable value, copies must be provided to up to nine responsible authorities such as the

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[31] H*Government Response to the House of Commons Culture, Media and Sport Committee Report on the Licensing Act 2003H*, Cm 7684. July 2009, p9

[32] UK Music, H*DCMS fails to support British music industryH*, 14 July 2009

[33] "HRejection of Licensing Act changes – contact your MP"

[34] Quoted in: H"696 to stay as Government ignores Whittingdale",H *Music Week*, 14 July 2009

[35] See above, section 5 of this Note

[36] DCMS, H*Legislative reform orders: proposals to: (1) Introduce a simplified process for minor variations to premises licences and club premises certificates and (2) Remove the requirement for a designated premises supervisor and personal licence at community premisesH*, August 2008

[37] H*Draft Legislative Reform (Minor Variations to Premises Licences and Club Premises Certificates) Order 2009H* (UP 531 2008-09). This is a revision of the draft Order originally laid on 8 December 2008 (UP 35 2008-09).

fire and rescue services, and the application must be advertised in the local paper or newsletter. Applications must be considered within 28 days and objections can be made on the basis of the four licensing objectives. If objections are received, there must be a hearing to determine the application, with any appeal against the outcome being made to the local magistrates.

The Order (as revised) simplifies this process where minor variations are being sought. In the Lords debate, the then Minister, Lord Carter, provided this summary:

> How exactly will the minor variations process work? Licence holders will make an application to the licensing authority in the normal way but, unlike the full variation process applicants, they will not be required to copy the application to responsible authorities or advertise it in a local newspaper. The form will be shorter and easier to complete. Applications will be decided in 15 days with no hearings or appeals and applicants will pay a flat rate fee.
>
> While we believe that this process is a significant change, it does contain important safeguards and protections. First, applications will be refused if they could have any adverse impact on the licensing objectives, which include the prevention of crime and disorder, public safety, the prevention of public nuisance and the protection of children from harm. Licensing officers will decide if applications meet this basic test, consulting responsible authorities like the police as necessary.
>
> Secondly, the minor variation process cannot be used to add the sale of alcohol to a licence, to extend the hours during which alcohol is sold and allow the sale of alcohol between 11 pm and 7am. This is very resonant with the findings of the first public consultation document on this exercise.
>
> Thirdly, the applicant must post brief details of the proposed variation on the premises so that residents know about the application and can tell the council if they have concerns. The local authority must take residents' views into account in reaching a decision but it is not required to hold a hearing. These safeguards should ensure that only genuinely minor variations are allowed through this simplified process. If, exceptionally, there are any subsequent problems at a premise, local residents can ask for an immediate review of the licence.[38]

In the draft Statutory Guidance published with the Order, we read:

> It is very much the Government's intention that applications to vary a licence for live music should benefit from the minor variations process unless there is likely to be an adverse impact on the licensing objectives.[39]

In their evidence to the Regulatory Reform Committee,[40] DCMS explained that

> providing specific definitions of 'minor variations' on the face of the Act would artificially exclude some variations that would not have an impact on the licensing objectives and include some that do.

However, this left some commentators uncertain as to where live music stood under the new dispensation. In another reply to the same Committee, the Department stated:

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[38] HHL Deb 15 June 2009 cc923-4

[39] HExplanatory notes to the revised draft Order, para 8.48

[40] Regulatory Reform Committee, H*Draft Legislative Reform (Minor Variations to Premises Licences and Club Premises Certificates) Order 2009H*, Second Report, 27 January 2009, Annex.

In many cases the extension of music and dancing beyond 11pm, or the addition of the playing of music to a licence, will not fall within the definition of a minor variation. This would be most likely where, for example, the extension would coincide with a pre-existing authorisation to sell or supply alcohol.

In a parliamentary reply to Lord Colwyn, the then Minister (Lord Carter of Barnes) reaffirmed how this change was intended to benefit live music:

The new minor variations process will allow licensees to make minor changes to their licences more quickly and cheaply. As this response makes clear, this may potentially include the addition or extension of authorisation for regulated entertainment (such as live music). In all cases, the test of whether a variation is minor is whether it could have an adverse impact on the licensing objectives. A live music group has been set up by Local Authorities Co-ordinators of Regulatory Services (LACORS) and the Musicians' Union to explain and encourage the use of the new minor variations process for those premises that wish to add live music to their licence. It will also encourage uptake of the existing exemption for incidental music.[41]

The Order came into force in July 2009.[42]

9 The earlier *Live Music Bill(s) [HL]*

When the minor variations Order was debated in the Lords, Lord Clement-Jones (Lib Dem) tabled an amendment urging that, before proceeding with the Order, the Government of the day should consider amending section 177 "to provide for an effective exemption of some performances of live music in certain small premises". Speaking to his amendment, the peer explained that he did not intend to force a vote, merely to take the opportunity to call for primary legislation to create such an exemption:

I therefore intend to introduce a Private Member's Bill that will provide a conditional exemption for live music in small venues licensed under the Licensing Act 2003. This exemption will be conditional on Section 177, which will be triggered so that a licence for live music can be reviewed, and if complaints by local residents are made, then there can be a full, proper hearing. The second element of the Private Member's Bill will be to reintroduce the two-in-a-bar rule so that any performance of unamplified live music by up to two people will be exempt from the need for a licence. Thirdly, the Private Member's Bill will provide a total exemption for hospitals, schools and colleges from the requirement to obtain a licence for live music when providing entertainment where alcohol is not sold and the entertainment involves no more than 200 people.[43]

A legal commentator in the *Morning Advertiser*, the trade paper of the licensed trade, foresaw difficulties ahead and reminded his readers that it was the House of Lords which had recently sought to protect residents' rights by tightening up the original draft of the minor variations Order:

Much as I applaud Lord Clement-Jones' efforts, following the recommendations of the recent Select Committee Report into the Act, I recognise how difficult it is to reach a compromise position. Residents will fight tooth and nail not to have automatic concession for music, for fear of disturbance going unchecked. This is in spite of the

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41 HL Deb 1 July 2009 c61WA.

42 H*Legislative Reform (Minor Variations to Premises Licences and Club Premises Certificates) Order 2009* SI 2009/1772

43 HHL Deb 15 June 2009 c934

> fact that environmental health officers have wide-ranging powers outside the Licensing Act to take action against noisy pubs that disturb neighbours.[44]

Feargal Sharkey, Chief Executive of UK Music, welcomed the proposed Bill:

> "Given the current economic situation, this is no time to be placing shackles on creativity. Following the Select Committee's report in May, we now have two clear signals of the needless harm and bureaucracy that the Licensing Act has imposed on small music venues. Live music is good for the economy, good for society and essential for the music industry. We urge Government to support Lord Clement-Jones, follow his lead and capitalise on one of this country's major economic and social assets".[45]

On 15 July Lord Clement-Jones introduced into the Lords his Private Member's Bill which sought to exempt from licensing requirements performances of live music in certain small premises.[46] A petition on the Downing Street website in support of the changes advocated by the Select Committee and Lord Clement-Jones has attracted 16,948 signatures to date.[47] The 2008-09 Bill never proceeded to second reading and fell at the end of the session.

In the next parliamentary session, Lord Clement-Jones re-introduced his Private Members' Bill into the Lords as the *Live Music Bill [HL] 2009-10*.[48] The purpose of the Bill was to amend the *Licensing Act 2003* with respect to the performance of live music. The Bill would exempt certain types of venue, and of performance, from existing licensing requirements for the performance of live music. Under the Bill:

- Venues authorised to supply alcohol with a capacity of less than 200 people, at which music would be performed between the hours of 8am and midnight, would no longer require a licence for the performance of live music.

- Up to two performers would be able to perform live unamplified, or minimally amplified, music without the need for a licence.

- Hospitals, hospital accommodation, schools and colleges would be able to host live music performances without the need for a licence.

The Bill stages (Lords and Commons) are listed here, with links to proceedings. The Bill passed through all its Lords stages and was taken up in the Commons by Don Foster. It had Commons first reading on 9 February 2010 but did not reach second reading before the dissolution of Parliament.

In DCMS questions on 1 March 2010, then Culture Secretary Ben Bradshaw was asked why his Government would not support the Private Members' Bill. He replied:

> **Mr. Bradshaw:** We think that there are a number of problems with the Bill, partly because there has been no formal consultation on its proposals. The hon. Gentleman will be aware that the proposals in the Bill are strongly opposed by the Conservative-controlled Local Government Association and by LACORS-Local Authorities Co-

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[44] Peter CoulsonH, "Musical chairs in the Lords"H, *Morning Advertiser*, 2 July 2009, p19

[45] UK Music, H"UK music endorses new calls for a small venue exemption and concerns over form 696"H, 17 June 2009

[46] H*Live Music Bill [HL] 2008-09H*

[47] Hhttp://petitions.number10.gov.uk/livemusicevents/H

[48] Text available HhereH.

ordinators of Regulatory Services. Without such proper consultation, we would be very worried about the legal robustness of such legislation. Also, we do not think that the focus on the old two-in-a-bar rule, which the Liberal Democrats and the music industry campaigned against for many years, is the right way forward. We think that our proposal is sensible and that it balances the needs of the music industry, of young musicians to get experience of performing and of local residents and councils regarding undue noise and disturbance.[49]

10 The DCMS consultation

Meanwhile, it appears, the former Government had reconsidered its position on live music in small venues. This news first emerged in press reports[50] overnight on 21/22 October 2009 and was confirmed later that day when the Culture Select Committee report was debated in Westminster Hall. In winding up the debate, the then Minister, Gerry Sutcliffe, said:

> That leads me to perhaps the main issue raised by the Select Committee Chair in relation to live music. My right hon. Friend the Secretary of State and I understand that many people who are passionate about live music are sincere in their view that some small events are being deterred or restricted because of unnecessary regulation. We are therefore minded to consider an exemption from the Licensing Act for live music in small venues with a capacity of less than 100, and we will set out the consultation. My right hon. Friend will write to Cabinet colleagues about the possibility of bringing forward a legislative reform order to deliver such an exemption. As hon. Members know, for that to be successful it must have the support of cross-party Committees in both Houses of Parliament. He believes that this should not be a party political issue, so he will write to his opposite numbers in other parties to try to establish a cross-party consensus. We believe that it is possible to deliver on that.[51]

From December 2009 to March 2010, DCMS ran a consultation seeking views on a proposal to exempt live music events for audiences of not more than 100 people from the requirements of the *Licensing Act 2003*. In order to ensure that any concerns of people living close to venues are taken into account, the exemption would only apply to performances that are indoors, and take place between 8am and 11pm. Residents and responsible authorities such as the police would have the power to call for an exemption to be revoked at a specific venue if there was cause for concern. The consultation document included a draft Legislative Reform Order and an Impact Assessment.[52] What was envisaged is clearly a specific exemption for music, related to size of venue. There was no mention of restoring the "two-in-a-bar" exemption. The then Minister confirmed in response to a point from Richard Younger-Ross that the figure of 100 was a notional one; the Government had not set an upper limit:

> Clearly, if the consultation overwhelmingly shows that everybody is happier with the figure of 200, and that will get us through the legislative reform order, we will consider it. We are suggesting the figure of 100, but that is one of the reasons for the consultation.[53]

In the same debate the then Minister gave this response to a question from the same Member about the *Live Music Bill [HL]*:

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[49] HHC Deb 1 March 2010 cc647-8

[50] E.g. H"Government to backtrack on controversial live music laws",H *Guardian*, 21 October 2009

[51] HHC 22 October 2009 c341WH

[52] DCMS, H*Proposal to exempt small live music events from the Licensing Act 2003H*, December 2009

[53] HHC 22 October 2009 c332WH

> The hon. Member for Teignbridge asked why we do not simply implement Lord Clement-Jones' Live Music Bill. Clearly, the Bill contains similar measures to those I have announced today, and would have a stronger chance of being passed if we get all-party support and use the legislative reform order procedures.[54]

DCMS has also published *Live music: an analysis of the sector* (January 2010, revised April 2010). This is an article which aims to explain how three sources of DCMS statistics provide details of changes in the live music sector between 2005 and 2009 and set these in context of wider industry data:

- Statistics on entertainment licensing, taken from the Alcohol, Entertainment and Late Night Refreshment Licensing Bulletin
- Analysis of cultural participation among adults from the Taking Part survey
- Research surveys of live music

11 Developments since the 2010 Election

The Coalition Agreement for the new administration included this undertaking:

> We will cut red tape to encourage the performance of more live music.[55]

Public responses to the live music consultation conducted under the previous Government were published on 26 June 2010.[56] There has been no "Government response" as such from the Coalition. In the most recent parliamentary answer (January 2011), DCMS Minister John Penrose said:

> The Government are currently considering options to remove red tape from live music and other entertainment. I hope to be able to announce our conclusions, including the timetable for reform, shortly.[57]

In a correspondence with Phil Little of the Live Music Forum, Mr Penrose said that "finding an answer that solves the problems without opening unwanted public safety loopholes elsewhere isn't easy." The same press source reports that "the Local Government Association has been lobbying against loosening restrictions, arguing that it could cause public disorder."[58] Lord Clement-Jones probed this point in a Lords question:

> To ask Her Majesty's Government what risks to public safety or public amenity arise from the performance of live music in workplaces that are not adequately covered by existing public safety and nuisance legislation, irrespective of licensing. [HL4100]
>
> **Baroness Garden of Frognal:** The Government believe that, in the light of specific health and safety and fire and noise legislation to address public safety and public nuisance, it is not always necessary or proportionate to require the additional layer of regulation through the licensing regime.
>
> This is part of our current thinking about how best to deliver the coalition commitment to remove red tape from live music and other entertainment. However, before finalising

54 HHC Deb 22 October 2009 cc343-4WH
55 HM Government, H*The Coalition: our programme for government*H, May 2010, p14
56 HDCMS website
57 HHC Deb 31 January 2011 c507W
58 H"Minister admits safety fears in live music reform"H, *Morning Advertiser*, 19 November 2010

> any proposals, it is important to test these assumptions with relevant stakeholders, and that is what we are doing ahead of announcing our preferred solution.[59]

In May 2011 a front page story in the *Sunday Times* reported that John Penrose, Minister for Tourism, was planning moves to "liberalise the licensing law":

> Under the reform, licences will be required only for events drawing crowds of 5,000 or more and those where alcohol is sold or where there is adult entertainment such as lap dancing or pole dancing.[60]

Since no detail was given, it is unclear what exactly is proposed, or how these ideas link to the Government's qualified support for the *Live Music Bill [HL]* (see next section).

12 The latest *Live Music Bill [HL]*

On 7 July 2010 Lord Clement-Jones introduced a new *Live Music Bill [HL]* as a Private Members' Bill in the Lords.[61] This is not identical with the Bill introduced in the previous Parliament. The new Bill would, if successful, implement an exemption for gigs with an audience of up to 200. Instead of restoring the old "two-in-a-bar" exemption, it would allow unamplified live music without a restriction on the number of musicians. At second reading on 4 March 2011 Lord Clement-Jones set out the Bill's intentions:

> My Live Music Bill amends the Licensing Act 2003 in five main respects, including an exemption for live music in small venues for audiences of up to 200 that are licensed under that Act. This exemption is conditional on a new Section 177, which could be triggered to review a licence and make live music in that venue licensable if complaints by local residents are made.
>
> The Bill reinforces the rights of residents by allowing conditions to be placed on the premises' licences, following complaints upheld under the Environmental Protection Act 1990. Unamplified live music is exempted anywhere between 8 am and midnight on the same day, but this can be disapplied in alcohol-licensed premises if complaints are upheld. Conditions could then be applied.
>
> A broad exemption is introduced for any premises not already licensed under the Licensing Act that qualify as a workplace for the purpose of health and safety legislation. This covers not only hospitals, schools et cetera, but factories, offices and any place covered by the workplace definition. This is an important new addition to the Bill.
>
> Then there is the removal altogether of the entertainment facilities provisions. There would no longer be a separate requirement to authorise the provision of musical instruments such as the piano for a school concert open to the public.
>
> There is a new exemption under the Bill to allow live and recorded music to accompany morris dancing, which I am sure my noble friend Lord Redesdale will approve of.[62]

In response, the Minister, Baroness Rawlings, explained that the Government was prepared to give the Bill qualified support but would be seeking amendments in Committee:

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[59] HHL Deb 29 November 2010 cc410-11WA

[60] "No more licences to party", *Sunday Times*, 15 May 2011, pp1,2

[61] HL Deb 7 July 2010 c203 (first reading – no debate)

[62] HHL Deb 4 March 2011 c1316

We agree with my noble friend that reform in this area is necessary and that it is the right thing to do to help local communities and boost the big society, as well as helping businesses. We must do so in a manner that at the same time ensures appropriate public protections are in place to cover issues such as noise nuisance, as the noble Lord, Lord Stevenson, said. We are pleased to announce that it is the Government's intention to be supportive of the Live Music Bill.

I must, however, add a number of caveats before we can offer unreserved support. First, we would support my noble friend in examining the technical aspects of the Bill to make certain that the legislation operates as effectively as possible and has no unintended or adverse consequences in the way that it amends the Licensing Act 2003. Secondly, we wish to explore issues relating to the time limits for live music performance. The previous Government's public consultation on the removal of restrictions for live music was predicated on a cut-off point of 11 pm, rather than midnight, as currently outlined in the Live Music Bill. This is an important point, and we wish to work with my noble friend to amend the Bill to reflect this, and ensure our continued support.

Thirdly, we will need to explore with my noble friend Lord Clement-Jones issues such as what the effect of the provisions of the Bill should be on conditions imposed by licensing authorities prior to such time as the proposed legislation comes into force. Those things aside, we are clear that we wish to support my noble friend's Bill. We are pleased that the Bill retains key local protections, including the right for licensing authorities, local residents and other interested parties to request a review of a premises licence where there are concerns about the licensing objectives of preventing crime and disorder, public safety, prevention of public nuisance and-as my noble friend Lady Benjamin will appreciate-the protection of children from harm. It is important that licensing authorities, local residents and businesses retain this right, and that robust controls remain in place to deal swiftly and effectively with problem premises. As part of the discussion process within government, we will be conducting a full impact assessment on my noble friend's Bill that will be subject to agreement from the Regulatory Policy Committee.[63]

[63] HHL Deb 4 March 2011 cc1336-7