A strong legislative framework?

The 2012 Sale and Supply of Alcohol Act

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Third, I would like to thank the 320 people who completed the survey on their experiences with the Act. Initially the focus was on the community side of things, emerging from the earlier study, but with help from one of the industry players we ended up receiving 150 completed surveys from licence holders. Because the area is quite strongly contested, there are some significant differences between the industry view and the community view, but also similarities.

Finally, I would like to thank the Health Promotion Agency, especially Giselle Barretta and Cathy Bruce; and Community Law, including Paul O'Neill, Simonette Boele and John Sullivan, and Liz Tennet from CLCA, for funding and supporting the precursor study. If I can pick out also three new friends: Grant Hewison, Nicki Jackson and Sally Casswell – you have all helped me personally and professionally on this journey.

Kia ora tatou.

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Executive summary

In her third reading speech on the Sale and Supply of Alcohol Act (2012), the Minister promised a "strong legislative framework for reducing alcohol-related harm". This study of the working of the legislation has found that it is not strong: it is divided, uneven, and often fails to achieve either of the two 'limbs' of its object: the safe and responsible supply of alcohol and the minimisation of alcohol-related harm.

Despite this, participants in the study mainly considered the process could be negotiated, albeit with difficulties. Through surveys, interviews with stakeholders and analysis of cases, the study has examined the key elements that make up the operation of the Act.

Six out of ten industry participants were satisfied with the licensing processes. Their concerns are about cost, delay and time, but also a determination to show that not all outlets have the same risk. Some on-licence holders note that alcohol-related harm cannot be controlled via off-licences or supermarket sales, and believe these are giving the industry a bad name.

Community stakeholders are concerned that the industry has too much power, that communities do not get an adequate say, that DLC processes are uneven and of variable quality and that agencies are restricted. Many noted the legislation is flawed and was a poor shadow of the original Law Commission proposals. Most, however thought the application and regulatory regimes were working, but this finding may be skewed by the high number of Council Inspectors in the sample.

The scheme of the Act, where communities have power to object and agencies to oppose any applications, thus bringing a balance to the process and achieving the object of the Act, was affected by some obvious difficulties. Communities faced many barriers to making objections, while agencies were uneven in their ability to adduce evidence and oppose applications. As well, the District Licensing Committees often lacked the legal and deliberative skills to make effective decisions. This has not been helped by the appellate body, ARLA, which has made a number of errors of law over time that were recently corrected by the High Court.

Barriers facing communities include poor systems of notification, little assistance in making objections, having to face a legalistic framework at the hearing, being cross-examined, having views discounted unless agencies also oppose the application and not having the legal support if an applicant objects, or if the community wishes to challenge a decision. The community has important roles under the Act but is given little support, advice or education to carry them out.

Barriers facing agencies include far too few resources for the workload of researching and, if necessary, opposing alcohol licence applications and the danger of being critiqued for taking too activist a role, if attempting alcohol harm reduction in their areas. In opposing, the agencies promote their own positions but also verify and strengthen the position of the community.

Harm minimisation is one of the limbs of the Act's object, but until recently has been underplayed in decisions throughout the system because of the appeal authority's made view that an objector or agency would need to show that the harm in an area could be traced back directly to the particular outlet. This decision has had a chilling effect on the sector for a number of years, and its overturn by the High Court this year, in favour of a much less restrictive view, will affect decision-making substantially in terms of renewals and new applications.

Nevertheless, the partial failure to establish local alcohol policies continues to impact on DLC processes, as issues over distribution of outlet, hours, processes and type of outlet continue to be fought out, case by case, in DLCs and ARLA.

Various initiatives have sprung up to strengthen community voices in the application process. Communities Against Alcohol Harm is focused on supporting deprived communities to be heard on alcohol applications, after a sense that South Auckland had been ignored for years. Ka Pai Kaiti takes a similar position in Gisborne, arguing against the alcohol and pokie harm in the area and among Māori in the Kaiti suburb.

In Wellington, the work of the police and medical officer of health, both within and outside of the licence processes, has attempted to go further and reach negotiated settlements on hours of operation to reduce harm. Such processes have, however, come under attack, raising questions about how the various elements of the work of these agencies can be reconciled.

Finally, there is a recent project which started in Christchurch, where community law centres support communities with education and advice to make good objections to alcohol applications. This has now moved into six districts, where legal champions support communities through objection processes.

The recent High Court decision in Lion Liquor provides opportunity for objectors and agencies to focus on alcohol-related harm. Can the new legal precedents in that decision strengthen the law so that its objects can, at last be met?

The findings of two substantive reports on surveys of industry and community participants are annexed to the overall report.

Introduction

After a long period of light regulation of the alcohol industry through successive policies (Maclennan et al, 2016 p.2), the Law Commission carried out a review of alcohol legislation in 2010. The review received over 3000 submissions and produced a report with significant and substantial recommendations for law reform (Law Commission, 2010). Some of these (but not all) were taken up by the government of the day. The 2012 Sale and Supply of Alcohol Act was one of three legislative instruments passed by Parliament to reduce alcohol harm and increase regulation in the industry. In her third reading speech, Minister Hon. Judith Collins noted that the bill provides:

> … a strong legislative framework for reducing alcohol-related harm. It is the first time in more than two decades that Parliament has acted to restrict, rather than relax, our drinking laws. Most New Zealanders enjoy alcohol in a responsible manner; however, the harm resulting from excessive drinking strains our country's health and law enforcement resources, and causes people and communities a lot of grief and stress.

However, there remains concern among researchers that the Act merely tinkered with alcohol laws rather than bringing about the significant changes that the Law Commission advocated (Kypri et al, 2011). There is also wider community concern that the alcohol industry may have an ongoing influence at the legislative level, promoting more alcohol 'friendly' policies (Quinlivan, 2018).

The primary aim of this study is to examine how the Act has worked in terms of the goal to restrict the proliferation of alcohol and minimise harm. In particular, as a result of a previous study (Gordon, 2017), there was concern about levels of inconsistency in decision-making between the 67 District Licensing Committees. At the heart of this study is the question of whether the scheme of the Act was effective in bringing about the Minister's goal to increase regulation of alcohol for the purpose of reducing alcohol-related harm.

Central to the study are the communities that have worked to oppose licence applications, and who have had a range of experiences in doing so. Indeed, this study emerged directly out of an earlier research project undertaken by Community Law on the kind of support communities have access to when objecting to alcohol licence applications.

That study (Gordon, 2017) concluded the odds were stacked against communities in terms of finding out about licence applications in time, making submissions, appearing at DLC hearings, dealing with the legalistic nature of DLC hearings and

having their submissions taken seriously. The power relationships were unequal, in particular in terms of legal advice, support and representation. If the Act was properly intended to give communities a say in alcohol licensing, then it simultaneously made it very hard for communities to play that role.

The striking aspect of that study was the finding that the outcome, in terms of the community voice being effective, depended on so many other things falling into place. It also depended on getting a good hearing from the DLC because, in most cases, communities did not have the resources to launch appeals. A loss at the DLC meant, to all intents and purposes, a complete loss. Similarly, if an applicant lost at the DLC, they might appeal to the ARLA, and communities were rarely able to hire legal representation to defend such cases at appeal.

Thus, the title of the 2017 study was: "We come in as a community but it becomes a legal game". In holding out the promise that community members could have their say under the Act, the legislators ignored the fact that public discourses would, within the context of hearings at all levels, be undermined by legal argument.

The design of this study

The study was designed to have three swathes of data collection through the middle of 2018. The first swathe was an online survey to be delivered to between 50 and 100 community leaders, agencies, submitters and others, including a small number of industry leaders. One industry organisation asked whether the survey could be sent out to licensees, and I agreed. The industry parties were keen to have their say. The results therefore included 184 from industry, of which 150 were usable (most of the rest were blank or nearly blank), 24 from Council Inspectors (who also had it distributed through their networks), 12 from Medical Officers of Health, four from New Zealand Police (I did not get permission to survey police – these four picked up the survey from other networks), 22 from submitter/ objectors and the rest from community, organisational, legal, policy or other groups. In practice this meant that about half the data derived from industry and half from organisations and communities.

Quantitative data was analysed using Microsoft Excel. All qualitative data was entered into the NVivo program and grouped into key themes for analytical purposes. Further drill down on the data is possible.

The second part of the study involved a range of stakeholder interviews. We interviewed lawyers, community workers, policy people, health promotion staff, researchers and members of community organisations. Locations were primarily Auckland, Gisborne, Wellington and Christchurch. Out of these interviews a

number of themes were identified, and these came to constitute the core themes to be reported here, although modified and extended by the findings of the third swathe of research.

The third part aimed at doing case analysis of DLC decisions to identify unevenness in decision making in various regions. The idea of comparing similar cases and looking for different decisions was abandoned fairly early on in this process. The reality is that DLCs celebrate their differences in style and approach and see their decisions as reflecting local exigencies; a claim that can rarely be proven.

For example, in Gisborne much effort is put into trying to ensure that local alcohol outlets are run by people who live in the area, not in Hawkes Bay, Tauranga or Auckland. In other areas, there is no interest in where the potential licensee lives, but there may be a concentration on hours of closing. In other places, the situation of youth drinking may come to the fore. So, the answer to the case analysis question of whether there is unevenness is, "yes, of course, that is built into the Act". Or, in the words of a community stakeholder:

> Inconsistently interpreted across the various DLCs, MoH, Licensing Inspectors which means different outcomes. Public notifications are almost non-existent due to online notices becoming the norm which makes it difficult for communities to have their say. DLCs are approving licences that make no sense for example, one that was recently granted in S Auckland.

In the community survey, between 60 and 70% of stakeholders thought that the amount of support for objectors, the DLC operation, notification systems, decision-making processes and the role of licensing inspectors were uneven across jurisdictions, and more than 50% agreed that a wide range of other processes/ functions were also uneven. A number of industry participants called for national rules and national delivery.

In a sense the question of unevenness in the operation of licensing processes resolved itself early in the study. What became of more interest, and the main focus in the third part of this study, was the construction of the law through precedent and appeal. With a strong view that the Act was itself inconsistent and badly formed, and with so many players involved in working through the legislation in practice, the focus of the last part of this study has shifted slightly to appeal matters via case analysis.

The landmark case in *Lion Liquor,* and other current debates at the appeal level (and their implications for the role of communities) will now be a stronger focus for the final part of the study. These have the advantage of also being highly topical. While

the Lion Liquor case is now made law, all of its implications for licence decisions have yet to become clear.

The scheme of the Act and its unevenness

The Act is quite complex. The object of the Act (s. 4) is that the sale, supply and consumption of alcohol should be undertaken safely and responsibly, and that "the harm caused by the excessive or inappropriate consumption of alcohol should be minimised". The harm is defined in the section quite broadly.

At the base level, potential licensees apply for one of a range of types of alcohol licence (on-licence, off-licence etc) to the Local District Licensing Committee, which is associated with, but separate in influence from, local authorities. These applications are publicly notified. People in the community with an interest "greater than the public generally" (s. 102 (1)) may object on a range of grounds set out in s. 105 of the Act. Three agencies: the Police, the Medical Officer of Health and the Council Inspector must consider, and may oppose, the application. If there are valid objectors, a public hearing of the DLC must be held.

Every renewal of a licence is treated as a new licence, with the same process to be followed, and no expectation that having a licence will automatically lead to its renewal.

Also within the Act is the ability for local authorities to develop, notify and adopt a Local Alcohol Policy, which, within legislative frameworks, may set local rules around location, trading hours and other factors.

The Act therefore describes a scheme in which the ability to get or renew a licence, and the restrictions on it, is moderated by any or all of community objection, agency opposition and the contents of any LAP. The role of the DLC is to adduce all the evidence presented and then stand back and make a "risk assessment", considering all of the evidence of all relevant considerations under the Act, and especially balancing the two 'limbs' of the object of the Act in relation to safe and responsible drinking and harm minimisation.

While the scheme is simple, the process of balancing the s. 4 'limbs' has proven to be quite complex. Essentially, the success of the Act in bringing justice is, on a day to day basis, in the hands of 67 District Licensing Committees, many of which are run by Councillors or by Commissioners, often with no legal training, sometimes with their own strong views about these matters, often with wealthy alcohol interests looking over their shoulders, trying to effectively consider and balance matters that may be subject of complex legal argument in appellant tribunals, often without legal

support or advice of any kind, and having to deal with power imbalances within the hearing process. It is not surprising that unevenness has emerged as an issue.

Uneven approaches can develop wherever there is discretion for local authorities to diverge from or interpret rules specified in the Act. Examples are discussed in the following sections.

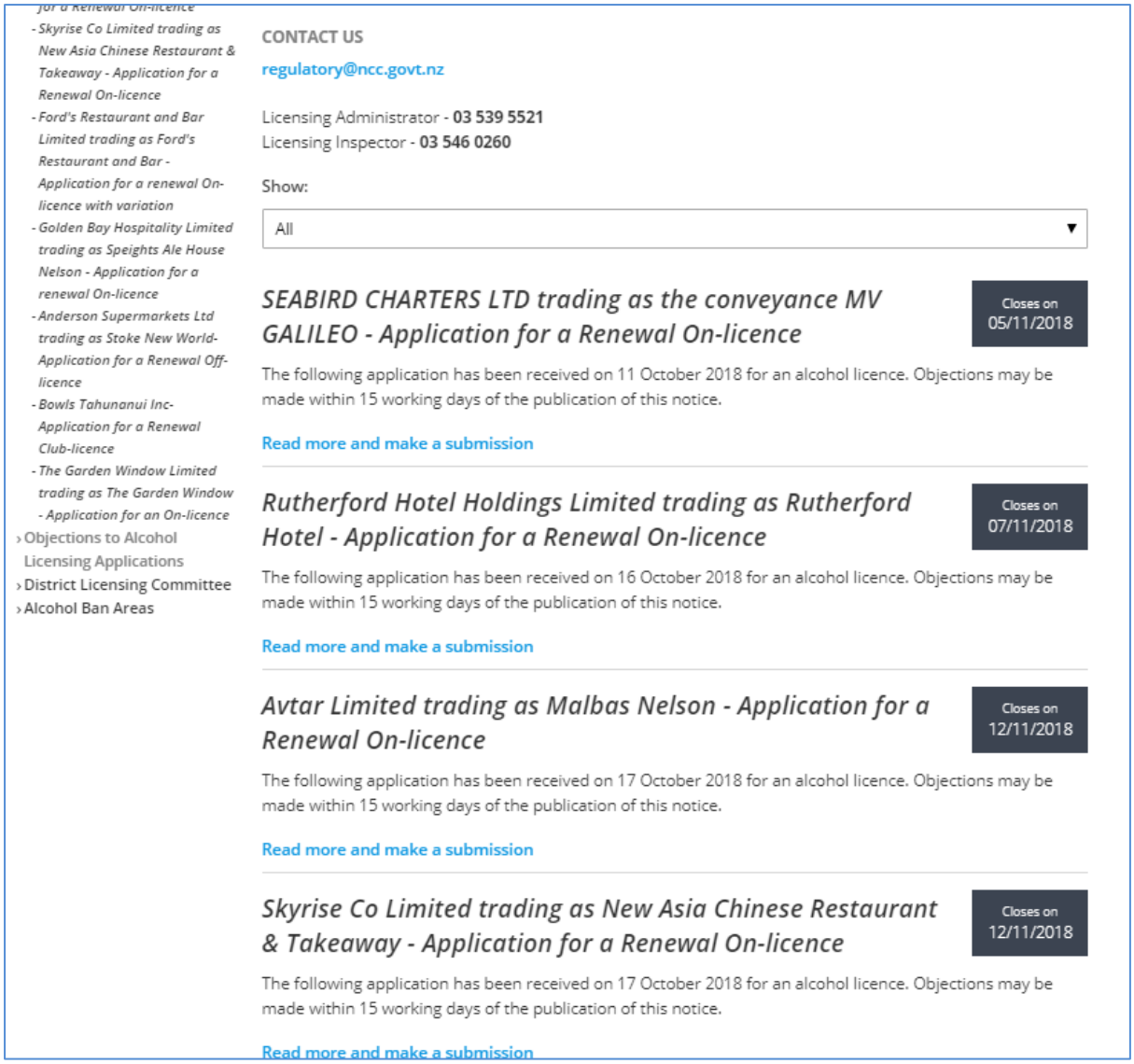
Notifications

Notifications under the Act are highly specified. The applicant must put a notice on or near the premises within 10 working days of filing the application, and must give public notice of the application within 20 days. Stakeholders noted a lack of enforcement of these rules, with notices "upside down", "a single sheet of paper that gets rained on", "in the window of the often-vacant building that no-one passes". In one recent case, the notice was behind multiple fences on a building site, until a complaint had it repositioned on the front fence.

Public notification is problematic. Some argue for newspaper and/ or online notification, but either have their problems. Of those that have online notification, there are a number with problems. In Auckland, so many applications come through, often with so little information attached, that it is hard to make sense of them.

In short, while notification processes are highly prescribed under the Act, the ability to actually access those notifications depends heavily on where a person is located. A model is Nelson City Council's online system, shown on the next page. This clearly indicates the business name, the type of licence and the closing date for objections. Clicking on a link gives a summary of the submission and information on how to view the whole submission. The Dunedin City Council website goes one step further, making the whole application available for viewing online by clicking on a link. This ensures that people do not have to travel into the city to view applications. We were told that other places had received legal advice that applications could not be put online.

Once advertised by whatever means (whenever the first notice appears), community objectors have only fifteen working days to lodge their objections. A large number (67) of community stakeholders noted that locals do not always find out in time to object. Even where notification is good, how can ordinary people keep track of new applications and renewals? This is a mammoth task, and one the ordinary person is unlikely to be able to maintain over time.



There is a view that Councils could do much more to facilitate community knowledge. Inspectors are required to notify agencies of applications; those notifications could potentially be sent much wider, to community groups, residents associations and the like. No participant told us that any broader notification took place, but it is possible that some inspectors do this.

However, the inspectors we spoke to were unwilling to offer such a notification services, for two reasons. The first was that the Act did not require them to do so. The second was a concern, detected in a number of inspectors we interviewed, that the inspectorate needed to be seen remain 'independent' at all times, and that this would extend to notifying potential objectors. Unfortunately, in the case of notifications, being neutral may mean taking little action at all, and that means potential objectors are at a huge disadvantage in finding out about applications. In some communities, police or medical officers of health do use their networks to ensure that notifications get to communities.

Making submissions and attending hearings

Most Council websites do provide information to the community on how to make an objection, and invite objections by letter or email. There are also online booklets issued by the HPA. Some objectors noted they got support from health, police and council agencies. Only half found out about the application in a timely manner, however. More information on the experience of notification and objection is provided in results of the stakeholder survey.

The main reasons that participants gave for their objection was a potential loss of good order and amenity in the area. Examples in the stakeholder survey included noise, vomit/urine, vandalism, pre- and side-loading, proximity to sensitive sites and so on.

The industry respondents were very concerned about community objectors. There was a worry that "Many of the criteria are very subjective which lends to inconsistency and can be overly influenced by objectors". As well, there is a concern in some areas that some objectors are opposing licence applications because they are "against alcohol", as one applicant put it (submissions on an upcoming appeal[1]).

A number of objectors attended hearings of the DLC and gave evidence. This is very important in terms of how the process works. The appeal authority ARLA has tended to "place no value on" community objections where the objector fails to turn up or given evidence. In the High Court decision of *Utikere v I S Dhillon and Sons Limited*, Kos J modified that position:

> There is no reason why an objector could not make a cogent, self-sustaining written objection. It would carry some weight. But its weight may tend to be diminished if the objector is not available to give evidence at the hearing and be questioned.

There are, of course, many reasons why objectors may not be available for hearings. In the stakeholder survey, 33 participants reported attending a DLC hearing as an objector. Out of the 33, 21 felt there was a power imbalance, with the power stacked in favour of the applicant. Twenty were cross-examined by a legal expert. Nineteen noted they were not prepared for the level of legal contestation they encountered and 17 felt intimidated. A number thought the process was very unfair:

[1] Gisborne Liquormart, appeal to ARLA, to be heard 15 November

> Absolutely not!! It was very intimidating with police & lawyers & lots of legal jargon. The worst part was that it was hugely culturally inappropriate
>
> The whole process is alien to communities. It's like you need an interpreter to participate otherwise you are left floundering, wondering where to sit, when to talk etc.

Many applicants come to hearings with their lawyer, while most communities do not. There is a significant power imbalance right from the start of the process, based on differential background knowledge of the law generally and the Act, advocacy skills and, at times, the power of large organisations with significant resources behind the application.

One community stakeholder in the survey suggested that neither side be able to bring legal advisors into DLC hearings, in order to reduce the levels of contestation and even up the power relationships. In consultation, others also expressed this view. But the right to representation is a basic one in law, especially when a person's reputation or livelihood is at stake. A lawyer-free space may not therefore be possible.

Finally, there are some legal questions addressed in hearings about the efficacy of community objections. In particular a decision in *Ponda*[2] stated that where the agencies have no adverse comments on an application, "it is unlikely that an objector will satisfy the Authority that the amenity and good order of a locality would be likely to be increased, by more than a minor extent"[3], noting the *Soala Wilson* case. In that case, ARLA noted: "If reporting agencies had corroborated the evidence of objectors based on their data and records that may have very well resulted in a different outcome. But that is not the case here." Therefore, without the support of agency objections, it is difficult for community objectors to prevail, although there have been such cases (e.g. the Harewood DLC decision, Christchurch, 2017; and the Flat Bush (Auckland) decision. April 2019), and it is possible these are increasing in number.

Communities face significant barriers in finding out about alcohol applications, writing their submissions and giving evidence at the DLC. Some alternatives have emerged that attempt to mitigate these disadvantages and will be discussed later.

[2] Re Ponda Holdings Ltd [2014] NZARLA 558

[3] Soala Wilson and Durga Sai Holdings Limited [2016] NZARLA PH 42 at 7.

The role of the agencies

Section 103 describes a process by which the Police, Medical Officer of Health and Licensing Inspector must inquire into each application. The secretary of the Licensing Committee must, upon receiving an application, send a copy of each of these agencies in their own territorial area. The agencies "must" examine and produce a report on each application, and:

> "if no report is received from the Police or Medical Officer of Health within 15 working days after the Police or Medical Officer of Health received the copy of the application, the Police or Medical Officer of Health does not oppose the application" (s. 103 (4)).

The agencies have the power to 'oppose' any objection. When this happens, the police normally provide evidence on alcohol-related harm in the community, and the Medical Officer of Health on health statistics.

For example, in the case of Liquorland Ferry Road[4], the Police Sergeant noted that factors leading to police opposition included high deprivation in the area, high crime rates, a large concentration of social housing, and high police call-out rates. The area has a Neighbourhood Policing Team due to its high risk.

The Medical Officer of Health in the same case also considered deprivation, also traffic flows, concentration of alcohol outlets and the effects of drinking on youth. The Inspector also opposed the application.

While the evidence provided by these agencies was important, it was also supported by much more detailed submissions from community members. In the event, the DLC declined the application, and this decision was subsequently appealed by the applicant.

The *Lion Liquor*[5] decision shows how the agencies may influence legal developments. This case, which was about reducing the hours of sales on Friday and Saturday nights at an off-licence, has led to the landmark High Court decision which is discussed elsewhere in this report. The DLC agreed with the opposing agencies that licensing hours should be reduced as requested, citing the high levels of crime, and the high levels of hospital admissions arising from alcohol in the area. In one of its most restrictive decisions, ARLA overturned the decision on the basis that the 'undoubted' harm in the area could not be sheeted home to the Lion Liquor outlet:

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[4] Riccarton Liquor Ltd, at Christchurch DLC 60A [2018] 1131 at [58] – [65]

[5] Medical Officer of Health v Lion Liquor Retail Ltd CIV-2017-485-506 [2018] NZHC 1123

> Or, put the other way, there is no 'causal' nexus between the grant of this renewal licence and general incidence of [alcohol-related harm] in the locality established by the respondents and objector[6].

At the time, the agencies in the Wellington region were under concerted attack for their role, probably from alcohol-related interests[7]. In particular, the police were criticised for "drumming up opposition" to licences, bullying licensees and trying to talk them into reducing hours. There was an Editorial in the Dominion Post and a question in the House, with the Police Minister concerned about these events.

It was therefore down to the Medical Officer of Health to appeal this highly restrictive ARLA decision. What the decision meant in practice was that, no matter what alcohol-related harm was evidence in the locality, unless "a plastic bag with the name of the outlet on it" (evidence of Dr. Stephen Palmer, Wellington MOH) was clearly linked to the harm (e.g. found on a person admitted to hospital), the grant of the licence would not be affected by that harm.

The decision to appeal to the High Court is always a big one for agencies. At ARLA, parties pay their own costs. In the High Court, if they lose, it is likely they would have to pay their own costs plus those of the other party. However, the MOH felt that the decision should not be able to stand unchallenged. All the work done by the agencies in collecting data and opposing applications would be for nothing if every appeal to ARLA led to the licence being granted on original terms because alcohol-related harm could not be proven to emanate from a particular outlet.

However, if any agency was going the challenge the ARLA decision, the Wellington MOH was the one to do it. As other evidence made clear, MOHs are in general highly under-resourced for the role they play in the alcohol licensing field. We were told by Dr Keith Reid (then MOH Dunedin and national Chair of MOHs) that few areas have the focus and resources of Wellington. In fact, nearly 1.5 FTE are devoted to the role in the Wellington region.

Therefore, Dr Palmer decided that the decision had to be challenged. The resulting High Court judgment is outlined in the next section on minimising harm. The decision has strengthened the role of MOHs in principle, though has not given them any additional resources.

Interviews with other MOHs painted the picture of a sector with big concerns and large responsibilities but few resources. For example, the MOH of the Tairawhiti

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[6] Cited in Medical Officer of Health v Lion Liquor retail Ltd at [19].

[7] This project was given oral evidence relating to the role of a particular person, but has chosen not to use it in this account. Everything written here is verifiable.

District, Dr Bruce Duncan, discussed the problems he faces in Gisborne and the East Cape. He noted essentially three problems:

1. It is hard to get quality data without the use of more resources then they have available and data collection in the health sector is limited.
2. They have to be selective about where they put their efforts.
3. The sheer volume of applications and renewals makes it challenging for the MOH to do its job.

He described the sector as "difficult". He believed there are too many outlets in the region, but does not have the tools needed to successfully oppose.

Dr Duncan stated that the MOHs do work collaboratively with the other agencies. This does not mean, however, that the agencies always agree.

Apart from the resource issues, which were discussed by every MOH interviewed, the role of agency under the Act "puts a target on our backs", according to one person interviewed. He noted that he had been sued, pursued and had parliamentary questions asked (2010-2011) about his work.

Most industry participants thought the police played a good or very good role in the licensing environment. A minority were concerned about over-intervention by police, and some noted unevenness between officers, which was worrying when there was a high turnover of alcohol compliance police:

> I have dealt with some very professional police in respect to a licensed premise that are happy to work with you and then on the other hand some that come across as not compliant to want to work together and have enforced a sense of unfriendly power.

The MOH were viewed mostly by industry respondents as having a positive role overall. They are "good" and "reasonable to work with – not dogminded [sic] and are open to having their minds changed". However, some questioned why the health services are involved. Several were quite harsh about the MOH role:

> They use bullying tactics to get what they want and continue to try and interrogate at renewal. They aren't prepared to engage with licensees. They can't state any specific issues of concern to an application when asked and yet prepared to oppose applications regardless should you stand up for your rights.

> The fact that they are objecting to a majority of applications in our area is an area of great concern. It is being done in a mandatory manner and must be extremely frustrating for both the DLC and ARLA.

Because of the *Ponda* decision discussed above, community objectors are somewhat dependent on the agencies opposing alcohol licences. It is much harder for community objections to succeed unless agencies also oppose applications. Community organisations also have generally positive view of the work of the agencies. Most find the police excellent, very good or good, although some feel there are not enough resources in some areas.

> This is largely true for the large metropolitan centres. In rural areas, where alcohol is also a major cause of police workload, the staffing levels are different and there is not the capacity or specialist expertise to respond in the same way. Yet the infrastructure for dealing with alcohol harm is almost completely absent in rural districts and so more of the burden falls on the police.

MOH were rated more positively than police by stakeholders. Many had developed "really good relationships" with MOH, and respected their role:

> Our MoHs have been real leaders in the alcohol control area but it is an underacknowledged role largely unsupported and they are having to participate in legal forums which are outside their realm of expertise. The whole Act has become a money spinner for lawyers.

Through interviews, this study attempted to gain an insight into the extent to which the Medical Officers of Health (police were not available for interview) were able to use resources to oppose applications. All MOHs interviewed noted they were greatly under-resourced for the role. Some of the larger centres get thousands of applications for new outlets or renewals each year – Auckland receives 5,000 such applications.

One way that these are managed is by a system of priority. For example, one MOH team uses the following criteria to decide on which applications to oppose:

1. New licences.
2. Off licences.
3. A high density of outlets in the area.
4. High deprivation levels in the area.
5. Consultation with key groups on vulnerabilities.

This team (as with many other areas) also consults on an ongoing basis with alcohol inspectors and police. It also had a number of frustrations with the DLC process, noting unevenness in process between DLCs within its regional area. They suggested a number of changes were needed to the DLC process. One was a need to upskill DLCs so that they all had a high level of competency and knowledge. A second was the need to make the DLC process "less daunting for people". In particular there was a need for: "an environment where people can come in and have their say". This may mean, it was suggested, that the DLC be a "lawyer-free zone".

The comment was also made that MOH has been leaders in taking cases to develop case law and it is that matter, in particular the contested question of harm minimisation and the *Lion Liquor* case, that the report considers next.

Minimising harm

The object of the 2012 legislation is defined in s. 4 as to bring about the safe and responsible sale, supply and consumption of alcohol. Also, the "harm caused by the excessive or inappropriate consumption of alcohol should be minimised". Harm is defined in two ways: harm to individuals and harm directly or indirectly, to society and community. The question of what 'harm minimisation' means has been debated ever since the legislation passed. Is it about reducing additional harm caused by new premises? Or reducing existing harm? Or a broad requirement for an improvement in harm-related indices? These questions have never been answered effectively, although recent case law takes a stance on aspects of this question.

It was the view of stakeholders interviewed for this project that until recently, the harm minimisation goal has been under-emphasised in the case law. Two reasons were given for this. The first was that it took some time for people to realise that there was a new regime in place, and essentially the old, far less regulated, approach continued to dominate case law until around 2015, broadly speaking. In other words, "it took many parties a long time to understand that there had been what was intended as a significant change in the legislation" (a lawyer). The second reason was that, from early on, the ARLA appeal authority took the view that evidence of alcohol harm had to be sheeted home to particular outlets. Unless the objector could find evidence that the harm had been caused, or would be caused, by the particular outlet, it would not be relevant. That view has been very prevalent but has recently been overturned by the High Court with significant implications for future decisions.

The particular case was the renewal of a licence for the Liquor King off-licence near Courtenay Place in Wellington. The agencies had argued at the Wellington DLC that hours of operation should be reduced from 11pm to 9pm on Friday and Saturday nights, to reduce the harm caused by alcohol in the area. Evidence was given of large amounts of drunken behaviour and arrests and increased hospital admissions. The DLC upheld the reduced hours, which the licensee then appealed to the Authority. The Authority reversed the decision, arguing [para 65] that a "causal nexus" was required between the granting of a licence and the object of the Act (minimising alcohol-related harm). The Authority went on:

> Evidence of vulnerability of the community is not sufficient to alter a premises operating in the absence of some link between the operation of those premises trading hours and that vulnerability.

This decision can be seen, along the spectrum of the analysis of alcohol harm, to be about the most restrictive possible interpretation of alcohol-related harm. From the

agency perspective, it needed to be appealed if any harm minimisation case was to succeed on appeal. At the time, however, the agencies in Wellington were under particular attack from alcohol and media interests, including the asking of questions in Parliament about their role. We were informed that the police were essentially unable to appeal at this point due to these pressures. Eventually, on the last day available for appeal, the Medical Officer of Health lodged an appeal to the High Court. This became a definitive decision, *Medical Officer of Health v Lion Liquor Retail Ltd*[8], which has changed the course of decision-making about the relationship between alcohol outlets and alcohol-related harm in relation to the issuing and terms of licences.

The High Court stated that the ARLA had "erred in law" on two matters. It failed to apply the correct legal test in setting the hours of operation, and it erred in its approach to the evidential foundation required for its conclusion.

The first error was that ARLA attempted to link the alcohol-related harm to the particular outlet. The High Court noted this was the wrong test. Clark J at paragraph [68] noted:

> In the face of such evidence the Act does not countenance the continuation of high levels of alcohol-related harm. The Act requires minimisation of the alcohol related harm. The task of the DLC was to respond to the risk and it did so. It is not necessary to establish, as the Authority required, that the proposed operation "would be likely to lead to" alcohol-related harm. To require demonstration of a link to this degree of specificity is not much different from requiring proof. Requiring proof of "a causative link is not only unrealistic but is contrary to the correct legal position".

As well, Clark J noted:

> It was sufficient to engage the requirement to minimise alcohol-related harm that the evidence implicates the premises. The Authority erred in requiring evidence of demonstrable historical harm. Rather, it was required to assess risk which, by definition, is future risk. In that regard, there was extensive evidence of the alcohol related harm associated with this locality on Friday and Saturday nights. In fact, the DLC in its decision described the evidence as compelling. Having read the evidence I agree with that assessment.

Essentially, this case constituted a fundamental change in direction for the appellate law in the field of alcohol law. Until May 2018, the regime was controlled by a view that alcohol harm had to be sheeted home to an individual outlet or potential outlet.

[8] CIV-2017-485-506

Now, the approach was to be a risk assessment that examined the link between a "real risk of alcohol-related harm and the grant or renewal of a licence" (para [67]). What this decision means in practice is yet to be fully understood. It is interesting that ARLA adopted the new principles within days in the *Lower Hutt Liquormart*[9] case (which has subsequently been upheld on appeal to the High Court). The DLC had, after a contested hearing, granted a licence to the applicant. The appellants noted, among other grounds, that "the DLC did not stand back and evaluate the evidence and provide reasons as to why granting the application will promote the object of the Act" [para 3.3]. ARLA restated the Lion Liquor principles.

In deciding to reverse the decision, thus rescinding the licence, ARLA stated:

> That the issue of the licence is compatible with the object of the Act is contrary to the evidence before the DLC, particularly that of Dr Palmer who gave evidence that the area in which the premises are proposed to be located are in an area that is in the high-risk category in respect of health harm from the inappropriate consumption of alcohol. His evidence goes to the vulnerability of the locality. The Authority accepts that a further bottle store will not help minimise the alcohol-related harm already existing in the immediate locality [para 128].

And:

> Standing back, the Authority does not consider that given the overall evidence of the vulnerability of the area, the issue of the licence even with the undertakings made and the conditions imposed, is capable of meeting the object of the Act [para 131].

This is a markedly different position than ARLA had been making prior to the Lion Liquor decision. With so little time since the landmark decision, and so few cases tested, it is difficult to know how widely the new principles will be adopted, and whether there will be a further challenge to the High Court on the application of harm minimisation rules to licences.

Such a dramatic change in the consideration (both in the processes and principles) by the appeal authority of the interpretation of the object of the legislation will reverberate through the network of DLCs, the agencies and other parties. The transition will be complex for some time where decisions made under the old interpretations are appealed under the new. Because of the likely chilling effect on both the renewal of existing licences and the issue of new ones, it is also likely that the Lion Liquor principles will be tested again in the appeal courts.

[9] Shady Lady Lighting v Lower Hutt Liquormart [2018] NZARLA 198-99.

Local alcohol policies

It is not within the scope of this report to outline the full struggle that has taken place over the adoption of Local Alcohol Policies. However, the status of LAPs does concern the focus of this report on communities. As noted in the stakeholder surveys, the Local Alcohol Policies (LAPs) have been the least successful elements of the legislation. Both community stakeholders and the industry noted major concerns about these policies.

The important relevant aspect to this report is that, in the absence of LAPs setting local limitations on outlets, it comes down to community action to oppose or set limits on outlets through the DLC process. If agencies and communities do not oppose or object, the DLC is entitled to find that, in all cases, the maximum allowable conditions under the Act are acceptable in all cases.

Jackson and Robertson (2017 p. 5) note the situation to date:

> Of the 33 Provisional policies notified, 32 were appealed. In almost all (94%) of the 32 appealed policies, the supermarket companies of Progressive Enterprises and Foodstuffs registered as appellants (note: some appeals were later withdrawn). The bottle store sector (as a whole) registered as an appellant in 81% of all appealed policies. In contrast, over one-quarter (28%) of all policies received appeals from the Police, health agencies and/or community members. Two judicial reviews were lodged to Provisional policies - in both cases they related to the geographic zoning provisions in the LAPs that determine on-licence trading hours.

They go on to note that the *average* duration from notification of a provisional plan to its adoption was 790 days. Changes made were mostly (71%) towards less restrictive regulations. In short, the contestation of LAPs has worked for the industry. But the costs to local Councils have been huge. After spending more than $1 million on defending its LAP, Christchurch City Council abandoned it in April 2018, and announced it would "start again" (Truebridge and McDonald, 2018).

> The Act outlines in s. 43 what it calls "default national maximum trading hours" for on-licences and off-licences. As noted in the industry survey, one clear position taken by the industry is that the hours stated in the Act should be the 'actual' hours: "There should only be national hours and rules, LAPs should be removed", as one industry respondent put it.

The terms of appeal in the Act (s. 81 (1)) are very broad indeed: "against any element of that provisional local alcohol policy". The ability to appeal has meant that the industry has been able to use legal routes to stymie attempts to regulate the sale and supply of alcohol in individual regions.

The sheer quantity of contestation at ARLA over LAPs has been enormous, taking up by far the majority of the Authority's time over the years (along with the perennial need to punish licensees who fail controlled alcohol operations with short suspensions of their licences). LAPs have not proved to be an effective tool for limiting licence conditions to meet local needs.

The implication of the failure of LAPs to moderate the legislative maxima is that every single application must be battled from ground zero – the assumption that the maximum hours and conditions will be achieved in every licence. This increases the costs and time involved in licence applications and still leaves communities in a vulnerable position.

It is as yet entirely unclear whether the harm minimisation position adopted in relation to licence applications will have spillover to the determination of aspects of LAPs.

Four regional case studies

South Auckland: Communities Against Alcohol Harm (CAAH)

The story of South Auckland has been a tale of the proliferation of alcohol outlets and increasing alcohol-related harm. A view held quite strongly in the South is that the Council Inspectors in the super city were firmly on the side of alcohol interests against the community. Whatever the cause, the community and its local board were faced with a number of losses over contested applications to the DLC.

Things begun to get a lot better when the Auckland Council changed their Inspectorate staff. Also, according to the CAAH group, the police and MOHs went from being "enemies" to "friends". Part of the reason for this was that the Māori Wardens got involved in the issue of alcohol-related harm, and engaged the police.

In short, the group had a long period working within the new legislative regime where it appeared that little had changed from the old regime. New outlets were continuing to open in South Auckland despite evidence of alcohol-related harm. The first appeal that members of the group was against the issue of an off-licence located across the road from the Southern Cross campus in a highly economically deprived areas of South Auckland. This was a very early case [2014], and it is easy to see that the decision processes have moved on. For example, the issue of alcohol-related harm was not even considered by ARLA, even though such harm was evident in the area.

More recently, the group has begun to have some 'wins' in opposing new licences. Grant Hewison is secretary to the group and is a Barrister. He has taken a wide range of (largely) pro-bono cases in South Auckland and also around the North Island. The picture at left is of Grant (right) and other members of CAAH protesting against the opening of a third alcohol outlet in Shannon.

Communities Against Alcohol Harm have been involved in many cases, and for a long time, especially when they were losing, there were no challenges to their status. But more recently they have begun to win a number of cases, and this has brought them to the attention of industry interests, with subsequent significant challenges to the status of the organisation.

S. 102 (1) of the Act states: "A person may object to the grant of a licence only if he or she has a greater interest in the application for the licence than the public generally". In most cases, for individual objectors, this has been interpreted by DLCs as a

geographical requirement – usually stated as within 500 metres or 1 kilometre of the outlet. Nevertheless, significant other groups, for example Community Boards, Residents Associations and health promotion organisations have usually been acknowledged as having an interest beyond that of the public generally. It was under this provision that CAAH has been given leave to be represented at many hearings in Auckland and other areas of the North Island.

Recently, however, a 'Memorandum of Counsel' (the "memo") has been issued by Alastair Sherriff of Buddle Findlay relating to an organisation with close association to CAAH[10], also represented by Dr Hewison.

The memo begins by acknowledging that "In legislation, unless the text and context require a different interpretation, person usually includes corporate bodies". Thus far, no problems of standing if the 'greater interest' clause is accepted.

However, the memo continues, "a body corporate cannot be a 'he' or a 'she'. A body corporate is an inanimate 'it'". Thus:

> The addition of those gendered pronouns, together with the substitution/ replacement of the former "Any person" with the 2012 "A person" all lead ineluctably to the interpretation… as entitling **only natural individual living persons (humans) to attain the status of objectors** (emphasis in original).

The memo contained 26 paragraphs but this is the nub of the argument. In its response to this submission, CAAH argued that of course the organisation has status as a body corporate. The use of gendered pronouns simply reflects modern English usage as it would be ungrammatical for an 'it' to be used with 'person'.

The issues of standing are important because they potentially remove questions of alcohol-related harm from the immediate neighbourhood and put into the wider social context. Issues such as Māori and alcohol, youth pre and side loading and other matters would then become more embedded into decision-making around the number, type and distribution of alcohol outlets within districts and between them.

Gisborne: Ka Pai Kaiti

Kaiti is among the most deprived suburbs of Gisborne, which is itself one of the most deprived cities in New Zealand. The Charitable Trust Ka Pai Kaiti was formed

[10] Memorandum of Counsel for Licensee responding to submission of Otara Gambling and Alcohol Action Group Charitable Trust Board dated 14 August 2018 as to status to object/ validity of objection. Auckland DLC Ref 8220015037, in the matter of an application for the renewal and variation of an on-licence by LNDLU and Co Ltd.

in the year 2000 to promote education, alleviate poverty and improve outcomes in the suburb. The organisation is located in premises within the Kaiti Mall, and has been concerned for some time about both the alcohol related harm and also the gambling in the area.

Within the Mall was the Kaiti Sports Bar, a small premises that had a TAB and Pokie machines, and an on-licence. When the alcohol licence came up for renewal, Ka Pai Kaiti objected on the grounds that there were three facilities within the Mall and a school opposite and they wanted a child-friendly mall. The Inspector opposed the licence on the grounds that the premises is "not a Tavern" under the Act, rather it is a gaming venue, and that therefore the renewal should be declined.

The DLC declined the licence on the basis that it did not meet the object of the Act.

The Licensee appealed and, for whatever reason, the Council did not join the appeal, so it was the outlet against the community, Ka Pai Kaiti. ARLA had to consider whether the premises are a tavern under the 2012 Act, defined as "premises used or intended to be use in the course of business principally for providing alcohol and other refreshments to the public" (s. 5). In this case, ARLA agreed with the DLC that the premises were not a tavern and therefore the licence could not be issued.

This had particular implications for the business, as the gaming machine licence was dependent on the on-licence being in place, so that was lost too. Under Gisborne's 'sinking lid' policy, unless the operator moved the pokies somewhere else, they would be lost. A small takeaway in the town centre, Pizza G, applied for an alcohol licence and noted its intention to open up a bar in the premises next to its shop, and install the gaming machines there. Ka Pai Kaiti protested against the application and it was withdrawn. There are, nevertheless, numerous small bars with gaming machines in central Gisborne.

However, moving into the city from their Kaiti base has meant a number of challenges to the organisation's standing. A new application for an off-licence was heard in 2018 and, on the basis largely of evidence from Ka Pai Kaiti, the application was declined by the DLC. The applicant appealed to ARLA, and a hearing was held in October 2018 in Gisborne[11]. The appeal was successful, the evidence from a number of sources being argued as inadequate. ARLA found both that Ka Pai Kai did not have an interest greater than the public generally in the application [at 90]

[11] Gisborne Liquormart Ltd v Ka Pai Kaiti [2018] NZARLA 316

and also that: "the trust must have an interest greater than that of the public in respect of this particular application" [at 84]. This finding – that a community organisation must show an interest greater than the public generally in a particular application- has been used to remove the standing of a number of groups since then (e.g. CAYAD in the DLC hearing of a renewal of an off-licence for the Woodham Road Liquor Store (Nekita Ltd, April 2019). Thus while the Lion Liquor decision has relaxed a causal nexus in relation to alcohol-related harm, allowing for much broader consideration of context, it has tightened the rules allowing community organisations to object to licences, requiring a causal link of some kind (which remains unspecified) between the organisation and the particular outlet.

While individuals continue to be able to object by virtue of living within a set distance from the outlet, community organisations with an interest in alcohol-related harm must now reach a higher bar than this; proximity is not enough.

Wellington: Agency activism

As part of this study a number of people and agencies were interviewed in Wellington. There is a history of opposition to licences in the Wellington region. One resident, Bernard O'Shaunessy, has been involved for over a decade in opposing licences, especially but not only in the Newtown area.

This section will largely discuss issues about the role of the agencies, and especially the police and MOH, in meeting the harm minimisation goals of the 2012 Act. In essence the question is whether the agencies should just receive applications and comment on or oppose them, or should they also work more broadly to minimise alcohol-related harm in the community? The Act is silent on any role for the agencies beyond inquiring into applications.

The Wellington City Council area has not managed to finalise a Local Alcohol Policy, due to opposition from the industry. However, the provisional LAP for the region includes the potential to reduce the hours of alcohol outlets, especially off-licences:

> The fundamental difference between on- or club-licence activity and off-licence premises is that there is no ability to control the consumption of alcohol purchased once it is taken off the premises. Limits on the hours of operation for off-licence premises help to constrain access to alcohol where that access is more likely to contribute to alcohol abuse and unsafe public environments[12].

[12] Wellington City Council Provisional LAP. Retrieved at: https://wellington.govt.nz/~/media/services/consents-and-licenses/alcohol-licensing/provisional-local-alcohol-policy.pdf?la=en

The provisional LAP also provides (non-enforceable) processes for dealing with issues of proximity and density. Without the LAP in place, however, these principles need to be considered on a case by case basis, adding to the workload for the agencies (and objectors) and increasing the contestation at DLC and appeal hearings.

Both police and medical officers of health have responsibilities broader than licence applications. For the MOH, the overall focus is improving public health and public amenity. For the police it is reducing harm and crime in communities. In these roles, working to ensure that alcohol outlets do not increase harm is very much part of their jobs.

Both agencies in Wellington have been attempting to work with licence holders in the region on the issues of hours of opening and also density. One case to be considered here was that of the Aro Fruit Supply. With a Minimart and a Superette already holding licences close by, the fruit and vegetable shop applied for a full off-licence in late 2017, in what the media referred to as a "booze war".

The agencies are not operating in a benign environment. In interviews, it was noted that the alcohol industry has a lot of power in the Wellington region. Expert Barristers are appointed by industry leaders who have deep pockets, often forcing the agencies to seek counsel themselves, stretching tight budgets.

The police were accused in the media, in influential blogs and by vocal opponents of drumming up opposition to the application by door-knocking in the neighbourhood and talking to residents about the additional harm that may be caused by an additional outlet. In an Editorial, the Dominion Post noted[13]:

> But the police went too far in spreading the word about this particular liquor licence application. They door-knocked businesses in the area around the Aro Fruit Supply shop, and they also shared on social media a guide on how to oppose an application. These actions might be defended as simply giving the public valuable information. But they also open the police up to Wellington lawyer Michael Bott's charge that they were acting as a lobby group rather than as neutral enforcers of the law.

[13] Retrieved at: https://i.stuff.co.nz/dominion-post/comment/editorials/93682649/Editorial-The-police-must-tread-carefully-over-liquor-licences

The police were also scolded by Kelly J in a recent case[14]: "Reporting agencies should be careful to avoid 'negotiating' conditions with an applicant in exchange for those agencies not opposing the application. … It would be an improper use of their reporting role …".

This may be true in terms of the reporting role, but if limiting outlets or hours minimises harm, then arguably it is part of the police's wider role. The police have been working quite hard to get outlets, including sporting venues, to look at reducing their hours in advance of licence applications. This may well be well within their brief, but can lead to questions in Parliament such as the following:

> Is it acceptable for police to say to bowling clubs that they will not object to a licence if the club agrees to police suggestions around hours and other licence conditions, but they will object if the club doesn't, and do these kinds of standover tactics have a place in New Zealand?

So whether it is standover tactics or rational operating practice is in the eye of the beholder, and in a fractious and oppositional arena, it is difficult for the agencies to achieve their wider goals without accusations of heavy handed behaviour. In the following extract from a media story about police and health officials being 'warned' not to get involved in negotiating earlier hours outside of licensing hearings:

> Deputy mayor Paul Eagle said the council had consistently made it clear to the police and the Medical Officer of Health that only it can set such hours.
>
> "What's been disappointing is the police seem to be encroaching into a role that is not theirs, and what we'd like to remind them is that is the role of the DLC," he said[15].

There seems to be little understanding that the goal is to avoid contestation at the DLC and opt for lower-level agreements as the best way to resolve licensing issues.

All of the attention on the Wellington agencies has made it difficult for them to perform their wider roles in public health and community safety. This project was not able to interview the police but the Wellington MOH was interviewed, especially on his role in appealing the Lion Liquor ARLA decision (see above) to the High Court. He noted that, with the police under such significant attack, and his own role being warned to stay within the agency boundaries, he was undecided for a long time on whether to make the appeal to the High Court.

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[14] Rapira-Davies v Patel [2017] NZARLA 52

[15] Retrieved at: https://www.radionz.co.nz/news/national/329896/wellington-police-and-health-warned-by-alcohol-authority

As noted above, however, the appeal was made (on the last possible day), the police did join as a party and the upshot was the most significant change in the law since the 2012 Act came into operation; the results of which are yet to be fully understood.

The various pressures on the agencies, and especially the police and health which also have wider responsibilities to the communities they service, raise questions about the role and function of agencies under the 2012 Act. All those we spoke to talked of a lack of resources and a surfeit of expectations. It is also worth noting that these responsibilities are carried out in a fishbowl, in plain site and subject to significant critique.

Christchurch: strengthening diverse communities

The final case study is about the post-earthquake environment in Christchurch. Many alcohol outlets closed down after the earthquakes and many others started up. In 2014 the DLC received an application for an of f-licence in Linwood, an area of high social deprivation in eastern Christchurch. The application was opposed at hearing by agencies and communities (except for the Council Inspector) and declined. At appeal[16], the neighbourhood was described as follows, as reported in the DLC decision:

> "[48] What we did find as totally compelling evidence came from Ms Smith of Te Whare Roimata. She is clearly a very experienced community worker who has worked with the people of this area for nearly 30 years. When she described the deprivation in this area, the huge problem of poor accommodation even homelessness, the poor health, the lack of employment and the transient population she spoke with conviction. We accepted her concern that the granting of this application would lead to problems that an already struggling community had no need of. We were left with a very vivid picture of an area if not in crisis then in a very vulnerable position."

The appeal was dismissed. What is important about this case is that it was the first time that Community Law Canterbury had provided free legal support and (at ARLA) representation for a local community. Community Law receives funding for legal services from the Ministry of Justice, but supporting communities wishing to object to alcohol licences falls outside the brief. Thus, to an extent, the alcohol support work was provided pro bono in Canterbury, and few other Community Law Centres were able to offer this.

[16] B & S Liquor Limited v New Zealand Police [2015] NZARLA 576 (6 October 2015)

Over the following couple of years, Community Law Canterbury continued to provide information and advice to potential objectors that approached the agency, and developed information and education materials. In 2016, the Health Promotion Agency funded the organisation to study the needs of the community in terms of legal support and advice. The resulting report (Gordon 2017) noted significant problems by communities in accessing advice and support and a large imbalance in terms of legal advice.

In 2018 the Christchurch DLC declined an application by Liquorland for a new off-licence in Ferry Road[17]. The objectors received training and support from Community Law. Despite the community and all agencies opposing the application, the DLC decision has been appealed and community lawyer Simonette Boele has an agreement with the objectors to represent them at appeal.

In 2018 also, the Health Promotion Agency and Community Law Centres Aotearoa (the national body) agreed to work together on a demonstration project in a number of regions to support communities to object to licence applications. The focus of this project is on community support and education. Materials include workshops on how to object to licence applications, taking into account legal requirements, and how to participate in hearings. A further community education programme has been developed to provide legal education for community organisations in reducing alcohol harm in their areas.

The aim is to provide a better legal voice for communities through the whole process. With the Lion Liquor decision emphasising the broader agenda of minimising harm, and this project encouraging community voice, it is hopeful that there will be noticeable effects in the decisions of DLCs and the appeal authorities over time.

The project described here is in its infancy. Already the lawyers working (part time) on this work have supported communities, carried out legal education, developed education programmes and produced materials. Proper support for communities in objecting to outlets that will increase alcohol-related harm is essential to balance some of the unevenness in the system.

[17] Riccarton Liquor Ltd (Christchurch DLC) June 2018

The Treaty of Waitangi claim

David (Rāwhiri) Ratū was interviewed for this project on the Treaty of Waitangi claim which is currently being litigated through the Waitangi Tribunal in relation to the operation of the Sale of Alcohol Act (2012).

The claim was made in 2017 under the banner of WAI 2575 – The Health Inquiry, and was made both by David Ratū as an individual and by the Turehou Māori Wardens ki Otara Charitable Trust.

Mr Ratū's claim had its genesis at the Auckland DLC hearing on a licence renewal for the Phoenix Lounge. He described this as a "shocking experience". Appearing as a Māori Warden, Mr Ratū found his standing challenged by the Inspectorare. He considered that "this was tantamount to disrespecting my mana as a Treaty partner". The presiding chair reserved his decision but subsequently ruled that Maori Wardens did have standing by virtue of their powers under the Maori Community Development Act 1962. Mr Ratū said:

> This was the most unfriendly, hostile environment I had ever encountered. It was very much a case of 'them' and 'us' – the community being the 'them'.

He recounted that, as a result of that experience, he began to engage with DLC processes. Over time, he has begun to engage with all three agencies in Auckland, who now have begun to consult with Māori on applications. However, his views of the DLC hearing process has not changed:

> I have played a part in that sandpit for a while no but others won't come in. Māori will not play a part in that process because it is foreign. Māori Wardens went to the first [hearing] and didn't go back. We had a witness lined up. At the break they refused to give evidence: "it's not safe for me".
>
> Why should Māori go in and be pulled apart? It is not a level playing field – lawyers shouldn't be there at all.

David Ratū and others concluded that "for Māori to be part of licensing processes, the Treaty of Waitangi needs to be operative within the Act".

He argued that DLCs appear respectful to Māori objectors but "do not act on it". He notes they tend to interpret the Act in a very narrow fashion that squeezes out the rights of people to be heard effectively.

He noted that "at present, DLC hearings are little more than a box-ticking exercise. But while they are there, I will continue to go and give evidence".

Māori and alcohol

Prior to contact with pākeha, Māori were one of the few peoples who did not develop alcoholic drinks: "The white man and the whisky bottle came to New Zealand together"[18]. In the mid-1800s alcohol became a site of struggle, where Māori leaders fought to keep alcohol ("waipiro") from their tribal areas but also resented Ordinances which excluded Māori from purchasing liquor. The history from then went through a number of phases, including various controls and uneven drinking practices around Aotearoa.

There is little doubt that during the wars, Māori soldiers were heavily exposed to alcohol. The following image shows a celebration dinner for the return of the Māori battalion in 1945:

Celebration dinner. Return of Maori Battalion, 1945. Photographer: John Pascoe. Alexander Turnbull Library, National Library of New Zealand/Te Puna Matauranga o Aotearoa, F. 1662 1/4.

[18] Te Iwi Maori me te Inu Waipiro: He Tuhituhinga Hitori He Tuhituhinga Hitori (slide presentation).

There is significant social and health evidence that Māori today suffer disproportionately from the effects of alcohol. In its 2011 report *Ko Aotearoa Tenei* (WAI 262), the Waitangi Tribunal notes that "Māori adults are much more likely to have potentially hazardous drinking patterns"[19]. MacLennan et al note that Māori "have an age-standardised alcohol-attributable death rate 2.5 times higher than non-Māori"[20].

The David Ratū claim argues: "that the sale, supply and consumption of alcohol in Aotearoa/ New Zealand is resulting in ill-health amongst Māori, disparities in health outcomes for Māori, and is actively driving health inequalities between Māori and other New Zealanders".

The Treaty claim

The claim notes that "these prejudicial effects are being caused, at least in part, by omissions made by the Crown in its regulation of the sale, supply and consumption of alcohol" (clause 3).

The omissions noted in the claim are the failure to implement all of the findings of the 2010 Law Commission recommendations and that the 2012 Act is inconsistent with the principles of the Treaty of Waitangi. The particular health interests noted in the claim were:

a) Evidence of alcohol misuse in imprisonment rates, domestic violence, low educational achievement and youth suicide;

b) Early death by alcohol-related causes, likely to be stopped and charged for offences that involve alcohol and harmful effects on finances, study, work, injuries and legal problems resulting from use of alcohol;

c) Effects on Māori women in terms of family violence, disruption of home lives, victims of sexual assault and involvement in car accidents; and

d) High unmet need for reducing alcohol consumption and controlling the causes of alcohol-related harm in their communities.

The claim notes that alcohol "may not simply be reflecting existing inequalities between Māori and other New Zealanders, but it may be actively driving inequalities".

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[19] Claim of David Ratū and Turehou Māori Wardens on WAI 2575.

[20] Maclennan, B et al (2016) New Zealand's new alcohol laws" protocol for a mixed methods evaluation. BMC Public Health 16:29.

In relation to the Act, the main claim is that it does not include a Treaty clause that requires the Act to take account of the principles of the Treaty of Waitangi.

The Treaty claim requests remedies arising from a declaration that the claimants ("indeed, all Māori") are likely to be affected by the failure to take into account Treaty principles in relation to ill-health, poor health outcomes, and health inequalities between Māori and other New Zealanders.

Remedies claimed are primarily around enacting all the findings of the 2010 Law Commission report and including a Treaty clause in the 2012 Act.

At the time of writing this report, the Waitangi Tribunal is considering whether to grant urgency in hearing this claim. In the papers, which support the original claim, certain actions are highlighted as being needed to meet Treaty obligations.

The first is the right to involvement on the decision-making District Licensing Committees. The goal is to ensure that every DLC hearing contains a Commissioner or member to ensure that Māori voices are heard in the process, and respected.

The second is a requirement that whakapapa be included in consideration of standing. For Māori, heritage is a living thing. If a pa site is located just down the road from a licence, or if tupuna resided in an area, then these interests must be able to be considered.

The third is that Māori have standing as tangata whenua, which would mean, for example, that iwi membership would confer standing in relevant situations.

There is the potential for a significant change in the conduct of hearings resulting from this claim. Like a number of others interviewed for this report, David Ratū believes that lawyers should be banned from DLC hearings. However, there is scope here for Treaty rights to provide at least a partial counter-balance to the legal framework that dominates many hearings currently.

Conclusion

Many of the issues documented by David Ratū and the Māori wardens are very similar to those faced by other members of communities wishing to object to alcohol licences: an alienating environment, a legal framework for hearings, and even extinction of rights to participate by being deemed not to have an interest 'greater than the public generally"'. David Ratū notes: "The key difference between Māori and the rest of society is that Māori are a signatory to the Treaty, are a Treaty Partner, the rest of the society are not".

The Treaty claim shifts the focus of licensing application decisions from being administrative matters to human rights, in this case dictated by rights under the Treaty of Waitangi. It has the potential to change the conduct and decision-making of DLCs.

The claimant is not expecting that this claim will lead to a wholesale rewrite of the Act. David Ratū believes the Act is bolstered by vested interests, and especially the power of the alcohol industry.

Nevertheless, armed with the decision of the Tribunal, he believes that significant difference will be able to be achieved at DLC hearings, affecting findings in particular regarding standing and whakapapa. "DLCs will be too scared not to take such a finding into account".

A "strong legislative framework" for reducing alcohol harm?

The 2012 Sale and Supply of Alcohol Act is a relatively simple piece of legislation made complex by a number of factors outlined in this report. These are:

The legislation is national but is delivered locally by 67 District Licensing Committees which vary in membership, expertise, legal analysis, staff support, training and decision-making (process and outcomes). Even licensing inspectors, who were well-represented in the survey, thought the DLC system was uneven and difficult, with too little training and legal support.

The ability of communities to object to licences is a key feature of the scheme of the Act. But this study and earlier research has found major difficulties that communities have faced at all points of the objection process. In some areas there has been virtually no community voice heard at all, despite concerns within communities. The rise of organisations such as CAAH and Ka Pai Kaiti has sought to even out that imbalance. But as these agencies have become successful in using the s.105 reasons for objection to have licences declined, in recent times the industry has sensed danger and has funded opinions to argue that these groups should not have standing at hearings. Standing has been denied to some groups on the basis of a recent ARLA decision.

There is great unevenness in the stance and work of the agencies across the country. This is very important because the evidence and sometimes opposition of agencies counts, in practice, somewhat more than community objections. We received little direct evidence from the police, but saw in group discussions that there were big differences between regions in their work in opposing licences. In the case study of the agencies in the Wellington region, the police got into difficulties by combining their agency role under the SSAA with their 'crime reduction' role in the community. The Medical Officers of Health faced similar difficulties, especially because the opposition role is time-consuming and relies upon the collection of high-quality data, which is, in smaller areas, outside the capacity of the role to produce. It is not clear how much resource these agencies were expected to use in the role, but it seems clear that there is not enough, in practice, to support well-informed and active agency involvement.

The failure of LAPs has impacted very heavily on all three groups discussed above – DLCs, objectors and agencies. In the survey, around half of all industry participants also felt that the LAP process was not working. If each region had a well-functioning LAP that expressed and met local needs, the high level of contestation at DLC and ARLA level would be massively reduced, and all parties would share a blueprint about what alcohol services may look like in a region. For example, LAPs

might lay down the number of outlets, their type, distribution across areas, hours of operation and so forth in their regions. The action by powerful industry interests to block LAPs that attempt to reduce the maxima expressed in the legislation has forced every DLC hearing potentially into a battleground, increasing unplanned unevenness (i.e. not based on LAPs but individual decisions) and leading to many appeals. On that note, ARLA has been clogged up by LAP cases for several years now, and this has slowed down the appeal process for licences. A number of researchers (e.g. Jackson and Robinson 2017) have suggested that LAPs should not be subject to appeal through the courts, but this would require legislative change.

There has been a significant unevenness of decisions over time and between cases and regions, which may be slightly modified by the existence of an appeal authority, ARLA. However, in May 2018 a High Court decision forced a major turnaround in how ARLA interpreted the Act in relation to alcohol-related harm, in the Lion Liquor case. The two errors of law identified were:

> That ARLA, while recognising the link between availability of alcohol and alcohol-related harm, failed to support the DLCs decision to limit hours: "The DLC did not have to be sure the condition would, in fact, minimise alcohol-related harm. It was entitled to test the possibility" [para 72e].

And:

> ARLA failed to apply the proper test by requiring demonstration of a clear link between an outlet and specific alcohol-related harm. In fact, "It was sufficient to engage the requirement to minimise alcohol-related harm that the evidence implicates the premises. The Authority erred in requiring evidence of demonstrable historical harm. Rather, it was required to assess risk which, by definition, is future risk" [at 70].

The effect of these two decisions regarding the proper legal considerations has yet, at the time of writing this report, to be fully realised. One observation is that ARLA and thus DLCs have been making these 'most restrictive' decisions for some years now, so that, in principle, all new applications and many renewal applications may fail if they are opposed by communities under the new interpretive framework. And, potentially (as the shift in what constitutes the law has been very significant), the DLCs might make such decisions simply because their own processes have been altered by the HC judgment.

On the other hand, given the difficulties documented in this report in getting communities and agencies to object or oppose licence applications, and certainly renewals, perhaps there will be little change resulting from the significant reinterpretation of the law carried out by the High Court. There is some evidence

that the rights of community groups to standing at DLC hearings are being reduced or extinguished at the same time that harm-related concerns are broadened.

In summary, the finding of unevenness through the alcohol law, whether intended via regional differences and LAPs, or unintended through administrative, education, community, agency and other factors, confirms the hypothesis that drove this project. Every sector agrees that the law is uneven, and uneven law is always potentially unjust. There is little certainty in the sector. A determinative point in one hearing may be completely disregarded in another. After five years of operation, there is little evidence of harm reduction arising from a change in licensing regime (Randerson et al, 2018).

The Minister promised a strong legislative framework for reducing alcohol harm, but if this was a key goal for the legislation, it has failed. There is far too much uncertainty and unevenness to characterise the framework as 'strong'. It is weak, complex and difficult to navigate for all parties. Some interviewed for this study felt this was the intention all along.

With the finding in Lion Liquor that the wrong legal tests have been applied over a long period of time, leading to lower estimates of potential harm from outlets, there is the possibility now of some clarity in the law at least. But this brings its own concerns, especially for licence applicants. They already find the process slow and expensive. Navigating the new environment where a licence application may be declined simply because there is alcohol-related harm in the area is going to be difficult, and it is likely that the Lion Liquor decision will be challenged in the higher courts at some stage.

This study discovered early on, in the survey work, that that levels of contestation in the alcohol law between communities and the industry is very high. The stakes are enormous: the ability to run an effective and profitable business without interference against the ability to have an alcohol harm-free community. The battle lines permeate every aspect of this space, and any replacement for the current law would also have to face these divisions. For that reason, it appears unlikely that major legislative change is on the cards at the present time.

Annex 1. Results of stakeholder survey

This section reports the findings of the survey for all stakeholders except owners and licensees in the industry. As Figure 1 shows, the stakeholders are a diverse group and not particularly well-balanced in terms of representation in the survey. The Council Inspectors were invited by their network to respond, and did so in significant numbers. On the other hand, NZ Police did not give permission for alcohol officers to participate. Four officers found out about the survey through networks and chose to take part.

It was pleasing that more than 20 objectors participated in the survey as these tend to be the 'unheard' voices in this area. Thanks to all the groups, large and small, that were able to take part and sent information around their networks.

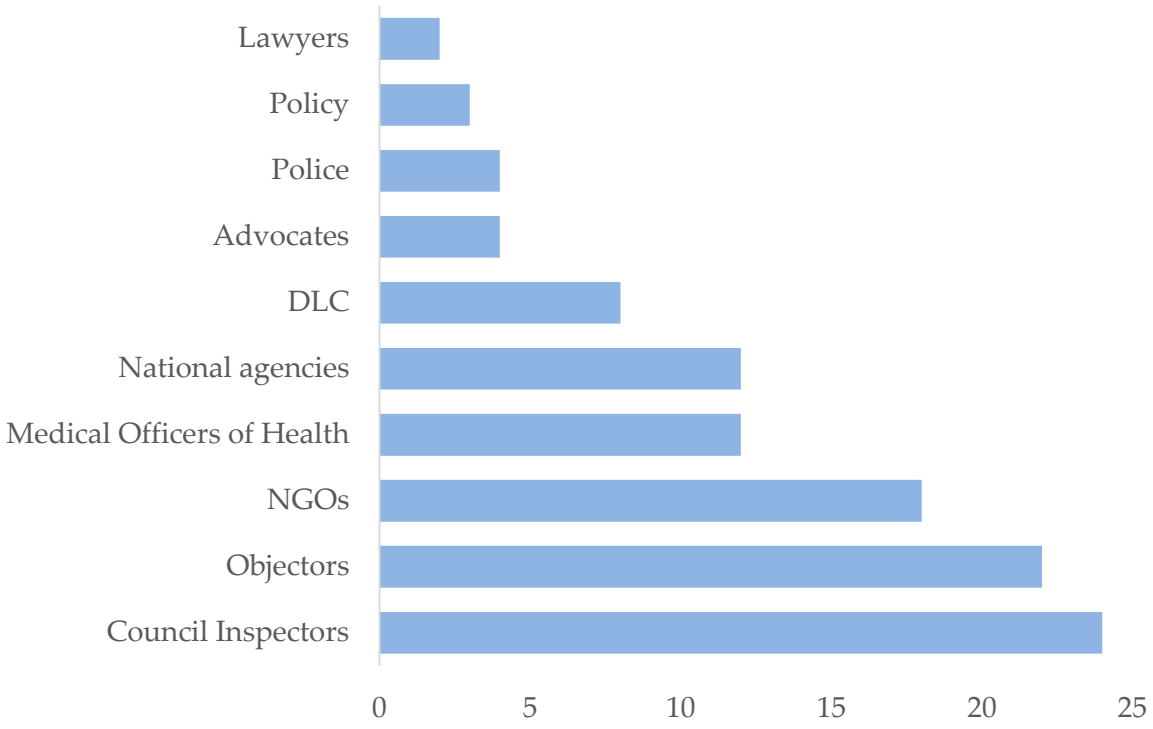

Figure 1. Stakeholder participants by category.

While the industry respondents to the survey are being treated in a separate report, all of these stakeholders are being analysed together. This is not to imply that the stakeholder group is homogenous – far from it. This report deals with a wide range of responses.

Omnibus views

To begin with, a number of stakeholders provided overviews of how they saw the legislation, which are worth repeating. These follow, in no particular order:

Access to justice: "The act is flawed from licence application onwards. Local councils are weary of costly legal repercussions for refusal to grant a licence to a liquor group with substantial legal expertise available. Community objectors cannot afford legal representation at these hearing and as a consequence their submissions carry little if any weight. The process continuing on from this point is flawed because of the above".

LAP/ off-licences/ access to alcohol: "It has generally had a positive effect on on-licence operations by lowering the amount of intoxication that is being found. The LAP process is a disaster and HNZ has done a very good job of pretty much getting most councils running scared. The proliferation of small off licenses is an issue that could easily have been better addressed by including a zoning aspect into s105 or having a much more effective LAP process whereby the public get what they ask for rather than licensees having all the say. There has been nowhere near enough done to address minors' access to alcohol - the default age is as low now as it has ever been".

LAP/ Law Commission/ devolution: "There are issues with undermining of local democracy with respect to allowing PLAP appeals by industry, there is a lack of subject literacy around alcohol harms among DLCs and there is lack of training and support for DLCs in their decision-making. The devolution of alcohol regulatory responsibility to local government has removed any sense of responsibility by central government to bring in policy change that would make the biggest impact to reduce harm (as per Law Commission's recommendations)."

Law Commission: "The Act was a fudge to make it look like the government was responding to community concerns and the Law Commission report. Instead we got a piece of crap that heavily favours alcohol death merchants."

Law Commission: "Act works reasonably well as specified in the Act, but Act was a long way short of the sort of behaviour shift suggested by the Law Commission. It therefore falls short of achieving any significant advances in reducing alcohol related harm."

Onus on licensees/ courts: "I believe the Act works well in putting the onus on licensees to ensure the sale and supply of alcohol is done in such a way to meet the object of the Act. I think the shift in responsibility is a good thing. The ability to sell

and supply alcohol is a privilege and the requirements of the Act reflect this. Like any new act there are perceived grey areas which have been and are being tested in the Courts but that is to be expected."

Individual responsibility/ lack of qualifications: "The Act does not have anywhere near enough focus on the individual drinker and ensuring they have responsibility. There is also no requirement for DLC members, MoH officers, or Council Licensing Inspectors to have any formal qualifications - currently the skill set and competency of those people in those roles is severely lacking."

Legislation/ objectors: "Working/not working is very difficult to quantify for 3 DLC's, and what is defined as working/not working. The outcomes? The Act is poorly drafted and has many "cut and paste" cul de sacs from SOLA i.e. sections don't link. The object is good but in practical terms the criteria have no weighting and the LAP are not an overriding criterion. In effect the Act is nothing more than the Sale of Liquor Act plus. It adds new criteria and adds some (weak) controls that remove on excess (single alcohol area, promotions). It has not changed the fundamental move from 1962 on necessity of licence to 1989 market demand for licences. Public objectors are exposed to an adversarial legal system despite the commission of inquiry structure."

DLC operation/bias: "Deeply concerned that while the Act has great objectives and intent, at the Council, DLC and industry level the intent and objectives are lost. [One] DLC runs their meeting's contrary to the act and guidance procedures and seems able to make judgements that are contrary to natural justice. Had a terrible experience where we read up on procedural requirements only to be told that this DLC does things differently. This makes a mockery of the process and the views of the community. From a process perspective, it's totally slanted toward the alcohol industry."

Read as a whole, these omnibus views reveal many different layers at which the legislation operates, and quite a wide range of problems. These will be unpicked and discussed throughout this report.

The licensing process

The stakeholder group were keen to have their views of the licensing process known. There were split views on every topic. The strongest element said to be working was the licence application system, and the weakest area is the local alcohol policies (LAPs). Results overall are shown in Figure 2 below.

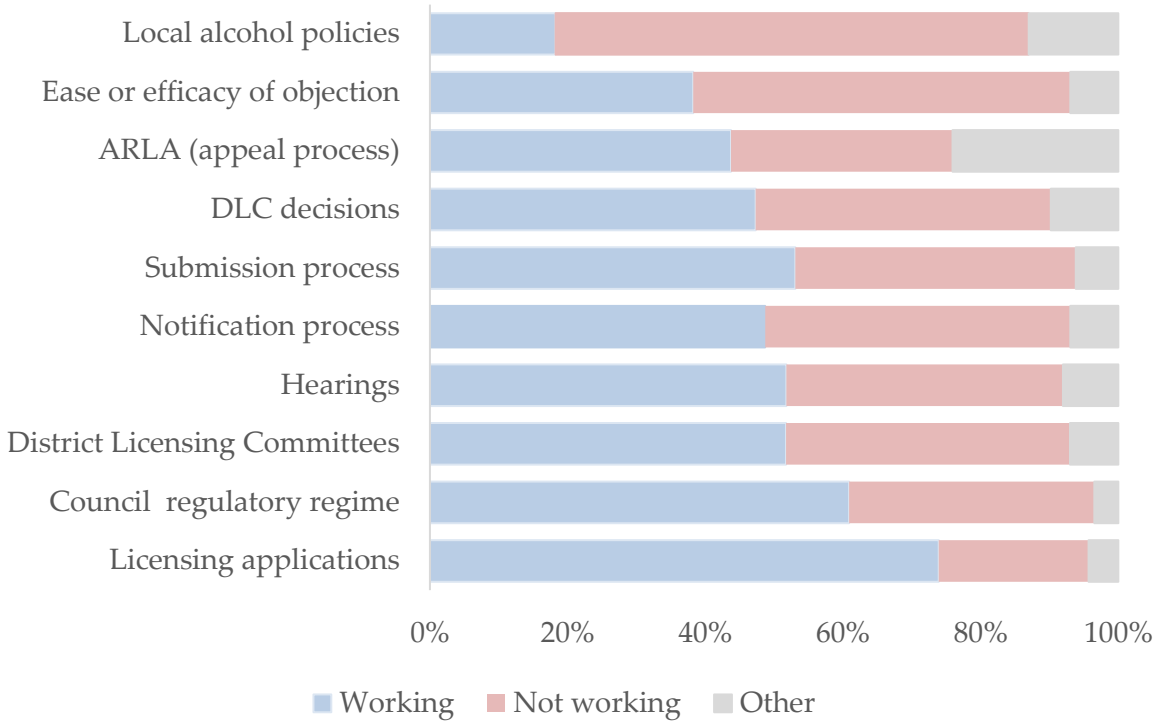

Figure 2. Views of participants about aspects of the licensing process.

There were few comments about either the application system (although this is covered in depth in the industry responses) or the Council regulatory regime. The District Licensing Committees, however, attracted a large number of comments on many different aspects of DLC operation. Some see the DLC as the space where various views can be heard, although there is concern about the expertise of DLC panels in some areas:

> Territorial Authorities have appointed Chairpersons and Commissioners who are not competent in their roles and consequently the licensing processes in those districts are not putting the Object of the Act in to effect.

> The Act has given too much power to untrained DLCs who may be local or may live 6 hours away. The Councils have no idea that the process is quasi-judicial and the inspector is often ignored or in some cases is writing decisions. LAPs have been a waste of time, too costly and industry-centric. Communities have not had what they were promised.

> The DLC should not be elected Councillors but have Commissioners instead to avoid conflict and political interference.

Because of the number, variance and differences around the country, "application processes also work but are varied across the country. Many regulatory agencies and

DLCs are lacking the skills for it to work properly". As well, "there is no consistency and it is based on their opinions rather than precedent and sometimes fact".

Many other responses discussed the inconsistencies between and sometimes within DLCs, sometimes in considerable depth. There is a strength of feeling among these stakeholders that justice is not being served because of these difficulties.

Responses also noted how difficult it was for communities to front up to DLCs:

> The hearing was so HARD. The applicants had a QC who just quelled our community objection. It was really nerve-wracking and embarrassing to speak into that space of the hearing. We were given no advice from the council on how to prepare or what should be in an evidence brief. The committee seemed to have made up its mind before we started. The inspector joked with the committee and the applicants during the breaks and seemed to not understand a need to appear neutral. The whole process felt overwhelmingly stacked against community objection.
>
> Difficult for submitters to testify at hearing due other commitments - work, family, health, transport etc. Difficult for unskilled submitters to effectively communicate, challenge misinformation, answer lawyer's technicalities.

Community stakeholders had a wide range of views about whether the legislation was working. There was a general view that the Act lacked clarity and some see it as "a mess".

> It is so poorly drafted compliance by local authorities and DLCs is inconsistent. ARLA gives the impression it still operates under the previous regime or at least is disinterested in the views of objectors - beyond counting the number of objections. My view of the Act may be skewed by a policy person at MoJ admitting to me it is a mess at the time DLCs were being set up.

But some believe this will work itself out over time, although in the meantime some groups, especially community objectors, pay the price of a poorly legislated regime.

Several community respondents were of the view that the Act had begun to meet its object of a focus on alcohol-related harm. On the other hand, industry still appears to have the upper hand in the application process.

As can be seen in Figure 2, the strongest area where there is a view that the Act is not working is in relation to local alcohol policies (LAPs). None of the larger regional authorities have completed LAPs. The main reason for this has been a logjam at

ARLA, where alcohol interests have opposed LAPs in huge numbers. Indeed, one stakeholder noted that most of the work of ARLA has been hearing objections to LAPs.

The Act outlines in s. 43 what it calls "default national maximum trading hours" for on-licences and off-licences. As noted in the industry survey, one clear position taken by the industry is that the hours stated in the Act should be the 'actual' hours.

The terms of appeal in the Act (s. 81 (1)) are very broad indeed: "against any element of that provisional local alcohol policy". The ability to appeal has meant that the industry has been able to use legal routes to stymie attempts to regulate the sale and supply of alcohol in individual regions. In the words of one stakeholder:

> The right to appeal of LAPs is undemocratic and has allowed the alcohol industry to buy favourable policies.

Some stakeholders noted that the LAP process has been a "disaster", which has been fuelled primarily by the ability of the alcohol industry to fight for maximum conditions through the appeal process. While the industry is quick to put legal teams onto challenging LAPs through ARLA, the community does not have the resources to do this:

> The main problem is the ARLA appeals process for both LAPs and DLC decisions. It makes it very hard for communities that are not well-resourced. The other is how few TLAs have been able to adopt a meaningful LAP due to appeals process being too expensive for them - it should just be a Special Consultative Procedure like other Council activities.

Ease of objection

Less than 40 percent of stakeholders thought that it was easy to object, and many noted a lot of barriers, including that:

> Lay people have abysmal knowledge about the Act. This is used by professionals to their advantage. They have months to prepare an application, objectors a matter of days.

And

> Communities are not getting enough support to object effectively. The law may be uneven from place to place.

A number of people commented on the imbalance of advice and support:

> It is extremely hard for communities to gather/ band together to comment on the impact of a licence application. Applicants are entitled to legal representation, but groups must represent themselves as individuals. The notification process is hard to follow for most people (with some not even being aware an application has been notified until it is too late). The process is a confused mix of legal and non-legal process. Councils vary too greatly on the way they work with the regulations.

And

> My basic understanding of the Act is that it was intended to give communities more say and input into the control of alcohol. This does not appear to be the case. Indeed it seems the Act has instead enabled the liquor industry to dominate the legal process. Communities who seek greater alcohol control don't have the resources that big alcohol has and there is a steam-roll effect. Communities literally have to give up the fight as they can't pay the costs. Smaller territorial authorities are also in similar positions. The Act or the way ARLA is interpreting the Act has seen the burden of evidence being placed on the proponents of more control - we have to prove that there is harm caused. The alcohol industry is not required to prove that harm is not occurring.

In short:

> It is too legalistic for community objectors and weighted towards the applicant rather than the minimising of harm to the community.

One submitter commented at length about the process:

> The Act aims to minimise the harm from alcohol, yet many communities do not yet have a Local Alcohol Policy to help guide policy and practice in this area. The Act supposedly aims to increase / strengthen community participation, but this is not happening in practice. The process of opposing is daunting and confusing for community members, and there is insufficient information about the hearing process and how it operates. I felt the hearing was fundamentally unfair, in that the Applicant had a lawyer, and they had seen all our letters of opposition in advance. We had no opportunity to view their evidence or arguments. The Inspector's Report was given to one of the community objectors, but declined to others. Our local council's admin processes seemed inefficient at best, incompetent at worst! The hearing took a

> full day, and then we were asked to provide written detail on each of our references (in our written Brief of Evidence), which had to be provided within 2 working days. In total I estimate that I spent 8 hours researching and writing my Brief of Evidence, 6 hours attending the Hearing (I had to leave early for an appt), and then another 3 hours writing the follow-up document with details on the references used and the relevance to the Application. I think its unreasonable to expect community members to do so much work, just to have their say. I also felt the hearing process was too adversarial. We are a small community - I would have preferred to just have an informal, facilitated meeting with the Applicant and perhaps a support person or maybe lawyer, and to have worked through a process to hear both sides and suggest some compromises. More like a Family Group Conference - I was shocked at how horrible a formal Hearing was - it felt like Court and it felt like we'd done something wrong. And I'm sure it was absolutely horrible and traumatic for the Applicant, who are a local couple just trying to keep their business afloat. Sorry for the long rave, but I really, really hated the process, and I feel that its completely unreasonable as a method for encouraging community participation in decision-making around alcohol availability. The District Licensing Committee members and their lawyer questioned our evidence (academic references on links between outlet density and increases in availability with alcohol-related harm). I felt the Committee was absolutely not neutral. One example is after the lunch break the District Licensing Committee Chair raised a point that the hotel in question already had a small sign advertising craft beer (in relation to our concern about increased branding and liquor-related signage). This seems inappropriate given that she was the Chair of the Committee and was supposed to be leading a democratic process in a neutral way.

As one person summarised the process:

> It works unless you are a community group wanting to have a say.

Uneven application and alcohol-related harm

Many survey comments were around the uneven application of the Act. The imbalance seems to stem from three areas. The first is the management of the power relationship between industry and community, and in particular that the industry, with high levels of legal advice, keeps attempting to re-interpret the legislation:

> The Act does not address real issues in society and places onerous responsibilities on licensees, while providing sections of the Act that are

> interpreted in multiple ways and in turn lead to extremely different amount of enforcement in different areas of NZ.

Second are the problems with the Act itself: "the Act is badly written, and contradicts itself", and "It is mostly working but the greatest problem is with consistency of interpretation."

Third are the multiple regional problems differences among the players:

> Inconsistently interpreted across the various DLCs, MoH, Licensing Inspectors which means different outcomes. Public notifications are almost non-existent due to online notices becoming the norm which makes it difficult for communities to have their say.

A number of participants examined whether the alcohol-related harm aspects of the legislation was working:

> My basic understanding of the Act is that it was intended to give communities more say and input into the control of alcohol. This does not appear to be the case. Indeed it seems the Act has instead enabled the liquor industry to dominate the legal process. Communities who seek greater alcohol control don't have the resources that big alcohol has and there is a steam roll effect. Communities literally have to give up the fight as they can't pay the costs. Smaller territorial authorities are also in similar positions. The Act or the way ARLA is interpreting the Act has seen the burden of evidence being placed on the proponents of more control - we have to prove that there is harm caused. The alcohol industry is not required to prove that harm is not occurring.

Other comments included: "Lots of work for little reduction in alcohol harm"; "there is little evidence that the Act has minimised alcohol-related harm" and:

> The ACT is a poorly written piece of legislation. It is hard to follow. In terms of the ACT working there does seem to be a better focus on minimising harm.

Proliferation of outlets

A number of stakeholders thought there were too many licences now:

> Main area of concern is the increased amount of licences. Started in an off licence 12 years ago with 2 off licences and two supermarkets in town. Now 12 years later we have 4 off licences and 4 supermarkets. Council states we have a problem with liquor abuse but still add licences.

A number of stakeholders mentioned the supermarkets as the cause of proliferation:

> The issue of supermarkets selling alcohol is the greatest contributor to alcohol harm in NZ and until such time as Government address this issue head on, we will continue to have to have generic policy to appease those who can afford the costly appeal process.

And off-licences:

> Again outside the issuing of licencing of on Premise, again the issue is more with Supermarkets and Bottle stores, who by volume contribute to approx 75% of all alcohol sold... so really where do we think the issue lies with Alcohol on over regulated Licenced premises or the Off Licence premises.. You do the maths!!

Is the legislation working?

When asked outright whether the legislation is meeting its objects to provide safe and responsible consumption of alcohol and minimise alcohol related harm, only 28% of community stakeholders answered unequivocally 'yes'. In contrast, 55% responded 'no', and 20% thought that the Act was "partially" working, or working "in some regions", or was poorly conceived (needs for change in age of drinking etc). Some had not seen the change from the previous regulations that they were looking for:

> The Act does not go far enough. We need greater regulation on advertising / sponsorship of alcohol. We need to really give communities a voice about alcohol - this should include whether alcohol can be sold in supermarkets and the hours that it is sold. We have seen very little gains from the new Act and it is timely for it to be reviewed.

A strong view of the operation of the Act emerges from these views. Stakeholders are concerned about the level of contestation, the unequal power relationships, the lack of readiness in the community (and the many barriers) and a partial failure of the Act to bring about the required change to minimise alcohol-related harm. The next section focuses specifically on the criteria by which people may object to an application for an alcohol licence, as outlined in s. 105.

S. 105 criteria

A series of questions about the application of s. 105 were put to community stakeholders. The results are summarised in Figure 3. below.

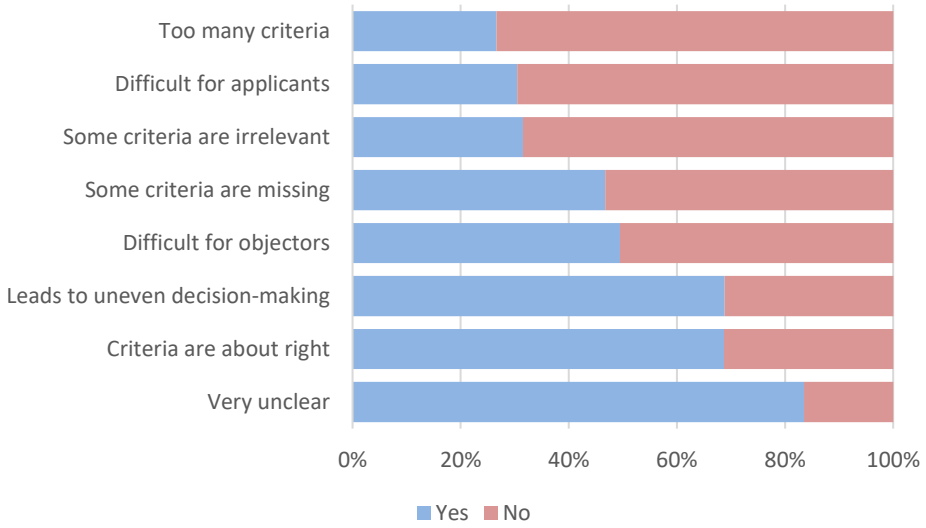

Figure 3. Views of community stakeholders on aspects of s. 105.

Quite strong views arise from the stakeholders about the criteria. There are not too many, and the areas are about right, but the criteria are very unclear and this leads to uneven decision-making.

Most of the concerns around clarity focus on the effect of the licence on 'amenity and good order', one of the most-used criteria (which is also further defined in s. 106), and one over which there are significant differences of views, and some hurdles to cross:

> Amenity concerns are almost impossible to prove prior to a liquor licence application. For example, a new bar may cause late night noise and disruption, but until it happens you have no evidence. The DLC is quick to dismiss anecdotal opinion and the assumption seems to be that unless there are very good reasons, a liquor licence application should proceed regardless of alleged 'amenity' concerns - concerns which are often ignored by the DLC.
>
> 105(h) and (i) Amenity and Good Order need better definition. Include freedom from intimidation, noise and anti-social behaviour, social deterioration from domestic violence, child and elder abuse, sexual and financial exploitation etc. Difficult to PROVE future effects, must be on probability. For off-license sales, no control on use of alcohol once sold, domestic harm largely concealed so does not show in police stats. Stress/intimidation of neighbours not recorded. Evidence of submitters very important here. Harm caused outside vicinity of outlet not considered, e.g. pre/side loading where trouble eventuates elsewhere, drunken driving. Liquor often transported elsewhere e.g. by passing motorists. Long-term

> health and other costs from alcohol abuse are born by whole community regardless of location of purchase.
>
> It appears that unless there are already demonstrable effects, a licence will be granted even if the likelihood that adverse effects will occur is high. In this case, the burden of proof seems to be entirely on objectors whereas it would seem more logical that the applicant should have to show there will be no adverse effect.

Others note the problem is more in defining alcohol-related harm:

> The criteria are vague and are not all consistent with harm reduction. For objectors who oppose on only one or two grounds it to easy for DLCs to decide largely on other criteria: it is a hotchpotch.
>
> It should be the applicant showing proof that their outlet is not contributing to the already growing alcohol-related harm to the community.

Many other comments in the section repeated previous themes. However, some interesting requests for additional criteria included: taking density of outlets into account, location safety, roads, bus stops etc, balance sheets, past enforcement actions and also that victims of alcohol-related harm have no stated interest in the process.

Participants were also asked whether s. 106, which extend the definition of amenity and good order, is useful. The general issue here for participants was that the onus of proof appears to be on the community to show that amenity and good order will be affected, and:

> Only proven existing noise and nuisance levels seem to be considered. How can a community PROVE an increase in noise or nuisance etc before licence is granted? Criteria should be the likelihood of an increase.

Similar comments note that communities in general have only days to assemble evidence once an application for a licence is notified. Really, it has been hard for communities to assemble the kind of evidence required by a 'causal nexus approach', where harm must be sheeting back to the operation of an individual licence. However, in a theme discussed at length in the final report, one participant notes:

> Causal nexus is an issue but hopefully the Kent Terrace recent decisions may provide some case law about this.

There is a strong feeling coming from participants that there is little wrong with s. 106, but that the interpretation of the Act, the onus on communities to provide prof and the 'causal nexus' approach adopted by ARLA have all together made it difficult to show lack of amenity and good order arising from a licence.

Notifications

The Act (s.101) requires that an applicant for a licence must attach a notice to the site "in a conspicuous place" and also, within 20 working days, "give public notice of the application". Community objectors have 15 working days to respond (s. 102 (2)) after the first publication of the public notice.

Community stakeholders reported that notification is made online (57) and/or by newspaper (58) in their area. The largest number (67) notes that the community does not always find out in time to object, and some (45) report that little is done to inform communities of when applications are coming up. Some respondents (28) note that there are attempts to ensure that potentially interested parties are informed. In comments, stakeholders note the difficulties that communities have in finding out about applications:

> As far as I know they only have to be posted on the relevant council website, which is a large and complex site, so it is difficult to find the applications even if you are looking for exactly that, and the other requirement is a tiny A4 sheet of paper in the window of the proposed premises. That is all.

> Few members of the public know they can object to premises applications or how to undertake the process if they are unsatisfied with a premises. TA's could do more and it is inconsistent across the country.

Most comments were of this particular nature. Two, however, berated the researcher for bias and offered an alternative view:

> You appear to have forgotten that licence applications are also posted on the actual licence site, so the "community" has absolutely no excuses to claim they have not been notified. If it is an important issue for them, then they need to take steps to take an interest and not sit around waiting for everything to be hand fed to them. You appear to have also forgotten than it only takes one objection to force a licensee to a hearing. Most "community groups" actually DO NOT represent the entire community, even though they claim to.

The problem with the on site notification is that notices are rarely 'conspicuous', are often a single sheet of plain paper which gets rained on or, in one case notified, is

upside down. In principle the notice on the door is a good idea but not one community submitter reported finding it useful. One put:

> Only notified on the Council website and a notice in the window of the often vacant building that no one passes! Very inadequate.

The agencies

The Police, Medical Officers of Health and district Inspectors play a specific statutory role in receiving and, if desired, opposing, licence applications.

Police

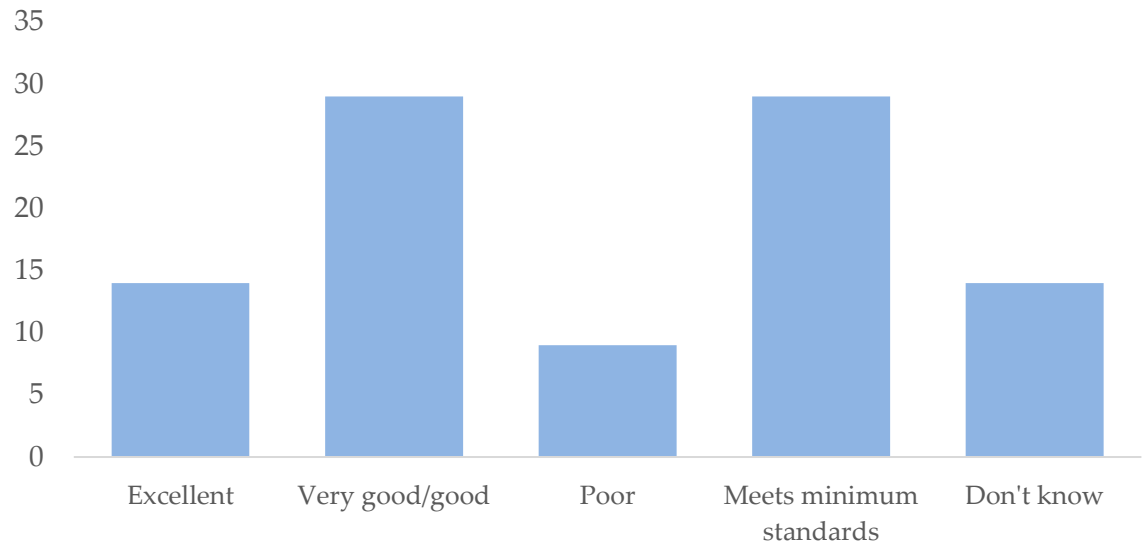

Figure 4. Views about the work of police on alcohol licensing applications

There were mixed evaluations of the role police play in licence applications by the community stakeholders. One common comment was that the practice of police moving around in these roles is not conducive to effectiveness:

> There was a focus by the Police when the act was first enacted but their input has been declining ever since. The rotation policy of staff within Police does not allow for continuity of relationships or expertise.

Other concerns are that there is little capacity for the police to be effective in some areas:

> This is largely true for the large metropolitan centres. In rural areas, where alcohol is also a major cause of police workload, the staffing levels are different and there is not the capacity or specialist expertise to respond in the

same way. Yet the infrastructure for dealing with alcohol harm is almost completely absent in rural districts and so more of the burden falls on the Police.

However, others thought the police were well-motivated to be involved:

> The Police deal with a large amount of alcohol related harm and are highly motivated to reduce it. They bring a good perspective to the process and experience of working within a legal paradigm.

Many participants noted that the police were inconsistent and that resources, staff experience, ability to collect evidence and a range of additional factors determine their performance at any time. There was concern that there is a lack of staff training for the role.

However, police in some main centres were considered to provide "excellent" work in the field of alcohol licensing.

Medical Officers of Health (MOH)

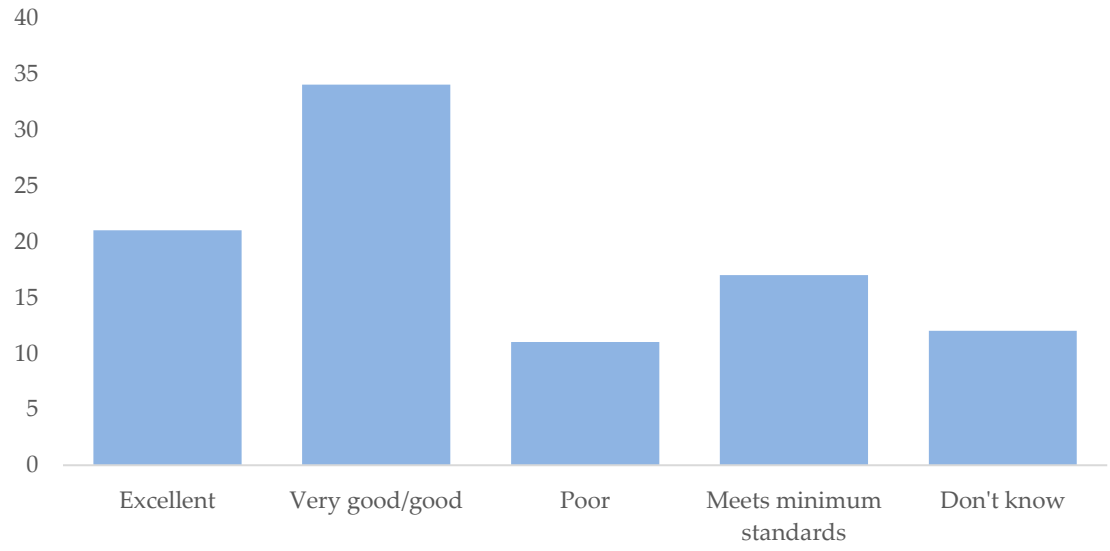

Figure 5. Views about the work of Medical Officers of Health on alcohol appns

The community stakeholders rated the MOH more positively than the police. Despite the relatively positive ratings, there were a number of criticisms of the MOH. These include that they are "fussy", try to cover too many areas, are inconsistent, lack resources or lack evidence for their submissions. However, there were a number of positive comments;

> In our situation the Medical Officer of Health did a thorough and factual report in opposing the application and were very helpful in supporting our community in putting together our own submissions.
>
> We have experienced some changes with MOH personnel in recent years. Once the person gains an understanding of the nuances of their role they contribute in a meaningful way. Really good relationship locally. This is critical and not always the case throughout the country.
>
> The MOoH here has worked very hard to establish case law to give clarity on the Act, this has been a very costly process for all involved and was only required due to lack of clarity in the Act.
>
> Our MoHs have been real leaders in the alcohol control area but it is an underacknowledged role largely unsupported and they are having to participate in legal forums which are outside their realm of expertise. The whole Act has become a money spinner for lawyers.

And finally, an informed position from a Medical Officer of Health:

> I am biased - I am an MOoH. I think that the MOsH are doing an okay job - there is a lot of resource going into responding to applications. Only about 3% of applications attract an opposition from the MOH - this indicates that the Act is not an effective mechanism to tackle issues of availability of alcohol. While the Act has been in force we have seen more alcohol being available in NZ and increased rates of hazardous drinking.

Community participants were also asked to rate the performance of Council Inspectors; as the largest single group in the study were inspectors these results may not be reliable as an indicator of community views. However, most consider inspectors to perform well or very well, while a small number (2) rated them as poor quality or dreadful.

Making objections

Views were sought from the 58 community stakeholders who had made objections, been a party to an objection or had given legal advice to an objector. They were asked why they had objected. Most had a number of concerns; these are, in order, effect on local community, too many alcohol outlets in their areas, too close to sensitive areas such as schools, hours of opening and concerns about crime in the community. Only about a quarter were concerned about the reputation of the licensee. Several outlined their concerns more specifically:

> The proliferation of on-licences led to an immediate impact on the residential neighbourhood, in particular noise (interrupted sleep), vomit/urine on private property, pre- and side-loading in the residential area and a verified increase in vandalism.
>
> Low socio-economic area, social housing issues, mental health facilities nearby.
>
> Concerned about visibility of alcohol signage/branding (i.e. advertising) in a prominent place at the entry to our community, and visible from SH1 and trains. Concerned about inconsistency with community identity as a place for families to visit, and for outdoor recreation.

The view by some licence applicants that those who oppose applications are some kind of rent-an-objector brigade is not borne out by the evidence of this survey.

Objectors were asked where they got information and support from in preparing their submissions. Most got information from the HPA website or booklets (24), and/ or sat down and worked it out themselves (24). Many also called on local advocates/ lay people with knowledge of the system (16), while some (7) got support from Community Law (offered only in Canterbury at the time). Finally, 10 people referred to guidelines on their Council's website. Most took 2, 3 or 4 of those actions.

A small number attended local workshops to help write their submissions, and some worked with experienced people in their communities. Again, small numbers got help from agencies working in the area of alcohol-related harm. But most had no assistance in writing their submissions.

Community stakeholders were also asked a number of 'yes/no' questions about the preparation of their applications, which together provide a useful overview of the process. These are outlined in Figure 6 on the next page.

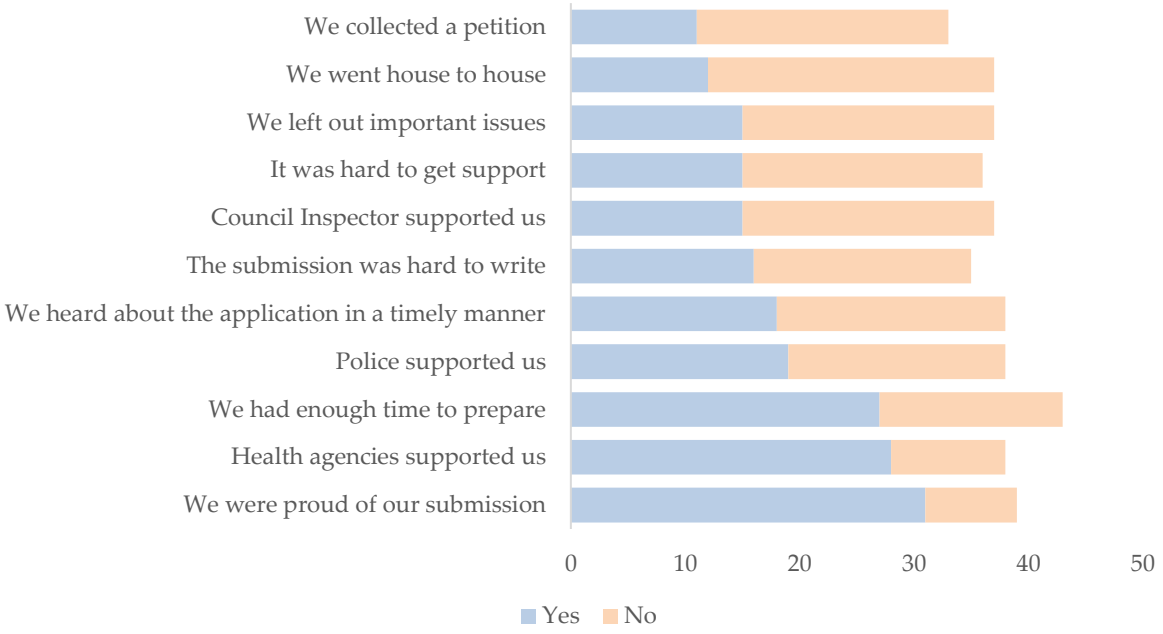

Figure 6. Steps taken by objectors in writing submissions in opposition

Overall, 33 participants attended a DLC hearing as an objector. Out of the 33, 21 felt there was a power imbalance with the power stacked in favour of the applicant. Twenty were cross-examined by a legal expert. Nineteen noted they were not prepared for the level of legal contestation they encountered and 17 felt intimidated. A number thought the process was very unfair:

> No. The lawyer supporting the applicant ran the show and attempted to discredit the evidence of the Medical Officer of Health eg can you trust Census data?
>
> Absolutely not!! It was very intimidating with police & lawyers & lots of legal jargon. The worse part was that it was hugely culturally inappropriate.
>
> The whole process is alien to communities. It's like you need an interpreter to participate otherwise you are left floundering, wondering where to sit, when to talk etc.
>
> No. See earlier comments. The fact that the Applicant has a professional lawyer (in this case a very senior lawyer) and the community does not, is inherently unfair. We were given no information about how the process would work from the Council. As noted, the Chair of the DLC showed bias and a lack of neutrality. We had to provide rock solid written evidence for every assertion we made, whereas the witness for the Applicant argued that alcohol-related harm didn't happen in our community, based on his

> experience as a probation officer in the 1970s!! The lawyer was inconsistent in having such a ridiculous witness who was totally just giving opinions; whereas he wanted us to provide an impossibly high standard of evidence for our statements. For example, one person cited a phone call with an academic, where they were given additional specific info about our community. The lawyer and the Chair both said that this evidence was irrelevant because the academic wasn't in attendance at the Hearing to present this evidence, and that it wasn't peer reviewed. I thought this was completely unfair and unreasonable. Expert opinion from an academic is valid evidence, and surely we aren't expected to produce every expert individual or organisation in person to support our arguments?!! I cited the World Health Organization - did they expect us to provide an expert from Geneva to come to the hearing?!

In summary, many of the community people found themselves in an alien environment that was slanted against them. Having said that, a number reported that they did have their say and were successful. Fourteen applications reported were declined and ten were accepted. In several cases the application was withdrawn due to community pressure, and some results were not yet in.

Organisations and agencies

A number of agencies are frequently involved in alcohol licensing processing, including the statutory agencies, lawyers and national and regional alcohol agencies. In this study, 58 identified as coming from such agencies (nearly half were licensing inspectors). They were asked about the unevenness of various aspects of the licensing system.

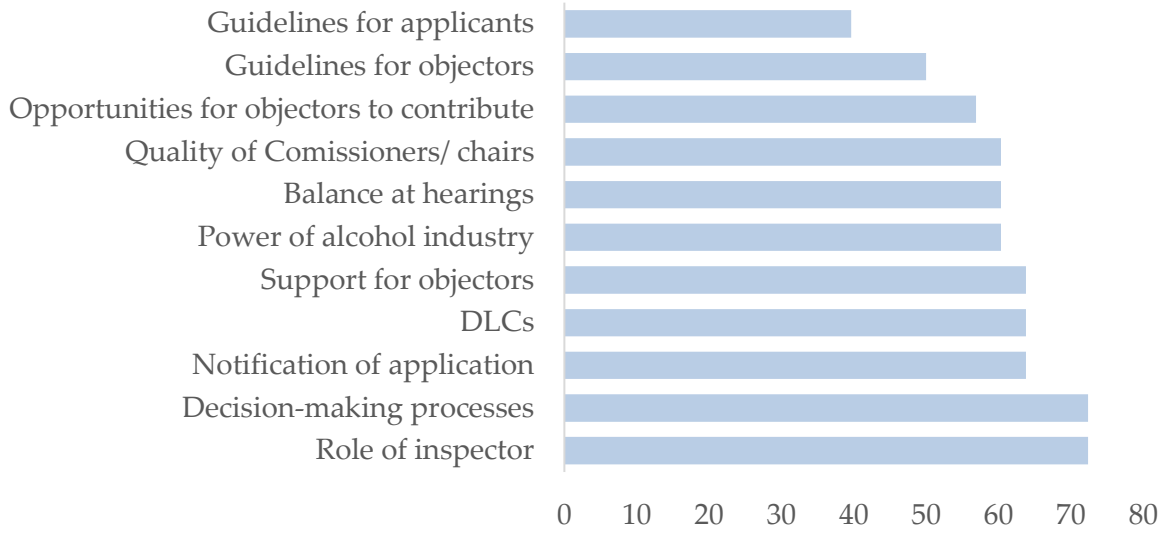

Figure 7. Percent agreement that various factors are uneven in alcohol administration (organisations and agencies)

It is perhaps surprising that agencies involved in the processes on a daily basis consider there is so much unevenness, especially since they go to the heart of the regulatory processes, with 70% perceiving decision-making and inspectorial processes to be uneven.

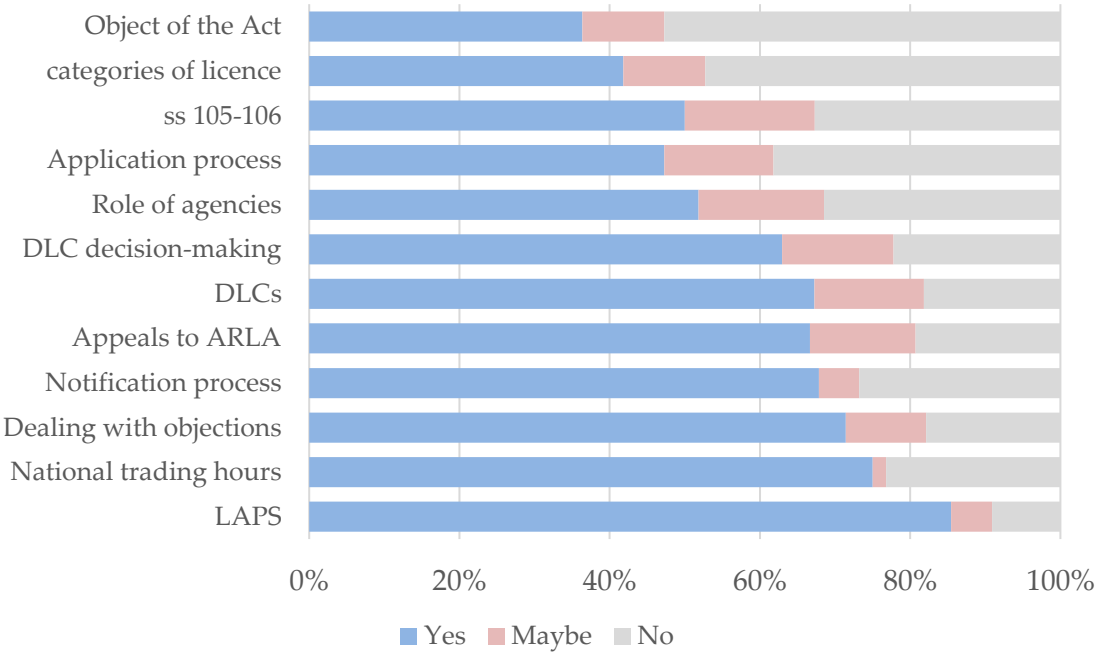

Figure 8. Aspects of the Act that need changing (stakeholder views)

Other issues noted by the organisations include conflicts of interest in DLCs, the poor wording of the Act, failure to understand harm minimisation, and industry influences. Some interesting contributions below:

> The intent of the Act was significantly modified by industry pressure, this is now evident in the failing of the Act to achieve its intended outcome in reducing harm.
>
> I would like to see DLC hearings lawyer-less i.e. like the tenancy tribunal and small claims.
>
> Appeals being allowed by industry to PLAPs, timeframes for application and opposition, appointment process for DLCs (more transparency), training of DLCs.
>
> The big players in the alcohol industry have more money and resources than agencies and the community this creates an uneven playing field in view of applications, appeals and representation.

Criteria for grocery stores - it seems too many premises that are more akin to a dairy/convenience store have obtained licences. Despite opposition from the agencies, the DLC and now ARLA are still too lenient.

Only 16 of the 141 community participants believed the Act was meeting its object to reform the system of alcohol sales for the benefit of the community as a whole. Fifty-five disagreed. A number of others had specific comments to make about this:

We need more time with Act enforce to see results, at the moment everyone is still trying to understand it.

The Act has gone some way but there are some glaring omissions - density, hours, price, availability for example.

The Law Commission Review suggested a raft of changes which could help with the reform of the sale and supply of alcohol into the community however the government only took onboard a few of the suggestions and left in a large portion of the old Act. Minimum pricing, upping the drinking age, excise tax, sports and alcohol advertising.

In some areas it is but generally it has added an increased administrative load with outcomes very dependent on the Councils and the individuals involved. There has been a change in the public perception of alcohol as a result of the publicity generated by the new introduction of the Act along with a reduction in the Blood Alcohol Level for driving. This in fact has had more impact in reducing alcohol-related harm than any single element in the Act.

Costs for on licences premises are very high and as a result, most people are drinking at home, with no professional oversight. Most harm in our community comes from off sales.

I think that it is a bit of yes and no. The Act is very much focussing on those selling or supplying which is appropriate and in that regard it is working. But we will continue to see alcohol related harm because of how and what people are drinking, often away from the constraints and controls of the Act and licensed premises. However, that is probably impossible to control. The reason I say no as well is that we can probably never achieve a position through licensing whereby some community expectations are met and even with the best intentions, those expectations are unachievable.

Too many restrictions on on-licences, not enough on off-licences, not enough holding the agencies to account, not enough penalties for individual members of the public.

Annex 2. Results of industry survey.

A total of 184 responses were received from industry participants. Unfortunately, 34 of these were essentially blank, and were omitted from the analysis (as they returned only null responses). Therefore, the results of responses from 150 industry participants are included here.

Views about the current licensing regime

The participants are generally more positive than negative about the current regulatory regime. Excluding 'other' and blank responses most of the participants supported the submission process (72%), applications (68%), District Licensing Committee (DLC) operations (68%), the notification process (65%), the Council regulatory regime (65%) and DLC decisions (61%). A majority still supported and Local Alcohol Plans (52%). The full results are outlined in Figure 1 below

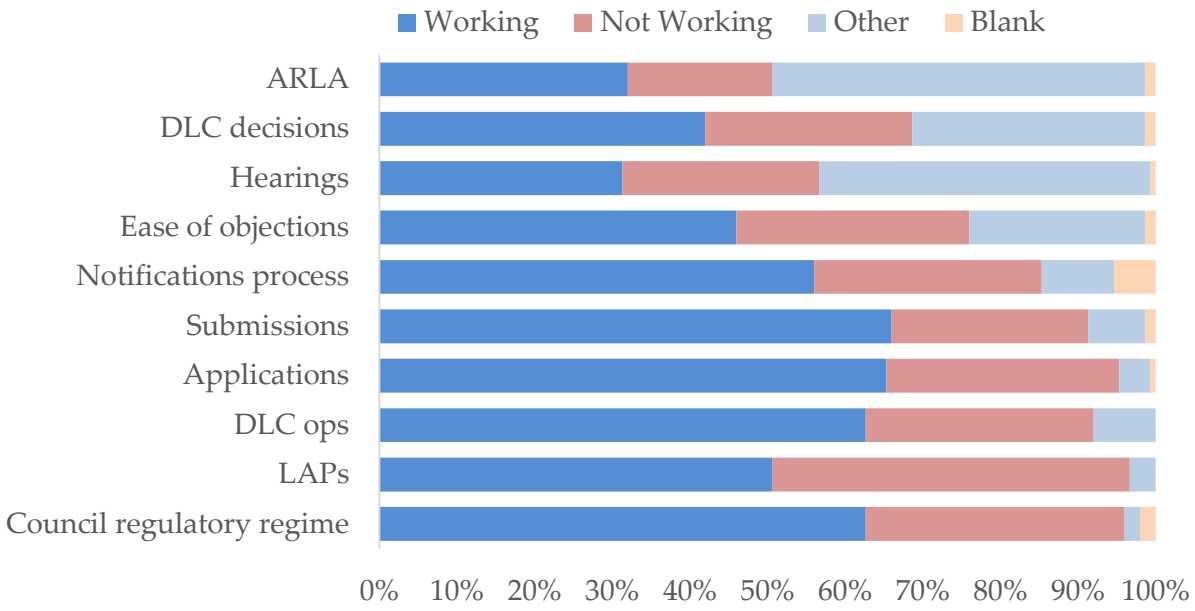

Figure 9. Views about whether aspects of the licensing regime were working

In qualitative comments, some participants explained why they were happy with the current regime:

> DLC members reside within their own communities which gives them a very good insight into how the alcohol licences within these regions are being handled as well as the community concerns surrounding these premises. More responsibility being placed on the owners of premises to be compliant

with harm minimization and to have the best interests of their customers/ community in mind is a great step forward.

We run a restaurant and with following the rules we have got a safe drinking environment so customers are happy and coming more often. It is up to you how your customers behave in your place. All of our front of house staff passed the LCQ. It is a great help that we can do that online. We are far away from the training classes so it is good having them online. Cheers to a safe and beautiful NZ.

In general, over 60% of industry participants were happy with the licensing regime, applications and Council processes. Nevertheless, around 15% of participants noted their concerns about these processes. Some noted their cities were "18 months" behind in processing applications, that it is "bureaucracy gone mad" and "archaic". Many mentioned the rising costs of licences: "local government setting of fees has caused unwarranted fee increases". Comments were quite diverse and some are included below to represent the range:

It is working for the Council, but the process to get a licence renewed is such a long and tedious one, although all information is with the council, one needs to fill it all out again. Also, they ask for punctuality otherwise we lose our licence, but we don't get the licence sent to us on time, which looks bad toward the customer.

Appears to be highly time consuming, onerous and one sided from council who treat licensees as idiots.

Process is too slow. Keep at a local level for all aspects. Local DLI (Inspectors) know hotels and outlets.

Too much power to the councils and it allows anyone to have a say in my business and hours.

It has done very little to reduce harm caused by alcohol and has created a huge bureaucrat regime.

Some licensees feel there is a need for the licensing process to distinguish between what they see as high and low risk, or good and poor behaviour, outlets. A selection of these comments is outlined below:

We are put in the same position as Hotels and Bars. (A restaurant)

> The objection process is flawed and the on premise licence suffers a very heavy price for the role of off premise and supermarkets. The level of power to delay decisions is far beyond the reasoning of practicality.
>
> The act is too much of one size fits all and then council have their differences, there needs to be more clarity between councils and the playing fields need to be level and not lopsided.

And a detailed analysis of issues in relation to off licences:

> I think that the Act in itself is working. It is just a basic set of rules regarding the sale and supply of alcohol. Areas of concern that I can see: 1. There seems to be no punishment for off licenses serving to known people who cause harm in the community (think street beggars, rough sleepers etc.). The harm they cause (public urination, accosting people for money, drunken disorderly etc.) in the public eye isn't seen by the off license managers so they keep on serving them. 2. To appeal an application the criteria under which you can do so is pretty small. Which is also tied to LAPs which don't seem to have a "concentration of liquor licenses" clause, meaning that areas could become overwhelmed with the saturation of places to purchase alcohol. Maybe also some money could be spent on making the general public aware of the rules that we have to abide by (no sales to underage, no service to intoxicated people etc). That way people might become better customers making it easier to enforce the rules.

Role of objectors

A number of respondents from the industry were very concerned about the role of objectors in affecting their ability to get a licence:

> DLCs vary on interpreting the criteria - can be swayed by matters other than evidence e.g. vocal community, especially where elected members are involved (or former elected members who are even worse).
>
> Ill-conceived objections are easily given weight.
>
> Many of the criteria are very subjective which lends to inconsistency and can be overly influenced by objectors.

There were many other such comments, and this theme will be picked up below.

Role of agencies

The roles of the police, medical officers of health and council inspectors under the Act are dealt with fully in the overall report. They are contested and complex. A couple of respondents, probably both based in Wellington where the agencies have been pro-active in trying to reduce hours, were particularly critical of the police and medical officers of health:

> The power of agencies to influence and almost harass Licensees, e.g. 'if you accept this condition we won't object' etc a sort of ganging up and over-stepping of functions/duties responsibilities will give any applicant who has had an objection a muddied view unless they get legal representation.
>
> I believe for the most part, the act is working. I find it difficult that the bullying tactics of Police and MOH are making it nearly impossible to engage with either in a productive way.
>
> Too much sway by police and health.

Again, these views are considered again below.

Local alcohol policies

Another contested area covered in the main report is local alcohol policies. Those that commented on these from an industry perspective were entirely negative about them, for a number of reasons:

> The Act is far too broad in its aspects and leaves interpretation too open for e.g. LAP decisions /debate.
>
> Local alcohol policies do not work and local government setting of fees has caused unwarranted fee increases.
>
> LAPS are a waste of time - section 105 and 131 deal with conditions well.
>
> Currently Queenstown is 18 months behind on licensing renewals. The continued threat of an LAP is negatively affecting our ability to invest further.
>
> LAPs are not working as they have to be too generic and allow the opportunity for the appeal process to be lengthy, costly and prohibitive in its aim to reduce alcohol harm. The issue of supermarkets selling alcohol is the

> greatest contributor to alcohol harm in NZ and until such time as Government addresses this issue head on, we will continue to have to have generic policy to appease those who can afford the costly appeal process.

Compliance

The industry also had some concerns about compliance with the law. Some noted that there were no rewards for excellent compliance such as lower fees or better treatment, and few sanctions for non-compliance. One person noted that the cost and complexity of compliance was too "onerous". Other comments reflect the huge diversity of concerns in this area:

> The hospitality sector is often regulated on the 1% -2% of people we are tasked with managing; without any personal accountability on the individual it will always be an uphill battle. Now that the Act has been in force for 6 years, there are many areas that are working and how the Act is enforced is settling down, however in my opinion without personal accountability, the sector is being overly regulated.
>
> Rules are not enforced, too many backyard selling activities.
>
> Find it difficult to meet duty manager requirements due to lack of qualified applicants. The six month NZ working experience rule is tough as many overseas candidates have loads of experience but may only be in NZ on 1 year working visa.

Some participants felt the Act was working because "there seems to be more understanding and acknowledgement of the harm that alcohol can cause". One person provided a lengthy summing up of how they perceived the Act is working:

> The Act has been successful in many ways, there has been a change in people's behaviour in licensed venues, there has been a general reduction on the quantity of alcohols used in NZ. On the challenging side, the industry is generally over regulated and the venue operators are under constant pressure to be responsible for other people's behaviour. With Councils developing their own LAPs we find inconsistency between councils on LAPs and how the law is implemented, the same applies to the police and in some cases HPA this makes operating businesses in different regions difficult. We find that applying for or renewing licences has become more difficult and onerous, mainly because councils are understaffed or staff have limited training. The process for people objecting to renewals or new licenses is flawed, as a single person can force a hearing, even though their objection is minor in nature.

There were both positive and negative comments on the effectiveness of the legislation in reducing alcohol-related harm. A number of participants were sceptical that any legislative scheme could reduce harm:

> The Act has done nothing to reduce alcohol related harm and in fact almost no legislation will. Only an extensive education campaign along the lines of the drink/drive message will work but it will take a generation at least.

A number of others thought that the legislation had encouraged people to purchase from off-licences and drink in unregulated places. This was just "moving people from supervised places to drinking more off site and in homes" and was perceived as increasing alcohol-related harm:

> However, when looking at the drinking culture around the town most alcohol consumption seems to be occurring in homes or in unmonitored areas. I am not convinced that there is any evidence showing that there has been a reduction in alcohol-related harm since the introduction of the Act.

> The Act while quite rightly attempting to ensure the safe consumption of alcohol is in fact having the opposite effect driving problem consumers away from the supervised situation to consume alcohol privately and those more numerous non problem drinkers find they can no longer sit outside on a warm night or expect any live entertainment. Our cities are dying at night. There is sound and people in a vibrant city.

Proliferation

Some respondents believe that Councils are pushing the proliferation of licences in order to maximise revenue or through inexperience. This point is linked to one above that notes that LAPs do not generally have clauses relating to the density of outlets, and that this is not considered adequately by DLCs.

> IN CHCH there are too many licences being granted. The pie is only so big and the financial stability of many businesses is undermined by the council ever keen to get another application fee and charges on going. The Council committee have no working experience of hospitality and thus are not qualified to judge if viable or not. The Indian community are using this lack

of control to push licences into areas purely to gain working visa rights for immigrants (related to or in many cases via backhand payments)[21].

In my view the District plan is not working. The issue is the fact that the council and Police are issuing licences to everyone who makes application, we have too many bars and restaurants to make the area viable. Everyone should have a business plan and budget to present. A cap should be placed on licences, as too many are issued by the council and Police and then they turn around and say we have too much intoxication etc. Again outside the issuing of licencing of on premise, again the issue is more with Supermarkets and Bottle stores, who by volume contribute to approx 75% of all alcohol sold... so really where do we think the issue lies with alcohol on over regulated Licenced premises or the Off Licence premises. You do the maths!!

While most people were in favour of the current regime, there were also many who had significant critiques of it. There were few comments either way about DLC hearings and the appeal authority ARLA. The main reason for this is probably that so few respondents have had experience of these aspects of the licensing process.

Harm minimisation

Participants were asked whether the objects of the Act, being the safe and responsible alcohol supply and consumption and minimisation of harm caused by the excessive or inappropriate consumption of alcohol, were being achieved by the Act. Responses were outline in Figure 2 below.

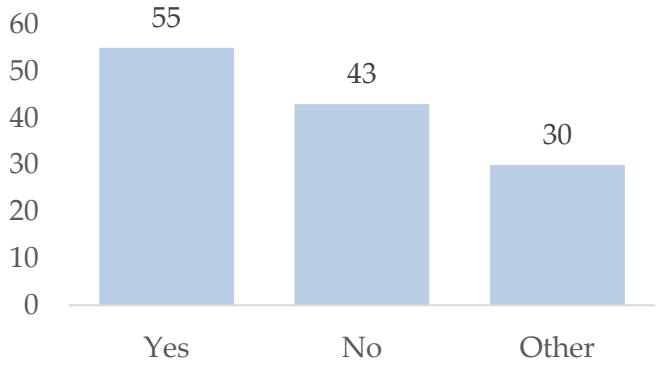

Figure 10. Whether the goals of harm minimisation are being met by the Act.

[21] No evidence was provided for this opinion. It is included here only because a number of people mentioned similar points. The Indian community has opened many licensed outlets throughout the country and there is no suggestion arising from this study that any

While there was a simple majority for the response 'yes', in fact such responses made up only 43% of the total, with 33% (one third) opting for a simple 'no' and 24% stating 'other'.

Those who responded 'other' were asked to write their opinions. There were three main kinds of views given. First, those who felt it was not up to the Act, but to 'personal responsibility' to minimise harm, and who felt the licensees were caught in a bureaucratic trap:

> The Act does not address personal accountability and makes the venue accountable for people's behaviour and choices. Having said that we have seen a change in people's mindset that they can be asked to leave a venue or denied entry if they don't follow the rules.
>
> The expectations on licensees to be able to influence the actions of the general public to minimise harm occurring is unreasonable. Personal responsibility must take precedence.
>
> The objective is fine but the bureaucracy imposed on licence holders burdensome.

The second set of views are that the Act has seen a shift toward off-premises drinking and that has tended to increase alcohol-related harm. It is likely there is a bias here in terms of representation because many of the respondents belong to the Hospitality Association whose members are primary hotels and restaurants, rather than off-licences:

> Act supposed to minimise harm caused by the excessive or inappropriate consumption of alcohol on public. In real life push people to drink out of public and sometimes more irresponsible drinking at home.
>
> To some aspect it achieves as people are supervised as they were on premises however more needs to be done with sale and supply OFF PREMISE.
>
> Obviously, supermarkets are selling most of the alcohol, cheaply, to kids.
>
> Supermarkets are selling alcohol at year 2000 prices. How much has fresh fruit and veges gone up?
>
> It addresses nothing to do with alcohol consumption in the private home where 80% is consumed & where almost all the trouble occurs.

> Yes it does inside a venue, but it is not helping with the preloading on streets and in public places before the customer gets to the venue. We are putting these people back on the street, or not allowing them to come in, this means there are more visually intoxicated people on the streets.

The third set of views is about the irresponsibility of some in the industry, the lack of enforcement, and the potential influence of 'who you know':

> Depends on the area, I have found there to be a double standard with operating standards depending on who you know.

> The Act does, the lack of enforcement does not.

> Supermarkets are totally irresponsible and sell product at 2 cents profit to (a) have lost leaders to bring people into their store (liquor should never be used as a loss leader), (b) they are forcing liquor stores to match these 2 cent profit margins and make no money and then go out of business. Ever asked yourself what happened to wine shops... undercut by supermarkets until they went bust and the supermarket share of the market grows.

Finally, one person noted that alcohol harm had not reduced because a "massive increase in licences, therefore more competition, leads to cheaper prices. Classic market theory in action but against the object of the Act". This issue of proliferation reappears continually throughout this study.

The s. 105 criteria

Industry representatives were asked whether the s. 105 criteria, which owners had to meet in order to get a licence, were the right ones. They were asked to tick one or more boxes to indicate their views. Answers are summarised in Figure 3, and there were also qualitative responses allowed.

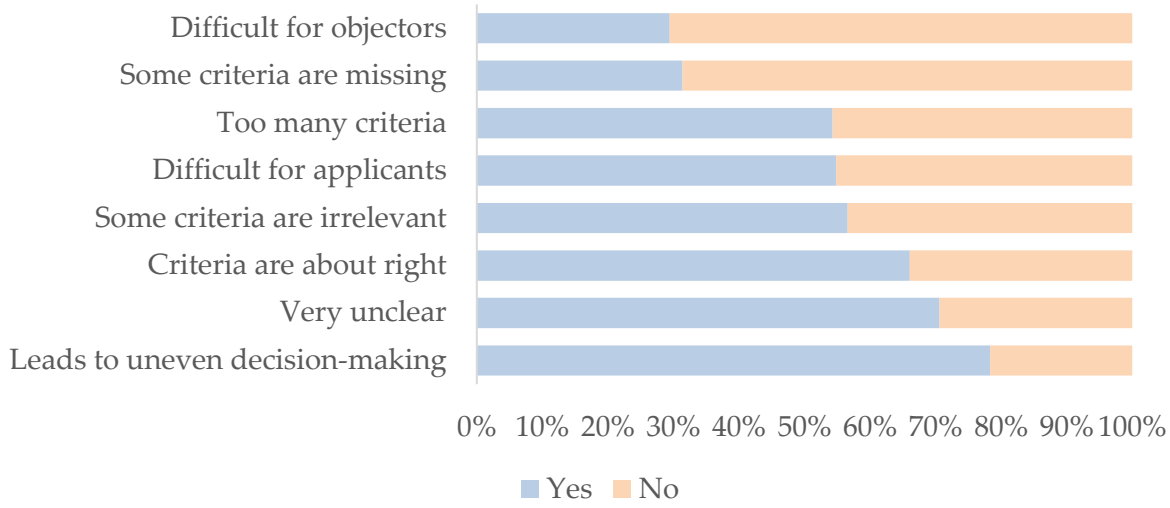

Figure 11. Views about the s. 105 criteria.

There were a wide range of comments about this question. A number of people considered that a failure to take into account the density of outlets was a concern:

> Not enough emphasis is placed on the number of liquor licenses in any given area and it seems that there is no cap placed on liquor licenses.

> There is no concern shown as to the number of licenced premises causing many places to be unsustainable. Note the number of venues going out of business. The pie (number of customers) is only so big.

Respondents were more likely to think that the current licensing regime leads to uneven decision-making Many views emerged around the unevenness faced by licensees at various stages of the licence process.

> Section 105 is not applied evenly between councils, so the process can vary significantly, collating and reviewing the data is onerous and time consuming.

> Not a level playing field across the country. Too much interpretation - DLC's, should be a national standard.

> Having licenses under 4 different DLCs, the interpretations from some take a pragmatic and logical approach and assess the operation of the outlet and operator. Whilst others don't consider the outlet and operations but what bad operators in the industry do and we get tarred with the same brush.

> Too complex.

> The section is totally slanted to objections and the ability of an individual decision maker to draw his/her own conclusions, it is far too vague and leaves the door wide open to greatly varied outcomes, the policy should be the same for the country and clearly defined. All Liquor Licensing since prohibition[22] has been flawed and needs a complete revamp.
>
> Specifically, the wording leaves for a lot of interpretation in terms of how much effect the proposed premises might bring the community.
>
> I believe that it should be based on individual cases as not all businesses are the same, nor is the makeup of the population in areas the same. A Country Pub should not be looked at the way city premises are viewed. Allowances should be made for good operators.

The theme of most of these objections is that local/ DLC based decision-making is too complicated and there are too many differences within and between regions in interpretation of the law and decisions made. Where differences should lie (if any should) is between good operators and bad operators, between different kinds of operators and 'individual cases'.

The New Zealand Police

Industry participants were asked how they viewed the role of the police in relation to the licensing process. They were asked to tick one box which best described their view. Results are shown in Figure 4 below.

[22] There was no prohibition in New Zealand.

Figure 12.Views of police, by no. respondents (n=93)

The modal (most common) response was that the police role was good or very good. As noted in comments reported above, there was a minority who were very critical of the police role in trying to negotiate down licensing conditions (this is largely a Wellington-based role, as far as we know).

Around a third of the comments note the police are 'fair', 'do a good job', are 'respectful', generally 'work well', 'respond when needed' and are 'very good'. Two outstanding comments:

> All members of the Police that I have had dealings with during my 15 years within the alcohol sector have been very supportive, approachable with regard to ensuring that the Act is complied with.
>
> They are diligent and practical, fair and open minded.

There is a high turnover of alcohol harm police (this is apparently a policy of the NZ Police), and some are better than others:

> Our current [town] officer is well respected and open to all parties with his communications and also to relating all situations back to the Act which is refreshing to work with.
>
> It depends on the individual. We work with many officers and some are great, some are not.
>
> Prior Harm Officer was brilliant. New guy in for a short timeframe and not prepared to meet or discuss issues. Very hands off.

There is unevenness in how police work with licensees:

> Again interpretation of events can vary, between two officers at the same incident, what the police call "serious' in a recent case was a husband and wife arguing in the carpark nearly an hour after the bar had closed, when they arrived they had gone but one officer decided to get aggressive to a person present as he had already had a run in with them - this was brought up in a hearing as a serious incident where it was used to question the suitability of the applicant.
>
> Generally they do a good job, but the new rules around intoxication are very Grey and you need breath testing in bars to identify if someone is intoxicated.

Inconsistent.

I have dealt with some very professional police in respect to a licensed premise that are happy to work with you and then on the other hand some that come across as not compliant to want to work together and have enforced a sense of unfriendly power.

It depends on the individual. We work with many officers and some are great, some are not.

Some licensees believe that some police are overly heavy-handed when it comes to policing licences.

The policing of licensed premises is way over the top.

Unhappy with 'sting' operations, not addressing issues but entrapment
We at times will have up to 8 police in high vis in a particular venue for up to 20-25 minutes talking to customers, this can happen on a regular basis it is something we put up with and cooperate with but it is not great for business at all and looks very military, at times they make our customers extremely uncomfortable. In general we have a very very good working relationship with the police but on these occasions it can be very unhelpful

The police have developed into the fun police. One experience I personally had. I asked a duty policeman at a function if he was happy with how things were going he replied that he was concerned that the people were becoming happy. There where absolutely no problems at that event.

Finally, some accuse the police of being ineffective or less than competent in their work.

They could show a bit more present in the restaurant not just waiting in there cars to pull them over. Be more pro active.

In our town police do not want a new licence to be granted but did not object because of the work involved in presenting their objection.

Only hear from them when things go wrong. No collaborative approach to make things better.

My liquor outlets gets stolen from on a regular basis, my cafe gets broken into 3-4 times per year. We have good video footage, ring asap, most times we see

the police three days later, their arrest rate success rate is very poor, the courts waste time and money always with excuses for these youth that walk away with a slapped wrist.

Reports are late, vague and police produce detailed evidence at the last minute. If they can't produce clarity on the reports they should be struck out as an agency in opposition.

They are under prepared for hearings and use broad definitions to get their arguments heard. They also believe they know what's best when it comes to kitchen and bar layout.

Medical Officers of Health

As the other external agency included in the legislation, the Medical Officers of Health (MOH)were also included in the industry survey. Respondents were asked to comment on their views of the MOH role in licence applications. Results are listed in Figure 5 below.

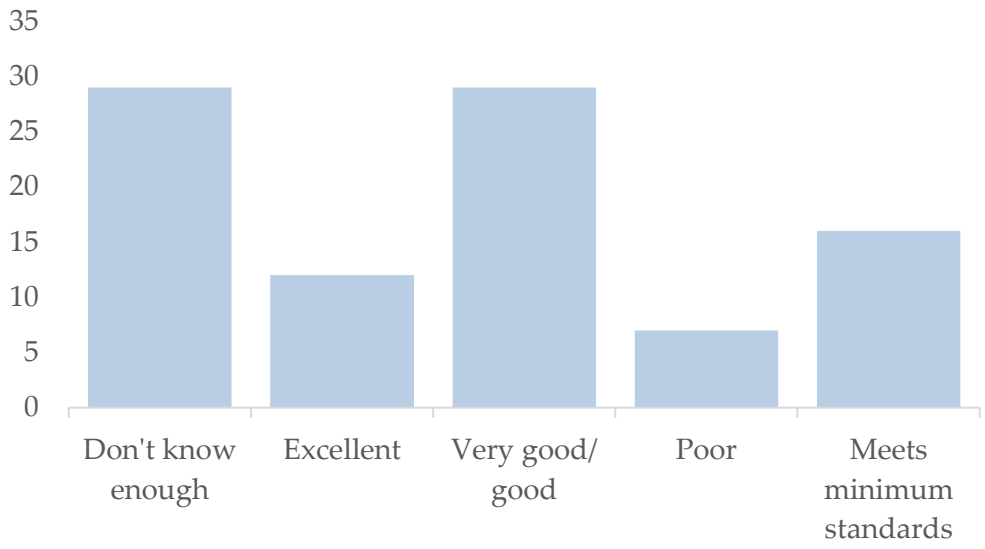

Figure 13. Views of Medical Officers of Health by no. respondents (n=93)

Many of the respondents were positive about the MOH. They are "always helpful to work with and get advice from". They are "good" and "reasonable to work with – not dogminded [sic] and are open to having their minds changed".

A number of respondents questioned the role. They "should not have any say in the process" and "there is no real need for this role, it's just going over information that is already supplied to council/DLA & police".

> Why are they even involved? Do they check the alcohol harm risk at every person's home?
>
> They have too much say.

Finally, there were some critiques of the role of MOH:

> Health seems to be trying to lead the charge for putting more pressure on operators and licensees to limit hours, sales etc. without always having a solid platform of evidence base for some of their requests or decisions.
>
> The discussions are often lengthy and fussy, not really understanding the practicality of what they'd like.
>
> They use bullying tactics to get what they want and continue to try and interrogate at renewal. They aren't prepared to engage with licensees. They can't state any specific issues of concern to an application when asked and yet prepared to oppose application regardless should you stand up for your rights.
>
> The fact that they are objecting to a majority of applications in our area is an area of great concern. It is being done in a mandatory manner and must be extremely frustrating for both the DLC and ARLA.

While everyone understands the role of the police as one of the key agencies, there appears to be less understanding by industry members of the role of the MOH.

Council Inspectors

Respondents were asked for their views on the performance of Council Inspectors. By far the majority or views were excellent or good and most of the rest were adequate. There is little concern within the industry about the role of inspectors.

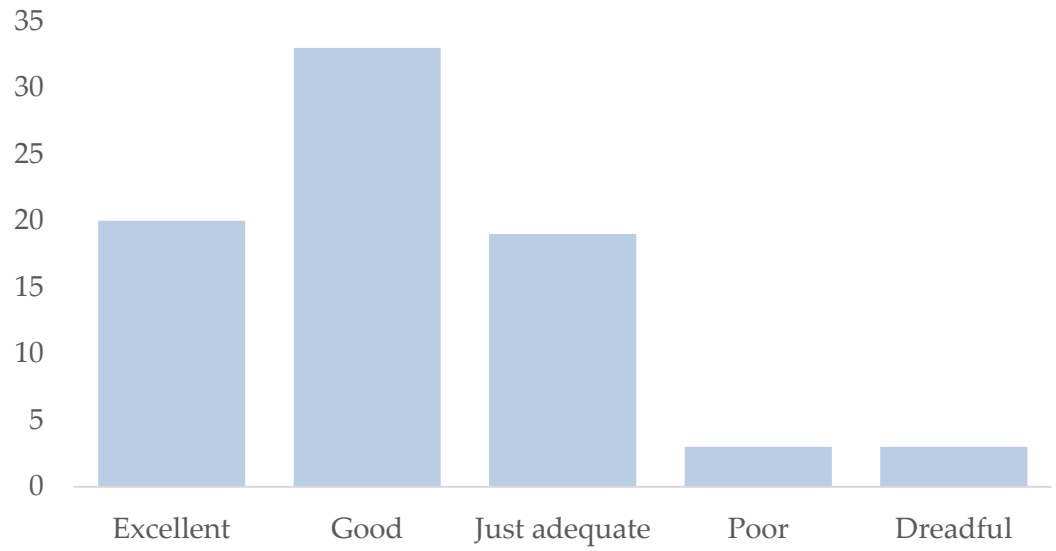

Figure 14. Industry views of Council inspectors.

About the industry respondents

In total, 88 respondents had been involved in a licence application or renewal. They sample was biased towards on-licences. 12 had an off-licence, 58 an on-licence, 4 a special licence and 12 both on and off licences.

Of these 88, 22 sought legal advice in making their application, and 15 were supported by a lawyer through a licence application. Most were happy with legal support (2 were unhappy). Eight of those responding have had one or more licence applications declined at either the DLC or ARLA.

Final comments

Participants were invited Most of the final comments that appear here have already appeared elsewhere in the industry survey. Just a small number are reproduced here. Quite a number of respondents comment here on the privileged role of supermarkets compared with other outlets, and the harm caused by off-premises drinking. Most other comments repeat previous points.

> The 2012 changes did nothing but impose costs and responsibilities on licensees. It failed to address real issues like pricing and supermarket discounting.

Most alcohol is consumed outside of licensed premises and the act misses this area completely.

Supermarket has applied for consents to build supermarket straight opposite a College and numerous other schools. How do they get on with liquor licence? Rules for some and rules for others!!!!

Relay is a small General store with a small selection of local wines on sale.... yet other supermarkets just carry on as they are with little or no changes made because foodstuffs have a dedicated legal team on the sale of alcohol. But yet they pick on the easy targets for their stats!

There should only be national hours and rules, LAPs should be removed.

Like all aspects of living and operating in NZ we need to reduce compliance cost and time involved, too many people on the gravy train!

Licences should be capped there is too many new licences issued.

Far too much to put down on this survey but less about the application for a licence (stupid process but so is everything council related) our issues are with the application of the Act

By reducing controlled drinking, they have more domestic violence.

As alcohol has become more and more expensive in bars the pattern for consumption has become buy cheap alcohol from supermarkets and bottle stores and then take drugs when you out partying. The act has failed to reduce harm all its achieved is to move where alcohol is being consumed and increased the use of drugs.

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