

Commission on Liquor Licensing

Report on Admisson and Service in Licensed Premises

December 2002

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Foreword

At the specific request of the Government, the Commission has considered issues relating to admission and service in licensed premises and now presents its conclusions and recommendations in this Report.

The announcement of the Government request to the Commission met with a very mixed reception and certain bodies refused to co-operate with the Commission in its allotted task. The Commission deeply regretted this but was grateful that before its work was finished many of those involved had made their views known to the Commission. The task proved a formidable one and all the more so because of the many strongly held views expressed by all sides.

The Commission set up a Subcommittee to deal with this issue and the Chairman wishes to express his sincere thanks for the enormous work which each member of the Subcommittee undertook. The Chairman also wishes to thank the Commission Secretariat for their considerable input and its Legal Consultant, Mr. Michael McGrath for his advice.

The Commission's approach to this task was underpinned by its rejection and condemnation of discrimination in the provision of goods and services. The Commission likewise condemns disorderly conduct and violence, particularly in licensed premises where the consumption of alcohol can easily lead to uncontrolled and unmanageable situations.

The Commission has, in this Report, endeavoured to make recommendations that are practical and workable and that will, when implemented, clarify the law and lead to an easing of tensions in this area.

Gordon Holmes
Chairman

Introduction

The Commission on Liquor Licensing was established by the Minister for Justice, Equality and Law Reform in November 2000 (Appendix 1).

In February 2002, the Department of Justice, Equality and Law Reform informed the Commission that the Government had extended its terms of reference to include the following:

"to examine the rights of licence holders to refuse admission and service in licensed premises and to make recommendations for any necessary legislative changes."

The Department also conveyed the wish of the Minister for Justice, Equality and Law Reform that the Commission seek submissions from the general public, including particular groups that had taken positions in the past on the subject of equality, equal status, etc. in addressing the new term of reference.

Since the Commission has from the outset undertaken its work in an open and transparent manner, and had already on several occasions invited submissions from the public and interest groups, the Minister's wish was entirely consistent with the Commission's working methods and practices.

Written submissions from interested parties were invited in newspaper advertisements on 11 April, 2002. The original deadline for the receipt of submissions was 10 May but the Commission has adopted a flexible approach and has accepted all submissions received up to early November.

From the outset, the Commission was aware of the sensitive nature of the challenge it faced in addressing the new term of reference and therefore, was anxious, to receive the views of all relevant organisations and individuals. The publicity and media comment generated by a number of equality officer decisions under the Equal Status Act, 2000 and the hostile reactions of certain representative bodies in the licensed trade, had already served to raise public awareness of issues arising in this area. Moreover, friction between certain trade interests and organisations representing groups covered by equality legislation had spilled over into the public domain.

A press release issued by the Equality Authority on 27 March following the Government's decision to extend the Commission's terms of reference proved unhelpful. The Authority's refusal at that stage to make a submission to the Commission prompted some non-statutory bodies and some voluntary bodies to follow the Authority's example. A number of these bodies subsequently wrote to the Commission enclosing copies of letters which they had forwarded to the Minister for Justice, Equality and Law Reform stating their belief that the Commission was not an appropriate body to deal with the subject of admission and service in licensed premises (Appendix 3).

While the Commission respects the rights of such organisations and individuals not to participate in the consultation process, it is much to be regretted that their views were not made available to the Commission - all the more so because the Authority subsequently made a most helpful oral submission to the Commission.

Since the Commission's additional term of reference was not altered in any way as a consequence of the representations made to the Minister, the Commission proceeded to examine the issues arising and to formulate recommendations for any necessary legislative changes.

In keeping with its working methods, the Commission appointed a subcommittee (Appendix 2) to examine the issues arising in relation to the new term of reference, to consider submissions received and to report back to the Commission.

The subcommittee met on a number of occasions and it was assisted in its task by a broad range of organisations and individuals that made written and/or oral submissions or that responded to its requests for information (Appendices 4 and 5). The Commission is grateful to all those concerned and would like in particular to thank those who made oral presentations for taking the time to meet the subcommittee and for the clarity of their presentations.

On 13 August, 2002, the Minister of State at the Department of Justice, Equality and Law Reform, Mr. Willie O'Dea, T.D., requested that the Commission give priority to the new term of reference and submit its conclusions and recommendations at the earliest opportunity. This request followed meetings which the Minister of State had held with representatives of the licensed trade and Traveller groups with a view to defusing tensions that had arisen in Co. Mayo in connection with a threatened ban by licence holders on serving members of the Traveller community. For its part, the Commission has responded positively to the Minister of State's request and has prepared this Third Interim Report to deal exclusively with matters arising in this area.

The Minister of State indicated in his letter that he had asked representatives of the Traveller groups to make submissions to the Commission as soon as possible and that their initial responses had been positive. Subsequently, both Pavee Point and the Irish Traveller Movement made written submissions and delegations from both organisations made oral presentations to the subcommittee. The Commission would like to thank both organisations for their assistance.

In October, the Equality Authority also sought a meeting with the Commission and subsequently made a presentation to the subcommittee. The Commission thanks the Chairperson and Chief Executive Officer of the Authority for their contributions.

Despite the delays, the co-operation of both the Authority and the Traveller support groups proved most helpful to the Commission in drawing up this Interim Report.

This Report is structured as follows: Chapter 1 explores the issues to be examined by the Commission, while Chapter 2 outlines relevant legislative provisions in the intoxicating liquor code and related measures, and equality legislation, including exemptions set out in the latter. In Chapter 3, the Commission assesses the adequacy of existing provisions in the intoxicating liquor code, the linkages with legislation relating to health, safety and public order, and makes a series of recommendations for legislative changes. Some of the proposed changes are clearly more urgent than others and may need to be given effect at the earliest opportunity. The less urgent changes could be addressed in the context of the codification of the licensing code which is to be undertaken on foot of an earlier

recommendation of the Commission.¹ Issues relating to the liability of licence holders are also considered. Finally, Chapter 4 deals with the issues raised with the Commission during the consultation process in connection with equality mechanisms and processes.

¹

Commission on Liquor Licensing, Second Interim Report, July 2002.

Chapter 1: Issues to be Examined

The Commission's new term of reference requires it to examine the rights of licence holders to refuse admission and service in licensed premises and to make recommendations for any necessary legislative changes. This is a broad mandate and the Commission has taken the opportunity afforded by it to examine a range of issues relating to admission and access in licensed premises. It appears to the Commission that these fall under three broad headings:

- a. Problems of discrimination contrary to equal status legislation;
- b. Health and safety of licence holders, employees and customers; and
- c. Public safety and welfare.

The Commission approached its task with two fundamental principles in mind.

The first is that the Commission condemns discrimination in any shape or form.

Secondly, the Commission recognises that licence holders have a right and a duty to maintain an orderly premises and to ensure the safety and wellbeing of not only themselves and their families but also of their employees to whom they owe various duties under the relevant legislation and of the public at large, i.e. their customers.

The Commission, therefore, condemns any conduct by any person or group of persons who by their actions or threats jeopardise the security of any licensed premises or the safety of any other persons in the premises.

Problems of Discrimination Contrary to Equal Status Legislation

The Commission is well aware of the sensitivities arising under this heading. As already mentioned, the tensions arising between representative bodies in the licensed trade and organisations representing groups covered by equality legislation have been reported extensively in the media. It is important at the outset, therefore, to assess the nature and scale of the difficulties in this area.

The submissions received by the Commission from the licensed trade focus almost exclusively on this area of difficulty. These submissions identified a number of common issues of concern to the trade. Firstly, it has been pointed out that while the liquor licensing code imposes various obligations on licence holders - some of which may require a licence holder to refuse admission or service and require a person to leave the premises - the code does not provide them with adequate legal means of refusing admission and service, nor with sufficient legal protection for their actions when they do so. Many of the existing legal provisions are couched in the archaic language of the 19th century and do not reflect modern conditions.

The licensed trade makes the point that the coming into force of the Equal Status Act, 2000, which it broadly welcomes, has not only prohibited discrimination on the part of service providers, but has also created a heightened awareness of rights of access to goods and services and a new assertiveness in exercising those rights. According to the trade, tensions arise in certain circumstances where the exercise of these rights conflict with requirements of the liquor licensing code. For example, persons who have attained the age of 18 years

enjoy the protection of the Equal Status Act and they are, therefore, entitled to seek admission and service in licensed premises. However, the liquor licensing code provides that it is an offence for a licence holder to sell or supply intoxicating liquor to a person under the age of 18 and if they do so, they risk closure under the terms of the Intoxicating Liquor Act, 1988.²

Section 31(4) of the Intoxicating Liquor Act, 1988 provides that in any proceedings against a person for the sale or supply of intoxicating liquor to a person under 18 years of age, it shall be a defence for such person to prove that the person in respect of whom the charge is brought produced to him or her an age card or, if the defendant is charged with permitting another person to sell or deliver the intoxicating liquor, to prove that an age card relating to the person to whom the intoxicating liquor was sold or delivered was produced by that person to that other person. The 'age card' referred to here is that provided for in section 40 of the 1988 Act and regulations subsequently made by the Minister for Justice, Equality and Law Reform.³ The Commission has already outlined its support for the age card scheme in the Interim Report on Off-Licensing.

In summary, a licence holder must be satisfied that a customer has attained the age of 18 years and is entitled to seek an age card under the general common law right to seek reassurance that one is not breaking the law in entering into a contract. The Equal Status Act does not impinge on this right in any way.

The licensed trade maintains that the new assertiveness in exercising rights is evident across the board and is not confined to particular groups even if the media reports have highlighted certain cases referred to the Director of Equality Investigation, particularly those involving members of the Traveller community.

The licensed trade has requested greater clarity in the liquor licensing code in relation to the grounds on which admission and service can be refused (see chapter 3). In its submission, Pavee Point states that "any service provider should be able to refuse any customer whose actions are a threat to public order; and that they should be able to call on the appropriate state agencies to deal with such issues." Pavee Point said that it would "challenge any threatened undermining of (equality legislation) when the bad behaviour of some was being used as a means of excluding the many". The Irish Traveller Movement also "believes that any service provider should have the right to refuse service on the basis of a threat to public order; however, to take action against an entire community over the actions of individuals is a model for discrimination".

The Commission has, therefore, grounds for believing that the demands of the licensed trade and the requirements of Traveller support groups are not irreconcilable and that legislative provisions directed towards maintaining public order and preventing disorderly conduct and violence could be supported by both sides.

The problems that have arisen in connection with admission and service have been extensively reported in the media. Unfortunately, much of the debate has created more heat than light. Both sides have presented their arguments in extreme and strident terms, leaving little ground on which to build compromise and consensus. The Commission believes that the use of strong language and the staking out of polarised and entrenched

² S.36A, as inserted by s.13 of the Intoxicating Liquor Act, 2000.

³

Detailed provisions are set out in the Intoxicating Liquor Act, 1988 (Age Card) Regulations 1999 (S.I. No.4 of 1999).

positions are not helpful to achieving a shared understanding of the problem and the finding of solutions.

In their submissions to the Commission, the licensed trade have expressed strong antipathy towards the public statements and behaviour of the Equality Authority regarding the scale of the problem. They maintain that the Authority has not acted in the even-handed manner to be expected of a publicly-funded body. It appears indeed that relations between the trade and the Authority have broken down as a result of the hostilities. The Commission regrets this and calls for restraint on both sides in future.

The VFI cites as an example of the Equality Authority bias against the licensed trade the press release issued on 26 June, 2002 in relation to the Authority's Annual Report 2001 which contains the following:

'The refusal to serve by publicans, hotels and restaurants constituted an unprecedented and almost overwhelming number of claims. Claims have been made by Travellers, Black people, older people, young people, parents with children, gay people, people with disabilities and women. Particularly disturbing is the number of claims made by members of the Travelling community. The number and variety of claims in this area must be indicative of persistent, sustained and endemic discrimination and a profound reluctance to make this arena of social interaction more inclusive.'

The VFI maintains that these serious charges are untrue and that they are not supported by the number of claims made under the Act.

The Commission has considered the Authority's claim on the basis of the casework activity outlined in its 2001 Annual Report. The total number of cases dealt with during 2001 was 675 and the cases relating to pubs/nightclubs, restaurants and accommodation were as follows:

Ground	Pub/Club	Restaurant	Accommodation
Gender	3	0	2
Marital Status	0	0	2
Family Status	3	3	3
Sexual Orientation	11	0	1
Religious Belief	0	0	0
Age	29	1	0
Disability	8	1	0
Race	8	0	4
Traveller community	350	0	7
Mixed	8	0	7
Total	420	5	26

The data set out in the Annual Report 2001 of the Office of the Director of Equality Investigations confirm this general picture. There were 854 referrals under the Equal Status Act during 2001 and two-thirds of these cases related to pubs, nightclubs and hotels. Of these, 545 were on the Traveller ground, 21 on the age ground and 6 on the disability ground. This means that 85% of all the complaints received on the Traveller ground related to pubs, nightclubs and hotels.

On the basis of the above data, the Commission has some difficulty in understanding how the Authority reached some of the conclusions set out in the press release reproduced above. For example, only 5 (0.8%) of the 675 cases involved restaurants. Any conclusion involving restaurants would seem to be harsh.

Only 3 cases - admittedly 3 too many - were lodged on the gender ground, while 3 more were lodged on the family status ground.

The Commission regrets the tone of the press release. The use of the words such as 'persistent', 'sustained' and 'endemic' may be calculated to make headlines but when the statistics upon which they are based are called in question they only serve to inflame the debate and polarise positions already adopted. The way forward is surely in dialogue and not in seeking media headlines.

The major problem regarding access relates to the Traveller community ground. At this stage, the Commission wishes to state its unequivocal belief that members of the Traveller community who have attained the age of 18 years have the same rights as any other person of 18 years or over to admission and service in licensed premises. Any restrictions on admission to, or service in, such premises must be based on objective criteria that apply equally to all.

The Commission also wishes to take this opportunity to condemn suggestions made in the recent past that a blanket ban be imposed on serving members of the Traveller community and unequivocally condemns actions already taken by licence holders in certain areas to impose such a ban. There can be no justification for such actions which are illegal under the Equal Status Act. Moreover, the publicity surrounding this action by licence holders had the effect of polarising already stated positions. It could also hinder the resumption of dialogue between the Equality Authority and the trade. The Commission welcomes the VFI's confirmation that such bans are not appropriate.

The Commission's view is supported by the terms of Council Directive 2000/43/EC of 29 June, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. While it is not entirely clear to the Commission that membership of the Traveller community falls within the scope of this measure (discrimination on the Traveller community ground does not fall under the race or ethnic heading in domestic equality legislation), the Commission considers that the definitions of direct and indirect discrimination in the Directive are relevant and applicable.

According to the Directive, indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, *unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary* (emphasis added). This means that restrictions on admission and service in licensed premises must be objectively justified on grounds such as maintaining an orderly premises, preventing drunkenness and underage drinking, protecting staff and customers, etc. and they must be applied in an evenhanded way.

Health and Safety of Licence Holders, Employees and Customers

The Commission is greatly concerned at the level of violent and disorderly behaviour in licensed premises. Such behaviour is by no means confined to members of the Traveller community even if evidence was presented to the Commission that a considerable number of incidents involving physical violence and public order offences have been committed in licensed premises by members of the Traveller community. Many such incidents have been cited in submissions made by the licensed trade and staff working in licensed premises. The Commission was also presented with distressing photographic evidence of injuries sustained in violent incidents and it appears to the Commission that insufficient attention has been given to this aspect of the problem in the past. A presentation by the Health and Safety Authority confirmed that violence in the workplace is on the increase.

It appears to the Commission that sexual harassment and harassment of licence holders and family members, employees and customers which is now prohibited under equality legislation, is also emerging as a serious problem. These issues need to be addressed.

Legal obligations are placed on employers under both the health and safety and equality codes. Licence holders may be liable for injuries sustained or harassment suffered by employees unless adequate policies and procedures have been put in place by the licence holders to deal with these situations. The Commission is aware of the particular difficulties that arise for self-employed licence holders and their families who have fewer means of redress in cases of injury or harassment.

Public Safety and Welfare

Refusal of admission or service in licensed premises may also be justified on public safety and welfare grounds. The Commission is concerned that the safety and welfare of the public remain paramount at all times. Fire safety is a specific concern particularly in clubs which tend to be overcrowded. The risk of injury as a result of overcrowding in confined spaces, especially at indoor events, also needs to be addressed. The provisions of the Fire Safety Act, 1981 are important in this context. The Commission is grateful to the Chief Fire Officers' Association for making a submission and for drawing attention to shortcomings in this area. The Commission hopes that the Chief Fire Officers' fears will be addressed as a matter of priority.

Safety concerns also arise in relation to indoor events, such as concerts etc., that are often attended by very large numbers of young people. The Commission is grateful to the Department of the Environment and Local Government for their submission on this subject and the presentation on the proposed Licensing of Indoor Events Bill, 2002.

Chapter 2: Legislative Background

This chapter deals with legislative provisions under three headings:

- I. Licensing Acts 1833 to 2000 (these will be referred to collectively as the 'liquor licensing code') and other relevant statutes;
- II. Equal Status Act, 2000; and
- III. the exemptions provided for in the Equal Status Act, 2000.

I. Statutory Obligations on Licence Holders

As the Commission stated in its first Interim Report, a licence is a permit, or authorisation, to do something that would otherwise be unlawful. A licence granted under the liquor licensing code is an authorisation to the person named on the licence to sell intoxicating liquor in accordance with the conditions attaching to it in relation to a premises. 'On-licences' permit the sale of intoxicating liquor for consumption both on and off the premises concerned, while 'off-licences' permit sale for consumption off the premises only. Retail licences expire annually in September each year and licence holders must apply to have them renewed. Renewed licences are issued by the Office of the Revenue Commissioners for the licensing year ending the following September.

The liquor licensing code and other relevant statutes contain numerous provisions which restrict, or otherwise may have an impact on, admission to or service in licensed premises. They are described in the following sections.

Renewal of Licences

The Courts (No. 2) Act, 1986 deals with the renewal of liquor licences and sets out the procedure to be followed.⁴ This Act introduced a streamlined procedure that greatly reduced the volume of work associated with the renewal process. The Act provides that where a renewal is applied for in respect of premises that were already licensed in the immediately preceding year, it is no longer necessary to produce a certificate of the District Court⁵ to the Office of the Revenue Commissioners for the purposes of obtaining a renewal of the licence.⁶

Where, however, a notice of objection to renewal of a licence has been lodged with the court - within the prescribed time limits - the 1986 Act provides that the licence shall not be renewed without production of such a certificate to the Office of the Revenue Commissioners.⁷ The certificate relates to (a) the good character of the licence holder, and (b) the peaceable and orderly manner in which the licensed premises were conducted in the year ending on the expiry of the licence.⁸ If the court is not convinced of the good character of the applicant, or is not satisfied that the

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⁵ S.4.

⁶ Previously, s.11 of the Spirits (Ireland) Act, 1854 provided for the renewal of all licences on production of such a certificate to the Revenue

⁷ Commissioners; that provision was repealed by s.9 of the 1986 Act.

⁸ Courts (No.2) Act, 1986, s.4(2).

⁹ *Ibid.*, s.4(5).

¹⁰ *Ibid.*, s.4(7).

premises have been operated in a peaceable and orderly manner, it may decide not to issue the certificate required for renewal of the licence.

The 'good character' of the applicant has been considered by the courts on a number of occasions in connection with the renewal of licences. Case law pertaining directly to the area being considered in this report, i.e. admission and service, is patchy. It would appear, nevertheless, that the courts would be disposed to entertaining an objection to renewal of a licence on foot of an arbitrary or unreasonable refusal of admission or service by a licence holder, especially if such a refusal ran counter to public policy objectives.

As far back as 1887,⁹ the justices refused to grant the certificate required for renewal of the licence because the publican had refused to supply intoxicating liquor and other articles for sale in his shop to certain persons who were 'boycotted' and had demanded excessive charges from others. The grounds of refusal were that the character of the applicant and the conduct of his business as publican had not been satisfactory during the preceding year.

The interpretation of the term "peaceable and orderly manner" referred to in the 1986 Act¹⁰ has been considered by the courts in cases of non-usage of licences. It appears that the judicial view to date has been that a failure to operate licensed premises during the licensing year without good cause provides grounds for objection to the renewal of the licence. The general test applied by the courts in relation to renewal is whether there appears to be an intention to trade, or to continue trading, under the licence. If there is no intention to trade, the court may refuse to issue the certificate and the renewal will not be granted by the Office of the Revenue Commissioners. (The Commission has already expressed itself strongly on the subject of dormant licences in the Interim Report on Off-Licences.)

In summary, objections to the renewal of a licence may be lodged, and be entertained by the courts, if the licence holder does not operate the premises in a peaceable and orderly manner. Breaches of the liquor licensing code - 'after hours' trading, allowing underage persons on the premises, serving underage persons or persons who are already drunk, permitting drunkenness or violence on the premises - would constitute evidence of a 'disorderly' house.

Children in Licensed Premises

The Intoxicating Liquor Act, 1988 provides that licence holders shall not allow a child - defined in the Act as a person under the age of 15 years - to be at any time in the bar of licensed premises.¹¹ It is an offence to do so. However, it is not an offence if the licence holder uses his or her discretion to allow a child to be present if the child is accompanied by his or her parent or guardian.

⁹ R (Delaney) v. The Chairman and Justices of Queens County, 20 L.R.I. 167.

¹⁰ S.4(7)(b), previously in s.11 of the Spirits (Ireland) Act, 1854.

¹¹ S.34.

The 1988 Act also provides that persons under the age of 18 years shall not be allowed on licensed premises during extended hours covered by an exemption order.¹²

Section 36 of the same Act provides that the holder of the licence of a licensed premises shall not permit a person who is under the age of 18 years and who is not accompanied by his or her parent or guardian (other than a person under that age whose employment in the licensed premises is not prohibited under section 38 of the Act) to be at any time on such premises.

Drunkenness, Violent, Quarrelsome or Riotous Conduct

Under the Licensing Act, 1872¹³, it is an offence for a licence holder to permit drunkenness or any violent, quarrelsome or riotous conduct to take place in his or her licensed premises, or to sell intoxicating liquor to a person who is already drunk. Section 18 of the same Act provides that any licensed person may refuse to admit and may turn out of the premises in respect of which the licence is granted any person who is drunken, violent, quarrelsome or disorderly and any person whose presence on the premises may subject him or her to a penalty under the Act.

The Refreshment Houses (Ireland) Act, 1860 provides that the holder of a wine retailer's on-licence commits an offence in permitting "any Person to be guilty of Drunkenness or other disorderly Conduct" in the licensed premises.¹⁴ For a second or third offence the court may disqualify the licensee from selling wine by retail for any term not exceeding five years after such conviction. That enactment is not part of the Licensing Acts, 1833-2000 and so section 18 of the 1872 Act does not apply.

Section 13 of the Intoxicating Liquor (General) Act, 1924 provides that where the purchaser of intoxicating liquor from an off-licence consumes that intoxicating liquor on the premises or on any highway, lane or byway, adjoining or near such premises, such licence holder shall, if it appears that such drinking was by his privity or consent, be guilty of an offence.

Prostitution

It is also an offence under the 1872 Act to knowingly permit the premises to be the place of meeting of reputed prostitutes, whether the object of their so meeting is or is not prostitution. If a licence holder is convicted of permitting the premises to be a brothel, the licence will be forfeited and the person will be disqualified from ever holding a licence for the sale of intoxicating liquor.¹⁵

Harbouring Thieves, etc.

Under the Prevention of Crimes Act, 1871, it is an offence for a licence holder to knowingly lodge or harbour thieves in the premises, or knowingly permit them to

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S.35.

13 S.13.

14 S. 31.

15 S.15.

meet or assemble there, or knowingly allow the deposit of stolen goods there while having a reasonable cause for believing them to be stolen.

Sale, Supply and Distribution of Drugs

Under the Licensing (Combating Drug Abuse) Act, 1997, where the District Court is satisfied that a person who is the holder of an intoxicating liquor licence (or a public dancing licence or a public music and singing licence) permits or suffers the use of the premises for the sale, supply or distribution of any controlled drug,¹⁶ or did not exercise control over the premises which was reasonable in all the circumstances, the licence may be suspended immediately.

As regards the issue of exercising sufficient control, the Act provides that the licence shall not be suspended unless a member of the Gardaí advised the licence holder of suspicions regarding the sale, supply or distribution of controlled drugs on the premises, warned him or her to take appropriate action to prevent such sale, supply or distribution and gave the licence holder sufficient time to take the necessary action. Where an intoxicating liquor licence is suspended under this Act, it cannot be renewed for about five years (until the Annual Licensing District Court of the fourth year following the date of the suspension). During that period the person whose licence was suspended is disqualified from holding any liquor licence.

Members of an Garda Síochána

Section 16 of the Licensing Act, 1872 provides that it is an offence to knowingly harbour or knowingly suffer to remain on the premises any member of an Garda Síochána on duty, except for the purpose of keeping or restoring order or in execution of his or her duty, or supplying any liquor or refreshment, whether by way of gift or sale, to any [member of an Garda Síochána] on duty unless by express authority of some superior officer of that member of an Garda Síochána.

Gaming and Betting

Section 9 of the Gaming and Lotteries Act, 1956, which repealed section 17(1) of the 1872 Act, provides that a licence holder commits an offence if he or she permits gaming on the premises (with some exceptions). Section 17(2) of the 1872 Act provides that a licensed person commits an offence if, *inter alia*, he or she suffers his or her house to be opened, kept or used in contravention of the Betting Act, 1853, itself indeed in need of revision.

Hotels

Section 3(1) of the Hotel Proprietor's Act, 1963 provides that the proprietor of a	hotel is under a duty to receive at the hotel as guests all
persons who, whether or not	under special contract, present themselves and require
sleeping accommodation, food	or drink and to provide them with the same, unless he
or she has reasonable grounds	of refusal.

¹⁶

Defined in s.2 of the Misuse of Drugs Act, 1977.

Miscellaneous Statutory Provisions outside the Licensing Code

Section 16 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 provides that no licensed premises, nor any premises where refreshment is ordinarily sold for consumption on the premises, nor any club premises where intoxicating liquor is usually sold shall for the purpose of promoting or procuring the election of a candidate at a municipal election, be used either as a committee room or for holding a meeting. That enactment is not part of the Licensing Acts, 1833-2000 and so section 18 of the 1872 Act does not provide a power to refuse to admit such persons.

Section 7 of the Dublin Police Act, 1842 (which applies in the Dublin Metropolitan District and encompasses more than retailers of intoxicating liquor) provides that it is an offence to “wilfully or knowingly permit Drunkenness or other disorderly Conduct in such House, Shop, Room, or Place, or knowingly suffer any unlawful Games or any Gaming whatsoever therein, or knowingly permit or suffer Prostitutes or Persons of notoriously bad Character to meet together or remain therein”.

Closure of Premises in the interests of Public Peace and Order

Section 19 of the Intoxicating Liquor Act, 1927 provides that whenever a Justice of the District Court is satisfied, on foot of a written application by a Superintendent or Inspector of the Gardaí, that in the interests of public peace and order it is expedient that the sale of intoxicating liquor should immediately cease in any town or village in the area, the Justice may order the immediate closure for the remainder of that day, or for a shorter period, of all licensed premises in the town or village concerned.¹⁷

When a section 19 order is made, every licence holder in the town or village concerned must, upon the same being communicated verbally to him or her by a member of the Gardaí, immediately close the licensed premises and keep it closed during the time mentioned in the order. Any person who fails or refuses to comply with the terms of any such order is guilty of an offence. Moreover, whenever a section 19 order is made and a licence holder fails or refuses to comply with it, any member of the Gardaí may use such force as may be necessary for ensuring compliance with it.

Summary

In summary, a liquor licence, as already stated, is not just a permit to trade but also creates an obligation to do so. A renewal of a licence may be refused by the courts on foot of a refusal of admission or service that is considered by the courts to be arbitrary or unreasonable. On the other hand, valid objections to the renewal of a licence may be lodged if the licence holder breaches those provisions of the liquor licensing code that oblige the licence holder to refuse admission or service in certain circumstances.

The penalties and sanctions applicable for certain breaches of the intoxicating liquor code are severe. They range from suspension of the licence for five years in the case

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There are similar provisions contained in s.21 of the Licensing (Ireland) Act, 1833 and, in the case of premises to which a wine retailer's on-licence is attached, s.30 of the Refreshment Houses (Ireland) Act, 1860.

of drugs offences (1997 Act),¹⁸ to closure orders for lengthy periods for underage drinking offences (2000 Act). Convictions for a wide range of other offences may be recorded on the licence (these endorsements expire after a fixed period). Where an offence is recorded on a licence which already carries two current endorsements, the licence shall be forfeited and no new licence may be issued in respect of the premises concerned.

The Criminal Justice (Public Order) Bill, 2002, which is before the Oireachtas, makes further provision for closure orders. If passed, the Gardai will be able to apply to the District Court for such an order where there has been disorder either on the premises or in the vicinity if the persons involved were on the premises. A closure order in respect of premises may last up to 7 days in the case of the first such order, and between 7 and 30 days in the case of a second or subsequent order.

II. **Equal Status Act, 2000**

The Equal Status Act, 2000 prohibits discrimination, *inter alia*, in the provision of goods and services to which the public generally, or a section of the public, has access. The discriminatory grounds set out in the Act are: gender, marital status, family status, sexual orientation, religion, age, disability, race, membership of the Traveller community. Responsibility for enforcement of the Act has been assigned to the equality bodies established by the Employment Equality Act, 1998, i.e. the Equality Authority and the Office of the Director of Equality Investigations (ODEI).

The establishment of the Equality Authority is provided for in Part V of the Employment Equality Act, 1998. The Authority's general functions are set out in section 39 of that Act and section 39 of the Equal Status Act, 2000. It is a publicly-funded, statutory body with a representative board of 12 members appointed by the Minister for Justice, Equality and Law Reform. According to the Annual Report 2001, the approved staffing level is 45 posts.

The 2000 Act provides¹⁹ that the Authority shall:

- a. work towards the elimination of 'prohibited conduct' (defined elsewhere in the Act as discrimination against, or sexual harassment or harassment of, or permitting the sexual harassment or harassment of, a person in contravention of the Act);
- b. promote equality of opportunity in relation to the matters to which the Act applies; and
- c. provide information to the public on, and keep under review the working of the Act and, whenever the Authority thinks it necessary, to make proposals to the Minister for its amendment.

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¹⁹ See p.14.
S.39.

More detailed statutory functions are set out elsewhere in the legislation, e.g. preparation of codes of practice,²⁰ conducting inquiries,²¹ carrying out equality reviews and preparing equality action plans.²²

The ODEI is a quasi-judicial body for those seeking redress for alleged discrimination. Cases are dealt with by equality officers who draw up reasoned Decisions based on evidence and case law. These are legally binding, but may be appealed to the Circuit Court. All Decisions are published on the ODEI's excellent web site. Mediation is available as an alternative means of redress in almost all cases. Mediated settlements are also legally binding and are confidential.

The procedure for taking a discrimination case under the Equal Status Act is set out in the Act itself. A person who complains of discrimination must seek redress by referring the case to the Director of Equality Investigations.²³ Before doing so, however, the complainant must notify the person against whom the allegation is to be made - the respondent - in writing of the nature of the allegation and the person's intention, if not satisfied with the response to the allegation, to refer the case to the Director of Equality Investigations. Questions may also be asked and 'material information' sought from the respondent at this stage.²⁴ This must normally be done within two months of the incident giving rise to the complaint, or where more than one incident is involved, within two months of the last incident.²⁵ It may be done by the complainant writing directly to the respondent or by using a standard form that has been produced for this purpose by the ODEI (Form ODEI 5).²⁶ It would appear that no form has been prepared for use by the recipient of a Form ODEI 5.

Respondents may, if they so wish, reply to any questions posed by complainants.²⁷ If a respondent fails to reply to a notification or to questions posed by the complainant, or supplies false or misleading information, or information that would not assist the complainant in deciding whether to refer the case to the Director, the Director may draw such inferences, if any, from the refusal to reply or from the information supplied.²⁸

The Director will not proceed to investigate a case unless he or she is satisfied that either the respondent has replied to the notification or that at least one month has passed since the respondent was notified.²⁹ A claim for redress must be submitted to the Director within six months of the incident giving rise to the complaint, or where more than one incident is involved within six months of the last incident. The ODEI has produced a standard form - ODEI 2 - for submitting complaints. This six month

²⁰ Employment Equality Act, 1998, s.56, as amended.

²¹ *Ibid.*, s.58.

²² *Ibid.*, s.69 as amended.

²³ Equal Status Act, 2000, s.21(1).

²⁴ S.21(8) defines 'material information'; it does not include 'confidential information' which is defined in s.21(9).

²⁵ S.21(3) allows the Director to extend this limit to four months in exceptional circumstances and where it is 'just and equitable'.

²⁶ Form ODEI 5 is available from the ODEI or may be downloaded from the ODEI web site.

²⁷ Equal Status Act, 2000, s.21(2)(b).

²⁸ *Ibid.*, s.26.

²⁹ *Ibid.*, s.21(4).

time limit may be extended by the Director to twelve months in exceptional circumstances.³⁰

The Equality Authority may also refer a case to the Director where it believes that discrimination exists, or existed, and it is not reasonable to expect the person experiencing the discrimination to refer the case to the Director.³¹ In such cases, the Authority takes the place of the complainant in the procedure already outlined. The Authority may also apply to the High Court or the Circuit Court for an injunction or such other relief as is deemed necessary to prevent further discrimination by a person found by the Director to have engaged in discrimination.³²

The Equality Authority pointed out during their presentation that in the vast majority of cases taken on behalf of complainants against licensed premises, no response was received by them in reply to a notification. This omission has not been mentioned in any of the submissions from the licensed trade. Yet, how can the Equality Authority function in a dispassionate way if they are furnished with the complaint on one side and no response on the other? In many cases, therefore, the individual licence holders have brought the ensuing problems upon themselves. The Commission is strongly of the opinion that where a notification of a complaint has been received the licence holder should respond without delay. If they have a full answer to it then there is a very good chance that the Equality Authority will proceed no further. This omission has certainly proved costly in many cases.³³

Where a complaint that complies with the notification requirements is received, the Director proceeds to investigate the complaint. In practice, the complaint is allocated to an equality officer for investigation. These investigations normally involve hearings where both sides have an opportunity to question each other and answer each other's questions. Hearings are conducted in private and the outcome is a written decision of the equality officer, which, if the complaint is upheld, provides redress for the complainant. The redress comprises an order for compensation for the effects of discrimination or an order that a person or persons specified in the order take a specified course of action. In cases where compensation is awarded, it may not exceed the maximum amount that could be awarded by the District Court in civil cases in contract. The current limit is €6,350. Section 14 of the Courts and Court Officers Act, 2002 increases the jurisdiction of the District Court. Section 1 of the Act provides that, *inter alia*, that section is to come into effect only when the Minister so orders. No such order has been made to date.

The Decision of an equality officer may be appealed to the Circuit Court within six weeks of the date of the Decision by either the complainant or the respondent. The appeal must be in writing and must set out the grounds on which it is being appealed. An appeal may also be made on a point of law from the Circuit Court to the High Court.

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Equal Status Act, 2000, s.21(7).

31

Ibid., s.23(1).

32

Ibid., s.21(3).

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The VFI state that they would be unaware of individuals who make no reply to correspondence. The Commission regrets that VFI members do not take the advice of their representative body not to ignore correspondence from either the Equality Authority or a complainant.

The Act makes provisions for mediation as an alternative route to resolving disputes. The Director is obliged to refer a case to equality mediation officers where it appears to the Director that the case is one that could be resolved by mediation.³⁴ However, if either the complainant or respondent objects to a case being dealt with by means of mediation, the Director cannot exercise this power.

III. Exemptions provided for in Equal Status Legislation

The central purpose of the equal status legislation is to prohibit discrimination on a number of specified grounds. Discrimination, whether direct or indirect or by association occurs, *inter alia*, where a person is treated less favourably than another person is, has been or would be treated.³⁵

When introducing the Equal Status Bill to the Dáil on 27 February, 1997, the Minister for Equality and Law Reform stated that the Director of Equality Investigations would provide a simple, inexpensive and speedy means of redress for victims of discrimination. He said that despite misunderstandings, the Bill would not require traders to give open access to the premises or prevent business people, in the ordinary day to day running of their business, from refusing service to someone because of misbehaviour, security concerns, inappropriate dress and so on. It would not give any protection to troublemakers or antisocial elements.

Three categories of exemption are provided for in the 2000 Act:

- i. section 14;
- ii. section 15(1); and
- iii. section 15(2).

Section 14 provides, *inter alia*, that nothing in the Act shall be construed as prohibiting action that is required in order to comply with:

- a. any enactment or order of a court;
- b. any act done or measure adopted by the European Union or Community; or
- c. any convention or other instrument that imposes an international obligation on the State.

This means that if a person is barred from a licensed premises under a court injunction, the refusal to admit or serve that person is not discrimination. Depending on the circumstances, action taken by a licence holder to comply with, for example, health and safety or fire safety law would not be discriminatory (see below).

The need to balance the obligations on licence holders to admit and serve the public with their responsibilities to refuse admission and service in certain circumstances is recognised in section 15. Section 15(1) states:

“For greater certainty, nothing in this Act prohibiting discrimination shall be construed as requiring a person to dispose of goods...or to provide services...to another person (“the customer”) in circumstances which would lead a

³⁴ Equal Status Act, 2000, s.24(1).

³⁵ *Ibid.*, s.3.

reasonable

individual having the responsibility, knowledge and experience of the person to the belief, on grounds other than discriminatory grounds, that the disposal of the goods...or the provision of the services..., as the case may be to the customer, would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services are sought...".

This is a general defence for all service providers and it would seem to provide a significant level of protection. Needless to say, any information gathered *after* the decision to refuse admission or service cannot be used to justify the decision already taken.

Section 15(2) goes further to take account of the specific needs of the licensed trade. It states:

"Action taken in good faith by or on behalf of the holder of a licence or other authorisation which permits the sale of intoxicating liquor, for the sole purpose of ensuring compliance with provisions of the Licensing Acts, 1833 to 1999 (now 1833 to 2000), shall not constitute discrimination."

While this subsection is geared to the specific needs of the licensed trade, there are significant qualifications: the action must be taken in 'good faith' and be taken for the 'sole purpose' of compliance with the intoxicating liquor code. This means that the licence holder must be able to demonstrate that a refusal of admission or service is not discrimination in another guise.

The Commission considers that there is a role for the representative bodies in the licensed trade to keep their respective members informed of developments in equality case law pertaining to sections 14 and 15 of the 2000 Act, and that there is scope for incorporating appropriate rules derived from equality officer decisions in a code of practice to be drawn up under section 56 of the 1998 Act, as amended by the 2000 Act (see below).

Likewise, the Commission is convinced that bodies such as Pavee Point and the Irish Traveller Movement can play an important and useful role at local level in building bridges between the licensed trade and the Traveller community. The Commission urges both sides to engage in dialogue and to consult with each other where appropriate in order to anticipate and defuse tensions.³⁶

Application of Equal Status Act to Garda Activities

During its deliberations the Commission has become aware of uncertainty concerning the extent to which Garda activities are covered by the provisions of the 2000 Act.

The position is that the investigation and prosecution of crime are not "services" within the meaning of the 2000 Act.³⁷ This matter was raised during Dáil debates in late 1999 and the then Minister availed of the opportunity to explain the difference

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Mr. J. Douglas suggested that education and training measures must be put in place to lead to a greater understanding of the respective rights and responsibilities of all those concerned.

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Donovan v Donnellan (Equality Officer Decision S2001-11).

between “controlling duties” exercised by the State and “services” provided by the State.³⁸ He went on to say that controlling duties in the areas of policing, defence and prisons would not be regarded as services but that the service aspects of policing, defence and prisons would come within the scope of the legislation.

Chapter 3: Recommendations for Legislative Changes

The Commission welcomes the positive engagement of the licensed trade and Traveller support groups in the Commission's deliberations on this difficult subject and their constructive approach to developing solutions to the difficulties they have identified. This chapter considers the issues relating to admission and service that were either raised with the Commission, or which the Commission considers from its own research to be relevant and important, and sets out recommendations for legislative changes under the following headings:

- I. Liquor licensing code;
- II. Offences not explicitly covered by the liquor licensing code;
- III. Health, safety and welfare considerations; and
- IV. Licence holder liability and duty of care.

I. Liquor Licensing Code

Peaceable and Orderly Premises

As mentioned earlier, renewal of an intoxicating liquor licence requires that the licensed premises be operated in a peaceable and orderly manner. This is a long-standing feature of the liquor licensing code and is a particular and onerous requirement that does not apply to many other providers of goods and services.

The licensed trade argued in their submissions that the retailing of intoxicating liquor cannot be equated with selling groceries, clothing or petroleum products. The Commission accepts this without hesitation. The existence of extensive and detailed licensing codes in this and other jurisdictions is proof, if proof were needed, of the unique responsibilities and obligations of intoxicating liquor licence holders. The severity of the penalties and sanctions applied for breaches of the liquor licensing code is also relevant. Licence holders must be allowed to protect their premises and their livelihoods. In practice, this means that they must be allowed some margin of discretion when it comes to decisions regarding admission and service of customers.

The Commission considers that the requirement to operate licensed premises in a peaceable and orderly manner is fundamental to the maintenance of public order. The Commission is conscious of the additional responsibilities that this imposes on holders of intoxicating liquor licences - including where appropriate the need to refuse admission to potential customers, or service to persons already on the premises - but considers that licence holders must remain responsible for maintaining peaceable and orderly premises.

The Commission recommends that the operation of peaceable and orderly premises remains a fundamental condition for renewal of intoxicating liquor licences and considers that the circumstances in which admission or service may be refused should be set out clearly in the relevant legislative provisions.

Drunkenness

The risk of drunkenness in licensed premises is real. When consumed in moderation alcohol is not dangerous but the disposition of many people to engage in excessive drinking creates a real risk of intoxication that can lead in turn to accidents, injuries and violence. This can involve other customers and staff. It can also spill over into public disorder when persons who are drunk leave licensed premises. This is a point on which the licensed trade and Traveller support groups are in complete agreement.

In their submissions to the Commission, the licensed trade bodies argued that the powers of licence holders to deal with instances of drunkenness and drunken behaviour have been eroded by the equal status legislation. The Commission is also aware of widespread public concern about the scale of public disorder and nuisance associated with the consumption of alcohol, particularly when large numbers leave licensed premises at closing time.

Current legislative provisions dealing with drunkenness are set out in the Licensing Act, 1872 and the Refreshment Houses (Ireland) Act, 1860. Section 13 of the 1872 Act provides, *inter alia*, that if a licence holder permits drunkenness on his or her premises, or sells any intoxicating liquor to a drunken person, he or she shall be liable to a penalty not exceeding €254.³⁹ Section 18 of the same Act provides that any licensed person may refuse to admit, and may turn out of licensed premises, a drunken person. Any such person who refuses or fails to leave the premises shall be liable to a penalty. (It appears that the current penalty of €12.70 (£10) has remained unchanged since 1924.) Moreover, the Gardaí are required on the demand of the licence holder to expel, or assist in expelling, every such person and may use such force as may be required for that purpose.

These provisions undoubtedly provide a significant level of protection for licence holders, but only if they are enforced. The onus is on the licence holder to take action and to seek the assistance of the Gardaí where necessary. The Commission considers that the penalty for refusing to leave premises should be increased substantially⁴⁰ and, that the law needs to be strengthened to permit licence holders to refuse admission to persons who have been expelled previously from the premises because of drunkenness. Licence holders must, however, maintain adequate records of refusals of admission and service.

The Commission recommends that existing legislative provisions be amended as a matter of urgency in order to increase penalties for drunken persons refusing to leave licensed premises and to permit licence holders to refuse admission and service to persons who have been expelled previously from the premises for reasons of drunkenness.

Violent, Quarrelsome and Disorderly Conduct

Section 13 of the 1872 Act also provides that if a licence holder permits any violent, quarrelsome or riotous conduct on his or her premises, he or she shall be liable to a

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This penalty was increased under s.51 of the Intoxicating Liquor Act, 1988 from £10 for the first offence, and not exceeding £20 for the second and any subsequent offence to £200 i.e. €254.

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It could be increased to €254, for example, to bring it into line with the penalty applicable to licence holders who permit drunkenness on their premises.

penalty not exceeding €254. Section 18 permits the licence holder to refuse to admit, and may turn out of the premises, any person who is violent, quarrelsome or disorderly.

The provisions are clearly intended to provide an adequate level of protection for licence holders, but here too the issue of enforcement arises. Moreover, the Commission is very conscious of the difficult position in which licence holders in outlying areas may find themselves. The owner, or a family member, may be alone in the premises and, therefore, vulnerable. The Commission is aware of the fear and terror that a licence holder, family members and employees may experience in cases of quarrelsome behaviour and violent conduct. The Commission is also aware of an increase in the incidence of abusive language, threatening behaviour and intimidation. The law must be strengthened to protect against such behaviour.

The Commission recommends that the provisions of section 18 of the 1872 Act be urgently updated and extended to encompass abusive language, threatening behaviour and intimidation. Licence holders should also be permitted to refuse admission and service to persons expelled previously from the premises for any such reason.

Closure of Premises in the interests of Public Peace and Order

Attention has already been drawn to the provisions set out in section 19 of the Intoxicating Liquor Act, 1927. The Gardaí believe that these provisions should be retained in the intoxicating liquor code and the Commission agrees.

The Commission recommends retention of section 19 of the 1927 Act in the interests of maintaining public peace and order.

Prostitution

The law relating to prostitution has been updated and detailed provisions are now set out in the Criminal Law (Sexual Offences) Act, 1993.⁴¹ The Commission notes that section 11 of the 1993 Act contains provisions relating to brothel keeping⁴² and considers, therefore, that the 1872 Act provisions need to be updated, taking account in particular of the public policy objectives set out in the 1993 Act.

The Commission recommends that provisions in the liquor licensing code relating to prostitution be reviewed and updated to take account of the provisions of the Criminal Law (Sexual Offences) Act, 1993.

Prevention of Crime

The Prevention of Crimes Act, 1871 makes it an offence for a licence holder to knowingly lodge or knowingly harbour thieves or reputed thieves or knowingly permit them or knowingly suffer them to meet or assemble there or knowingly to deposit goods there if there is reasonable cause for believing them to be stolen. Provision is made for forfeiture of the licence on conviction of an offence (at the discretion of the

⁴¹ Ss.6 to 13.

⁴² A provision similar to s.14 of the 1872 Act is contained in s.7 of the Dublin Police Act, 1842.

court for a first offence, but obligatory for a period of two years for a second offence). There is a further penalty where two convictions have been made over three years in respect of the same premises regardless of whether the persons convicted were the same. The Commission considers it likely that this provision has been overtaken by provisions in more recent criminal law and if so, it may be redundant.

The Commission recommends that the case for retaining a provision on the lines of section 10 of the 1871 Act be examined.

Children in Licensed Premises

The Commission has dealt with this issue at some length in its Second Interim Report. It welcomes the Government decision to amend the Equal Status Act, 2000 in order to safeguard the discretion available to licence holders under Part IV of the Intoxicating Liquor Act, 1988 and which allows them to exclude children from licensed premises. The Commission has always been of the opinion that the licensed premises is not a suitable place for children. However, where children are permitted to be in licensed premises then they should remain at all times in the control of the parent or guardian who brings them in. As we stated, if a publican wishes to forbid children under a certain age from his or her premises he or she should be entitled to do so. Furthermore, a publican wishing to limit the hours in which children can be in licensed premises should be entitled to do so. Indeed, the legislature might seriously consider dealing with this matter on a statutory basis keeping the best interests of children, a vulnerable section of our community, as their primary objective.

The Commission recommends retention of the restrictions on children in licensed premises and, as already outlined in the Second Interim Report, recommends that where children are permitted, licence holders should be entitled to require a person who is accompanied by a child and who, in the opinion of the licence holder, has been on the premises for an excessively long period to leave the premises together with the child.

Sale, Supply and Distribution of Drugs

As already outlined, the Licensing (Combating Drug Abuse) Act, 1997 provides that where the District Court is satisfied that a licence holder permits or allows the use of the premises for the sale, supply or distribution of any controlled drug, or if the licence holder did not exercise reasonable control over the premises, the licence may be suspended immediately. This is an important and necessary provision given that licensed premises are frequented by many young people.

The Commission recommends retention of the 1997 Act provisions in order to prevent and curtail the sale, supply and distribution of controlled drugs.

Admission of Groups

A common concern of all sectors of the licensed trade related to the potentially disruptive behaviour of groups of people in licensed premises. It seems clear to the Commission that the risk of boisterous behaviour and disorderly conduct increases in

a group context, whatever the makeup of the group may be, particularly where intoxicating liquor is involved. Moreover, there is a likelihood that the wellbeing and comfort of other customers will be ignored by such a group. If disorderly conduct or violent behaviour occurs, the risk to the safety of staff and customers, and the probability of damage to the premises, will be all the greater. However, even if licence holders were to be given discretion to exclude groups, there would be a continuing risk of group members entering individually and joining up later within the premises.

While the Commission does not underestimate the practical drafting difficulties involved, it believes, nonetheless, that appropriate legislative provision would be desirable to permit licence holders to refuse admission and service to *any* group of people that poses a risk of disorderly conduct.

*The Commission recommends that enhanced discretion to refuse admission or service be made available to licence holders in the case of groups of persons where there is any danger of disorderly conduct or harassment or improper behaviour towards staff or customers or towards the safety of the premises generally.*⁴³

II. Offences not explicitly covered by the Liquor Licensing Code

The Commission has identified a number of offences that are not currently recognised under the intoxicating liquor code but which, depending on the circumstances, might necessitate a refusal of admission or service in licensed premises.

Offences against a Person

The Non-Fatal Offences against the Person Act, 1997 makes it an offence to:

- a. make a threat to kill or to cause serious harm to any person;
- b. use any of the following means without lawful authority to compel a person to refrain from doing something that he or she is legally entitled to do or to do something that he or she is legally entitled not to do:
 - i. using violence or intimidation to that person or his or her family;
 - ii. injuring or damaging his or her property;
 - iii. persistently following him or her from place to place;
 - iv. watching or besetting his or her place of business or residence.

The licensed trade and staff of licensed premises have argued that threats of violence and intimidation have been made against licence holders and staff who have refused admission or service in circumstances where the licence holder or staff felt obliged to refuse under the liquor licensing code.

The Commission believes that a licence holder, or an employee, who is subjected to intimidation or threats of violence should be permitted to refuse admission or service in the licensed premises concerned. In the Commission's view such

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Mr. C. McCamley and Mr. C. O Mongáin do not support this recommendation because they consider that it involves a possibility for discriminatory practices.

behaviour would amount to 'disorderly conduct' as described above and the definition of disorderly conduct in future legislation should encompass this dimension.

Use of Weapons

Under the Firearms Acts, 1925 to 2000, it is an offence for a person to have any knife (or other article that has a blade or which is sharply pointed) with him or her in any public place unless the person concerned can prove that the article was for use at work or for a recreational purpose, or alternatively that the person concerned had a good reason or lawful authority for carrying the article in a public place. It is also an offence for a person to have in a public place any article adapted for use for causing injury to, incapacitate or intimidate any person. A *mens rea* of recklessness is sufficient to commit this offence. Public place in this context is defined as any premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise.

The Commission believes that such an offence would also amount to disorderly conduct as described earlier and would provide sufficient grounds for a refusal of admission or service in licensed premises. The definition of 'disorderly conduct' should also encompass this aspect.

The Commission recommends that disorderly conduct be defined in such a manner as to encompass offences against a person and firearms offences.

Gambling

The Gaming and Lotteries Act, 1956 provides that the licence holder of licensed premises shall not permit gaming on the premises.⁴⁴ Gaming is defined in the 1956 Act as playing a game (whether of skill or chance or partly of skill and partly of chance) for stakes hazarded by the players. This does not cover the playing of a game where no stake is hazarded by the players other than a charge for the right to take part in the game provided that only one such charge is made in respect of the day on which the game is played, the charge is the same for all the players and the promoter derives no personal profit from the promotion of the game. It also does not cover the situation where the licence holder or his or her private friends play cards for stakes in a part of the premises other than that in which the sale of intoxicating liquor generally takes place if the friends are being entertained by the licence holder at his or her own expense.

The 1956 Act makes provisions for the issue of search warrants where there are reasonable grounds for supposing that offences against the Act have been, are being or are about to be committed.⁴⁵ A conviction under the Act may, at the discretion of the court, be recorded on the licence of the licensed premises concerned. The Commission is aware of the Government's intention to reform the Act and considers that the definition of 'disorderly conduct' should also encompass engaging in gaming activities contrary to the provisions of the Gaming and Lotteries Act, 1956.

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⁴⁵ S.9.

S.39.

III. Health, Safety and Welfare Considerations

Health and safety emerged as a major issue in the context of the Commission's work in this area. The Commission is particularly concerned about the health, safety and welfare of licence holders, their families and employees as well as the customers who enter licensed premises in the expectation of enjoying a safe and peaceful environment. The Commission recognises that the need to maintain a safe working environment may require a licence holder to refuse admission and service in certain circumstances.

Safety in the Workplace

The Commission was very fortunate that Dr. Dan Murphy, Director of Occupational Medical Services at the Health and Safety Authority (HSA) was able to make an oral presentation on health and safety issues and would like to thank Dr. Murphy for his expert assistance and advice.

Under the Safety, Health and Welfare at Work Act, 1989, employers are obliged to ensure:

- i. the safety, health and welfare at work of all employees; and
- ii. that persons other than employees are not exposed to risks to their safety or health.

This means that quite apart from the employer's obligations towards his or her employees, there is also an obligation towards other persons. Each employee is also required to take reasonable care of his or her own safety, health and welfare and that of any other person who may be affected by that employee's actions or omissions.

The 1989 Act requires all organisations, whether public or private, to compile a safety statement setting out how health and safety standards are being implemented. Failure to comply with this obligation may result in criminal prosecutions and be relevant to the resolution to any compensation claim arising from accidents or injuries in the workplace.

The Commission is also concerned that there is currently no mechanism whereby successful prosecutions under the 1989 Act in respect of licensed premises are brought to the attention of the court in connection with the renewal of the licence concerned.

The Commission recommends that a mechanism to ensure that the required health and safety standards are in place as a precondition for the renewal of intoxicating liquor licences.

Section 6 of the 1989 Act states that it shall be the duty of every employer to ensure, as far as is reasonably practicable, the safety, health and welfare at work of all employees. Dr. Murphy mentioned the potential hazard of violence in the workplace and drew the Commission's attention to a valuable brochure produced by the HSA entitled 'Violence at Work'. Violence occurs where persons are verbally abused,

threatened or assaulted in circumstances related to their work. Public house and hotel staff are in the higher risk category according to the HSA.

It is clear to the Commission that licence holders have a particular responsibility to prevent violent, aggressive or hostile acts towards those whose safety, health and welfare they are obliged to protect. The Commission has been informed by the licensed trade that such incidents have frequently occurred, and has been presented with distressing photographic evidence of the consequences of such incidents. The Commission deplores such behaviour.

While it is possible that action taken by a licence holder to refuse admission or service to a person posing a risk to the health and safety of staff may be permitted under the exemption set out in section 14 of the 2000 Act, the Commission believes that this must be placed beyond doubt. Consequently, the Commission has no hesitation in recommending that the liquor licensing code be amended to make it possible for licence holders to refuse admission or service to persons who present a risk of engaging in violent, aggressive or disorderly behaviour towards the licence holder, his or her family members, employees or customers. By incorporating this provision into the code, the 'good faith' provision in section 15(2) will apply.

The Commission recommends that appropriate provision be made in the liquor licensing code to permit a licence holder to refuse admission or service to any person who, acting or threatening to act in a violent, aggressive or disorderly manner, poses a risk to the health, safety or welfare of the licence holder or members of the licence holder's family, employees, customers or members of the public, or require such person to leave the premises. Failure to leave the premises when requested should be an offence.

Harassment in the Workplace

The Employment Equality Act, 1998 prohibits sexual harassment - as well as harassment on the other named grounds - in the workplace by the employer, another employee or by a client, customer or other business contact of the employer. The reference to 'customer' is significant in the present context since it means that a licence holder must seek to ensure that employees are neither sexually harassed nor harassed on any of the other grounds by customers in the licensed premises. Employers are required to take such steps as are reasonably practicable to prevent such behaviour (see below).

The licensed trade employees have drawn attention to the problem of racial and sexual harassment in submissions. Door supervisors ('bouncers'), security staff and bar staff have been on the receiving end of such behaviour. The Cork/Kerry Publicans Group drew attention to alleged racial abuse of staff, while the VFI referred to a case in Co. Galway where an employee was subjected to sexual obscenities following her refusal to serve a customer.

The Commission recommends that licence holders be permitted to refuse admission and service to persons who sexually harass or harass the licence holder, members of the licence holder's family, employees or customers.

Fire Safety and Overcrowding

Under the Fire Services Act, 1981, applicants for the grant or renewal of intoxicating liquor licences must give advance notice in writing to the fire authority in the functional area in which the premises are located, and the fire authority may decide to appear, be heard and adduce evidence in respect of the application before the court.⁴⁶ Persons having control of premises used for any purpose involving access by members of the public - whether on payment or otherwise - have a duty to take all reasonable measures to guard against the outbreak of fire on the premises.⁴⁷

The Commission has been made aware of concerns on the part of Chief Fire Officers in relation to current controls. It appears that extensions or alterations to existing premises, or changes of use, are occurring without the fire authority being informed. No fire safety certificate is applied for, nor commencement notice served, as required by the building control regulations. This means that the fire safety arrangements and procedures in the premises may be inadequate but the licence is renewed on the basis of outdated information. The Commission supports rigorous enforcement of fire safety provisions and calls on the responsible authorities to ensure full compliance with the statutory requirements and, furthermore, that sufficient resources are made available for this purpose.

The Chief Fire Officers have also voiced concerns in relation to overcrowding in existing licensed premises. At present, safe occupancy levels are determined only in the case of public dance licences issued by the District Court and the limit in each case is attached as a condition of the licence. Safe occupancy levels are not determined in respect of other such premises where people may meet in large numbers.

The Chief Fire Officers have recommended that all applicants for the grant or renewal of intoxicating liquor licences be required to inform the court of any extensions, alterations or changes of use in respect of the premises concerned and to present evidence of compliance with planning permission as well as a fire safety certificate and a copy of the commencement notice served on the building control authority. A safe occupancy level, provided by the relevant fire authority, should be determined by the court in respect of the premises concerned and be attached as a condition to the licence.

The Commission endorses the recommendations of the Chief Fire Officers relating to improved fire safety in all licensed premises. Care must be taken to ensure that there is no overcrowding - whether in licensed premises or in registered clubs and every effort must be made to establish a proper method of inspection.

The 1981 Act also provides that every person on a licensed premises must act in such a way as to ensure that as far as is reasonably practicable persons on the premises are not exposed to danger from fire as a consequence of any act or omission by that person. The Commission believes that any person who acts in a manner likely to

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⁴⁷ S.24. (This section does not apply to off-licences.)
Fire Services Act, 1981, s.18.

create a risk of fire should be required to leave the premises and the licence holder should have a right to exclude that person from the premises.

The Commission recommends that an appropriate provision be made in the liquor licensing code to permit a licence holder to refuse admission or service to any person or persons whose actions have created, or are likely to create, a risk of fire on or near the premises.

Licensing of Indoor Events

The Commission is grateful to the Department of the Environment and Local Government for providing information and useful assistance in connection with the proposed licensing of indoor events. The Department drew the Commission's attention to the existing 'Code of Practice for Safety at Indoor Concerts' which provides detailed practical advice and assistance to organisers of such events. The Code provides a useful summary of the provisions of the liquor licensing code relating to underage drinking.

The Commission welcomes the proposed Licensing of Indoor Events Bill, 2001 which will provide a statutory framework for crowd control and safety at such events. In particular, the Bill provides that a licence from a fire authority will be required and those involved in organising such events must have regard to relevant codes of practice. It is also proposed to strengthen the provisions of the Fire Services Act, 1981.

The Commission recommends that the Licensing of Indoor Events Bill be enacted as a matter of priority.

IV. Licence Holder Liability and Duty of Care

The licensed trade, especially the Cork/Kerry Publicans Group, has drawn the Commission's attention to the burden of escalating insurance costs and the particular problem this poses for licensed premises with a low turnover. The Commission recognises this and it is clear from what follows that licence holders find themselves dealing with a labyrinth of liability laws which will be examined in this section under a number of headings:

- i. Occupiers' liability;
- ii. Vicarious liability;
- iii. Employer's liability; and
- iv. Duty of care.

i. Occupiers' Liability

The provisions relating to occupiers' liability were reformed in the early 1990s and the rules that replaced the old common law rules are now set out in the Occupiers' Liability Act, 1995. The Act established new distinctions between the occupier's duties to different categories of entrants (visitors, trespassers and recreational users) to the property in question.

Liability under the 1995 Act arises primarily in relation to dangers existing on the premises. Danger is defined as a danger due to the state of the premises. This would seem to indicate that an injury sustained as a result of slipping on a surface, falling on an unlit stairs or falling masonry would be covered. It is not clear, however, if injuries sustained as a result of violent or aggressive behaviour by another customer would fall within the scope of the Act. It seems clear, nevertheless, that the licence holder has 'a duty of care' to customers irrespective of the provisions of the 1995 Act (see below).

ii. **Vicarious Liability**

Equal Status Act

Provisions relating to vicarious liability are set out in the Equal Status Act, 2000.⁴⁸ It provides that anything done shall be treated as done by the employer/principal, whether or not it was done with that person's knowledge or approval. Therefore, an employer cannot hide behind employees in order to evade the Act's provisions. However, where proceedings are brought against an employer in relation to an alleged act of an employee, it shall be a defence for the employer to prove that he or she had taken 'such steps as were reasonably practicable' to prevent the employee from doing that act or similar acts.

It appears, therefore, that a licence holder will be liable for discriminatory acts of an employee, even where the act was done without the knowledge or approval of the licence holder. However, if the licence holder can demonstrate that 'such steps as were reasonably practicable' were taken, liability may not arise. The Commission assumes that such steps would include the adoption of non-discrimination policies, appropriate training for employees and an accessible complaints system.

Employment Equality Act

Apart altogether from the licence holder's liability for the acts of employees under the 2000 Act, the licence holder may incur liability under the Employment Equality Act, 1998 for acts of an employee towards another employee, *or for acts of customers or clients towards employees*. Section 15 of the 1998 Act is similar to section 42 of the 2000 Act in that anything done by a person in the course of his or her employment is treated as an act of the person's employer whether or not it was done with the employer's knowledge or approval. The Act deals with sexual harassment in the workplace and it defines sexual harassment by the employer, another employee or a client, customer or other business contact of the employer as discrimination on the gender ground.⁴⁹ It makes similar provision in relation to harassment on the other grounds.⁵⁰

It seems clear from the foregoing that in order to avoid vicarious liability, licence holders must once again have taken 'such steps as were reasonably practicable' to prevent the sexual harassment or harassment on one of the other grounds.

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S.42.

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S.23.

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S.32.

In order to prevent such acts by customers or clients, it may be necessary for a licence holder to require a person to leave the premises.

iii. **Employer's Liability**

Employers have a duty of care to their employees. This duty encompasses the provision of a safe place to work, proper equipment, provision of competent staff and safe working systems. The common law duty of care has been supplemented with legislation, in particular the Safety, Health and Welfare at Work Act, 1989 and regulations have also been made thereunder.

It is also worth noting that the Occupiers' Liability Act provides that nothing in the Act shall be construed as affecting any enactment or any rule of law relating, *inter alia*, to employers in respect of their duties towards their employees.⁵¹ There is extensive case law in this area which demonstrates how both statute and common law provisions have been interpreted by the courts.⁵²

iv. **Duty of Care**

Licence holders also have a common law duty of care to customers. The extent of that duty is not, however, entirely clear when the injury to the customer was caused by the violent, quarrelsome or disorderly conduct of another customer. It is likely that in certain circumstances, the licence holder would indeed be regarded as negligent and, therefore, liable. This might arise in cases where the incident was reasonably foreseeable, e.g. where the violent customer had a record of violent or disorderly behaviour or had previously been barred from the premises on those grounds.⁵³

In the Commission's view, this points yet again in the direction of the licence holder needing greater powers to refuse admission and service to persons who are drunk or are acting in a violent, aggressive or disorderly manner, or threatening so to act, and to require such persons to leave licensed premises.

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52 S.8.

53 See 'The Licensing Handbook' (ed. Cassidy) (1996), chapter 12 and McMahon and Binchy 'Law of Torts' chapter 18.

In *Walsh v. Ryan* [1993] 5 WJSC 1474; Unrep HC Lavan J, 12th February, 1993 it was held that neither s.13 nor s.18 of the 1872 Act were relevant to a negligence claim in which a customer in a public house was attacked by a drunk.

Chapter 4: Issues arising in relation to Equality Infrastructure

Many of the submissions received by the Commission, particularly those received from the licensed trade, deal with the equality infrastructure established under equality legislation and contain suggestions for adapting the current structures and procedures. On the other hand, Pavee Point, the Irish Traveller Movement and the Equality Authority insist that equality provisions must be maintained and, where necessary, strengthened in order to combat discrimination in the provision of goods and services.

The Commission does not wish to make any formal recommendations for legislative changes in relation to these matters since the primary focus in this report is on the liquor licensing code. The Commission, however, wishes to avail of this opportunity to put forward a number of suggestions arising from issues raised in submissions.⁵⁴ While those involving legislative changes will require further consideration and wider consultation, others can be accommodated under existing provisions.

I. Role of the Equality Authority

The Commission was originally hampered in dealing with the suggestions of the licensed trade regarding the role of the Authority because of the Authority's reluctance to engage with or assist the Commission in its work. The decision of the Authority to co-operate with the Commission was greatly appreciated and we are grateful to the Chairperson of the Equality Authority, Ms. Kate Hayes, and the Chief Executive, Mr. Niall Crowley, for their presentation on the work of the Authority.

Providing Information and Advice

The Authority has a statutory function to provide information on the Equal Status Act.⁵⁵ It has produced and circulated a brochure entitled "An Introduction to the Equal Status Act, 2000", which is also accessible on the Authority's web site.

This publication is merely an 'introduction' to the Act and it does not purport to be anything else. Nonetheless, it does not accurately explain some provisions of the 2000 Act and it omits references to others:

- a. The brochure contains a brief summary of the exemptions set out in the Act. While making reference to the general exemptions contained in sections 14 and 15 (1) there is no mention whatever of section 15(2), i.e. the provision stating that actions taken in good faith under the Licensing Acts are not discrimination. The Commission welcomes the Authority's confirmation that this omission will be corrected in the next reprint of the brochure.
- b. The sexual orientation ground is defined in the legislation as meaning heterosexual, homosexual and bisexual. The Authority has used the words "gay, lesbian and bisexual" thus giving the impression that heterosexuals who are discriminated against are excluded from the protection of the Act. This again is a mistake that should be corrected.

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⁵⁵ Mr. C. McCamley considers that this chapter should not be included in the report.

S.39.

The Commission suggests that more detailed and accurate information be contained in future editions of the brochure 'An Introduction to the Equal Status Act, 2000'.

Assistance provided by the Authority

A person who considers that they have been discriminated against may seek the assistance of the Authority in taking proceedings and the Authority may, at its discretion, provide assistance if it is satisfied that the case raises an important matter of principle or if it appears to the Authority that it is not reasonable to expect the person making the request to adequately present the case without such assistance.⁵⁶

The Equality Authority's strategic plan for the period 2000 - 2002 sets out the Authority's intention to provide legal assistance 'where appropriate' to those seeking to take a case under the legislation. As a result of the presentation made by the Authority, the Commission is now aware of the criteria for granting such assistance.

The Authority informed the Commission that while it was willing to provide assistance in many cases following the entry into force of the Equal Status Act in late 2000, more restrictive criteria had been adopted in early 2002 and these were supplied to the Commission. The Authority reacted positively to the Commission's suggestion that in the interests of transparency and accountability these criteria be published and that information be provided on the number of cases assisted, etc.

The licensed trade has expressed discontent about the ready manner in which the Authority appears to be prepared to provide assistance to complainants. They maintain that this relieves complainants of all costs associated with taking the case and that this is encouraging unfounded claims and growth of a 'compensation culture'. In cases where an allegation of discrimination is not upheld, the respondent must still meet the costs of defending the case. The level of these costs can be considerable.

The Commission notes that the provisions relating to legal assistance by the Authority are more generous than those applying to the Legal Aid Board under the Civil Legal Aid Act, 1995. Section 29 of that Act provides for a means testing system that may require the applicant for assistance to make a financial contribution. The contribution may, however, be waived by the Board. On the other hand, the Board may recover the cost of providing legal services from the legally-aided person out of monies received by that person as a result of the provision of legal services.

As mentioned earlier, the Authority indicated that a characteristic of cases involving licence holders is that they don't respond to complaints of discrimination. The Authority has been required to decide whether to assist in any given case without any input from the person complained against. Clearly, licence holders who do not respond to such complaints to the Authority must accept the consequences.

The Commission accepts that the Authority has a discretionary power under the legislation to provide free legal aid to complainants. This function of the Authority is not well understood by the licensed trade. For example, VFI drew the Commission's attention to a case taken up by the Authority in early 2001 and to a reply received from the Authority stating "*you should further note that one of my functions as a solicitor*

⁵⁶ Employment Equality Act, 1998, s.67.

is to represent my clients and not to make impartial decisions. That is the function of an equality officer in the Office of the Director of Equality Investigations". This illustrates the need for clear and transparent criteria and accountability for the use of public funds for such purposes.

The Commission suggests:

- *that the Equality Authority's strategic plan state the criteria governing the provision of assistance under section 67 of the 1998 Act, as amended, and that details of assistance provided be set out in detail in each Annual Report; and*
- *that every licence holder against whom a complaint is made should respond in the appropriate form to enable the Authority to make a balanced decision when deciding whether or not to grant assistance to a complainant.*

Codes of Practice

The Commission believes that the Authority's role in developing codes of practice is a vitally important service to service providers.⁵⁷ The Commission believes that the development of such a code for the licensed trade has become an urgent necessity in order to help licence holders to meet their obligations under equality legislation.

The Commission has already expressed its disapproval of public pronouncements by both the Authority and the VFI which have led to entrenched positions and have hindered any spirit of co-operation between the respective bodies. The drawing up of a code of practice is, in the opinion of the Commission, a necessary step to be taken and dialogue is essential for this process.

In its Annual Report for 2001, the Equality Authority explained that work on developing such a code had commenced but that co-operation had been withdrawn by some representative bodies of the licensed trade. The Authority confirmed that the VFI had taken the initiatives before the Equal Status Act had entered into force, while the VFI confirmed to the Commission that it had indeed subsequently withdrawn from the process. The LVA said that it was willing to continue discussions on drawing up a code.

The Commission is extremely disturbed that co-operation between the Equality Authority and some of these bodies has broken down and urges both sides to show restraint in their public pronouncements. Indeed, the Commission feels that it would be better if neither side made any such pronouncements pending re-engagement in the process of developing a code. This code - which the legislation provides may be admissible in evidence if given statutory approval by the Minister for Justice, Equality and Law Reform - should be clear and concise and contain practical advice and guidance for licence holders. The Commission is aware that the licensed trade has already signed up to a code of practice concerning the employment of young persons in licensed premises which will serve as a useful model for developing a code under the equal status legislation.

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Employment Equality Act, 1998, s.56 as amended by 2000 Act.

The Commission considers it essential that the licensed trade and the Equality Authority participate in dialogue to develop a code of practice on access to licensed premises and calls on the representative bodies of the licensed trade to re-engage in the process of drawing up such a code.

II. Role of the Office of the Director of Equality Investigations (ODEI)

At the outset, the Commission would like to sincerely thank the Director of Equality Investigations, Ms. Melanie Pine, and the Head of the Equal Status Unit, Ms. Éimear Fisher, for making a presentation on the structure and procedures of the ODEI at an early stage in the subcommittee's work. The clarity of the presentation, and their willingness to discuss issues arising, greatly assisted the Commission in its deliberations. The Commission has also become aware of the efforts made by the ODEI to engage with the licensed trade and to explain the obligations arising under the 2000 Act, in particular through participation in a series of regional seminars organised by the VFI.

Confusion regarding Structures

From the outset of its deliberations, the Commission was aware of a significant level of confusion and misunderstanding concerning equality structures and procedures.

A strong impression has been created that equality officers work for the Equality Authority rather than for the ODEI. This is reinforced by incorrect reporting in the media. The confusion is entirely understandable given their respective titles and corrections issued by the ODEI do not appear to have been successful. The Commission believes that the perception that equality officers work for the Equality Authority is damaging to their impartiality and independence. More recently, the ODEI has adopted the title 'Equality Tribunal' which may go some way towards addressing the confusion.

The Equality Authority and the ODEI occupy separate premises in the same building and even though their accommodation is completely separate, geographical proximity undoubtedly contributes to the difficulties of distinguishing their respective roles and functions.

The Equality Authority gives legal assistance in many cases and is naturally inclined, therefore, to publicise the outcomes of successful cases. The ODEI rightly refrains from comment - given its quasi-judicial role - and confines its press releases to the details of the case and the equality officer's decision. It would appear that much of the misinformed comment and publicity surrounding the *Glimmerman* case was due to an initial incorrect interpretation by the Equality Authority of the Equality Officer's decision and the Intoxicating Liquor Act, 1988.

The Commission believes that confusion and misunderstanding in relation to equality structures are capable of eroding public confidence in both the legislation itself, and the structures established by it, and that these matters should be addressed in any review of the legislation.

Role and Functions of Equality Officers

The Anti-Discrimination (Pay) Act, 1974 provided for the appointment of equal pay officers attached to the Labour Court to investigate disputes concerning equal pay and to issue a recommendation. Either party to a dispute could appeal to the Labour Court against a recommendation, or for a determination that a recommendation had not been implemented. The Labour Court - comprising employer and worker representatives - heard and decided appeals. Either party to a dispute could appeal the Labour Court ruling to the High Court on a point of law.

With the entry into force of the Employment Equality Act, 1977, equal pay officers became known as equality officers and their functions were extended to investigations of alleged discrimination on the grounds of sex or marital status in relation to access to employment, conditions of employment (apart from pay and pensions) and training as well as promotion, regrading or classification of posts in employment. Equality officers remained attached to the Labour Court and issued recommendations as before. Either party could still appeal a recommendation to the Labour Court and the Court heard and determined appeals in accordance with the procedures set out in the Act. An appeal to the High Court on a point of law was still permitted.

The Employment Equality Act, 1998, which replaces the 1977 Act, involves both a *quantitative* and *qualitative* extension of the functions of equality officers. The number of grounds was extended from two to nine: gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community. Decisions of equality officers may be appealed to the Labour Court. A decision of an equality officer which has not been complied with, may be enforced through the Circuit Court, after the period for appeal to the Labour Court has elapsed. Cases may be appealed from the Labour Court to the High Court on a point of law.

The Equal Status Act has greatly extended the functions of equality officers. They are now required to have a knowledge of, and be familiar with, the law as it relates to the provision of goods, services and accommodation. They must also be familiar with other areas of law, e.g. the liquor licensing code, in order to give due weight to the exemptions set out in the 2000 Act.

As mentioned earlier, cases of alleged discrimination are now in the main a matter for the Director who allocates them to equality officers. However, cases involving dismissal may still be brought to the Labour Court while those involving equal pay and discrimination on the gender ground may be brought directly to the Circuit Court.

III. Issues that may need to be addressed

The concerns raised with the Commission in submissions and presentations fall under the following headings:

- a. Background and training of equality officers;
- b. Lack of representative tribunal structure;
- c. Procedural shortcomings and lack of due process;
- d. Mediation.

The Commission regrets that the licensed trade has not in general availed of the opportunities provided in the legislation to appeal equality officer decisions to the courts rather than seeking changes to the legislation. The costs associated with such appeals are undoubtedly a contributing factor, and individual licence holders may be anxious to avoid the publicity that would inevitably accompany such an appeal.

Background and Training of Equality Officers

- a. The evolution of the role and functions of equality officers under the Acts of 1974, 1977, 1998 and 2000 has already been outlined. It appears that the grade of equality officers is pegged at the level of the Civil Service Assistant Principal grade and that appointments are made by way of recruitment competitions open to relevant civil service grades. The Commission was informed that a legal qualification is not a requirement for the grade. However, the Director of Equality Investigations advised the Commission of an extensive training programme for equality officers and the availability of expert legal assistance within the ODEI.

The Commission is aware of the substantial body of case law which has already emerged from the ODEI. This is available in a readily accessible and user-friendly format on the Office's web site. The Commission is concerned, nevertheless, that an enormous burden of responsibility now rests on the shoulders of equality officers and that the *qualitative*, as opposed to the quantitative, change in their role as already outlined may have been underestimated and may, therefore, need to be reassessed in the light of experience. Equality officers are now required to carefully weigh up the respective requirements of equal status legislation along with the demands of other legislative codes, and the exemptions recognised in sections 14 and 15 of the 2000 Act, in order to arrive at *decisions*, as opposed to recommendations, that can only be appealed to the Circuit Court.

The Commission appreciates the difficulties experienced by equality officers in seeking to interpret the liquor licensing code when section 15(2) of the 2000 Act is invoked by complainants. It is no easy task. For example, in the *Glimmerman* case, cited earlier, the Equality Officer gave examples of when a publican could refuse service: "For instance; if a publican saw an under 18 year old consuming alcohol on the premises when accompanied by a parent then the publican *could* (emphasis added) be entitled to refuse service".

The Commission wishes to point out that the liquor licensing code makes provision for offences relating to:

- the sale or supply of intoxicating liquor to under 18 year olds by licence holders;
- the purchase of intoxicating liquor by a person, e.g. a parent, for consumption by a person under 18 years old, and
- the purchase by an under 18 year old of intoxicating liquor.

In the example given by the Equality Officer, the licence holder, parent and young person may all be guilty of offences arising from the fact that the young person is consuming intoxicating liquor on the premises. The penalty for the licence holder may be a temporary closure of the premises even if the parent had purchased the alcohol for the young person.

The intoxicating liquor code is extremely complex and the Commission considers that a solid understanding of the code is essential where respondents seek to rely on the exemptions provided in section 15 of the 2000 Act. It is therefore striking that a legal qualification is not considered necessary even though equality officers have a jurisdiction equivalent to that of a District Court judge⁵⁸ and may order a person to take a specified course of action. The latter power would seem to be very wide as there are no limits set out in the legislation. Could an equality officer, for instance, order a licence holder to close the premises for a number of days as the District Court is empowered to order under the Intoxicating Liquor Act, 2000? The Commission notes that actions specified by equality officers under this heading to date have included a requirement to adopt an equality policy and to prominently display a notice to this effect.

The onerous nature of the task of the equality officers is added to because in many instances, parties appearing before them are legally represented.

Lack of Representative Tribunal Structure

- b. The licensed trade supports the establishment of a more representative tribunal to replace the ODEI, on the lines of the Labour Court or the Employment Appeals Tribunal (EAT), or the District Court.⁵⁹

The Labour Court is made up of a Chair, two Deputies and 6 ordinary members, three representing employers and three representing workers. The Court also has a legal adviser - the Registrar. The Chair or a Deputy together with an employers' member and a workers' member take each hearing of the Court. In this way, both sides to a dispute can be confident that their views will be heard and understood. Decisions reached in this way are likely to be more acceptable to both sides.

The EAT which acts judicially was set up to provide a speedy, fair and inexpensive and informal means for individuals to seek remedies for alleged infringements of their statutory rights. It consists of a Chairman, who is either a practising barrister or solicitor of 7 years standing, 22 Vice-Chairmen (21 of whom are either practising barristers or solicitors) and a panel of 60 other members, thirty nominated by the ICTU and thirty by employer organisations. At hearings, a party to an application may cross-examine any witnesses called by any other party.

While the ODEI shares some of the features of the Labour Court and the EAT, other important features are absent. The Commission considers that some adjustment to ODEI structures may yet prove necessary, in particular, the establishment of a panel selected by service providers and minority groups covered by the equality legislation, based on the Labour Court or EAT models. Adjudication structures enjoying the

⁵⁸ Equal Status Act, 2000, s.27.

⁵⁹ Mr. J. Douglas said that ICTU do not see any justification for altering the current system.

confidence of service providers as well as complainants would ensure the support and trust of all sides.

The Commission in general advocates recourse to the District Court when dealing with all licensing issues. It has a number of advantages. It is transparent, open and it functions within known parameters and established procedures. It can hardly be said that the District Court cannot deal with a matter of this nature with sensitivity since it already deals with family law matters. The Commission was informed by the Gardai that they would support the adjudication of cases involving licensed premises in the District Court.

Procedural Shortcomings and Lack of due Process

- c. Numerous concerns relating to procedural shortcomings were also brought to the Commission's attention. These included complaints relating to:
 - a. Right of complainant to seek information from respondent without any reciprocal right;
 - b. The procedures for the giving of evidence at hearings;
 - c. Lack of cross examination rights;
 - d. The making of submissions before hearings.

It became clear to the Commission during its deliberations that no uniform approach is taken to the way in which hearings are conducted. The approach taken appears to be determined by the equality officer hearing the case. This lack of consistency generates uncertainty and a lack of confidence in the adjudication process.

The Commission believes that due process must apply in proceedings under equality legislation and that informality, while desirable, should not be at the expense of fairness. The Commission recommends that an independent study of procedural issues be undertaken to ensure fairness for complainants and respondents alike. In that regard, the Commission notes that section 25 of the Equal Status Act, 2000 provides that ministerial regulations may specify "procedures to be followed by the Director in carrying out investigations...". The legislation therefore affords the means of addressing perceived weaknesses in the current procedures and the Commission recommends that consideration be given to drawing up regulations to address those weaknesses.

- d. Mediation

It has become clear to the Commission that the mediation process is not being used to any significant extent. This is most regrettable in the Commission's view since this option was intended as a less confrontational means of redress.

There would appear to be a certain resistance to mediation because of a perception on the part of the licensed trade that it may involve payments rather than acceptance of an apology or adoption of an equality policy by the respondent. Assurances were offered by the Equality Authority and the ODEI that this is not so. Indeed, a recent analysis of the mediation process by the ODEI shows that many cases which resulted

in mediated agreements were resolved with no monetary compensation.⁶⁰ The Commission has no hesitation in recommending much greater use of the mediation option in future and compliments the ODEI on its work in promoting the mediation process.

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Developments in Alternative Dispute Resolution (ADR) - The Equality Tribunal's Mediation Service - 2 years on (December, 2002).

Summary Recommendations

Recommendations	Reasons
Peaceable and Orderly Premises 1. The circumstances in which admission or service may be refused should be set out clearly in legislation.	To ensure that licensed premises operate in a peaceable and orderly manner in the interest of public order.
Drunkenness 2. Existing legislative provisions should be amended to increase penalties for drunken persons refusing to leave licensed premises and licence holders should be able to refuse admission and service to persons who have been expelled previously from the premises for reasons of drunkenness.	To strengthen the laws in relation to drunken persons.
Violent, Quarrelsome and Disorderly Conduct 3. Section 18 of the Licensing Act, 1972 should be updated and extended to include abusive language, threatening behaviour and intimidation, and licence holders should be allowed to refuse admission and service to persons expelled previously from the premises for any such reason.	To strengthen the law in relation to disorderly conduct in licensed premises.
Closure of Premises in the interests of Public Peace and Order 4. Section 19 of the Intoxicating Liquor Act, 1927 in relation to public peace and order should be maintained.	In the interest of public order.
Prostitution 5. The provisions in the liquor licensing code relating to prostitution should be reviewed and updated to take account of the provisions of the Criminal Law (Sexual Offences) Act, 1993.	To ensure that the provisions in the liquor licensing code relating to prostitution are consistent with those in the 1993 Act
Prevention of Crime 6. The retention of a provision similar to section 10 of the Prevention of Crimes Act, 1871 should be examined.	To ensure the relevance of provisions in the 1871 Act relating to licence holders.
Children in Licensed Premises 7. The restrictions on children in licensed premises should be retained and, where	To allow licence holders to have discretion in relation to the presence of children or their

children are permitted, licence holders should be entitled to require a person who is accompanied by a child and who, in the opinion of the licence holder, has been on the premises for an excessively long period, to leave the premises together with the child.	premises.
Sale, Supply and Distribution of Drugs 8. Provisions of the Licensing (Combating Drug Abuse) Act, 1997 should be retained.	To prevent and curtail the sale, supply and distribution of controlled drugs and to ensure that licence holders are enabled to exercise reasonable control over their premises.
Admission of Groups 9. Licence holders should have enhanced discretion to refuse admission or service in the case of groups of persons where there is any danger of disorderly conduct or harassment or improper behaviour towards staff or towards the safety of the premises generally.	To protect the safety and wellbeing of staff and customers.
Use of Weapons 10. There should be a clear definition of disorderly conduct to include offences against a person and firearms offences.	To clarify the law to ensure the protection of staff and customers of licensed premises.
Safety in the Workplace 11. Legislation should provide that required health and safety standards are in place as a precondition for the renewal of intoxicating liquor licences.	To strengthen health and safety legislation in respect of licensed premises.
Safety in the Workplace - contd. 12. A licence holder should be enabled to refuse admission or service to any person who, acting or threatening to act in a violent, aggressive or disorderly manner, poses a risk to the health, safety or welfare of the licence holder or a member of the licence holder's family, employees, customers or members of the public, or require such person to leave the premises. Failure to leave the premises when requested should be an offence.	To enable licence holders to refuse admission and service to persons in the interests of the health, safety and welfare of the licence holders themselves, family members, employees, customers or members of the public.

Harassment in the Workplace 13. To permit licence holders to refuse admission and service to persons who sexually harass or harass the licence holder, members of the licence holder's family, employees or customers.	To ensure that the licensing code reflects provisions in the Employment Equality Act, 1998 in relation to sexual harassment and harassment in the workplace.
Fire Safety and Overcrowding 14. Fire safety provisions for all licensed premises must be improved and every effort taken to establish a proper method of inspection.	To ensure that there are effective and relevant fire safety controls in operation in relation to licensed premises.
15. A licence holder should be enabled to refuse admission or service to any person whose actions have created, or are likely to create, a risk of fire on or near the premises.	To improve fire safety controls for licensed premises.
Licensing of Indoor Events 16. The enactment of the Licensing of Indoor Events Bill should be given priority.	To ensure that an effective statutory framework is in place in relation to crowd control and safety.

Appendix 1

Members of the Commission on Liquor Licensing

Mr. Gordon Holmes, Chairman

Mr. Michael Ahern, Solicitor, Killorglin, Co. Kerry

Mr. Seamus Carroll, Principal Officer, Department of Justice, Equality and Law Reform

Mr. Phonsey Croke, Principal Officer, Office of the Revenue Commissioners (representing that Office and the Department of Finance)

Mr. John Douglas, MANDATE and member of ICTU Executive Council

Mr. Frank Fell, Chief Executive, Licensed Vintners' Association

Mr. Chris Fitzgerald, Principal Officer, Department of Health and Children

Ms. Carmel Foley, Director of Consumer Affairs

Ms. Ailish Forde, Director General, RGDATA (Retail Grocery, Dairy and Allied Trades' Association)

Ms. Isolde Goggin, Competition Authority

Chief Supt. John Kelly, An Garda Síochána

Mr. Jim McCabe, National Spokesperson & Executive Member, NOffLA

Mr. Christopher McCamley, Assistant Principal, Department of Education and Science

Mr. Michael Murphy, Irish Business and Employers Confederation (IBEC)

Mr. Colm Ó Mongáin, Press and Information Officer, National Youth Council of Ireland

Mr. Henry O'Neill, Chief Executive, Restaurants Association of Ireland

Mr. Tadg O'Sullivan, Chief Executive, Vintners' Federation of Ireland

Mr. John Power, Chief Executive, Irish Hotels Federation

Mr. Patrick Prendergast, Irish Nightclub Industry Association

Mr. Eddie Sharkey, Registrar, Bord Fáilte

Mr. Brian Whitney, Assistant Secretary, Department of Enterprise, Trade and Employment

Secretary: Ms. Catherine Sheridan, Assistant Principal, Department of Justice, Equality and Law Reform

Secretariat

Ms. Antoinette Gavin, Executive Officer
Ms. Olive Curran, Clerical Officer

Consultant

Mr. Michael McGrath, Barrister

Appendix 2

Subcommittee on Admission and Service in Licensed Premises

Mr. Gordon Holmes (Chair)

Mr. Michael Ahern

Mr. Seamus Carroll

Chief Superintendent John Kelly

Mr. Henry O'Neill

Appendix 3

Organisations which confirmed non-participation in the Consultation Process

1. Age Action Ireland
2. Blanchardstown Area Partnership
3. Conference of Religious of Ireland (CORI)
4. Gay & Lesbian Equality Network
5. Irish Council for Civil Liberties
6. One Parent Exchange and Network (OPEN)

Appendix 4

Submissions Received

1. Capital Bars plc
2. Cork/Kerry Publicans*
3. Mr. Sam Doran
4. Mr. Matt Downey
5. The Equality Authority*
6. Mr. Jody Finnegan
7. Irish Hotels Federation*
8. Irish Traveller Movement*
9. Licensed Vintners' Association*
10. The Molloy Group
11. Ms. Odette Murphy
12. Office of the Director of Equality Investigations*
13. Mr. Timothy O'Leary
14. Ms. Suzanne O'Sullivan
15. Pavee Point*
16. Mr. Mark Riordan
17. Mr. Terry Tyrrell
18. Vintners' Federation of Ireland*

* Organisations which made written and oral submissions

Appendix 5

Consultees

1. Chief Fire Officers' Association
2. Committee on Liquor Licensing Law in Scotland
3. Department of the Environment and Local Government
4. Equality Commission for Northern Ireland
5. An Garda Síochána
6. Health and Safety Authority

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