MARGOT RAMSAY

Amplifying community voice in the alcohol licensing system: The importance of the Sale and Supply of Alcohol (Community Participation) Amendment Bill

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Abstract

In light of political opposition to the Sale and Supply of Alcohol (Community Participation) Amendment Bill, which seeks to remedy issues resulting from the Sale and Supply of Alcohol Act 2012, this paper argues that this law reform is crucial. The Bill passed its third reading on the 24th of August 2023 (days before this paper was to be submitted). This passing is a positive step to ensure that communities have a greater say as to when, where and how alcohol is sold in their local areas. The paper addresses the potential risks of the reforms but argues that on the whole, these law changes are necessary to address the current imbalance between community concerns and the alcohol industry in the Aotearoa New Zealand licensing system. Furthermore, this paper makes the argument that District Licensing Committees should aim to adopt an active enabling approach during licensing hearings. Research proves that this approach can allow community members without legal representation to make more effective submissions.

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I Introduction

Administrative decision-making in every area of regulation is a balancing act of many competing interests. The Sale and Supply of Alcohol (Community Participation) Amendment Bill is a prime example of how attempts to improve public participation can result in consequences to efficiency and procedural rights. The significant changes to the current Sale and Supply of Alcohol Act 2012 and the cited reasons for these reforms, reflect the tug of war between conflicting demands of accountability present in administrative tribunals around the world. They also reflect arguments often part of the debate around administrative justice. In our current alcohol licensing system, the advantage lies with the alcohol industry, and there are barriers preventing meaningful community participation. The Bill passed its third reading on the 24th of August 2023 and will usher in reforms that have a strong likelihood of swinging the balance back in the favour of the community.[1] While contemplating the risks that these reforms pose, I will argue that in light of the current failures of the system, the harm that alcohol is causing many communities, and the original purpose of the Alcohol Act, these law changes are a needed rebalancing of competing interests. However, with each solution comes a new set of problems that need to be addressed. Thoughtful guidance, improved training of licensing board members and overall clarity in the decision-making process could further strengthen the quality and perceived legitimacy of alcohol licensing decisions. Moreover, if the direction of these reforms – a shift away from adversarial tribunals - is to be embraced, I argue that licensing boards should take on more of an active enabling approach, to ensure that community members without legal representation can effectively participate in licensing decision-making.

[1] Ginny Anderson "Huge win for communities with passing of new alcohol laws" (24 August 2023) <www.beehive.govt.nz>.

The purpose of the Sale and Supply of Alcohol Act 2012 (Alcohol Act) is "for the benefit of the community", to regulate the sale, supply and consumption of alcohol.[2] Ensuring this is undertaken safely and responsibly is one objective of the Act.[3] It also aims to minimise harm caused to the community (and society generally) by excessive or inappropriate consumption of alcohol.[4] The provisions in the Act aim to give communities more say in where and when alcohol can be sold in their neighbourhoods.[5] This was in response to the 2010 Law Commission report, which recommended a new Act, that among other things, would aim to introduce new grounds on which licences can be declined, and allow more local input into licensing decisions through local alcohol policies and the District Licensing Committees.[6] Eleven years after its introduction, it is overwhelmingly clear that the Alcohol Act has fallen short of reaching these objectives. The Sale and Supply of Alcohol (Community Participation) Amendment Bill (Alcohol Community Participation Bill) offers much needed reform. The four key reforms include granting District Licensing Committees the power to decline the renewal of a licence if it will be contrary to a local alcohol policy;[7] removing the right to appeal local alcohol policies directly to the Alcohol Regulatory and Licensing Authority;[8] expanding the right to object to licences;[9] and ensuring licensing hearings are not adversarial or unnecessarily formal.[10] These law changes seek to "increase the influence of local communities on alcohol licensing decisions in their area."[11] The aim is to re-align the reality of the current licensing process with the initial goals of the 2012 Alcohol Act.

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[2] Sale and Supply of Alcohol Act 2012, s 3(1).

[3] Section 4(1)(a).

[4] Section 4(1)(b).

[5] Ministry of Justice *Supplementary Analysis Report: Sale and Supply of Alcohol (Community Participation) Amendment Bill* (17 November 2022) at 1.

[6] Law Commission *Alcohol in Our Lives: Curbing the Harm* (NZLC R114, 2010) at 6.

[7] Sale and Supply of Alcohol (Community Participation) Amendment Bill 2022 (205-2), cl 12.

[8] At 21.

[9] At 12A.

[10] At 14.

[11] Commentary.

II The potential benefits justify the reforms

A Enabling local alcohol policies to have their intended positive consequences

A central aim of the Alcohol Community Participation Bill is to enable local alcohol policies to be implemented more easily and to have more legal force. Evidence-based local alcohol policies that are developed in consultation with the community, are a way community interests were intended to be reflected in licensing decisions.[12] Under the new Bill, District Licensing Committees will be given the power to decline a licence renewal if it is inconsistent with the local alcohol policy.[13] Also, they can impose conditions on the licence to ensure consistency with the policy.[14] Currently these policies do not need to be taken into consideration when licences are renewed and the discretion of these authorities is quite restricted.[15] Removing the current right to appeal local alcohol polices directly to the Alcohol Regulatory and Licensing Authority is the second key reform. Only the avenue of judicial review will remain for these appeals.[16] Currently under s 81 of the Alcohol Act, a person or an agency that have made submissions as part of the consultative procedure can appeal any element of a draft local alcohol policy.[17] The Alcohol Act also provides that, until appeals are resolved, no element of the local alcohol policy can come into effect.[18] New restrictions impact the alcohol industry's profits, so this provision acts as an incentive for appealing. Consequently, many local authorities have struggled to enact local alcohol policies because they are met by "tortuous and uneven legal battle[s]" with the alcohol

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[12] Commentary; and Sale and Supply of Alcohol Act, s 79.

[13] Sale and Supply of Alcohol (Community Participation) Amendment Bill (205-2), cl 12.

[14] At 12.

[15] (13 December 2022) 765 NZPD (Sale and Supply of Alcohol (Community Participation) Amendment Bill – First Reading, Eugenie Sage); and Ministry of Justice *Supplementary Analysis Report*, above n 5, at 2.

[16] Sale and Supply of Alcohol (Community Participation) Amendment Bill 2022 (205-2), Commentary; and Ministry of Justice *Supplementary Analysis Report*, above n 5, at 51.

[17] An appeal also needs to be submitted within 30 days of the provisional draft being produced. See Sale and Supply of Alcohol Act, s 81(1).

[18] Ministry of Justice "Local Alcohol Policies (18 December 2020) <www.justice.govt.nz>.

industry.[19] It is important that the grounds on which these policies can be appealed is tightened, when we consider the potential these policies have to manage alcohol related harm, as well as the current struggle local authorities face to enact them. Giving local alcohol policies more legal force can further their potential benefits and ensure community interests are brought to the forefront.

Local alcohol policies are regulations over-and-above the national provisions in the Act.[20] They add an extra layer of regulation around the location of licence premises, licence density, maximum trading hours, conditions on licences, and one-way door restrictions.[21] Not having this layer of regulation has been devastating for low-income areas in Aotearoa, which have a much higher density of alcohol stores and consequently experience more alcohol related harm.[22] This was a result of the 1990s liberalisation of alcohol regulation which led to a huge burden being placed on vulnerable communities to fight relentlessly to address alcohol outlet proliferation in their neighbourhoods.[23] Higher bottle store density in these communities has resulted in "price wars, longer trading hours and inequities in alcohol harm."[24]

Evidence highlights that local alcohol policies offer "significant potential to right the wrongs of the past, while enabling councils to utilise evidence-based measures to address

[19] Nicki Jackson "Communities struggle against alcohol industry" (11 July 2019) University of Auckland <www.auckland.ac.nz>.

[20] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 42.

[21] Sale and Supply of Alcohol Act, s 77.

[22] Shanti Mathias "The alcohol licensing process is broken. Who bears the harm?" *The Spinoff* (online ed, New Zealand, 8 November 2022).

[23] Jackson, above n 19.

[24] Jackson, above n 19.

local concerns."[25] Research undertaken in Aotearoa[26] and internationally[27], proves that higher density of licences and longer opening hours is linked with more harm and crime. Alcohol-related harm in Aotearoa is estimated to cost $7.85 billion annually from impacts to health, productivity, unemployment, justice, ACC and welfare costs.[28] This country has had a historical issue with hazardous binge drinking, and the resulting harms fall disproportionately onto our youth, Māori and Pasifika populations.[29] A 2023 study by Otago University ranked alcohol as the most harmful drug, surpassing methamphetamine and synthetic cannabis use.[30] The report said "many experts argue that current alcohol policy and regulations in Aotearoa New Zealand are insufficient to curb these harms and their inequitable distribution."[31] In order to "meaningfully reduce alcohol related harm", the report calls for consideration of "reducing the density and opening hours of alcohol outlets."[32] What this overwhelming evidence tells us is that these reforms, and their intent to increase the breadth and the legal force of local alcohol policies, can significantly benefit public health and our society in many ways.

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[25] Jackson, above n 19.

[26] See generally Matt Hobbs and others "Close proximity to alcohol outlets is associated with increased crime and hazardous drinking: Pooled nationally representative data from New Zealand" (2020) 65 Health & Place 102397; Steve Randerson, Sally Casswell and Marta Rychert *Diminished inclusivity in public space: How alcohol reduces people's use and enjoyment of public places, literature review* (Te Hiringa Hauroa/Health Promotion Agency, Wellington, 2019); and Sally Casswell and others "International alcohol control study: pricing data and hours of purchase predict heavier drinking" (2014) 38 ACER 1425.

[27] See generally Thomas F Babor and others "*Alcohol: No Ordinary Commodity* – a summary of the third edition" (2022) 117 Addiction 2967; Michael Livingston, Claire Wilkinson and Robin Room *Community impact on liquor licences: an Evidence Check brokered by the Sax Institute for NSW Ministry of Health* (Sax Institute, October 2015); and Genevieve David and others "Exploring the implementation of public involvement in local alcohol availability policy: the case of alcohol licensing decision-making in England" (2022) 117 Addiction 1163.

[28] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 7.

[29] At 7 – 8.

[30] Rose Crossin and others "The New Zealand drug harms ranking study: A multi-criteria decision analysis" (2023) Journal of Psychopharmacology.

[31] Crossin, above n 30.

[32] Crossin, above n 30.

The Alcohol Act aims to regulate alcohol to minimise direct and indirect harm to communities and society generally.[33] The impact on the amenity and good order of a locality of a licence or existing licensing is something that District Licensing Committees need to consider when making a decision.[34] The focus of the recent research by Massey University's SHORE & Whariki Research Centre was on "diminished public space inclusivity and amenity due to the local supply and use of alcohol."[35] Interviews with community members highlighted that people frequently avoided particular areas because of increased risk of harm from drinkers.[36] "Residents in six of eight neighbourhoods expressed that there were too many bottle stores in the area, and that this easy access contributed to local alcohol related harm."[37] This evidence shows that communities want and need fewer licences being approved.[38] The Alcohol Community Participation Bill will give more power to licensing authorities to decline renewing a licence when it is contrary with the local alcohol policy. This is needed considering the current situation where licences are frequently approved and rarely declined, even in areas of high density.[39]

Removing the right to appeal under s 81 will remove the fear of litigation and allow councils to introduce local alcohol policies more easily. Many hold the opinion that "local councils need to have the powers to uphold community wishes without requiring huge resources to fight the commercial interests."[40] This is supported by evidence that shows that the chance of parties appealing local alcohol policies is high. Out of the 33 provisional

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[33] Sale and Supply of Alcohol Act, s 4.

[34] Sale and Supply of Alcohol Act, ss 105(h)(i).

[35] Steve Randerson and others *'I feel it's unsafe to walk': Impacts of alcohol supply on public space in eight neighbourhoods, and residents' input to alcohol licensing decisions* (Te Whatu Ora, Wellington, 2022) at 7.

[36] At 13.

[37] At 2.

[38] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 1 and 9.

[39] At 1 and 9.

[40] Jackson, above n 19; See also Select Committee News "Justice Select Committee, Sale and Supply of Alcohol (Community Participation Bill), Subcommittee A & B" (press release, 1 March 2023) at 4.

policies developed up to the end of 2017, 32 have been appealed.[41] This is an undeniable figure. With each appeal, legal costs and stalled policies are burdensome on councils and communities. These appeals have had led to five councils halting or abandoning efforts to enact local alcohol policies, including Christchurch City Council which gave up on its policy, having spent five years and $1.1 million fighting an appeal.[42] Wellington City Council halted efforts after its policy was appealed by eight parties and the upper licensing authority found against them.[43] When we consider the current inability of local authorities to enact a policy without spending time and money in litigation, then removing this right to appeal appears necessary.

The ground on which an element of the local alcohol policy can be appealed against is that it is unreasonable in the light of the Alcohol Act's object.[44] This ground has proven ripe for industry groups to target with arguments, leading to lengthy litigation. The prolonged process to enact the Auckland Council's local alcohol policy is a strong example of the consequences of s 81. The case went all the way to the Supreme Court, taking eight years and $1 million tax-payer dollars to settle.[45] The litigation continued for this long because the supermarket duopoly could keep arguing around whether the licensing authorities and the Courts undertook the correct test around reasonability in light of the objective, showing this test was still in a grey legal area.[46]

This brings me to the potential *arguments against* removing the right to appeal local alcohol policies. The recent Supreme Court decision of *Woolworths New Zealand Limited v Auckland Council* means that there are now tighter reigns on the grounds of appeal.

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[41] Nicki Jackson and Heather Robertson *A Review of Territorial Authority Progress Towards Local Alcohol Policy Development* (Auckland Healthwatch, Auckland, 2017) at 5.

[42] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 44.

[43] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 44.

[44] Sale and Supply of Alcohol Act, s 81 (4).

[45] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 44.

[46] See *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 293; and *Woolworths New Zealand Limited v Auckland Council* [2023] NZSC 45.

Therefore, as the right to appeal can ensure accountability and provide confidence in licensing decisions and wider governmental regulation, there is a legitimate view that s 81 should be kept because new decisions will refine its use. In its judgment, the Supreme Court stated that a further appeal from an Alcohol Regulatory and Licensing Authority decision should not invite a high level of factual analysis such as what was before them in the Auckland Council case.[47] The court stressed that a further appeal should only be a check around unreasonableness in light of the object of the 2012 Act.[48] This decision will encourage businesses to think twice before appealing an element unless the effect will be clearly arbitrary or disproportionate, and it should give councils greater confidence that they can adopt local alcohol polices.[49] Overall, this recent judgment could reduce the likelihood of lengthy litigation. This Supreme Court decision highlights the natural progression of case law tightening and clarifying grounds of appeal. If s 81 remains, the grounds for appealing a local alcohol policy could be further reduced as time goes on, allowing a good balance of competing interests to eventuate.

Another argument against this reform is that it cuts away at due process for complaints, triggering a fear that government will be overreaching into businesses' state of affairs, without the right to appeal ensuring accountability. As argued by the New Zealand Alcohol Beverages Council, "Councils do not always get things right, and losing the general appeal right to [the Alcohol Regulatory and Licensing Authority] removes an important check on Council powers."[50] This argument is supported by the fact that the right to appeal an administrative decision that affects individuals and businesses is important under the principles of natural and administrative justice.

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[47] *Woolworths New Zealand Limited v Auckland Council*, above n 46, at [37].

[48] At [37].

[49] See Padraig McNamara and Tim Fischer "Landmark alcohol decision has national implications" (8 May 2023) Simpson Grierson <www.simpsongrierson.com>.

[50] New Zealand Alcohol Beverages Council "Strengthening community involvement in our licensing decisions is a good idea but this proposed new law is not the answer" (press release, 9 June 2023).

Administrative justice is comprised of competing interests, and the tension of which, is highlighted within arguments for and against the removal of the general right to appeal local alcohol policies. Administrative justice not only cares about substantive fairness (just outcomes), but also aims to protect procedural fairness (just processes).[51] It "concerns the extent to which individuals affected by decisions are treated fairly and have the ability to ensure adequate redress of grievance."[52] Thus, on one hand the alcohol industry would argue that it is in the interests of the wider public and the individual that processes guarantee that complaints are dealt with justly and fairly.[53] On the other hand, administrative justice equates to distributive justice, which demands that administrative decision-making ensures resources are allocated efficiently and rationally across many areas, in the interest of the wider public.[54] It transpires that the outcomes we want prioritised, and the interests we want to protect needs to be reflected in our regulatory systems. As the Alcohol Act set out to regulate alcohol so it is safely and responsibly sold and consumed, as well as minimise alcohol related harm (to communities and society generally)[55], then the need for easier implementation of evidence-based regulation becomes clear.

Even though businesses will not be able to appeal local alcohol polices directly to the Alcohol Regulatory and Licensing Authority, they will still be able to bring judicial review proceedings, albeit on more limited grounds.[56] Members of the alcohol industry have argued that as the industry can still bring these proceedings, which have been the cause of

[51] John Clarke, Morag McDermont, and Janet Newman "Delivering Choice and Administering Justice: Contested Logics of Public Services" in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing, United Kingdom, 2010) 25 at 34.

[52] Andrew Gamble and Robert Thomas "The Changing Context of Governance: Implications for Administration and Justice" in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing, United Kingdom, 2010) 3 at 19.

[53] Mihiata Pirini "The Citizen and Administrative Justice: Reforming Complaint Management in New Zealand" (LLB (Hons) Dissertation, Victoria University of Wellington, 2009) at 7.

[54] At 6.

[55] Sale and Supply of Alcohol, ss 3 - 4.

[56] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 51.

most delays, then removing the right to appeal provisional policies will not necessarily speed up the licensing process.[57] Yet this can be rebutted by the fact that the grounds for judicial reviews are more restricted - an error in law or another narrow judicial ground needs to be established- which can limit the cases that come through the court.

There is no doubt that judicial review will be a more difficult process for making an appeal, and many parties will not have the required resources for lawyers. It is also worth noting that communities will also lose the ability to appeal, but at the same time it is likely they will be better served by the removal of the right to appeal. Those who appeal these policies tend to be large industry players who have the resources to litigate. By 2022, 86% of provisional alcohol policies have been appealed by supermarkets and 72% by bottle stores.[58] With these reforms, supermarkets will be able to bring judicial review proceedings to air grievances but on the basis of more restricted claims. A positive of the Alcohol Community Participation Bill is that when judicial proceedings are brought, local alcohol policies can remain operative. This will enable local alcohol policies to have their intended positive effects on a faster timeline.

The alcohol industry is concerned that granting District Licensing Committees the power to decline renewing licences if they are contrary to local alcohol policies will create business uncertainty. The industry is fearful that even if a business is well run or valued by the community, they will not know whether they will have a viable business each time they go to renew their licence.[59] Licensing committees need to consider how licenced premises are run.[60] It is likely they will use this new power to consider the specific local policy to determine the interests of the area and reject renewals when this action is justified – such as when the licence is causing harm in an area, or where there is a high density of licences.

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[57] New Zealand Alcohol Beverages Council, above n 50.

[58] Alcohol Healthwatch *The Sale and Supply of Alcohol (Harm Minimisation) Bill* (May 2022) at 2.

[59] New Zealand Alcohol Beverages Council, above n 50; and (13 December 2022) 765 NZPD (Sale and Supply of Alcohol (Community Participation) Amendment Bill – First Reading, Nicole McKee).

[60] Sale and Supply of Alcohol Act, ss 105(1)(b)(j); and Amohia Te Waiora “Alcohol licensing and hearings: a guide for DLC’s” <https://resources.alcohol.org.nz>.

All in all, this objective of mitigating alcohol harm is important, and needs to be considered in balance with the uncertainty the reform will cause to businesses.

Despite these arguments from the alcohol industry, it is explicit that *these reforms are necessary* to ensure that councils can implement evidence-based local alcohol policies, which are not watered down, and without undue cost and delay. There is no certainty that the industry will stop trying to abuse this appeal mechanism, as they earn large profits when there are lighter alcohol regulations, and evidence shows that appeals result in less restrictive regulations.[61] Research has proven that the regulation introduced by these polices has potential to reduce alcohol related harm, and better realise the objectives of the original legislation.[62] The criticism is that these reforms around local alcohol polices will jeopardize important accountability mechanisms and business certainty. Other ways of maintaining procedural and substantive justice needs to be thought about to ensure the reformed system is not weak in other areas. Clear guidance needs to be released around how local alcohol policies will affect licensing decisions, and how the authorities will weigh up competing issues. Also, the process of developing local alcohol policies should be taken with care, and consultation with stakeholders is crucial to mitigate disillusionment from businesses. On-licence businesses can benefit communities by providing a vibrant setting to socialise, and I understand their fear around how these benefits may be disregarded. Yet overall, what these reforms will hopefully do is refocus the priorities of the licensing system, in terms of bolstering the influence of local alcohol policies, to benefit public health and the amenity of neighbourhoods, especially in vulnerable communities.

B Strengthening community voices in District Licensing Committee hearings

The District Licensing Committee hearing process is another way the alcohol licensing system is failing to ensure that the community is on the same playing field as the alcohol industry. District Licensing Committees are independent licensing authorities.

[61] Jackson and Robertson, above n 41, at 5.

[62] See Randerson, Casswell and Rychert, above n 26.

They run tribunal hearings which are an opportunity for licence applicants, as well as public officials and objectors from the community to make submissions on a licence application or renewal. Insights into the current system reveal that, when they object to a licence application, community members who typically do not have legal representation, face uneven battles with the alcohol industry who do. By making hearings less formal, and less adversarial, the Alcohol Community Participation Bill targets what is preventing communities from effectively participating in the licensing system. The Bill will also change s 102, so that any person may object to an application for the grant of a licence, whether as an individual or as a representative of a group or an organisation.[63] As the law stands only a person with a "greater interest than the public generally" can object to a licensing application.[64] This could be someone living or working in the same street as the proposed licenced premises or could include members of a local marae or school but excludes those who might be concerned about the general effects of alcohol in the community.[65] This provision has been construed narrowly, acting as another obstacle in the way of community members being heard. These law changes are needed, despite their risks, as the alcohol licensing system is currently failing to provide space for community members to voice concerns and impact licensing in their areas.

1 Expanding the right to object

A salient issue in the current system is that the right to stand under s 102 of the Alcohol Act has been construed narrowly by licensing authorities. Some District Licensing Committees have interpreted the use of the words 'he or she' in the clause to mean only natural persons have a standing to object.[66] This has meant iwi representatives, school

[63] Sale and Supply of Alcohol (Community Participation) Amendment Bill (205-2), cl 10.

[64] Sale and Supply of Alcohol Act, s 102(1).

[65] Amohia Te Waiora, above n 60.

[66] Alastair Sheriff "Updating Alcohol Licensing" (paper presented to New Zealand Institute of Liquor Licensing Inspectors Inc Annual Conference, Wellington, August 2019) at 6; and Ministry of Justice *Supplementary Analysis Report*, above n 5, at 15.

principals, addiction clinicians, charities and church leaders have been denied from objecting as representatives.[67] Community organisations that regularly work in the area or take an interest in reducing alcohol harm have also been excluded from the process, because they have been unable to prove this narrowly constrained interest.[68] Allowing anyone to make submissions is a necessary reform as it will enable these individuals and groups, plus others who have a genuine concern for their community to participate in the licensing system. This can lead to community-centred outcomes.

Expanding the right to object to licences provides the opportunity to reduce some of the ways that the alcohol licensing system is failing Māori. It was found that the licensing authorities consistently failed to recognise important elements of Māori culture.[69] This has allowed precedents to develop that limit the influence of Māori objectors' contributions, such as the licensing authorities not recognising Māori concepts of authority.[70] Decision makers have not accepted local hapu membership, whakapapa links to the whenua and marae or community leadership as demonstrating sufficient interest in the application.[71] This reform will necessarily remove these barriers and allow more Māori to influence licensing decisions which impact their neighbourhoods.

The *contrary point of view* is that case law has evolved to ensure that appropriate objectors are being heard; those living or working in the areas that will be directly affected by the licence.[72] Those who do not live or operate a business within one or two kilometres

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[67] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 15.

[68] See *General Distributors Ltd v Countdown Cable Car Lane* [2018] NZDLCWN 907; *GTD Trading Limited – Liquorland Papatoetoe Communities Against Alcohol Harm Inc* [2019] NZARLA 222; *Gisborne Liquormart Limited v Kair Pai Kaiti Trust* [2018] NZARLA 316; and *A One Limited 'Taupiri Wine Shop' v Waikato District Licensing Committee* [2021] 10/2021.

[69] Randerson and others, above n 35, at 29-30.

[70] At 29-30.

[71] At 30.

[72] Select Committee News, above n 40, at 5-6.

of the proposed site have not been allowed to submit at a hearing.[73] This restriction has led to 370 of 538 objectors for a proposed bottle store in Khandallah being automatically excluded from objecting.[74] Business owners are concerned that expanding the right to object will invite many objections from national groups that do not have a link to the local community.[75] This likely stems from the fear that businesses will end up facing an uphill battle if their licence application is objected by many. However, the way s 102 has been interpreted could be seen as creating unfair artificial restrictions, which makes it difficult for those who live rurally to participate in the licensing system. Culling this number of community objections dampens community voice.

This narrow construing of s 102 can be seen as necessary to prevent District Licensing Committees from being bogged down by too many submissions. There are legitimate concerns that allowing anyone to object will "prolong the application process and result in less efficiency", as well as increase costs, including for those attending hearings.[76] The cost burden to councils and rate payers is an important point to consider.[77] There is tension in this reform, between encouraging public participation, and the competing demand for efficiency. This tension is seen time and time again in administrative decision making.[78]

A solution to this issue was first proposed in the first version of the Bill. Licensing authorities could manage the volume of objections and appearances at hearings, by

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[73] Randerson and others, above n 35, at 30; and Dave Armstrong "Good folk of Khandallah aren't wowsers - they're smart citizens with a fair point" (20 August 2019) Stuff <www.stuff.co.nz>.

[74] Armstrong, above n 73.

[75] New Zealand Alcohol Beverages Council, above n 50.

[76] New Zealand Alcohol Beverages Council, above n 50.

[77] Select Committee News, above n 40, at 4.

[78] Harlow and Rawlings stated that "formal participation requirements, for example, are a rightful democratic attribute and necessary instrument for institutional learning; on the other hand, policymakers and agency officials may well be nervous about the propensity of delay and indecision, and sometimes for good reason" in Carol Harlow and Richard Rawlings *Law and Administration* (4th ed, Cambridge University Press, Cambridge, 2021) at 350.

striking out evidence if it met set criteria, or if it was likely multiple parties will present similar evidence, for example.[79] The Justice Committee recommended deleting these sections from the Bill due to the concern that "these provisions could exclude valid objections and discourage participation."[80] The opposition were also worried these provisions will lead to licensing authorities "picking winners."[81]

As inhouse decisions are not subject to scrutiny from the public, there is a risk that these discretionary powers could be used extensively to reduce evidence brought by communities, and that there will be a repeat of the narrow interpretation of the right to stand. Already, a lot of discretion is in the hands of the licensing authorities.[82] It is fair for the Justice Committee, seeing how s 102 has been interpreted, to delete these sections. Although for the sake of improving efficiency and preventing civil delay, these management tools could be necessary to later introduce. Yet they will only work if proper guidance (to improve clarity around the management tools' and the wider system's objectives) is provided for the licensing authorities. This highlights the importance of setting up administrative decision-making with clear parameters and objectives, so that adversarial effects do not occur down the track.

On the whole, expanding the right to stand will impact efficiency but would provide those who are genuinely concerned with a licence application the ability to object. Encouraging public participation in the licensing system and not (potentially) arbitrarily inhibiting those who wish to support their communities is important. Bearing in mind that a central objective of the Alcohol Act is to minimise alcohol related harm for the benefit

[79] Sale and Supply of Alcohol (Community Participation) Amendment Bill (205-1), cl 16; and Sale and Supply of Alcohol (Community Participation) Amendment Bill (205-2), Commentary.

[80] Sale and Supply of Alcohol (Community Participation) Amendment Bill (205-2), Commentary.

[81] (13 December 2022) 765 NZPD (Sale and Supply of Alcohol (Community Participation) Amendment Bill – First Reading, Michael Woodhouse).

[82] "Subject to the provisions of this Act and of any regulations made under this Act, the authority or committee may regulate its procedure in such manner as it thinks fit." Sale and Supply of Alcohol Act, s 203 (9).

of the community[83], then this reform will enable this aim to be met, by ensuring that more community members can voice their concerns.

2 *Hearings to be less adversarial and less formal*

Ensuring hearings are less adversarial and less formal is another way the Alcohol Community Participation Bill proposes to strengthen community voice in the licensing process. This is an attempt to shift away from the current court-like processes.[84] Under the Alcohol Community Participation Bill, licensing committees must establish appropriate procedures to consider applications and ensure that the procedures avoid unnecessary formality.[85] The Justice Committee suggested providing a non-binding, non-exhaustive list of factors that a licensing authority could consider to make hearings less formal. These include the location and timing of the hearings, the layout of the venue of hearings, the timetable of hearings, and the language and terminology to be used at hearings.[86] The Bill also looks to better facilitate the use of virtual submissions.[87] To ensure less adversarial hearings, the Bill prohibits cross examination.[88] In the reformed system, parties and their representatives will not be able to question other parties or their witnesses.[89] A purposeful shift to hearings that are less adversarial and less formal is a necessary attempt to level the playing field, as community members have found that the process is weighted in favour of the applicant.[90] District Licensing Committees will need to consider how they treat community objectors, and actively remove some of the obstacles they face in the current system.

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[83] Sale and Supply of Alcohol Act, ss 3-4.

[84] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 29.

[85] Sale and Supply of Alcohol (Community Participation) Amendment Bill (205-2), cl 14.

[86] At 14.

[87] At 13.

[88] At 14.

[89] At 14.

[90] Mathias, above n 22.

Evidence indicates that community voices are not being heard in the District Licensing Committees hearing process.[91] SHORE & Whariki Research Centre's report highlighted key reasons why "when community members object to alcohol licences they seldom succeed."[92] It was found that the legalistic and adversarial nature of hearings are intimidating and disrupted people's ability to provide an effective objection.[93] Community members are often up against well-resourced applicants, who tend to have lawyers who run unsettling cross examination.[94] "Applicants more often have legal representation than community objectors, creating an imbalance in important procedural and legal knowledge such as awareness of case law."[95] This impact is more prominent in vulnerable areas with the least resources.[96] As a result, licences are being approved in areas where there is already high density.[97] This reform will directly target what is leading to imbalanced hearings and improve the system's inclusivity.

In *opposition* of the reform, there is a strong argument that it will undercut procedural and substantive justice, and that it risks deleterious effects on the quality of decisions. Cross examination can be a useful tool for seeking the truth.[98] A general view is that an adversarial process is seen as the "gold standard" process for producing and testing evidence.[99] In a social psychology experiment, Thibault and Walker found that the method of reaching the decision was as important as the outcome in generating perceptions of

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[91] Randerson and others, above n 35, at 3.

[92] At 1.

[93] At 3.

[94] Mathias, above n 22; See also (13 December 2022) 765 NZPD (Sale and Supply of Alcohol (Community Participation) Amendment Bill – First Reading, Arena Williams).

[95] Randerson and others, above n 35, at 3.

[96] Allen and Clarke *Community Law Alcohol Harm Reduction Project: A formative evaluation* (Te Hiringa Hauroa/Health Promotion Agency, Wellington, 2021) at 16.

[97] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 1.

[98] Select Committee News, above n 40, at 3.

[99] Robert Thomas *From 'Adversarial v Inquisitorial' to 'Active, Enabling, and Investigative': Developments in UK Administrative Tribunals* (Research paper, University of Manchester, 2012) at 7.

fairness and satisfaction.[100] There is a possibility that without the typical adversarial tribunal process including cross examination, then this could impact perceptions about the quality and legitimacy of decisions.

This reform, however, might not necessarily impact the quality of decision making. Hamilton City Council submitted that District Licensing Committees have an inquisitorial nature already, and that removing cross examination will cut costs, save time and will not have a negative impact on proceedings.[101] In contrast to a more adversarial hearing, "in inquisitorial proceedings, the judge assumes a proactive role of identifying issues and gathering evidence and also takes full control of the proceedings and governs the participation of the parties."[102] In Aotearoa, we have an illustration of a more informal, less adversarial hearing in the resource consent process. These take on an inquisitorial nature and it is said that the hearings run more time-efficiently.[103] Thus, this reform has the potential to improve efficiency in the hearing process[104], which is required with expanding the right to object.

There is extensive discussion on how administrative hearings should be run to uphold administrative justice, which can inform the analysis of this law reform.[105] Mashaw defines administrative justice as "qualities of a decision process that provide arguments for the acceptability of its decisions".[106] Administrative justice includes the need for government agencies to balance justice in the individual case with other imperatives, such as government policy, consistency and need for efficiency within budgets.[107] What competing

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[100] Michael Adler "Understanding and Analysing Administrative Justice" in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing, United Kingdom, 2010) 129 at 137.

[101] Select Committee News, above n 40, at 4.

[102] Thomas, above n 99, at 1.

[103] Select Committee News, above n 40, at 5.

[104] See also Thomas, above n 99, at 7.

[105] See Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing, United Kingdom, 2010).

[106] Michael Adler "A Socio-Legal Approach to Administrative Justice" (2003) 25 Law & Policy 323 at 329.

[107] Robin Creyke "Administrative Justice in Australia" in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing, United Kingdom, 2010) 271 at 274.

value should be prioritised, and the style and substance of regulation is linked with the view on the role of the state.[108] For example, the argument that the hearing should be adversarial and legalistic can be linked with the belief in individual freedom.[109] Advocates for this view would argue "that the primary function of administrative law should be to control *excesses* of the state power and subject it to the rule of law."[110] A contrasting view would see law as "a tool by which society is enabled to realise its collective goals."[111] With each of these reforms, there has been this tension; between enabling communities to be able to voice their concerns about alcohol harm, (and public health as a wider collective good), which comes into conflicts with ensuring that businesses face a fair and consistent regulatory system, backed by procedural justice. Summing up this issue, Harlow and Rawlings said, "our regulatory system has the pivotal role in resolving the regular conflict between prosperity and protection."[112]

Each side highlights compelling points and reason for concern, so it is important to find a balance and use mechanisms to ensure that the licensing authorities are producing fair and consistent decisions, even in a process that is less traditionally adversarial. This reform finds this balance – the removal of unnecessary formality and cross examination makes the process more inclusive for community objectors and shifts the power balance back into their favour. It is crucial to note that typically in licence hearings, only one side - the applicants - have legal representation, which supports the use of a more inquisitorial approach.[113] Considering the evidence that adversarial licensing hearings are not serving members of the public, then a shift away from this is needed. This is clear, particularly

[108] Harlow and Rawlings, above n 78, at 1 and 302; See also Paul Craig "Three Perspectives on the Relationship Between Administrative Justice and Administrative Law" in Robin Creyke and John McMillan (ed) *Administrative Justice – the Core and the Fringe, Papers presented at the 1999 National Administrative Law Forum* (Australian Institute of Administrative Law Inc, Canberra, 1999) 28 at 31.

[109] Harlow and Rawlings, above n 78, at 14.

[110] At 7.

[111] At 7.

[112] Harlow and Rawlings, above n 78, at 302.

[113] Thomas, above n 99, at 6.

when we remember the original objectives of the Alcohol Act; of setting up a regulatory system for the benefit of the community.

III Critique – changes to hearings might not be enough

Despite the potential negative consequences of the four key reforms to the Sale and Supply of Alcohol Act 2012, they are necessary so that that the Act's aim of enabling community members to have a greater say in the alcohol licensing system are actualized. At the same time, there is a possibility that these reforms will not be able to alleviate all the current obstacles in the way of meaningful community participation, particularly in the District Licensing Committee hearing process. It is likely that parts of the community will still be alienated from the process, as expertise, time and resources will still needed to be able to effectively submit in the legalistic process. Making the hearings less formal and less adversarial will not necessarily increase many community members' ability to make an effective submission. The reality of members of the public struggling to link evidence and arguments to the criterion under the Act was cited in the recent SHORE & Whariki Research Centre report as one of the biggest obstacles in the way of the community being able to impact licence decisions.[114] After looking into discussions around these recurring issues in administrative tribunals, I propose that District Licensing Committee hearings should look to go one step further and adopt an enabling approach when appropriate.

Even under this reformed system, the legalistic nature of the licensing process will still contribute to an imbalance for community objectors. To be successful in the licensing hearing, "objectors must present a considerable amount of robust evidence, linked to a criteria in the Act, to show that granting or renewing a licence would increase (or fail to minimise) the risk of alcohol-related harm near the store." [115] This has proven difficult for the public to achieve without legal assistance.[116] Knowledge of case law and how to link

[114] Randerson and others, above n 35, at 3.

[115] At 2.

[116] At 2.

this specific evidence to the criteria is complicated.[117] Objections from the community tend to fail if they are too general or not well linked to the licence application.[118] Also, District Licensing Committees are less likely to put weight on evidence from community objectors. In licence hearings where community objectors were the only party opposing an application, only 2% of applications were declined.[119] This is compared to a declining rate of 33%, when the public was joined by at least one agency.[120] The impact of this issue is "felt the most among community objectors in the poorest areas"... as "these communities face often the acute issues of high density of off-licences" and seldom have legal representation.[121]

Even with informal tribunal processes, "legal decision makers adopt a legal perspective on what constitutes relevant information."[122] This is the central problem with tribunals; how to have community objectors without legal representation submit effectively in a process that relies on the legalistic framing of arguments against criteria, with case law and evidence being used to bolster arguments. This is a very difficult issue, and one that is seen in hearings worldwide, and across administrative decision-making.[123] There is no straightforward or clear solution.

A response to this problem of navigating legalistic proceedings without legal assistance is adopting an enabling approach, argued Leggatt.[124] Adler's study of different tribunals also showed that active, enabling and inquisitorial methods made it more easier

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[117] At 3.

[118] At 3; Failing to link national or regional statistics to a specific locality will likely be insufficient to stop a licence renewal. See *Flaxmere Liquor* (2008) *Limited* [2019] NZARLA 94 at [150] and [159]; and *Hawkes Bay MOH v Parizara.* [2019] NZARLA 98.

[119] Auckland Regional Public Health Service *Is the community's voice being heard?* (5 December 2019) at 3.

[120] At 3.

[121] Ministry of Justice *Supplementary Analysis Report*, above n 5, at 29.

[122] Gráinne McKeever "A Ladder of Legal Participation for Tribunal Users" (2013) Public Law at 6.

[123] David and others, above n 27.

[124] Harlow and Rawlings, above n 78, at 611.

for unrepresented users to put their case forward and achieve a successful outcome.[125] An enabling approach is similar to an inquisitorial role. Thomas argued that the inquisitorial and adversarial dichotomy "does not adequately capture, either descriptively or normatively, the distinctiveness of administrative adjudication."[126] He reasoned that the focus should instead be on the degree of intervention used in tribunals, which can range "from a passive, reactive stance to a more proactive or intrusive one."[127] The District Licensing Committee hearings could be described as soft inquisitorial with these reforms. "A soft inquisitorial approach might mean that the judge can make inquiries by asking questions or, with the assistance of the parties, investigates the issues."[128]

With an enabling approach the licencing committees will play even more of an active role. Under an enabling approach, "the tribunal gives an unrepresented appellant every possible assistance to enable her to participate and to compensate for her lack of skills or knowledge."[129] This is achieved through a "combination of creating the right atmosphere and assisting the appellant by bringing out relevant facts."[130] Overcoming these barriers to participation can be done through the tribunal explaining clearly why certain processes had to be followed, adapting the legal language of decision-making, and enabling "tribunal users to tell their story in ways that users as well as panel members felt was relevant".[131] There is evidence that indicated that this approach can improve the success rates of unrepresented appellants[132], and could bridge the gap between the community objectors and the alcohol industry. Research cited similar issues with community participation in the UK licensing system, which resembles the one in

[125] Brian Thomson "Current Development in the UK: System Building – From Tribunals to Administrative Justice" in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing, United Kingdom, 2010) 484 at 510.

[126] Thomas, above n 99, at 1.

[127] At 1.

[128] At 1.

[129] At 1.

[130] At 1.

[131] McKeever, above n 122.

[132] Thomson, above n 125, at 510.

Aotearoa.[133] The report came to the same conclusion; that licensing authorities should proactively support oppositions from the public so that they are presented in a valid way, which would allow them to impact the reduction of alcohol availability. [134]

Interestingly, it was found that UK licensing authorities take a dispute resolution or "policy brokers approach", where they "take into account the specific issues of competing parties and try to find some common ground". [135] Yet, it was found that this approach did not focus on promoting licensing's objective of enabling public involvement to reduce alcohol related harm, and concerns were raised that these aims were being undermined.[136] This shows that trying to strike a balance between groups with competing interests, when one side may be better resourced, results in compromised regulation that does not effectively reduce alcohol harm.[137] This is seen in our system when the appeals of provisional local policies have resulted in watered-down regulation.[138] If a regulatory system aims to benefit the community, we should not shy away from setting it up, on the basis of evidence, so that this can be achieved.

The *arguments against* an inquisitorial approach and an enabling approach are the same. As mentioned before, administrative tribunals involve a balancing act of competing interests, and when one groups is valued, others can be affected. "…it is usually difficult if not impossible to satisfy fully each demand for accountability."[139] There is a need to preserve decision-makers' neutrality, which could be impacted by a duty to inquire or be proactive in a hearing.[140] So while fairness may require a decision-maker to assist unrepresented parties, processes cannot favour one party.[141] There is the "risk that a more

[133] David and others, above n 27.

[134] David and others, above n 27.

[135] David and others, above n 27.

[136] David and others, above n 27.

[137] David and others, above n 27; See also Babor and others, above n 27.

[138] Jackson and Robertson, above n 41, at 5.

[139] Gamble and Thomas, above n 52 at 21.

[140] Thomas, above n 99, at 11.

[141] Matthew Groves "Duty to Inquire in Tribunal Proceedings" (2011) 33 Syd LR 177 at 194.

active approach might relieve the parties of their responsibilities of presenting and scrutinising the evidence."[142] Some may argue that an enabling approach will be seen as bias from the licensing authority towards community objectors and take away from the perceived legitimacy of their decisions.

Another potential issue with a more enabling and even inquisitorial approach in administrative tribunals, is it is difficult to come to a full-blooded legal outcome, when the degree of legality is lessened.[143] There is a risk that "if the tribunal is not supplied with the best evidence, the quality of justice is likely to suffer".[144] This will not be so much of an issue with a traditional adversarial hearing approach. Tension exists - even though community members struggle in this approach without legal representation, legalistic processes can ensure that quality and consistent decisions can be made. From this point of view, the criterion of the Alcohol Act is set up, so that the licensing authorities can decline or approve licence applications for good reasons, that have been mapped out by the Act, and case law previously. It is difficult to create an airtight quality process that hasn't been honed by a history of case law. Especially with the removal of cross examination and other procedural rights, such as right to appeal, licensing decisions need to appear to be well reasoned, so they are perceived as quality and legitimate. An enabling approach "can rub up against the need to investigate thoroughly, which can involve raising points unfavourable to appellants."[145] Those applying for a licence need to be confident about the process that reaches the decision, and the decision that is made.

Despite these points that can be made against adopting a more enabling approach, we cannot ignore that throughout select committee submissions and the research done by Massey University, it is overwhelmingly clear that is not just cross examination that is intimidating to community objectors.[146] The complicated legal framework they are

[142] Thomas, above n 99, at 8.

[143] Select Committee News, above n 40, at 4.

[144] Harlow and Rawlings, above n 78, at 612.

[145] Thomas, above n 99, at 7.

[146] See Select Committee News, above n 40, at 9; and Randerson and others, above n 35, at 3.

expected to submit within to object effectively, without support, is reducing the power of the community voice. District Licencing Committees shifting to a more inquisitorial approach will help this issue to a degree. Adopting an enabling approach will mitigate this obstacle even more, and the possible transformation of the process is worthwhile. Academic thinking and research findings are congruent with the potential outcome being incredibly beneficial for community objectors who do not have legal representation.[147] This approach could then be used in other administrative tribunals across Aotearoa which suffer from the same issues.

Māori objectors will also benefit from an enabling approach, improved training of the board members, as well as improving clarity around the aims of the hearing process. This is because the way that legal framework currently operates will continue to be an issue to Māori objectors, even with the reforms. The SHORE & Whariki Research Centre report found the "legalistic nature of the hearing environment as an entirely inappropriate way to engage with Māori and one which excluded many from participating." [148] Legal research done on the licensing process found "Māori objectors had no space to argue Treaty matters because of the way the present legal framework operates."[149] Precedents have been allowed to develop that limit the influence of Māori objectors' contributions, such as evidence provided by reporting agencies being prioritised above Māori community leaders and representatives.[150] This is due to the legal framework of the Alcohol Act and the licensing committees' consistent failure to recognise important elements of Māori culture.[151] Also, some District Licensing Committees "have declined requests to either proactively or separately assess the impacts of a licence on Māori, stating that impacts on Māori are

[147] See Thomson, above n 125, at 510.

[148] Randerson and others, above n 35, at 2.

[149] At 28.

[150] At 29.

[151] At 29.

considered in their overall decision."[152] In light of the evidence showing alcohol harm falls disproportionately on Māori,[153] then these issues can be seen to be significant.

There needs to be further clarity for licensing authorities in terms of considering Te Tirti o Waitangi and te ao Māori in their decision-making. The Justice Committee recommended that District Licensing Committees must ensure that its procedures allow for tikanga Māori to be incorporated into proceedings, and that written and oral evidence to a licensing authority could be made in te reo Māori.[154] This reform would be great step forward. It is clear that a shift needs to happen in how District Licensing Committees are run, in terms of proceedings and how they consider evidence – a shift away from processes which are highly technical and lack heart is needed.[155] This was suggested in the SHORE & Whariki Research Centre report, where one community member suggested reprioritising the values of the licensing committees, which includes the recruitment process – they stated there needs to be more Māori and more representation from the communities that are most affected by alcohol related harm.[156] It should be ensured that licensing decision-makers are well versed in Māori culture and authority, and this could ensure that Māori voices are better respected and participation from Māori participants is encouraged. Kristen Maynard in "Te Tiriti O Waitangi and alcohol law" argued that Te Tiriti O Waitangi should be referred to in appropriate places throughout alcohol legislation and be explicit about how it can be given practical effect.[157] An explicit reference to Te Tiriti within the Bill needs be considered as it could ensure that these important changes happen, and that the system does not continue to fail Māori. It should also be ensured that Māori are consulted with during the development of local alcohol policies, which is currently not required.[158]

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[152] At 29.

[153] Kirsten Maynard *Te Tiriti o Waitangi and alcohol law* (Te Hiringa Hauora/Health Promotion Agency, Wellington, 2022) at 5.

[154] Sale and Supply of Alcohol (Community Participation) Amendment Bill (205-2), cl 14.

[155] Randerson and others*,* above n 34, at 31.

[156] At 31.

[157] Maynard, above 153, at 6.

[158] Sale and Supply of Alcohol (Community Participation) Amendment Bill (205-2), Commentary.

Currently, licensing boards typically have more of a legal or business background, instead of expertise in health, science or te ao Māori.[159] This lack of expertise of the decision-makers in these areas further disadvantages the community in the licensing system.[160] Going forward, who the members of licensing committees are, will be also important. If not direct members of the community, they need to have awareness of, and empathy for the impact of alcohol on communities. Leggatt stated that the enabling approach relies on recruitment and training of chairs to be able to take this facilitative role.[161] Training, skill and experience is required to ask carefully phrased and neutral questions into sensitive matters.[162] Overall, "the extent to which a tribunal is able to provide an effective enabling approach will depend upon the individual judge and his or her experience in being able to draw out the evidence effectively."[163] In Germany for example, bank safety regulatory officials are career employees and are subjected to extensive education and training.[164] Consequently, they are trusted to use a particular method and make programmatically sensible judgments.[165] To overcome the concerns around neutrality and quality of decisions, District Licensing Committees need to be adequately trained in this role.

Licensing authorities need the ability to be able to inquire, but it is also important that other members of the community, including the alcohol industry, trust the authorities' decisions. To ensure that decisions are still perceived as quality and legitimate, licensing authorities should also provide a clearer indication of how they will support the public before and during hearings, as was suggested in the UK research report.[166] Clear

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[159] Mathias, above n 22.

[160] Randerson and others, above n 35, at 3; and Mathias, above n 22.

[161] Harlow and Rawlings, above n 78, at 611.

[162] Thomas, above n 99, at 7.

[163] At 6.

[164] Robert A Kagan "The Organisation of Administration Justice Systems: The Role of Political Mistrust" in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing, United Kingdom, 2010) 161 at 175.

[165] At 175.

[166] David and others, above n 27; See also Creyke, above n 107, at 295.

instructions can strengthen the quality of decisions. The UK Select Committee also reported that regulators were unanimous in their belief that clarity around the decision-making process was the most important quality, "as it helped regulators to readily understand their purpose and to focus their mind quickly on the work at hand."[167] It was also found that clarity of their role helps improves the consistency and organisation, and ensures that the process will be better run, as well as providing greater opportunities for monitoring performance.[168] Consequently, it was concluded that the authorities are likely to be effective when they are working towards limited and relatively narrowly defined duties and objectives.[169] To conclude, these reforms need to happen alongside improved training of authorities and clear guidance on how these reforms will operate. This can help provide certainty for the community and the alcohol industry, ensuring licensing decisions are seen as fair and consistent.

IV Conclusion

Administrative and tribunal processes involve a trade-off exercise; when one interest may be sought to be protected, this can cause detriments to other demands of accountability. This is evident in the criticisms of the four key reforms of the Alcohol Community Participation Bill. Granting licensing committees the power to decline licences renewals if will be contrary to local alcohol policies can improve the impact of evidence-based regulation and allow licensing to reflect the interests of the local area. Yet, there are concerns this reform will reduce business certainty. Removing the right to appeal provisional policies will allow local authorities to implement regulation that the local community wants, without wasting time and money. However, there are concerns that this will remove an important accountability mechanism. Changing the law so that anyone can object to a licence will remove the current artificial restrictions but could be detrimental to efficiency. Finally, shifting the licensing hearing process away from being adversarial and formal can risk weakening the 'quality' of decisions, but will allow community members

[167] Harlow and Rawlings, above n 78, at 230.

[168] At 230.

[169] At 230.

to participate in the licensing system more effectively. From one point of view, the risks these reforms pose could be argued to be worse than the status quo, perhaps from the standpoint that business interests need to be protected as an imperative but also to realise other benefits, particularly to the economy.

It is important to take a step back. We need to ask what we value as a country; do we value caring for individual and public health as well as protecting the amenity of neighbourhoods for the long-term benefit of Aotearoa? Taking a step back is crucial to understand what mechanisms should be prioritised to achieve the objectives of a policy. Scholars have argued that the appropriateness for certain procedural rights depends on the characteristics of the decision-making process in question, in other words what is trying to be achieved.[170] For example, a "public interest approach to planning would gravitate towards a less formal, more inquisitorial style of procedure."[171] A more active approach from licensing authorities is justified by the overriding objective.[172] This Bill can be supported as the Alcohol Act was enacted with a key objective of enabling communities to participate in the licensing system so that public interests can be better reflected. This is because, in Aotearoa, vulnerable communities feel the reverberations of excessive supply and consumption of alcohol. These communities have had to relentlessly fight against the proliferation of licences, and the current system still puts them on the back foot. The fact that licences are being approved in areas where communities do not want them highlights how the priorities of the system have become skewed.

The alcohol industry is concerned this Bill will shift the system too much in the favour of the community. Yet despite the criticisms, these reforms are necessary. When we bear in mind the aim of the Alcohol Act is to minimise direct and indirect alcohol related harm to the community and wider society, then the system needs to be community-centred in how it operates, which can hopefully result in more community-centred outcomes. These

[170] Adler "Understanding and Analysing Administrative Justice", above n 100, at 135; See also Creyke, above n 107, at 295.

[171] Craig, above n 108, at 31.

[172] Thomas, above n 99, at 4.

reforms will be a great step forward in improving the ability of local authorities to introduce evidence-based policies, and as research shows, this is likely to have the positive consequences of reducing alcohol related harm. The Alcohol Community Participation Bill is important as it will trigger a much needed refocus of the priorities of the Aotearoa alcohol licensing system, to reduce the stark disadvantaged position that community members are currently in.

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