

## **Noctis/Poppleston Allen Crisis Management Document:** **A contingency document to avoid or deal with a crisis in late night sector businesses**

### **Introduction**

*We live in an age of tough legislation. We live in an age of intense media scrutiny. We live in an age of blame. We live in an age when the selling and consumption of alcohol is increasingly being demonised. These factors all mean that regularly updating all company policies on health and safety is crucial. Should things go wrong it is also increasingly important to have a crisis management strategy.*

*Given the negative historical associations that the late night sector still endures, the authorities and the media are often not prepared to accept the truth that our sector is, for the most part, well-run and corporately socially responsible - resorting instead to old-fashioned prejudices. This means that operators need to make sure that our sector's businesses bear the closest possible legal, operational and media scrutiny.*

*It is important to note that it is not enough for those who wish to scrutinise the late night sector that businesses are well-run and corporately responsible - they must be seen to be responsible too.*

*The aim of this document therefore is to give a quick guide to a) avoiding a crisis and b) dealing with any crisis which may arise effectively and efficiently. Part 1 deals with understanding the new and existing regulatory and legal framework which underpins businesses to help avoid a crisis scenario and Part 2 deals with what to do if a crisis occurs.*

## Part One

### Legal Risks and Practical Prevention

The Licensing Act 2003 heralded greater freedom for operators and customers of late night premises in offering the opportunity to apply for later hours than had been possible under the previous more restrictive regime.

The nervousness of Central Government at the prospect of large numbers of revellers hitting the streets in the not so early hours of the morning led to the Act containing within it a great deal more regulation than was initially anticipated. The power of review together with approximately 50 offences contained under that piece of legislation alone left operators in no doubt that they were going to be under greater scrutiny than ever before.

This means that responsible authorities such as Environmental Health Officers (Health & Safety at Work Act, Food Safety Act, Health Act, Control of Noise at Work Regulations etc) and the Fire Authority (Regulatory Reform (Fire Safety) Order) are being encouraged to use their powers more than ever and that these powers are also coupled with the ability to take action in review proceedings either simultaneously to a prosecution under the legislation or instead of such a prosecution, taking advantage of the less severe burden of proof.

We are seeing more and more prosecutions of this nature and therefore operators must be aware that in addition to the normal action which can be taken against the licence on review (e.g. modification of conditions, curtailment of hours, suspension of licence or revocation) high financial penalties on conviction can also have a nasty detrimental effect on the bottom line.

In the event that there is a fatality as a result of failings in the areas of health & safety, food safety or fire safety, for example, then the whole position is aggravated by the arrival of the Corporate Manslaughter and Corporate Homicide Act 2007 which makes it easier for organisations to be prosecuted not only for their safety failings but actually for causing death. This has been difficult historically, although it has always been possible to prosecute individuals for corporate manslaughter where their individual recklessness could be proved. From the corporate point of view, there is now the real possibility of fines of up to 10% of turnover together with requirements to make potentially expensive improvements to existing safety systems and to advertise failings publicly.

### Practical Example

The glass washer behind your main bar develops a fault and stops working. It is a bank holiday weekend and you are expecting to hit capacity two nights in a row for the first time in months. Your staff rota is such that you will have enough staff to deal with the weekend's trade but clearly if the washer is not working then your bar staff's ability to serve customers will be hampered by the need to keep washing glasses. As a result of this, one of your bar staff has a go at fixing the machine. He touches a live component, receives a powerful electric shock and is killed. The emergency services are called and the Police arrive. The area quickly becomes a crime scene and as such you will not be able to open tonight at all! In all of the mayhem you realise that the accident is reportable

under RIDDOR and do so. The local Environmental Health Officer arrives on the scene and starts to go through your health & safety documentation. You do have a Health & Safety Policy in writing as you have more than 5 employees but it has not been updated for some time. The people named in the document no longer work for you. The EHO wants to see a risk assessment for the glass washer but you simply don't have one. You are able to produce some induction training reports for the member of bar staff but it is plain from the EHO's reaction that they are really not up to scratch.

What is going to happen?

### **The Legal Risk**

The immediate consequences of such an incident can simply be the loss of business as a result of not being able to trade during a period when investigations and inspections are being carried out at your premises. From there it is really a question of what problems have been discovered by the Environmental Health Officer. Not having a proper risk assessment in place is an offence under the Health & Safety at Work Act and punishable by a fine of up to £5,000. Problems such as inadequate training or an inadequate safety policy may well add up to failing to adequately ensure the health & safety of your employees with a potential fine of up to £20,000 in the Magistrates' Court and unlimited should the matter proceed to the Crown Court. If it is felt that systemic failings within your organisation i.e. lack of training, risk assessment etc have substantially contributed to the cause of your barman's death then prosecution for corporate manslaughter is likely. A fine of up to 10% of turnover would be enough to take most businesses down and even if you survive it you may not have much of a business left given the powers to require publication of your failing either in national press or by writing to your customers individually..

### **Practical Prevention**

Listed below are details of the key pieces of legislation that you need to be aware of and the principal areas under each which you should have covered in order to minimise the chances of running into problems:

#### **THE HEALTH & SAFETY AT WORK ACT 1974**

- Health & Safety Policy – you must have a policy. If you have 5 or more employees then that policy must be in writing. You must regularly update this document. Amongst other things the policy must deal with the policy's aims, who is responsible and then what exactly you expect people to do and how you expect them to do it.
- Risk Assessments – the management of Health & Safety at Work Regulations 1999 require employers to carry out risk assessments which must be suitable and sufficient in relation to any hazards and risks which occur during the course of employment. Risk assessments will deal with identification of hazards, who could be harmed and how, evaluation of risks and identification of control measures to minimise the risks. As with the policy, risks assessments must regularly be reviewed and revised.

- Training – it is all very well having the policy and the risk assessments in place. You must make sure that your staff are aware of them and have fully documented training as evidence of this. If the training is not documented then it is all too easy for staff members who may be understandably nervous about blame being attributed to them, to simply point the finger at you as their employer and say “I wasn’t given proper training”.
- Penalties – depending upon the type of offence there are maximum fines of up to £20,000 in the Magistrates’ Court and unlimited in the Crown Court. There is also the possibility of imprisonment.

### **THE FOOD SAFETY ACT 1990**

- Hazard analysis – it is a legal requirement under the Food Hygiene (England) Regulations 2006 that all food businesses have a food safety management system within the HACCP (Hazard Analysis Critical Control Point) principles. This is not dissimilar to the process of risk assessment mentioned above and involves identification of the hazards and the points during processes at which they may occur. You will have to decide which points are critical to ensuring food safety and identify and implement effective control and monitoring procedures. Once again it is imperative to review and revise the system on a regular basis.
- Training – it is imperative that all of your staff are totally familiar with the procedures which you have put in place and the hazards which may arise. Such training must be documented so that it may be produced to Environmental Health Officers investigating an outbreak of food poisoning, for example.
- Penalties – depending upon the type of offence there are maximum fines of up to £20,000 in the Magistrates’ Court and unlimited in the Crown Court. There is also the possibility of imprisonment.

### **THE REGULATORY REFORM (FIRE SAFETY) ORDER 2005**

- Risk Assessment – a responsible and competent person must carry out a fire risk assessment focusing on the safety of employees, customers and anyone who may have legitimate reasons for being in the building. Consideration must be given to where a fire could start, why it could start and who could be affected by it. The person must then identify control measures to remove or reduce the risk, record the findings and regularly review and revise the risk assessment.
- Training – once again it is imperative that all staff are fully trained with regard to the fire risk assessment and what to do should an emergency situation arise. This training needs to be clearly documented as a means of protecting yourself should the worse case scenario arise.
- Penalties – individual fines can be up to £5,000 in the Magistrates’ Court or unlimited in the Crown Court.

## **THE LICENSING ACT 2003**

- Offences – there are many offences under the Licensing Act 2003 and you should be familiar with all of them. The primary offences undoubtedly surround unauthorised licensable activities, underage sales and drunkenness. Unauthorised licensable activities involve making sure that you comply with the conditions on your licence and do not undertake any licensable activities which are not permitted thereunder.
- Defences – most offences under the Licensing Act carry some form of due diligence defence. This means that you can avoid liability for an offence by demonstrating that you did everything you could to avoid its commission. Even where there is not such a defence, being able to establish this may result in avoidance of prosecution or at the very least in minimising the level of financial penalty imposed by the Court. You will therefore need to be able to demonstrate that staff members have been properly trained in terms of what the licence actually permits and the conditions which restrict its use. Equally, they must be familiar with all of the offences under the Licensing Act including the provisions concerning drunkenness and underage sales. All of this training should be carefully documented so that it may be produced in the event that a problem arises.
- Penalties – fines for unauthorised licensable activities can be up to £20,000 and/or 6 months imprisonment. Others range from £500-5,000.

## **THE HEALTH ACT 2006**

- Offences – the major offence is that of failing to prevent smoking in licensed premises. It is also an offence not to have the correct signage on display.
- Defences – there are due diligence defences available to both offences. Once again, you will need to demonstrate that you have done everything you possibly could to prevent the offences occurring. It is considered good practice to have a Smoking Policy which details how you will deal with people smoking within your premises. Staff should be fully trained with regard to the policy and know what to do in the event that someone ignores their instructions. Training, lack of ashtrays and clear signage should provide a positive indication that you were doing everything you could to prevent smoking in your premises.
- Penalties – a fine of up to £2,500 can be imposed for failing to prevent smoking in licensed premises and up to £1,000 for failing to have the correct signage.

## **THE CONTROL OF NOISE AT WORK REGULATIONS 2005**

- The duty – all employers whose employees are or may be exposed to noise whilst at work are required to determine the noise levels to which their employees are exposed.

- Lower level (80db) – you must carry out a risk assessment and make suitable protection available, implement a maintenance programme for your protection and a training programme.
- Upper level (85db) – you must reduce the noise at source, implement ear protection zones and provide ear protection which must be used by employees. You must also provide health surveillance for them.
- Penalties - fines of up to £5,000 are possible in the Magistrates' Court and up to £20,000 in the Crown Court.

By putting preventative systems in place you will save yourself a whole lot of stress and misery should something go wrong. Your crisis management following an incident would also be much more straight forward as you will know exactly what you are looking for in terms of carrying out any initial internal investigation.

### **Further Reading**

Clearly all of the legislation referred to contains a lot more detail than is produced in this guide.

The Poppleston Allen Regulatory Trade Guide (available on-line at <http://www.popall.co.uk/general/regulatorytradeguide.asp>) provides a much more detailed reference tool in respect of regulatory issues which affect the licensed trade.

In respect of licensing generally, the Poppleston Allen Licensed Trade Guide (available on-line at <http://www.popall.co.uk/general/licencedtradeguide.asp>) contains much greater detail in protecting your business against the threats mentioned above as well as many others.

## Part Two

### Dealing with a crisis

Infringements of the above legislation can land businesses in a great deal of trouble - as outlined in **Part One**. Clearly no operators want a crisis – and certainly problems can be minimised by having proper policies and protocols in place - however, sometimes a crisis is unavoidable.

If a crisis is unavoidable, then it must at least be handled well: operationally, legally and in communications terms. A legal crisis caused by infringement of the above legislation (dealt with in **Part One**) will inevitably also trigger a media crisis. Noctis can offer a good deal of advice in this area too. Executive Director, Paul Smith has over fifteen years experience devising and implementing communication strategies around crisis management. Contacting Noctis therefore should be your first call:

(Office hours): 0161 476 8381

(Out of normal office hours): Paul Smith 07768 258194

**NB: It is vitally important that both lawyers and communications people are fully engaged and involved from the earliest possible point.**

### Timing

The timing of the crafting of the message around a crisis is crucial. Spending too long before a statement is issued will mean that the media, faced with a vacuum, will construct their own story for you. It is crucial that this first contact is handled quickly and well.

The first response is often just a holding statement which may include one, or a combination, of these messages:

- “We are aware of the situation and we are dealing with it.”
- “We have company policies and protocols which we are following.”
- “We don’t want to speculate on what caused this until the results of our initial investigations are known.”
- The full facts are not yet known, but as soon as they are, we will issue a full press statement.”

### Next Steps

The next step can vary considerably, depending on the outcome of initial investigation.

In an ideal world, the next step will be discovering that proper procedures were followed and that this accident or occurrence could not have been prevented – meaning that the business, whilst it is sorry this occurred, is blameless. Sometimes however the initial investigation will uncover issues which will call into question the competence of either policy or staff – or both.

A full series of statements need to be signed off and agreed between the business, lawyers and the communications people for this stage as any public declaration may become evidence in a future legal case.

It may be that the occurrence is directly attributable to the actions of one or a small number of individuals not following company policies or protocols. Questions will then be asked as to how this has occurred: Were the staff in question properly trained and properly supervised? What was the date of their last training session? What training had the staff been given? Was this level of training deemed (by the company) to be sufficient?

If the accident was caused by faulty machinery, falling masonry etc, questions may be asked such as:

When was the equipment/building maintained?

What arrangements has the business got in place in terms of maintenance contracts?

Where is the company's Health and Safety Policy? Is it up-to-date?

Have all staff been trained?

Is there a dedicated 'first aider' on all shifts?

Was the 'first aider' called immediately?

What did the 'first aider' do when they arrived at the incident?

How long after the accident was an ambulance/police (or both) called?

**NB: By providing swift and accurate responses to these enquiries, operators will not only be doing the right thing – they will be seen to be doing the right thing.**

### **Good policies, bad press**

Sometimes a story will turn negative – regardless of the future positive outcome of any investigation. This false accusation can obviously damage the reputation of a business almost as much as an unsubstantiated allegation. A credible advocate whether it is the MD, Senior Manager, lawyer etc, needs to be rebutting any unsubstantiated allegations.

It is crucial at this point that the advocate doesn't create any "hostages to fortune". This could be by saying things like: "We know that the outcome will prove us innocent"/"The accusations are groundless" etc as this will only serve to undermine the operator further at a later date and will fire up the indignation of any injured parties, by calling their veracity into question.

### **Injured parties**

Accidents, by their very nature, have victims. In the event of worst case scenario the victim will be killed or seriously injured and therefore their case will be advocated in the media by lawyers and family members. It is crucial that the lines of communication remain open with these injured parties. Exactly how much can be said, needs to be agreed by operators' lawyers – in order to avoid any unnecessary or inaccurate admission of corporate (or individual) guilt.

Often there will be external people who will be called in to offer either an onlooker's position or a speculative "expert" opinion. It is crucial in these circumstances that a

credible and sympathetic advocate is put up to rebut any negative comment which will help fuel the fires of negative media coverage.

### **Protecting the brand/corporate image**

Clearly not all media crises will involve personal injury, but may involve damage to the brand or corporate image. These cases typically involve a complaint, perhaps by a customer or former staff member.

These situations have the potential to severely damage the corporate reputations of a business.

**NB: The protocols for protecting the brand are not dissimilar to those regarding personal injury.**

## **About Noctis**

Formed in 1952 as the Association of British Ballrooms and previously known as the Bar Entertainment and Dance Association and the British Entertainment and Discotheque Association, Noctis (re-named in February 2008) represents the interests of businesses operating in the nighttime economy. Over time our membership base has shifted from dancehalls to discotheques and we now count clubs, bars, dance, live music, student and hybrid venues amongst our growing membership.

Noctis represents a heavily-regulated group of businesses and we perform a strong advocacy role with local and national government, the police and many other key stakeholders. Noctis engages with all of these bodies - promoting good practice and lobbying against poor proposals. We have a solid track record of success and a growing membership base on which to build. In addition we continue to offer active input into all pertinent legislation which impacts on all operators in the nighttime economy.

The involvement and active support of our members strengthens Noctis locally and gives greater credibility to Noctis at a national level. In return, we can offer members access to expert advice and support at a corporate, regional and unit level. On policy matters, Noctis offers support on a wide range of issues which have included, over recent years, the Licensing Act, The Violent Crime Reduction Act and the Security Industry Authority registration scheme, offering practical advice, update on timings and information provision in a variety of formats. Operationally, we can help our members secure lower insurance premiums and savings on PRS and PPL tariffs.

Together, Noctis and its members can secure further policy success on the national and local stage, seek cost savings on insurance and music licensing and offer managers practical advice on their day to day dealings with local regulators.

## About Poppleston Allen

**Poppleston Allen** is a licensing practice dedicated to the leisure industry. Established in 1994 it has achieved a high national profile with an experienced and knowledgeable team and is based in Nottingham with an office in London.

Consistently rated one of the best in the liquor licensing field, Poppleston Allen remains the largest firm of specialist licensing solicitors in the UK who deal exclusively with licensing law and procedures, regulatory crime and training and the firm has a client base ranging from small companies and independent licensees to some of the most important names in the leisure industry.

Our expertise covers all licensing matters relating to liquor, entertainment and betting and gaming. In addition, we can advise in criminal cases ancillary to licensing, such as charges under the Trade Description Act, Health and Safety Act infringements and other regulatory crime.

We are committed to providing exceptional professional services and are valued for both our excellence in advocacy and for our administrative assistance. Adding value to our service is key to the relationship we have with clients and we are at the forefront of developing web-based solutions for their business needs.

In addition to our client services, we work hard to understand your industry: We present legal seminars, provide editorial for many trade publications, including Night Magazine, offer advocacy-training schemes and are well known as conference speakers. We retain our position as leading licensing lawyers through our involvement in licensing policy: We advise a number of trade bodies, including Noctis and National Pubwatch and key Partners regularly attend Government Advisory meetings in respect of law reform.