

8 January 2016

Review of the Three Strikes Disciplinary Scheme
Office of Liquor, Gaming and Racing
By email: threestrikes.review@olgr.nsw.gov.au

To Whom It May Concern

RE: REVIEW OF THE THREE STRIKES DISCIPLINARY SCHEME

ClubsNSW welcomes the opportunity to provide comment to the Office of Liquor, Gaming and Racing (OLGR) in relation to the Review of the Three Strikes Disciplinary Scheme.

Clubs are widely recognised as safe, family friendly venues, as evidenced by official data from the Bureau of Crime Statistics and Research (BOCSAR) that shows the level of alcohol related violence in clubs is at its lowest on record. It is noted that clubs also have less than eight percent of strikes incurred (15 of 189).

ClubsNSW supports evidence-based policy as a method of producing effective and well considered regulation. ClubsNSW endorses the NSW Government's commitment to target and punish irresponsible venues and managers rather than treat all licensed venues on a one-size-fits-all basis, and we encourage the enforcement of the Liquor Act 2007 to achieve that outcome.

It should be clear to regulators which venues operate outside public and legal expectations, and the Liquor Act currently provides appropriate mechanisms through which targeted action can be taken on a case-by-case basis.

The 'Three Strikes Disciplinary Scheme' (the Scheme) is one of a number of regulatory and self-regulatory frameworks that exist in relation to liquor in NSW. This includes the Liquor Act itself, which has a range of powers in relation to venues, Schedule 4 of the Liquor Act (also known as the 'violent venues list'), liquor accords, area-wide restrictions for venues in the Sydney CBD and in Newcastle, venue licence conditions and in-venue policies and procedures.

As a result of the myriad different liquor regulations that now exist, ClubsNSW believes that the framework has become complex, is poorly understood by venues and difficult to navigate. This is particularly the case for smaller clubs.

We submit that the system requires streamlining and that the current provisions in the Liquor Act provides regulators with sufficient powers should they be necessary. However if the Scheme is to be persevered with, the aim should be to make it well understood and effective.

There are a number of 'high risk' venues with regard to alcohol misuse and anti-social behaviour which are largely absent from the strikes register, while a number of 'low-risk venues', such as regional clubs, have received a strike for comparatively trivial offences. Given the seriousness of the 'Three Strikes' regime, this undermines the integrity of the scheme in the eyes of stakeholders.

Given inconsistencies in application of the Scheme, along with the multifaceted regulations that exist alongside it, ClubsNSW submits that the Scheme should be updated to better achieve the policy intent of a well-regulated and responsible liquor industry.

The 'Three Strikes' Disciplinary Scheme

The Liquor Amendment (3 Strikes) Act 2011 was introduced to improve compliance with the Liquor Act and to provide a deterrent for poor venue management. The Scheme is designed to deliver a severe penalty to licensees who have been repeatedly convicted of a range of offences under the Liquor Act.

The penalty upon receiving a third strike is severe. For clubs, a third strike can result in the disqualification of the club secretary, dismissal of any or all of the club directors, and/or the appointment of an administrator to manage the club. For a club secretary dismissed for having received a third strike, it is unlikely they would ever be employed to run a club, or hospitality business again. Recognising the severity of the penalty, industry expects strikes to be issued for only the most serious offences.

In our view, that has not been the case. Since the inception of the program, 15 clubs have received strikes. Of those one club has received 2 strikes. It is noted that the majority of clubs received strikes for "permitting an intoxicated person on the premises" and also that, in many cases, neither the club secretary nor the directors were likely to have been on the premises when the incident occurred.

This is problematic as issuance of a first strike occurs without the ability to apply discretion. Given the severity of the consequences of permitting intoxication (being one of only three strikes which may cause a person's hospitality career to end) it is important that discretion be applied before issuing any strike. The application of such discretion should include consideration of the seriousness of the offence, who was responsible for it (that is, whether it was an accident by a new or junior staff member as opposed to the club secretary), a venue's compliance history as well as implementation of any risk mitigation procedures.

Risk Versus Penalty

There is concern that enforcement of the scheme has been inconsistent with the severity of the penalty, in that a number of small clubs have incurred a strike despite having no history of alcohol-related issues while many venues which have appeared consistently on Schedule 4 of the Liquor Act are yet to receive a strike.

The prevailing view of industry and the public is that the most extreme offences for venues are for alcohol related violence, but only four of the 189 strikes issued relate to such conduct.

It is incongruous that the harm which arises from violence, including hospitalisation or death, typically causes the venue to receive a lower penalty (being one of up to 12 incidents before being included on Level 2 of Schedule 4) than permit intoxication on the premises (being a single incident leading to a strike).

It should be clear to regulators which licenced premises have not met legislative or community standards. We urge regulators to focus greater attention on venues that have been identified as high-risk. Failing to penalise these venues, while simultaneously issuing the ultimate penalty against venues with no history of alcohol-related issues, serves to undermine the credibility of the Scheme.

With the introduction of risk based licensing the financial cost of a strike incurred by the club is payable for the following three years, which is regarded as excessive for a club without a prior negative compliance history. ClubsNSW submits that it would be contrary to good public policy if an otherwise blemish-free club were to close because of the compliance cost that arose from a single incident for which a strike was issued.

ClubsNSW submits that for venues with no history of liquor licence breaches or anti-social behaviour each strike should be issued at the discretion of the OLGR following consultation with Police, rather than being automatic, and the first strike should remain in place for a period of 12 months rather than three years as is currently the case. In addition, the financial penalty under risk-based licensing for the first strike should only apply for 12 months.

Clubs are Safe Venues

BOCSAR data affirms that licensed clubs are the safest of all licensed premises where alcohol is consumed on premises. Yet liquor regulation fails to acknowledge that some types of venues (such as clubs) are safer than others (hotels and nightclubs) nor does regulation reward excellent venue compliance. In other words, liquor regulation in NSW is a big stick with no carrot.

Clubs, by their member-based nature, have inherent abilities to control anti-social behaviour and are therefore wholly unrepresented on the violent venues list (Schedule 4). A club has not appeared on the Schedule 4 list since July 2013. Unlike other venues where patrons are essentially anonymous, if people wish to enter a club they must reveal their identity by signing in or providing their membership card. All licensed clubs impose strict standards of behaviour via internal disciplinary processes which can include lifetime bans for trouble makers.

Furthermore, the sale of alcohol is no longer considered a primary service for clubs, with KPMG calculating that in 2011 clubs generated approximately 16 per cent of total revenue from beverage sales. Many clubs now sell more coffee than alcohol and therefore consider the sale of alcohol to be a complementary service. It is important to note that clubs can still be disciplined under the Three Strikes Scheme, even if they cease selling alcohol altogether, for example by breaching a licence condition or their approved trading hours.

To that extent the Scheme is not designed to be an alcohol management regime. Yet, as stated earlier, the expectation of venues and the public is that a three strikes (and you're out) system is reserved for the most egregious behaviour. In the hospitality space, that is for matters typically related to the sale, service or oversight of alcohol.

ClubsNSW would like to see an approach whereby a strong compliance record is rewarded. This may include through a reduction in the club's annual risk based licensing fee. Alternatively it could include discretion being applied so that if a venue has received no breaches in, say, five years that OLGR would waive a first strike and instead give a warning.

In contrast, ClubsNSW believes that licensed premises which have had repeated serious incidents of alcohol related violence and anti-social behaviour, for example those on Level 1 of Schedule 4, should be identified for compliance activity including strikes.

Alternatives to the Three Strikes Scheme

While not the intention of OLGR or the NSW Government, the multiple layers of liquor regulation serve to undermine the integrity of the enforcement framework. Licensees want clear and consistent rules that target irresponsible management appropriately for the harm they cause.

ClubsNSW supports local liquor accords as a means of bringing together the Police and suppliers of alcohol in a particular local area to address problems specific to that local community. The participation rate of clubs in local liquor accords is high. It would be relevant to see how many recipients of strikes participate in their local accord.

While legislation often takes a 'one size fits all' approach, the localised nature of liquor accords is reflective of the diversity of the liquor industry and means that initiatives can be aimed squarely toward identified local problems.

ClubsNSW recommends that consideration be given to whether a venue is a member of a local liquor accord as a factor mitigating issuance of a first strike. This would serve to encourage more venues to participate in accords and strengthen the ability to collectively address local issues.

Personal responsibility is also vital in reducing alcohol-related offences. ClubsNSW has welcomed initiatives by the Government to change the drinking culture to one of safe consumption and highlighted that this supports the efforts of service staff and management to comply with RSA practices.

Is The Regulation Achieving Its Aims?

At the inception of the three strikes disciplinary scheme Minister Souris stated that the aim of the scheme was to tackle "irresponsible alcohol service and consumption which results in neighbourhood disturbance, offensive behaviour... and other violent incidents."

ClubsNSW questions whether the Scheme is serving that purpose given we understand that only three venues on the most recent violent venues list (December 2015) have received strikes.

In our view the Scheme is applied by local licensing Police on an ad hoc basis. This results in some regions experiencing disproportionate numbers of strikes, for incidents which rate comparatively low in relation to the harms caused. Indeed, there appears little correlation between the venues which have received strikes and the public's understanding of alcohol trouble spots. This issue may be resolved by giving OLGR oversight of the Scheme in the same way that it reviews Schedule 4. That is, the ability to exercise discretion in the application of a strike.

Application of the Strike

Where a club has incurred a strike this potentially impacts on the future employability of a manager, yet as indicated earlier the manager may have had nothing to do with the causation of the strike offence. ClubsNSW submits that club managers who have taken reasonable steps to address incidents in venues should not be punished for the irresponsible behaviour of a staff member who incurred a strike. This principle was recognised by the NSW Government in the 2010 Memorandum of Understanding with ClubsNSW, with club managers being offered a defence against prosecution where reasonable steps were taken to comply with the Liquor Act and special conditions.

Conclusion

ClubsNSW believes that liquor regulation should be clear, evidence-based and target non-compliance without undue impact on those with track records of good compliance. The three strikes scheme is one of a number of levels of regulation that all have a similar purpose; achieving a safe and responsible framework for the sale, service and consumption of alcohol. Yet the Scheme is inconsistently applied, overlaps with other liquor regulation and is poorly understood by venues. While the penalties under the Scheme are extremely onerous, strikes have been issued for offences commonly seen as more trivial than those dealt with under Schedule 4 via less onerous penalties.

ClubsNSW recommends that to improve the integrity of the Scheme and give credibility to the seriousness of each strike, the Scheme should be amended to give consideration to a number of sensible defences before receiving a first strike.

These include consideration of the venue's compliance history. In addition, a venue manager's reasonable steps to ensure compliance should be weighed before a strike is issued against them. These defences should ensure an isolated instance of poor compliance does not lead to an excessive punishment being received. Instead only operators which repeatedly fail to comply with the law would be punished.

Where a first strike is incurred by a club without prior incidents, it should remain in place for a period of 12 months rather than three years, so as to limit the risk based licensing fees on the not-for-profit club and avoid punishing the members.

ClubsNSW appreciates the opportunity to provide comment on the Review of the Three Strikes Disciplinary Scheme. Should you wish to discuss this submission further, please contact Josh Landis, Executive Manager – Public Affairs at ClubsNSW on (02) 9268 3004 or jlandis@clubsnsw.com.au.