

Artificial light statutory nuisance – continued utility of the current exemptions for certain premises

Section 79(5B) Environmental Protection Act 1990

December 2011

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www.defra.gov.uk/consult/2011/12/13/artificial-light-1112/

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Section 1: Summary

Summary

- 1.1 This paper seeks views from relevant stakeholders regarding the continued utility of exempting certain premises from the artificial light statutory nuisance provisions under Part III, Environmental Protection Act 1990 (EPA) in England.
- 1.2 The package contains a covering letter and this paper.
- 1.3 This paper will be of particular interest to:
 - those associated with or responsible for the relevant exempt premises;
 - local authority environmental health departments;
 - other interested stakeholders e.g. occupiers of premises near these exempt facilities; and
 - other special interest groups.

How to contribute

- 1.4 This paper will be open to responses on 13 December 2011 and will remain open until 17 February 2012.
- 1.5 Responses should be sent in writing or by e-mail to the following addresses:

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This document is also available on the Defra website:

www.defra.gov.uk/consult/2011/12/13/artificial-light-1112/

The deadline for comment is 14:00 on Friday 17th February 2012.

Confidentiality Statement

- 1.6 In line with Defra's policy of openness, at the end of the response period copies of the responses we receive may be made publicly available through the Defra Information Resource Centre, Lower Ground Floor, Nobel House, 17 Smith Square, London SW1P 3JR. The information they contain may also be published in a summary of responses.
- 1.7 If you do not consent to this, you must clearly request that your response be treated confidentially. Any confidentiality disclaimer generated by your IT system in e-mail responses will not be treated as such a request.
- 1.8 You should also be aware that there may be circumstances in which Defra will be required to communicate information to third parties on request, in order to comply with its obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations.

Scale of consultation

- 1.9 This paper is an informal consultation. Those who may be affected by the outcomes will be specifically contacted and the response period will be less than 12 weeks. Others are also welcome to comment on the proposals as they see fit.

Section 2: Seeking views on the continued utility of the current exemptions for certain premises from artificial light statutory nuisance provisions

Background

- 2.1. Part III of the Environmental Protection Act 1990 (EPA) establishes the statutory nuisance regime under which local authorities have a duty to inspect their area from time to time to detect any statutory nuisances and to take such steps as are reasonably practicable to investigate any complaint of a statutory nuisance made by a person living within the area. Where a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the area of the authority, the local authority must serve an abatement notice. Statutory nuisances are listed in section 79(1) EPA and include matters such as odour, dust, noise and smoke etc.
- 2.2. In England and Wales, the Clean Neighbourhoods and Environment Act 2005, section 102, introduced artificial light to the statutory nuisance regime by inserting paragraph (fb) into section 79(1) of the EPA. The statutory nuisance under section 79(1)(fb) is “*artificial light emitted from premises so as to be prejudicial to health or a nuisance*”. At the time of this addition a number of exemptions were provided (section 79(5B) EPA).
- 2.3. The exemptions are for artificial light emanating from:
- an airport;
 - harbour premises;
 - railways premises, not being relevant separate railway premises;
 - tramway premises;
 - a bus station and any associated facilities;
 - a public service vehicle operating centre;
 - a goods vehicle operating centre;
 - a lighthouse;
 - a prison.

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- 2.4. By contrast, under Scotland's artificial light nuisance provisions, which were introduced after England and Wales, through the Public Health etc. (Scotland) Act 2008 under Section 79(5BA) EPA a "lighthouse" is the only exempt premises from statutory artificial light nuisance.
- 2.5. For industrial, trade or business premises the statutory nuisance regime provides for 'best practicable means' as grounds of appeal against an abatement notice and as a defence against proceedings for the offence of contravening or failing to comply with such a notice. If the recipient of an abatement notice can prove that they have used the best practicable means to prevent, or to counteract, the effects of the nuisance, they may rely upon this when appealing to the magistrates' court under section 80(3) EPA. The court will consider whether best practicable means have been adopted, interpreting the term in accordance with the provisions of section 79(9) EPA. (See Annex A for more details on best practicable means.)
- 2.6. Note: The artificial light nuisance provisions do not apply to premises occupied by the Crown for Defence purposes in England, Wales and Scotland. This particular disapplication of the statutory nuisance provisions is not subject to this review.

Purpose of this paper

- 2.7. In 2009 the Royal Commission on Environmental Pollution (RCEP), concerned at growing levels of light pollution, published a report entitled 'Artificial Light in the Environment'. The Commission noted the disparity between the Scottish exemptions from statutory nuisance that apply only to lighthouses and premises used for defence purposes, and the English and Welsh exemptions that cover a wider range of facilities. The RCEP report recommended *"that the Government departments responsible for light nuisance legislation in England and Wales, and Scotland keep the legislation under review"*. In response to the recommendation Government committed to *"examine the utility of the current exemptions listed within the [EPA] Act"*.
- 2.8. Subsequently, in the Natural Environment White Paper published in June 2011 the Government stated a) *"We will work with industry and other bodies to reduce the negative impacts of artificial light and protect existing dark areas"* and b) that *"In 2011 we will consult*

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relevant organisations on whether the exemptions from artificial light statutory nuisance continue to be appropriate and take action if necessary.” (The Natural Choice: securing the value of nature.)

- 2.9. The purpose of this paper is to seek views from relevant stakeholders on the continued utility of exempting certain premises from the artificial light statutory nuisance provisions in England. The exemption for lighthouses is not included in this paper and lighthouses will continue to be exempt from artificial light statutory nuisance.
- 2.10. At the request of the Welsh Government, views on removing the exemptions from premises in Wales are not being sought here.

Reasons for the exemptions - England and Wales

- 2.11. The exemptions in the England and Wales provisions were included for public interest reasons, such as the importance of such premises to the community, and safety reasons. There was the expectation that exempt premises would take seriously their social responsibility to use artificial light responsibly and with consideration to local circumstances.
- 2.12. Government guidance on sections 101 to 103 of the Clean Neighbourhoods and Environment Act 2005 – Statutory Nuisance from Insects and Artificial Light states:
- “Whilst the Government recognises that some premises are of strategic importance owing to their nature and importance to the community, and exterior lighting may be necessary to prevent crime, disorder and safety hazard, it is expected that exempted premises will take seriously their social responsibility to use artificial light responsibly and with consideration to local circumstances. Exempted premises are expected to maintain lighting systems that do not unduly affect the environment and neighbourhood. Lighting systems should be adequate for purpose, and not in excess of that requirement, so that impact is minimal whilst remaining compatible with the use and function of the facilities. Inappropriately designed installations may cause unnecessary distraction for drivers on adjacent highways and compromise safety for road users, pedestrians, and people with a visual impairment. The Government will consider further guidance on good practice use of artificial light if necessary.*

Local authorities may still need to undertake an initial investigation of complaints made about artificial light from exempted premises in order to establish first whether or not that premises really is the source. Even though enforcement action for artificial light statutory nuisance from exempted premises cannot be taken under section 102, efforts should still be made to negotiate an acceptable solution on an informal basis. The exemptions are to protect the public interest and health and safety, not to condone the irresponsible, inconsiderate or unnecessary use of artificial light.”

Reason for the lack of exemptions – Scotland

2.13. It is understood that the Scottish regime did not extend the exemptions beyond lighthouses as the premises can use the best practical means defence when they have used the best practicable means to prevent, or to counteract, the effects of the nuisance. Notably, this defence can be used by all previously listed premises including prisons, which would not be the case if their exemption was removed in England (see paragraphs 2.16 and 2.21 below for further details).

2.14. Paragraph 6.3 of the Scottish guidance at:

<http://www.scotland.gov.uk/Publications/2009/01/23142152/8> states;

‘The artificial light pollution provisions go further than those implemented in England and Wales as the provision introduced by the 2008 Act will capture all fixed light installations and stationary objects (other than lighthouses and certain defence and military premises) which cause a nuisance. The regime extends the best practicable means defence to all cases of light nuisance in order to simplify the provisions.’

Options under review

2.15. The options under review in this paper are therefore:

- **Option A: Remove some or all of the exemptions (except lighthouses)**
- **Option B: Do nothing (i.e. keep the exemptions as they are)**

The case for removing the exemptions

2.16. Since the introduction of artificial light as a statutory nuisance in England and Wales in 2006 the need and utility for the long list of exemptions has been periodically questioned by professionals and interest groups. There may be grounds for considering the exemptions potentially unreasonable and unnecessary for the following reasons:

- The majority of premises listed in section 79(5B) EPA are industrial, trade or business premises, therefore if they were no longer exempt from the statutory nuisance provisions, the best practicable means defence would still be available to recipients of abatement notices at such premises (see Annex A for more details). This should allow these premises to continue to operate safely. (Prisons are the only exempt premises under review in this paper which are not categorised as ‘industrial, trade or business’ and would therefore not be able to use this defence in England.)
- In addition, National Significant Infrastructure Projects designated under Part 3 of the Planning Act 2008 and granted development consent have a defence of statutory authority against any nuisance abatement notices. Section 122 of the Railways Act 1993 also confers a defence of statutory authority in civil or criminal proceedings on any person in the use of rolling stock on any track or use of land comprised in a network, station or light maintenance depot under certain qualifying conditions as detailed in the Act (see Annex B for more details).
- The exemption does not allow for effective remedies, notwithstanding Government guidance, should operators act unreasonably in causing a nuisance (which may be prejudicial to health). Complainants affected by artificial light from such premises have no recourse through the statutory nuisance provisions and ultimately rely solely on the less efficient route of common law private nuisance or ‘Alternative Dispute Resolution’ (ADR). However, the common law private nuisance action is not always available to individuals without ownership, or a right to exclusive possession, of their premises. It can also be expensive for the complainant. Removing the exemptions would allow statutory nuisance action to be taken, if appropriate, against these operators in order to abate unnecessary light nuisance.
- There is a lack of justifiable parity in the applicability of the artificial light provision with regards to lighting from different types of premises, as well as potential confusion about

the scope of the exempted categories. Removing the exemptions would ensure equitability across the premises types and reduce confusion.

- Responsible premises operators employing best practicable means should not have to take measures to abate artificial light nuisance if the exemptions were removed. Therefore removing the exemptions should not create a cost for them.
- Removing the exemptions would result in irresponsible operators having to meet the same standards that responsible operators do now. Removing the exemptions would therefore create 'a level playing field'. If currently irresponsible operators have to take measures to abate artificial light nuisance, by reducing excessive, inefficient, or poorly installed lighting, this may result in a decrease in lighting costs, electricity and energy. It may also benefit local residents as artificial light has been known to disrupt sleep in humans.

The case against removing the exemptions – burden on business

- 2.17. If the exemptions are removed and a premises is found to be causing an artificial light nuisance, abatement measures may need to be implemented at a cost to the premises operator. Notwithstanding this, nuisance lighting is typically caused by excessive, inefficient or poorly installed lighting. Abatement may require re-angling of lights so as to decrease spill (nuisance) light. It might also be achieved by avoiding over-lighting (lighting only to the level required) or by replacing older, inappropriate lighting types (with poor control overspill) with modern replacements.
- 2.18. If the exemptions are removed and a premises is found to be causing an artificial light nuisance but the operator considers themselves to be using best practicable means, there may still be a cost to the operator in appealing against an abatement notice. Furthermore, if an operator on whom an abatement notice is served contravenes or fails to comply with the notice, and is found not to be using best practicable means to prevent an artificial light nuisance, they may be found guilty of an offence. A person who commits an offence on industrial, trade or business premises could be liable on summary conviction to a fine of up to £20,000.

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- 2.19. As such, the removal of the exemptions may be viewed as an increase in regulation for premises operators at a time when there is a strong Government drive to reduce regulatory burden on business.
- 2.20. Removing the exemptions may also result in an increase in costs to local authorities as they have a duty to investigate artificial light nuisance complaints from non-exempt premises.
- 2.21. Prisons are not industrial, trade or business premises and are therefore the only premises under review in this paper that would not be able to use the best practicable means defence to appeal against an abatement notice if their exemption was removed. The questions posed in this paper (below) ask for comments on each individual premises to seek views on whether the exemption is still justified in each case.

Current complaint data

- 2.22. A recent survey of 122 local authorities in England and Wales ([An Investigation into Artificial Light Nuisance Complaints and Associated Guidance](#)¹) shows that despite the exemptions from the legislation being widely reported in local authority light pollution/nuisance information leaflets and/or on local authority light nuisance web-pages, a small number of complaints are still made to local authorities in respect to artificial light sources at premises that, on investigation, turn out to be exempt premises.
- 2.23. The report makes reference to one local authority who commented that the availability of the best practicable means defence should enable facilities where health and safety requirements for lighting outweigh other concerns to come within the scope of the legislation.
- 2.24. Local authorities were also asked to sub-categorise complaints received from transport sources and to specify the sub-category in that case (no options were provided). The breakdown of the complaints is shown in Table 1, which shows that six sub-categories were reported.

¹ <http://www.defra.gov.uk/environment/quality/noise/artificial-light-pollution/>

Artificial light complaints from transport sources

Transport sub-categories	Total no. of complaints reported by the surveyed local authorities within each transport sub-category over 3 years
Bus stations and associated facilities	7
Railway premises*	5
Airports	1
Goods vehicle operating centres	1**
Bus shelters	1
Taxis (unspecified)	1
[Harbour premises ***]	0 ***]

Table 1 : Artificial light nuisance complaints from transport sources, showing the number of complaints per sub-category of transport related premises.

Notes to table:

* This data includes 2 complaints relating to level crossing lights and 2 relating to railway station car-park lights

** Two such cases were, however, reported in case studies.

[***] One case example reported concerned premises where this issue may have arisen, although it was not considered as part of the investigation (even if to rule it out).

2.25. Of a total of 22 “transport-related” lighting complaints reported under this study, 6 were not sub-categorised.

2.26. Because these premises are currently exempt, a number of local authorities may not have recorded complaints even if they received them. Therefore the number of complaints shown may not reflect the full extent of the potential problem. The survey did not give information regarding follow-up action taken in respect of these complaints as it is not required for councils to do so.

2.27. The Scottish Government do not hold data on the number of complaints made to local authorities regarding exempt premises but have reported no known problems with the reduced exemptions in the Scottish regime.

Questions

2.28. **Option A:** Remove some or all of the exemptions (except lighthouses)

- The relevant premises with the exception of lighthouses would come into the statutory nuisance regime.
- All premises under review with the exception of prisons would be able to use best practicable means as grounds of appeal against an abatement notice. This should allow these premises to continue to operate safely.
- Prisons are not industrial, trade or business premises and would therefore not be able to use the best practicable means defence.

Q.1 Do you think that all the exemptions should be removed (except lighthouses)? Why?

Q.2 Do you think airports should retain their exemption? Why?

Q.3 Do you think harbour premises should retain their exemption? Why?

Q.4 Do you think railways premises should retain their exemption? Why?

Q.5 Do you think tramway premises should retain their exemption? Why?

Q.6 Do you think a bus station and any associated facilities should retain their exemption? Why?

Q.7 Do you think public service vehicle operating centres should retain their exemption? Why?

Q.8 Do you think goods vehicle operating centres should retain their exemption? Why?

Q.9 Do you think prisons should retain their exemption (given that they would not be able to use best practicable means as grounds of appeal against an abatement notice)? Why?

2.29. **Option B:** Do nothing

- This option would mean that there were no changes to the current exemptions and the current system would remain the same.

Q.10 Do you agree with the option of do nothing? Why?

2.30. **General Questions**

- These questions are included to gather other relevant information from stakeholders on the current exemptions.

Q.11 Do you have any data on artificial light complaints made against exempt premises (either directly to the premises or via the local authority)? Please provide details.

Q.12 Do you have any data on the potential costs to premises operators if the exemptions were to be removed? Please provide details.

Q.13 Do you have any data on the potential costs to local authorities if the exemptions were to be removed? Please provide details.

Q.14 Do you have any data on the potential benefits to operators, local authorities or local residents if the exemptions were to be removed? Please provide details.

Outcome of the paper

2.31. The responses to this paper will be analysed and further steps will be considered if the results suggest a need for change.

Annex A: Further detail on ‘best practicable means’

1. Using ‘best practicable means’ to prevent, or to counteract the effects of, a nuisance can be grounds of appeal against an abatement notice where artificial light is emitted either from industrial, trade or business premises, or by lights used only for the purpose of illuminating an outdoor relevant sports facility (regulation 2(2) of the Statutory Nuisance (Appeals) Regulations 1995). ‘Best practicable means’ is also available as a defence against proceedings for an offence of contravening or failing to comply with any requirement or provision imposed by an abatement notice (section 80(7) and (8) EPA). The defence must be established by the person relying upon it, and it is for the courts to decide whether best practicable means were in fact used to prevent, or to counteract the effects of, the nuisance.

2. The term ‘best practicable means’ is to be interpreted by the courts in accordance with the provisions of section 79(9) EPA:
“(a) ‘practicable’ means reasonably practicable having regard among other things to local conditions and circumstances, to the current state of technical knowledge and to the financial implications;
(b) the means to be employed include the design, installation, maintenance and manner and periods of operation of plant and machinery, and the design, construction and maintenance of buildings and structures;
(c) the test is to apply only so far as compatible with any duty imposed by law;
(d) the test is to apply only so far as compatible with safety and safe working conditions, and with the exigencies of any emergency or unforeseeable circumstances.”

3. Industrial, trade or business premises are defined in the EPA as:
“premises used for any industrial, trade or business purposes or premises not so used on which matter is burnt in connection with any industrial, trade or business process, and premises are used for industrial purposes where they are used for the purposes of any treatment or process as well as where they are used for the purposes of manufacturing” (Section 79(7) EPA).

Annex B: Statutory Authority

1. A number of Acts of Parliament provide a defence of statutory authority in civil or criminal proceedings for nuisance (i.e. common law nuisance or, arguably, statutory nuisance) most notably in the case of transport related premises is the Railways Act 1993 and the Planning Act 2008.
2. Section 158 of the Planning Act 2008 confers statutory authority for carrying out development consented to, or doing anything else authorised, by a development consent order. Such authority is conferred only for the purpose of providing a defence in any civil or criminal proceedings for nuisance.
3. This would include a defence in proceedings for nuisance (including artificial light nuisance) under Part III of the Environmental Protection Act 1990, but only to the extent that the nuisance is the inevitable consequence of what has been authorised.
4. This defence would, therefore, apply to all National Significant Infrastructure Projects designated under Part 3 of the Planning Act 2008 and granted development consent. Relevant transport infrastructure is qualified within the Act, but includes highways, airports, harbour facilities, railways, and rail freight interchanges.
5. Section 122 of the Railways Act 1993 confers a defence of statutory authority in civil or criminal proceedings on any person in the use of rolling stock on any track or use of land comprised in a network, station or light maintenance depot under certain qualifying conditions as detailed in the Act.
6. Neither of these two Acts exempts such premises from the statutory nuisance provisions, but, as detailed above, a defence is provided in any proceedings. The defence does not extinguish the local authority's duties under Part III of the EPA 1990 to inspect its area and take reasonable steps to investigate complaints of statutory nuisance, and to serve an abatement notice where satisfied of its existence, likely occurrence or recurrence.
7. Defra have, to date, taken the position that local authorities have no discretion as to whether or not local authorities issue abatement notices once they are satisfied that a statutory nuisance exists or is likely to occur or recur.
8. The defence of statutory authority (like a defence of BPM) may, therefore, be tested in court if proceedings are instituted by the local authority. The current exemptions for all

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the transport related premises, however, eliminates the duty on a local authority even to investigate complaints and serve an abatement notice if otherwise justified. Therefore, the ability to 'test' the appropriateness of a problematic lighting scheme on transport related premises through formal court proceedings is also eliminated. Furthermore, the effect of these exemptions is to weaken any informal advice or influence the local authority might otherwise have on the perpetrator of the nuisance.