


Articles

Light Pollution and Nuisance: The Enforcement Guidance for Light as a Statutory Nuisance

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 Enforcement; Lighting; Statutory nuisance

Introduction

Some forms of exterior lighting have become subject to statutory nuisance control through the Clean Neighbourhoods and Environment Act 2005,² and the Department for Environment, Food and Rural Affairs (“DEFRA”) has issued the guidelines for enforcement (“the guidance notes”).³ The new law raises a number of issues. First, the control of lighting could be seen as running contrary to the psychological feeling that light is a positive force, akin to cleanliness, safety and security; whilst regulation should be reserved for the tangible nuisances that carry infection or contagion. As a result, this paper will initially outline the background justifications behind the new law.

Secondly, the new law raises the issue of enforcement, for the Chartered Institute of Environmental Health has not openly supported the law and as this body governs those responsible for its enforcement (environmental health officers), this presents a potential major problem for enforcement. As a result, this paper will concentrate on how and when lighting may be encompassed within the statutory nuisance regime. It is submitted that the inclusion of lighting will certainly test the limits of the Victorian statutory nuisance regime, and parallels will be drawn between lighting and noise, which is an already accepted less “tangible” statutory nuisance.

Background

The recognition of exterior lighting as a potential statutory nuisance is a result of various government consultations, where the problems caused by nuisance exterior lighting and light pollution were criticised,⁴ and it also follows a long campaign by both the British Astronomical Association’s

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² s.102 has inserted para.(fb) into s.79(1) of the Environmental Protection Act 1990 to provide that “artificial light emitted from premises so as to be prejudicial to health or a nuisance” may constitute a statutory nuisance. For a full analysis on the background of the new law, see Morgan Taylor & Hughes, “Exterior Lighting as a Statutory Nuisance” [2005] J.P.L. 1131–1144. Generally on light pollution, see Morgan Taylor, “And God Divided the Light From the Darkness: Has Humanity Mixed Them Up Again?” (1997) 9(1) *Environmental Law & Management* 32–39; Hughes and Morgan Taylor, “And Can’t Look up and See the Stars” (2004) 16(2) J.E.L. 215–232. See also Mizon, *Light Pollution, Responses and Remedies* (Springer-Praxis, London, 2002).

³ “Statutory Nuisance from Insects and Artificial Light, Guidance on Sections 101 to 103 of the Clean Neighbourhoods and Environment Act 2005” (DEFRA, London, 2006): www.defra.gov.uk/environment/localenv/legislation/nea/index.htm

⁴ The ODPM has published several relevant consultations: “Living Places—Powers, Rights and Responsibilities Consultation” (2002) and “Living Places: Cleaner, Safer, Greener (Clean Neighbourhoods Paper)” (2004) ODPM, London, where 15% of respondents raised



Campaign for Dark Skies (“CfDS”)⁵ and the Campaign for the Protection of Rural England (“CPRE”). Moreover, the number of recent complaints to environmental health officers about exterior lighting rose in the mid-1990s. The Chartered Institute of Environmental Health (“CIEH”) found that the numbers of complaints concerning lighting made to Local Authorities rose by 44 per cent from 1993 to 1996.⁶

As the new law comes from concerns over light pollution, a definition of light pollution is required for the purposes of context:

“Light pollution might be defined as any form of artificial light which shines outside of the area it is intended to illuminate, including light that is directed above the horizontal into the night sky creating skyglow (which blocks out the night time stars) or which creates a danger by glare.”⁷

However, the new law is not intended to regulate all aspects of light pollution generally, but only a specific sub-category—exterior lighting giving rise to a statutory nuisance, and the two are not necessarily the same. It is clear from DEFRA’s guidance notes that:

“...although light pollution might affect the aesthetic beauty of the night sky and interfere with astronomy, it is not necessarily also a statutory nuisance. The statutory nuisance regime is not an appropriate tool with which to address light pollution per se”.⁸

The criteria for statutory nuisance

In order to amount to a statutory nuisance, the law requires the action to be “prejudicial to health, or a nuisance”.⁹ Thus there are two possible routes by which a statutory nuisance may be committed. The most likely form of lighting to cause adverse health effects under the first limb is that which shines into bedroom windows. However, the CIEH seems to doubt the negative health effects possible through lighting, for it states “. . . lights briefly turning on and off . . . may be irritating to light-sleeping people with thin curtains, they will rarely, if ever, be harmful”.¹⁰ One might agree in the case of an ordinary incandescent light shining from a neighbouring house, but the issue is surely different when one considers a powerful 500 watt, so-called “security” floodlight. Moreover, a review of the medical literature gives a different view, for there have been a number of studies that have indicated that light at night can suppress the production of melatonin, which in turn can lead to breast or colorectal cancer.¹¹

the issue of lighting; “Full Regulatory Impact Assessment of the Clean Neighbourhoods and Environment Bill”, DEFRA, December 2004, p.67, available at: www.defra.gov.uk/corporate/regulation/2004/cleanneighbourhoods-bill.pdf. Moreover, the Seventh Report of the House of Commons Science and Technology Committee for the Session 2002–2003 considered the issue in its “Light Pollution and Astronomy consultation”, HC 747-1: www.publications.parliament.uk/pa/cm200203/cselect/cmsctech/747/74702.htm#evidence. The authors’ submission is at: www.publications.parliament.uk/pa/cm200203/cselect/cmsctech/747/747we48.htm#n3

⁵ The CfDS website is at: www.britastro.org/dark-skies/

⁶ The main sources of complaints were domestic security lighting (55%), sports facilities (21%) and industrial and commercial premises (19%). Memorandum from the Chartered Institute of Environmental Health, submitted by Graham Jukes, Chief Executive, to the Parliamentary Select Committee: www.parliament.the-stationery-office.co.uk/pa/cm200203/cselect/cmsctech/747/747we144.htm

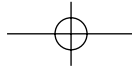
⁷ In the absence of any pre-existing statutory definition, DEFRA has adopted that suggested by the author at consultation stage. Definition contained in guidance para.90.

⁸ Guidance para.90.

⁹ Clean Neighbourhoods and Environment Act 2005, s.102.

¹⁰ Parliamentary briefing, “The Clean Neighbourhoods and Environment Bill”: www.cieh.org/about/policy/briefings/The%20Clean%20Neighbourhoods%20and%20Environment%20Bill.pdf. The Chartered Institute of Environmental Health, Chadwick Court, 15 Hatfields, London, SE1 8DJ, UK.

¹¹ See in particular Blask et al., “Melatonin-depleted blood from premenopausal women exposed to light at night stimulates growth of human breast cancer xenografts in nude rats”, *Cancer Res.* 2005 Dec 1; 65(23) 11174–84; Blask et al., “Putting cancer to sleep at night: the neuroendocrine/circadian melatonin signal”, 2005 Jul; 27(2): 179–88; “Pauley, Lighting for the human circadian clock: recent research indicates that lighting has become a public health issue” (2004) 63 *Medical Hypotheses* 588–596. See Morgan-Taylor and Hughes, *op. cit.*, text at fn.26 *et seq.* for the wider effects on animals.



Some assistance is to be found for other possible negative health effects in the literature concerning noise nuisance. It is accepted that noise may give rise to a number of adverse effects. For example, noise which wakens the complainant may produce the cardio vascular “startle” reaction. This causes the tightening of blood vessels and the release of adrenaline, which in turn may lead to fatigue and headaches. Moreover, noise has long been known to cause other physiological responses in relation to the effects on sleep.¹² Sleep is quite simply a psychological necessity and a reduction may lead to, inter alia, a loss of concentration, increased irritability and generally reduced efficiency. If sleep deprivation by noise can be accepted as giving rise to an adverse health effect why is there an apparent institutional unreadiness to consider the similar effects of light?

It is submitted that the physiological effects caused by lighting may be similar to noise. Admittedly, there are comparatively few studies as yet on the problems caused by lighting, but lights can and do wake people up, as does noise. Moreover, with noise it appears that the subject does not need to be fully awakened to suffer the same negative effects as someone who has been deprived of sleep altogether.¹³ Thus people’s health could be adversely affected by the floodlighting the CIEH refers to as “light briefly turning on and off” during the night. Indeed, the research considered above concerning cancer risks does not restrict itself to lighting that wakes the subject, the risk factor is the level of night-time light entering the bedroom.

The glare from overly bright lighting can also cause further problems, for although the iris may contract to cut down the amount of light entering the eye, the scale of the glare from floodlighting can cause momentary blindness and pain. This is particularly an issue for the elderly, as the muscles controlling the iris do tend to become less efficient with age.¹⁴

However, is a health effect required for a lighting-based statutory nuisance under the second limb, “or a nuisance”? The CIEH stated its views in its reply to the Clean Neighbourhoods Consultation,¹⁵ under a heading entitled “Unnecessary Provisions”. It believed that the meaning of statutory nuisance:

“is not synonymous with ‘annoyance’ and it is narrower than ‘nuisance’ at common law; it is not about aesthetics either, rather the statutory nuisances are essentially about public health. . .”¹⁶

This view appears to state that there must be a negative public health effect to invoke the second “or a nuisance” limb of statutory nuisance. Thus merely to be a “nuisance” is not enough, there has to be some connection with health as well.

It is submitted that a different interpretation of the criteria is that it is an “either or” test, and so there does not need to be a negative public health effect per se if the second limb “or a nuisance” is used. Malcolm and Pointing state that the link with health under the second limb is, with statutory nuisance generally, more “tenuous” and amounts to an interference with “personal comfort”.¹⁷ Indeed, Lord Wilberforce stated that “personal comfort” may be what is actually required to constitute the

¹² “Effects of Noise on Physiological State, Noise as a Public Health Hazard”, ASHA Report 4, 1969, pp.89–98. See also Penn, *Noise Control, The Law and Its Enforcement* (3rd edn, Shaw & Sons, Glasgow, 2002), pp.10 *et seq.* for an analysis on the effects on sleep.

¹³ Penn, *op. cit.*, p.11.

¹⁴ “Towards Better Practice”, ODPM: www.odpm.gov.uk/index.asp?id=1144838, s.3.2. Note that this document refers to light “trespass” when it presumably means light nuisance in law.

¹⁵ See fn.10.

¹⁶ *Ibid.* p.3.

¹⁷ Malcolm and Pointing, *Statutory Nuisance, Law and Practice* (Oxford University Press, Oxford, 2002), p.41, para.4.42.



nuisance limb, but not the other “prejudice to health limb”.¹⁸ The confusion appears to arise from the point that where something is prejudicial to health it can still be a statutory nuisance if it only affects the premises where it is situated. Where the allegation is one of “nuisance”, the deleterious affectation must emanate from premises outside those affected.

Further evidence is also found in the case-law and in *Malton Board of Health v Malton Manure Co*¹⁹: Stephen J. stated that the effluvium in question “was a (statutory) nuisance whether causing injury to health or not”.²⁰ Indeed, in the recent case of *Godfrey v Conwy BC*,²¹ Rose L.J. accepted that:

“it cannot have been Parliament’s intention to have equated (statutory) nuisance with prejudice to health. If it had been, the word nuisance would have been otiose”.²²

He also said it was “not a very happy stance” that such an argument had been presented.²³ The court in *Godfrey* also stated that the test for statutory nuisance is accepted to be the private nuisance common law test, as given, for example, in *Murdoch v Glacier Metal Co Ltd*.²⁴ That is, judged by the standard of the reasonable man, and whether the activity amounts to an unreasonable interference with the use and enjoyment by the claimant of his/her land, taking into account the nature of the area, has the activity materially and unreasonably detracted from his/her enjoyment of their own property?

Again, there seems to be further argument for comparing light-based statutory nuisance with that of noise, for statutory noise nuisance does not have its origins in the nineteenth century sanitary statutes either. Indeed, the earliest control over noise was by way of bye-laws, aimed at tackling noise that affected personal comfort. Although noise may cause a “personal comfort” effect, it is unlikely to satisfy the “traditional” content of what is thought to constitute “prejudice to health”, as the health effects caused by noise are not those recognised as illnesses in the nineteenth century.²⁵ It is submitted that the same reasoning should apply to the negative health effects suggested by the medical research on the effects of night time lighting. It is submitted that nineteenth-century concepts of public health which were concerned with illnesses arising from infections or contagions which invaded physical integrity, are not applicable to either noise or lighting based statutory nuisances. It is further submitted that to require a clear physical invasive effect before the “or a nuisance” limb of the definition is satisfied would nullify the provision with regard to light and indeed cast doubt upon the validity of the noise provisions. It is submitted that the issue should turn on “personal comfort”.

The interpretation of whether lighting can amount to a statutory nuisance is the most fundamental of issues, and there is a possibility that the CIEH could advise its members that lighting must cause a negative public health effect in order to amount to a statutory nuisance. It is submitted that this would defeat the intention of the statute.

This brings us to the second fundamental problem with the CIEH comment. It fails to recognise that lighting may cause tangible “personal comfort” issues, which go beyond mere annoyance. Effects

¹⁸ Lord Wilberforce stated: “. . .confusion occurs in some of the cases through the use of the words ‘personal comfort’. These words are appropriate enough in the context of what is a ‘nuisance’ for the purpose of the Public Health Act 1936 . . . but they are quite inappropriate in relation to the other limb ‘prejudicial to health’.” *Salford CC v McNally* [1976] A.C. 379 at 389.

¹⁹ (1879) 4 Ex. D. 302.

²⁰ *Ibid.*, at 306. For a full analysis of what constitutes the nuisance limb of statutory nuisance, see Malcolm and Pointing, *op. cit.*, pp.40 *et seq.*

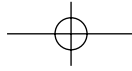
²¹ [2001] Env. L.R. 38.

²² *Ibid.*, at 23 (cited in Malcolm and Pointing, *op. cit.*, p.41, fn.64).

²³ *Ibid.* at 25.

²⁴ [1998] Env. L.R. 732.

²⁵ Malcolm and Pointing, *op. cit.*, pp.43–44.



on personal comfort could of course include a great number of the issues mentioned above, if they were not held to meet the public health limb.

By way of contrast with the views of the CIEH in recognising the negative effects lighting may have, the DEFRA guidance notes state:

“It is sometimes stated that a complaint . . . could easily be mitigated by the use of curtains or blinds . . . It is for the Environmental Health Practitioner to exercise discretion over what is reasonable and what is not. It might be reasonable to expect a complainant to use curtains or blinds of everyday standard if they are bothered by unwanted light . . . It might not be reasonable to require a complainant to purchase blackout hangings which might be expensive, and/or impair that person’s enjoyment of their property. It is not reasonable to leave the solution and cost of abatement to the complainant rather than the perpetrator. Few would wish to have their curtains drawn on a hot summer’s night.”²⁶

This underscores the recognition of the wider “personal comfort” issues.

The probable main causes of complaint

This leads us to what sorts of lighting are covered by the new law, and whether this tallies with those most likely to cause complaint. Guidance para.85 provides a list of the sorts of lighting that DEFRA expects to generate the most complaints. These are:

- domestic and commercial “security” lights;
- healthy living and sports facilities;
- domestic decorative lighting;
- exterior lighting of buildings and landscapes; and
- laser shows/sky beams/light art.

The mention of decorative lighting may be seen as an infringement of civil liberties; however, there are cases where excessive decorative lighting has ended up in court, with concerns for road safety due to the high levels of traffic visiting to see the display, litter, and the worry over resulting increased crime. Indeed, “house blinging” is very much on the increase and so the express mention of decorative lighting in the guidance notes is probably quite wise, so long as it is realised that this is only going to apply to very large displays.²⁷ The intention is not to criminalise ordinary behaviour, but to tackle behaviour that crosses the line of reasonable give and take into the statutory nuisance definition. The most severe case the author has heard of is an American example which consisted of “3 million lights and could be seen by plane from as far as 80 miles away”.²⁸

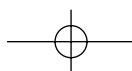
Sky beams and “light art”

Sky beams have been the subject of a great deal of complaint and media attention, and they are listed as possible causes of complaint in guidance para.102. Examples of complaint include “The Centre” at Milton Keynes Christmas sky beam of 2002, which received a number of complaints that led the

²⁶ Guidance notes, para.93.

²⁷ “No Cheer in Christmas Lights Row”, <http://news.bbc.co.uk/1/hi/scotland/577326.stm> (although note that the new law does not apply in Scotland, where this complaint occurred).

²⁸ “Little Rock Dims the Light Fantastic”, *The Times*, December 11, 1993, and see the defendants’ own website at www.jenningsosbornefamily.com/christmaslights/default.asp



beam users to conduct a public consultation. They received over 200 responses, of which 78.7 per cent were against the use of the beam.²⁹ However, another beam was used in the run up to Christmas 2005, and the application for retrospective planning permission was withdrawn shortly before the planning meeting. Stockport has recently refused planning permission, in a well-publicised case for a sky beam on “environmental grounds”,³⁰ which follows earlier decisions such as at Guildford³¹. Admittedly, these decisions have been made with reference to the wider environmental impact of the lighting, but they may amount to a statutory nuisance if the above criteria are met, and the complainant’s enjoyment of his/her property is adversely affected (an issue that will be addressed later).

Moreover, “light art” is becoming increasingly popular with many local authorities in order to put their area “on the map”. For example, Barnsley is planning a “Halo of Light” over the town:

“...the Halo will consist of a large circle of light, possibly projected from a location within the town centre. The Halo will be approximately 1.5 km in diameter, and it is intended that it will be visible from miles around.”³²

The BBC is planning a new “public art” feature that is to project a light beam into the night sky:

“During the hours of darkness the cone will be lit so that it glows and at key times a fine beam of light will project from its base approximately 900 metres (3,000 feet) into the night sky (the limit set by the Civil Aviation Authority).”³³

There are many more such lighting features (including “light art”) planned for the United Kingdom, involving varying levels of night-time lighting.³⁴ Due to the scale and intentional visibility of these forms of lighting, it is expected that they will trigger an increasing number of light-related complaints and so should be considered as possible sources of complaint at the outset; if they meet the criteria for statutory nuisance.

Many of these potential lighting nuisances are not only authorised by local authorities, but commissioned by them. It is clear that they are doing this in good faith, aiming to generate business and encourage a “feel good factor”. However, the result in practice may be different; complaints may ensue about a loss and not a gain of personal comfort.

Effective, clear guidance at planning stage may help to halt an increase in lighting that may amount to a statutory nuisance. This creates a potential dilemma for local authorities in planning for good lighting. Indeed, the ODPM had promised an annex to PPS 23, including exterior lighting; however, the annex has been published, with no mention of lighting. The result is that there is still no clear guidance on exterior lighting.

Clear planning guidance really should be given by the Government as to what local authorities should and should not be permitting, or doing themselves. DEFRA guidance, para.102 does offer some

²⁹ Private correspondence from Tracy Ruddell, PR and Communications Officer, The Centre, Milton Keynes, January 20, 2003.

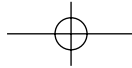
³⁰ “‘Blackpool’ light to be turned off”, *Stockport Express*, January 25, 2006.

³¹ Newsletter of British Astronomical Association’s Campaign for Dark Skies, Issue No.16, winter 2000: www.britastro.org/dark-skies/docs/issue16.htm

³² www.barnsley.gov.uk/remakingbarnsley/viewProject.asp?PID=22

³³ www.bbc.co.uk/pressoffice/pressreleases/stories/2004/04_april/01/skyline.shtml

³⁴ For example, the “Lobsterpot” or “Skyvault”, a large illuminated mesh feature planned for the M1 in the Midlands: www.skyvault.info/ and www.thisisleicestershire.com/display/Node.jsp?nodeId=132384&command=displayContent&sourceNode=200172&home=yes&contentPK=1368676. Or “Light up Queen Street” in London: www.cityoflondon.gov.uk/Corporation/media_centre/files/2005/Light+Up+Queen+Street.htm



help, although it falls well short of being clear and unambiguous advice from central government about lighting. Although in recommending capturing potential statutory nuisances at planning stage, DEFRA refers to various sources of data on good lighting, including “Safer Places: The Planning System and Crime Prevention”.³⁵ However, there is no crime prevention element in light art and so this source is not directly applicable. DEFRA simply recommends that local authorities “carry out professional reviews of developments involving exterior lighting to minimise their impact by day and night”. Moreover, there should be a continuing obligation placed on the grantee of planning permission to “ensure that the installation is maintained in a satisfactory manner; and that all screen, shields, baffles and aiming requirements etc are maintained.”³⁶ Once again though, shields and baffles are not applicable to light art and sky beams where the intention is to direct the light as far and widely as possible.

DEFRA continues by making the useful point about changes in the local environment:

“The existence of planning permission does not, however, mean that a statutory nuisance cannot exist . . . Circumstances and local environments change, so for example, artificial light that was not a nuisance may become one.”³⁷

However, it could be argued that the nature of the environment has changed by the granting of planning permission to an area where more light-based nuisance could be expected,³⁸ which may neutralise this point. Does this raise the issue of whether zoning on the US model might be appropriate for controlling lighting levels at planning stage, with higher levels of lighting being permitted in cities than in the suburbs or rural areas? Zoning has been tried for noise, but the noise abatement zones have not proved to be anywhere nearly as successful as had been hoped. The express intention has been to not only control existing noise, but also that of new developments through careful planning.³⁹

The Institute of Lighting Engineers has produced a guidance note on the levels of lighting, and this utilises the concept of zoning, with four zones.⁴⁰ These range from zone E1, “intrinsically dark landscapes”, such as national parks, to E4, high district brightness areas, such as city centres. One of the dangers of zoning is, however, that lighting may travel significantly outside of the zone from which it originates, and thus clear demarcation lines between zones do not exist, even if the lower lighting level is used for premises on the boundary of two zones. Thus, a national park zone E1 may be adversely affected by the lights from a city many miles distant.

These guidelines as they stand really aim to tackle the wider aspects of light pollution caused by upwardly directed light. Whilst this approach is welcome, there is, however, no mention of light as a common law or statutory nuisance. Instead, there is frequent mention of “light trespass”, the term often used interchangeably (and confusingly) with nuisance in the non-legal literature. As a result, the guidance notes will almost certainly not prove to be quite as effective as they could be for enforcement.

³⁵ Guidance para.113 refers to the ODPM and Home Office (Crime and disorder), (ODPM, London, April 2004). Online: www.crimereduction.gov.uk/activecommunities61.htm. It also refers to: www.securedbydesign.com

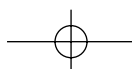
³⁶ Guidance para.114.

³⁷ *ibid.*, para.115.

³⁸ *Gillingham BC v Medway (Chatham) Dock Co Ltd* [1992] 3 All E.R. 923.

³⁹ Penn, *op. cit.*, p.133.

⁴⁰ The guidance note was updated in 2005. All relevant ILE guidance is to be found at: www.ile.org.uk/light-pollution.htm



“Light art” and sky beams are clearly light pollution in the wider sense, but the domestic householder needs protection for his/her enjoyment of property. For example, a householder with such lighting shining into windows at night may have a case, but whether the loss of the night sky over the same householders’ garden could be a statutory nuisance is an issue certain to be tested early on in the life of the new law. The line between what is a light-related nuisance and what is light pollution which falls short of a statutory nuisance needs clarification. It is submitted that, as the provisions were introduced in response to complaints about light pollution in general, that the requirement for there to be “personal discomfort” should be widely interpreted to ensure that light pollution is not excluded from matters that could be dealt with as light nuisances—a rigid dichotomy between the two concepts could be understandable if the result was that general light pollution sources were intended to escape regulatory control. Issues relating to the defence of hypersensitivity will be addressed later.

The DEFRA guidance notes further state “(l)ocal authorities should also take into account whether laser shows/beams etc are a sustainable or wasteful use of energy,”⁴¹ but whilst this is to be welcomed, such energy costs are not strictly directly relevant to statutory nuisance, but more to the wider, and as yet, un-tackled issues of light pollution. This shows the difficulty in siphoning off part of the broad light pollution problem by way of statutory nuisance, and using another part as a partial justification.

Another problem is that a local authority is not able to prosecute itself,⁴² which could create problems over light nuisance caused by lighting under the control of a local authority, such as a “light art” feature commissioned by the local authority to put its area “on the map”. This may further damage the integrity and reputation of local authorities in the eyes of both the public and local businesses, for those charged with enforcing the law may be seen as not having to obey it themselves.

Floodlighting

Guidance paras 91–96 deal with domestic floodlights and paras 97–100 deal with business floodlights. DEFRA clearly expects that the domestic 500-watt floodlight is probably going to be one of the major causes of complaint. While the deterrent effect of lighting is subject to debate,⁴³ it is clear that overly-bright lighting can create shadows or glare, for criminals to hide in or behind. Due to the excessive wattage of these floodlights, it is not surprising that they commonly shine into neighbours’ windows, often preventing or disturbing sleep as previously detailed.

It might be argued that any curtailment of the use of floodlighting is wrong simply because there is a chance that it may aid in crime avoidance or detection. It could also be argued that criminalising the misuse of such lighting may disadvantage members of vulnerable groups who might otherwise not fall victim to crime. This is not an accurate view for two reasons. First, a balance has to be made between the legitimate interests of security and those of personal comfort. The classification of continuously ringing burglar alarms as a statutory nuisance⁴⁴ by analogy lends clear support for arguing the new law has a justifiable role in controlling the nuisance which floodlighting may cause.

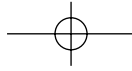
Secondly, it is submitted that angling such floodlighting otherwise than straight down at the ground potentially negates any possible detection of the crime through passive surveillance as it may dazzle

⁴¹ Guidance para.102.

⁴² *R. v Cardiff C, C Ex p. Cross* (1982) 6 H.L.R. 1.

⁴³ Marchant, “A Demonstration That the Claim That Brighter Lighting Reduces Crime is Unfounded” (2004) 44 *Brit. J. Criminol.* 441–447.

⁴⁴ Indeed, premises may be entered after the granting of a warrant for alarms which continuously ring and where there is no key holder contactable. Noise and Statutory Nuisance Act 1993, s.9, Sch.3.



potential witnesses, as well as shine into neighbours windows. Even then, the very intense lighting will create dark shadows readily affording cover to criminals. The Campaign for Dark Skies website contains a number of images taken by the author, of a would-be burglar standing under a 500-watt domestic floodlight.⁴⁵ The negative glare effect from the light when it is angled other than straight down is readily apparent.

It has already been pointed out that glare from such lighting can also cause problems, especially for the elderly, whose iris muscles may not respond quickly and so lead to momentary blindness and pain.⁴⁶ The elderly, clearly as one of the groups vulnerable to crime, may also be adversely affected by bad lighting intended to reduce crime.⁴⁷

As a result of these negative effects and because there is no published evidence attesting to the security effect of such lighting, the author believes that these lights cannot accurately be described as security lights. Central government does not recommend the use of 500-watt domestic floodlights for security purposes, instead recommending, inter alia, that the dwelling should look occupied.⁴⁸

However, the new law will almost certainly come into conflict with the assumption that brighter lighting equates to greater security, and that any control of the security of one's dwelling is an act of unwarranted control, even the actions of a "nanny state". The new law will also criminalise behaviour that is usually done in ignorance of the nuisance it causes and for perfectly reasonable motives. It may also result in neighbour disputes, as it requires one neighbour to complain about another. Therefore, there needs to be a considerable degree of public education from central government and not only on crime prevention. Tackling the various misconceptions underlying "innocently" caused nuisances is clearly required.

Street lighting

Street lighting is also expected to generate complaints, but they are unlikely to be located on "premises"⁴⁹ and so although not actually expressly exempt, they will probably not be within the scope of the Act. This is interesting, as there are many instances of complaints against street lighting which shines into bedroom windows, where the complainant has been given short shrift by the local authority.⁵⁰ However, in acknowledging street lighting complaints:

"The Government expects local authorities to take reasonable steps to investigate and, where appropriate, resolve problems from street lights as a matter of good practice and consideration for the local environment and the community to which they are accountable."⁵¹

So DEFRA clearly hopes that the issue of street lighting will not be a problem in practice. It remains to be seen if this will be the case.

⁴⁵ CFDS website: www.britastro.org/dark-skies/floodlights.html?60

⁴⁶ See text above at fn.14.

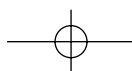
⁴⁷ "Towards Better Practice", ODPM: www.odpm.gov.uk/index.asp?id=1144838, s.3.2.

⁴⁸ Morgan Taylor & Hughes, op. cit., see text at fn.14 *et seq.*

⁴⁹ *Ibid.*, 1138–42. Guidance paras 103–107 deal with street lighting.

⁵⁰ *Ibid.*, 1136–1137.

⁵¹ Guidance para.104.



Exempt premises

The list of exempt premises includes goods vehicle operating premises and public transport depots.⁵² However, it is unclear as to why these premises should be exempt (perhaps apart from light houses). DEFRA has stated that:

“...some premises are of strategic importance due to their nature and importance to the community, and exterior lighting may be necessary to prevent crime, disorder and safety hazard...”⁵³

However, the issue of statutory nuisance is to try and reduce the negative effects of lighting, by encouraging the responsible use of appropriate lighting, which actually promotes safety. This statement simply reiterates what any business or consumer would argue in defence of their lighting. DEFRA then states:

“Light 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 and compromise safety for road users...”⁵⁴

Therefore, DEFRA’s argument appears to be self-defeating. The guidance then states that:

“The Government will consider further guidance on good practice use of artificial light if necessary.”⁵⁵ It is suggested that not only was this needed at the outset, but that the exemptions are completely without justification and based upon a total misunderstanding (or a political unwillingness to act) by central government of the core issues. Indeed, it is entirely probable that DEFRA had no choice in the matter, or risk the loss of the entire provision.

A sufferer from excessive light that would otherwise be a statutory nuisance will have to content themselves by personally availing themselves of the pre-existing right to a private nuisance action. However, it is possible that a court may take on board the exempted status of a defendant as evidence in favour of the defence of social utility, which would mean that the existence of the exempted status category may actually undermine the underlying common law, which has to date been an effective tool, in the rare instances where it has been used. As a result, the exempt category may be a significant retrograde step.

There has already been one case involving a victim of light nuisance from an exempt business at an industrial estate. The victim, who received little co-operation from the industrial estate, wrongly thought that the nuisance originated from lights attached to a recycling depot, and was threatened, quite graphically, with a libel action if he mentioned his complaint to anyone. The business stated quite triumphantly that it was exempt, expressing far more concern for itself than for the environment or the nuisance caused.⁵⁶ Fortunately for all concerned, the lighting came from a different business and has been resolved. However, it is feared that this sort of response is not going to be isolated.

⁵² New s.79(5B) of the Environmental Protection Act 1990: ‘airports, public service vehicle operating centres, harbours, goods vehicle operating centres, railway premises, lighthouses, tramway premises, prisons, bus stations and associated facilities, premises occupied for defence purposes.’

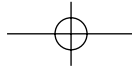
Guidance paras 116–117 deal with exempt premises.

⁵³ Guidance para.116.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ Private correspondence from a Campaign for Dark Skies victim in the North East of England.



Defences

Best practicable means

All industrial, trade, business or outdoor sports facilities have the defence of “best practical means” available to them. DEFRA underlines that “it is for the courts to decide whether best practicable means are being used”,⁵⁷ and then states that the pre-existing guidance in s.79(9) of EPA 1990 should be used. This includes having regard to “local conditions and circumstances . . . and the financial implications, the design, construction and maintenance of buildings. . .”⁵⁸

The financial implications of avoiding nuisance lighting may be very inexpensive when the building is built, thereafter the cost of abatement is usually only that of re-angling lighting, or adding louvres/baffles/shields, which should not be high unless very old lighting is being used and custom baffles are needed. Indeed, this once again underscores the need for lighting to be adequately considered at planning stage.

The DEFRA guidance notes deal specifically with sports grounds and they state that they “would not normally expect local authorities to have to resort to a statutory nuisance abatement order to address complaints”.⁵⁹ To justify this, DEFRA states that all new floodlighting schemes are subject to scrutiny under the planning system. However, it has already been stated that there is little planning guidance given by central government over external lighting and the promise for a lighting annex to PPS23 has not come to fruition.

The guidance lacuna is particularly important, especially for sports ground lights, as they are amongst the brightest lights likely to cause complaint.⁶⁰ Concern could be expressed over why sports ground and healthy living premises were not made exempt, as running contrary to government public health policy. However, although covered, they have the defence of “best practical means” open to them. The brightness of sports lighting may be the reason why two of the recent cases via common law private nuisance for light concern them, and in both cases the claimant was successful.⁶¹ The cases highlight the danger of assuming that local authorities will know how to avoid problems at the planning stage, and this assumes clear guidance from central government. Many lighting schemes do exist where sports ground lighting is contained and nuisance minimised, and so illuminated sports grounds need not be synonymous with nuisance.⁶²

Further problems in connection with the defence of “best practicable means” arise once again in connection with arguments that the lighting is for security purposes. However, there is no mention of security in the guidance notes concerning this defence. The security claim is often made as a “trump card” to justify, for example, leaving on some floodlights all night for security purposes. As a result, reducing the duration of light causing a nuisance by way of curfew may greatly assist some victims. However, curfews also present a problem, for lighting that goes out at 23.00 may not cause a problem for adults, but this may cause a significant problem for children, who should be in bed much earlier.

⁵⁷ Guidance para.118 deals with this defence.

⁵⁸ *ibid.*

⁵⁹ Guidance para.121. Paragraphs 119–124 deal with “healthy living” and sports facilities.

⁶⁰ See fn.6, 21% of complaints concerned sports ground lighting.

⁶¹ *Bacon v Gwynedd CC Tywyn*, unreported, December 2004, case no.AB 300050, concerned sports ground lighting and *Stone Haven and District Angling Association v Stonehaven Tennis Club*, unreported, January 1997, Stonehaven Sherriff's Court.

⁶² For examples of good and bad lighting, see the Campaign for Dark Skies website at: www.britastro.org/dark-skies/goodvbad.htm?60



On the issue of security, it could be argued that, as modern surveillance cameras are sensitive at low-light levels, and very sensitive in infra-red, that the very bright visible light floodlighting which causes a nuisance is not necessarily appropriate for security purposes at large business premises. Indeed, many businesses with bright floodlighting also have infra-red lamps as a back up. This may undermine the use of over-bright floodlighting still further.

The hypersensitive claimant

The astronomical community hoped that the new law would tackle light pollution head on. However, it has been shown that this is not the express purpose of the new law. Astronomers' consternation may well be justified, considering the origins of the provision.⁶³ So the hypersensitivity defence may well be applied against the star-gazing claimant. Indeed, one amateur astronomer has reported that his local authority has stated that he has no redress under the new law due to hypersensitivity:

“Nuisance relies on the concept of the average person. It is not designed to take into account individual hobbies or unusual sensibilities. Although I can sympathise with the problems you face with regards to your interest in astronomy this cannot be taken into account when assessing if a nuisance exists or not.”⁶⁴

The result of this view is somewhat perverse (and it is submitted, wrong in this case to dismiss out of hand), as the new law was created because of concerns over light pollution, but it is intended to deal only with lighting that amounts to a statutory nuisance. Therefore, it is submitted that the “personal comfort” criterion for statutory nuisance dealt with earlier is applied so as to recognise the origins of the provision, and that the night sky is often looked at by many ordinary and reasonable persons of all ages. Most reasonable people have hobbies, and it is submitted that a hobby that is only adversely affected by badly angled (and often overpowered) lights is not always going to be hypersensitive. Astronomy is only minimally affected by good lighting. It is submitted that the solution would be to recognise lights that shine across property disturbing star-gazing as a *potential* negative effect on personal comfort for the purposes of the provision. Moreover, it is entirely possible that someone could suffer a negative health effect through the loss of their ability to enjoy a hobby, through clinical depression for example. Whilst it is accepted that not all complaints from amateur astronomers could meet the criteria, some should and all ought to be investigated by local authorities. Otherwise, any complaint which would otherwise meet the criteria could be dismissed, if by coincidence it has been put forward by an amateur astronomer.

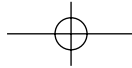
Summary dismissal of astronomers' complaints will almost certainly result in ill feeling among the astronomical community and Ombudsman complaints, a state of affairs which will benefit no one.

Co-existing remedies which may augment the new law

Clearly not all forms of bad lighting will be caught by the law of statutory nuisance, but other pre-existing remedies exist which could augment the reduction of light related nuisances. One of the main problems with statutory nuisance is that it must adversely affect the claimant's enjoyment

⁶³ See fn. 4.

⁶⁴ Private correspondence from a member of the Campaign for Dark Skies.



of their property, and lighting such as sky beams may rarely meet this criterion. They may, however, cause a significant distraction danger to road users.

A form of enforcement which is seldom used by local authorities is that of public nuisance. Clearly, this criminal offence requires a negative effect on the comfort or convenience of a class of Her Majesty's subjects, i.e. the problem is so indiscriminate in its effect that it would be unreasonable to expect an individual to take action.⁶⁵ It is not related to private property rights and may not fall within the scope of s.79(1) of EPA 1990.⁶⁶

Public nuisance at common law is a possible action if the positioning of the light is "an act not warranted by law" and the effect of the act is:

"to endanger the life, health, property . . . or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects".⁶⁷

This common law offence, which is triable either way, does not need society as a whole to be affected, nor does actual knowledge of the nuisance need to be established. However, the interference with the public's rights must be substantial and unreasonable. For example, a defendant responsible for a house was liable as it was in ruinous condition and likely to fall down, thus endangering people using the highway.⁶⁸

It is suggested that lighting features such as sky beams or "light art" may meet these criteria, for they are usually used for advertising purposes, or to draw the viewers' attention to something. Moreover, there has been at least one death due at least in part to a "security" floodlight, where a car driver was unable to see a pedestrian, being blinded by the glare from a badly angled pub car park light.⁶⁹ This was a missed opportunity to test light related public nuisance, as although a death resulted, no prosecution ensued.

An analogy may be drawn between the recent increase in potential widespread light nuisances and noise cases, but Malcolm and Pointing state that there has not been an increase in the numbers of noise cases brought under public nuisance. "A lack of familiarity amongst local authorities with the public nuisance procedure may be a factor".⁷⁰ It is important to bear in mind that an individual may commence a public nuisance action where they have suffered special damage.⁷¹

Conclusion

The new law does tackle some of the more pernicious effects of bad lighting, but only scratches the surface of light-related problems generally. It has been made expressly clear that the new law is not intended to deal with the wider problems of light pollution that these forms of lighting cause. Nevertheless, the new law is to be welcomed, for it removes (in part) the pre-existing lacuna concerning the control of exterior lighting.

⁶⁵ *A-G v PYA Quarries Ltd* [1957] 2 Q.B. 169.

⁶⁶ Malcolm and Pointing, *op. cit.*, p.37, paras 4.25–4.27 and pp.292–293, paras 17.22–17.25.

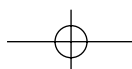
⁶⁷ *Archbold* (Sweet and Maxwell, London, 2005) at paras 31–40 *et seq.* For a full analysis on this issue, see Morgan Taylor and Hughes, *op. cit.*, at 1133 *et seq.*

⁶⁸ *Watts* (1757) 1 Salkeld 357; and see generally *Blackstone's Criminal Practice* (Blackstone Press, London, 2005), B11.100 *et seq.*

⁶⁹ "Blinded' driver kills man", *Wallingford Herald*, June 6, 2002: <http://archive.thisisoxfordshire.co.uk/2002/5/31/39441.html>

⁷⁰ Malcolm and Pointing, *op. cit.*, p.88, para.6.17.

⁷¹ *Overseas Tankship (UK) v Miller Steamship Co Pty, The Wagon Mound (No.2)* [1967] 1 A.C. 617.



There are, however, a number of serious limitations to the law. The attitude of the CIEH may prove critical as to the way the provisions are put into practice. Judging by the CIEH's published views, there is a real danger that they will advise their membership that lighting cannot amount to a statutory nuisance unless there has been a negative public health effect, i.e. some prejudice to health in the traditional sense. Such a view would completely undermine the provisions and in turn may lead to a disjointed and unco-ordinated flurry of private prosecutions from disgruntled complainants. No good will come from such a state of affairs. Fortunately, many environmental health officers have shown a genuine interest in the subject, as many attended the first national conference on light pollution and nuisance in April 2006.⁷²

The problems are further compounded by the limitations of the sorts of lighting covered. The lack of express inclusion of street lighting is problematic, as this form of lighting continues to cause nuisance to many residents. A danger is that the public may see the new law as effectively exempting local authorities from liability. Further disappointment arises from the list of exempt premises. The argument appears to be that, as lighting is needed for safety and operational purposes, so bad and nuisance lighting is permissible. However, it is submitted that this paper demonstrates the problems of such arguments. The rise in popularity of "light art" will challenge the provisions to the limit as to what may amount to the level of harm required to amount to a statutory nuisance.

The new law could give rise to controversy inasmuch as lighting is generally seen as synonymous with safety and security, so there is a clear need for the provisions to be augmented through education for both the public and enforcement agencies.

The author argued at consultation stage of the Bill that avoidance rather than retroactive enforcement was the most fruitful way to tackle such lighting, and still believes that this is needed to deal with wider lighting-based problems. Lighting forms known to cause significant complaints could be banned or subject to control. This could include, for example, the sale of 500-watt floodlighting to consumers for illuminating gardens. Moreover, consumer floodlighting could be manufactured so that it could only be fitted with the light angled downwards. Similarly, manufacturers of floodlighting could be required to supply clear fitting instructions. Planning controls could regulate the angles at which lights may be fitted, so as to minimise nuisance. Such proactive measures would avoid environmental health officers being burdened with the extra workload created by the new law. Commercial lighting could also be proactively controlled via clear planning guidance. Currently, there is a fragmented approach to lighting problems from central government and this needs to be consolidated. Local planning control varies considerably in practice from area to area. It is submitted that this is not desirable, and the ODPM could, at the very least, produce the promised lighting annex to PPS23.

Irrespective of its limitations, the new law offers a springboard for the further control of the wider, or "macro" aspects of light pollution. It is hoped that central government, in the current climate of energy awareness, will see fit to investigate the total costs to the environment and may adopt proactive measures to combat waste energy from waste light, not just that which causes a nuisance, and a statutory nuisance at that. Finally, as light-related problems are a global issue, it is hoped that other nations, perhaps even the European Union, may take action to stem this problem.

⁷² "Exterior Lighting, Statutory Nuisance and Light Pollution", De Montfort University Leicester, April 20, 2006. See: www.dmu.ac.uk/faculties/business_and_law/conferences/light_pollution.jsp and the talks are available at: www.britastro.org/dark-skies/dmu.html