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Email: journal@instituteoflicensing.org
Visit: www.instituteoflicensing.org

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Registered Address: Institute of Licensing
Ridgeway
Upper Milton
Wells
Somerset
BA5 3AH

Email: news@instituteoflicensing.org
Visit: www.instituteoflicensing.org

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Daniel Davies, MIoL
Chairman, Institute of Licensing

Welcome to another edition of the *Journal of Licensing*, number 36 and counting. The *Journal* continues to go from strength to strength, mirroring the progress of the Institute itself.

I am delighted that I have been re-elected as Chair of the Institute for a further three years. I have thoroughly enjoyed the first years of my tenure, and I am immensely proud of and thankful for the hard work of those backstage who ensure that the Institute flourishes and expands its reach even further. My role as Chair is made immeasurably easier by the Board and the regional executives who are singing from the same hymn sheet with regards to moving the Institute forwards. Space precludes mentions of all by name, and to name a few would do a disservice to the many, but thank you everyone.

Nowhere is the work of the unsung heroes more important than in organising the National Training Conference. We will return to Stratford Upon Avon between 15-17 November, for the annual three days of work and (suitably for the birthplace of Shakespeare) play where delegates from across the UK and the spectrum of licensing regimes get together to learn and share. The programme is shortly to be finalised, but confirmed speakers are from the cream of the licensing world, so it is expected that as usual we will sell out quickly. Book your place online via the Institute website.

Nominations are being taken for the Jeremy Allen Award which is presented annually at the NTC. See Sue Nelson's Institute news section for more information.

On the subject of training, it is great to see so many training events and regional meetings taking place in person once more, including the Summer Training Conference in Cardiff which took place recently.

Back to the *Journal*, and our lead article this time around is on the important topic of "Martyn's Law", aka the Protect Duty, born out of the Manchester Arena terrorist attack in 2017. The Bill is in draft form at the moment but it can be said with certainty that the Protect Duty will have major implications for licensed venues. On the basis of the old adage "fail to prepare, prepare to fail, the article's authors Jeremy Phillips KC and Jonathan Welch of Francis Taylor Building look into their crystal ball to give readers a flavour of what to expect. We are also indebted to Jeremy for his periodic Case Digest which can be found at the back of the *Journal*.

"Simple" and "easy" are perhaps words which do not readily lend themselves to taxi licensing, but fortunately we have James Button to share his views on how such choices are available for the Government to do much more to make taxi licensing fit for purpose in the 21st century. Roy Light gives his thoughts on the direction of travel in assessing the "fit and proper person" test for taxi licensing.

We encourage contributions to the *Journal* from licensing officers and so I am delighted that John Newcombe of Dorset Council has provided an Opinion piece emphasising the important work of safety advisory groups.

The shifting sands of attitudes to sexual entertainment venues and the interaction of the licensing regime and the Public Sector Equality Duty still loom large in the industry, and two recent cases are analysed by Josef Cannon and Ruchi Parek. Helpful guidance for local authorities on their Statement of Licensing Principles for Gambling is provided by Charlotte Meller of the Gambling Business Group.

A relatively rare licensing case to make it to the higher courts is examined by Philip Kolvin KC, highlighting some interesting pronouncements on the malleability of the licensing objectives under Licensing Act 2003. Leo Charalambides' Editorial picks up on this theme too, which is sure to be of interest to practitioners going forward.

Leo's editorial also touches on the recent gambling White Paper, and you can turn to Nick Arron's latest article for an in-depth analysis of the proposals and their ramifications.

The next edition of the *Journal* will be dropping, as usual, at the NTC in November. I hope to see many of you there.

Institute of Licensing

JOURNAL OF LICENSING ISSUE 36

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Leo Charalambides, FIoL
Editor, Journal of Licensing

The much-anticipated Gambling Act 2005 review *High Stakes: Gambling Reform for the Digital Age* (April 2023) reminds local authorities that the gambling policy statement "is an opportunity to identify and address gambling-related harms in its area and publish specific objectives for a locality". (6[155])

The review states:

> *Through developing their policy statements, licensing authorities are able to set out their ambitions for gambling in their area, and this in turn informs how they assess and decide applications for new gambling premises. It is important that local leaders feel empowered to make use of their existing powers when making decisions about their areas.* (6[158])

The review highlights the recently adopted Westminster City Council gambling statement, which introduces and designates seven gambling vulnerability zones (GVZs) within its area. These GVZs are areas identified within the council's local area profile, within which the council has significant and increased concerns associated with the risk that gambling premises may pose to vulnerable people, children, crime, disorder or any combination of these. Gambling premises are expected to have regard to the issues within the locality and demonstrate how the risks are to be mitigated.

This is a reminder of a fundamental principle that licensing decisions are often, perhaps always, about the suitability of location. These decisions revolve around:

> *an evaluation of what is to be regarded as reasonably acceptable in the particular location. … deciding what (if any) conditions should be attached to a licence as necessary and proportionate to the promotion of the statutory licensing objectives is essentially a matter of judgment rather than pure fact.*
>
> (*R (on the application of Hope & Glory PH Ltd) v City of Westminster Magistrates' Court & Ors* [2011] EWCA Civ 31).

This focus upon the proper development of policy statements is nothing new. The s 182 Guidance under the Licensing Act 2003 (LA2003) highlights that "providing a regulatory framework for alcohol which reflects the needs of local communities and empowers local authorities to make and enforce decisions about the most appropriate licensing strategies for their local area" is a key aim and purpose of the legislation and principal aims for everyone involved in licensing work. (Section 182 Guidance [1.5])

These strategies could be as simple as an expectation that an applicant for a premises licence has obtained planning permission (although this cannot be enforced) or they could explain the planning status to more ambitious strategies relating to the diversification of the late-night economy, promoting diversity and inclusion, protecting girls and women. Local needs will vary according to local circumstances which are often poorly understood and articulated. Local can, however, be creative, imaginative and integrate other wider council policies relating to, for example, sustainability, climate change, single use plastics and disposable containers.

It seems to me that the recent case of *The Porky Pint Ltd v Stockton-on-Tees Borough Council* [2023] EWHC 128 (Admin) is an invitation to think about the proper application of the licensing objectives given their ordinary and natural meaning, and how they relate and overlap with each other in a particular set of circumstances at a given location.

Local strategies are not just about cumulative impact assessments (CIAs) and cumulative impact policies (CIPs). Interestingly, the Westminster GVZ policy in the *High Stakes* review introduces the Government's intention to bring gambling in line with alcohol and legislate by introducing CIAs "when Parliamentary time allows". Whether and how this will work within the legislative scheme of the Gambling

Act 2005 remains to be seen.

CIAs, CIPs and GVZs remind me of the short-lived and ultimately unsuccessful introduction of alcohol disorder zones (ADZ) under the Violent Crime Reduction Act 2006 (now repealed). It transpired that local authorities did not want to label areas in their localities as an ADZ, because spoken slowly and out loud, the word could sound like "a disease" – hardly the best label to encourage growth, regeneration and local pride.

Westminster's GVZ policy encourages a proper appreciation of the character of the locality as an important factor in assessing and mitigating risks arising from gambling premises. Similarly, LA2003 expects applicants to obtain sufficient information to enable them to demonstrate that they understand the layout of the local area and the physical environment and any risk posed to the local area by an applicant's proposed licensable activities (s 182 Guidance [8.42]).

The locality principle dates back to *Struges v Bridgman* (1879) and continues to be a lively debate in respect of principles and application (most recently by the Supreme Court in *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4 [38] – [46]). A proper appreciation of locality is a key feature of the separate albeit sometimes overlapping regimes of planning, licensing and environmental health. The *High Stakes* review is a timely reminder that licensing policies and decision-making merit careful consideration of suitable strategies for particular locations and the applications made within them.

We are delighted to be planning our signature three-day National Training Conference for 2023 to be held in Stratford-upon-Avon.

The programme will include the range of topic areas our regular delegates have come to expect, with well over 50 sessions across the three days delivered by expert speakers and panellists.

See the agenda tab for confirmed speakers. This will be updated as they are confirmed. A draft agenda will follow later in the year.

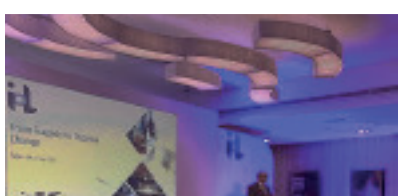
We look forward to welcoming new and seasoned delegates to the NTC along with our expert speakers and our event sponsors.

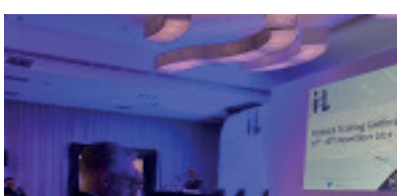
Early booking is always advised, and bookings will be confirmed on a first come first served basis.

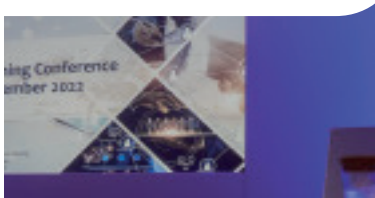
The Gala Dinner (Thursday evening) is a black tie event, and will have a set theme (theme tbc).

For more information and to book your place, please visit https://www.instituteoflicensing.org/EventItem/GetEventItem/174677

or email events@instituteoflicensing.org







Martyn's Law: the Protect Duty

Government proposals to tackle terror will have major implications for licensed venues. **Jeremy Phillips KC** and **Jonathan Welch**, summarise what is known of the proposals as they stand and identify some key legal issues arising

After much discussion and campaigning over the last five years or so, on 19 December 2022 the Government announced details for the Protect Duty, now to be known as Martyn's Law in tribute to Martyn Hett who was killed alongside 21 others in the Manchester Arena terrorist attack in 2017. Martyn's mother, Figen Murray, has with Brendan Cox (husband of the murdered MP Jo Cox), collaborated with the Home Office and campaigned tirelessly for legislative action to be taken to reduce the likelihood of such atrocities in the future.

The proposed law - which is still at Bill stage - will aim to improve resilience and protection against the threat of terrorist attacks. In order to achieve this the legislation will place a legal requirement on those responsible for affected locations to consider the threat from terrorism and implement appropriate and proportionate mitigation measures.

Timeline of the Bill

- 2017: 14 terror attacks in UK since 2017, itself a particularly bad year. A number of these terrorist attacks occurred in publicly accessible locations (PALs), including the Manchester Arena.
- 2019: the London Bridge and Borough Market attack inquest highlights the confusion surrounding responsibility for counter terrorism measures on the bridge and surrounding areas. Indeed, the inquest revealed the uncertainty as to whether there was any statutory duty to this effect owed by highway authorities or local authorities in general. Drawing an analogy with health and safety legislation, the Metropolitan Police Service suggested there should be a legal duty owed by the private owners of sites. Submissions were also made by bereaved families that there should be primary legislation imposing specific duties on public authorities and private owners regarding the protection of vulnerable sites and roadways from terrorist attack.
- The Chief Coroner recommended[1] that consideration be given to either:
  a) introducing legislation governing the duties of public authorities (including highway authorities) regarding protective security; or
  b) producing guidance indicating what existing legal duties require in practice of public authorities regarding the assessment of sites for protective security needs and the implementation of protective security measures.
- The Conservative Party's manifesto made a commitment to take action in this area.
- 2021: in February an 18-week consultation on a Protect Duty began.
- In June Sir John Saunders published his initial recommendations in Volume I of the Manchester Arena public inquiry. This contained strong recommendations for the creation of a 'Protect Duty'[2] and identified failings[3] in the measures and protocols in place at the Manchester Arena.
- 2022: in January the Government reported it had received a record 2,755 responses to its initial consultation. Overall, there was significant support for the introduction of a legal duty, subject to threshold levels and a proviso as to the golden thread of proportionality.
- 19 December saw the publication of a general 'fact sheet'.
- Draft legislation was promised for spring 2023, to be enacted by end of this Parliamentary session (ie, pre-December 2024).
- 2023: *Paterson's Licensing Acts* published Sir John Saunders' "reflections" on the immediate practical steps that could be taken by licensing sub-committees considering applications for significant venues.

1 See § 36-40 and MC3, MC4.

2 See §8.40-42.

3 See §11.31, §15.333, §12.567.

What the Bill might look like

In the absence of draft legislation we may assume[4] the 'fact sheet' is a policy blueprint and broadly indicative as to what any Bill will look like when published in draft form.

A general concern is that without legal compulsion, counter terrorism security efforts often fall behind legally required activities.

The Protect Duty will require those responsible for certain locations to consider the threat from terrorism and implement appropriate and proportionate mitigation measures.

The Duty will apply where the following three criteria are satisfied: (i) qualifying activities; (ii) eligible location; (iii) threshold(s).

Premises where "qualifying activities" take place will include “entertainment and leisure, retail, food and drink, museums and galleries, sports grounds, public areas of local and central Government buildings (eg, town halls), visitor attractions, temporary events, places of worship, health, and education”.

With regard to "eligible location", prior to the consultation it appeared to be suggested that the Duty could apply to “public spaces” – ie, open public locations with no clear boundaries. That would now seem to be outside the scope of the legal duty. It appears that the definition of publicly accessible locations has been tightened up as these are now defined as “any place to which the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission”, and may be permanent buildings, or temporary event locations *where there is a defined boundary* and open access to the public.

For maximum occupancy thresholds, premises will be within scope if the maximum occupancy meets the thresholds of either 100+ (Standard tier) or 800+ (Enhanced tier) – see below for more on Standard tiers and Enhanced tiers.

Exclusions / exemptions are locations where: transport security regulations already apply; those that are vacant over a reasonable period or are permanently closed; those with large floor space and low occupancy in practice (eg, warehouses and storage facilities); and offices and private residential locations.

4 The National Counter Terrorism Security Office (NaCTSO) has however made it clear that it cannot provide any assurance that courses or products currently being advertised and linked to the legislation will support organisations in being complaint with Martyn’s Law in future.

How the Bill may affect licensed premises

There is a duty on owners and operators of certain locations to increase their preparedness for and protection from a terrorist attack by requiring them to take proportionate steps,[5] depending on the size and nature of the activities that take place there.

Thresholds:

- *Standard tier*: maximum capacity between 100 – 799 persons. Duty holders will be required to undertake “simple yet effective activities to improve protective security and preparedness”. These will include completion of free training, awareness raising and cascading of information to staff and completion of a “preparedness plan”.

  The Home Office appears to have relatively simple ambitions such as ensuring that staff are aware of clear processes for decisions and actions such as locking doors and directing staff and customers to alternative exits in the event of an attack.

- *Enhanced tier*: maximum capacity of 800+. Such venues will have to undertake risk assessment and security plan, considered to a “reasonably practicable” standard. Duty holders will be required to assess the balance of risk reduction against the time, money and effort required to achieve a successful level of security preparedness (which is a recognised standard in other regulatory regimes, eg, fire and health & safety).

Locations run by volunteers:

- Places of worship will all be within the Standard tier, regardless of capacity (unless they charge tourists for entry or hire out the site for large commercial events). The Government intends places of worship to receive bespoke treatment, as a reflection of the existing range of mitigation activities delivered and funded by Government to reduce their vulnerability to terrorism and hate crime.

- Other volunteer-run locations will fall within scope as with other locations, according to the relevant thresholds.

Resources / support:

5 Achieved through enhanced security systems, staff training and clearer processes.

- ProtectUK[6] is a central website with guidance, advice, learning and engagement with experts. It will be the main free "go to" resource.

Enforcement:

- An inspection capability will be established to educate, advise and ensure compliance with the duty. Sanctions may be used to ensure breaches are effectively dealt with.

Legal issues

Until such time as we see the draft legislation it will be impossible to comment with certainty upon the legal issues arising. Nonetheless, the following areas are likely to present a challenge to the Government and Parliament[7] when it falls to consider any Bill:

- Avoiding any compromise of accessibility to premises, as well as fire and health and safety standards.

- Interpretation in practice (and law) of "reasonably practicable" and "foreseeable risk".

- The handling of sensitive information.[8] Note that:

  - There is already provision for planning applications through SIPA (the sensitive information in planning applications Government publication) although the guidance is not very well suited for anything other than major / critical infrastructure.[9]

  - Licensing applications – the Home Secretary announced she would amend LA03 to provide procedure for sensitive information in licensing applications (and presumably appeals).

  - Will the s 182 LA03 Guidance be amended to include counter terrorism objectives?

- Liability of premises: if a terrorist attack occurs and a licensed premises has not complied to a reasonable standard with the public duty, how would this stand with insurers? Presumably compliance with the legislation will become a standard condition of insurance in most policies. How will the degree of compliance be assessed?

- Will it be possible to delegate or sub-contract the protect duty to specialist security contractors?

- Will specific elements of the Protect Duty automatically rest with sub-contracted staff (eg, security consultants or guards)? How will their liability / responsibility operate? Will they be regarded as independent actors from the owner / occupier, or indivisible from that entity?

- Also with regard to planning and licensing conditions, might some local authorities / local planning authorities seek to "double up" the duty with conditions that replicate the requirements of the new Act? Will they have any role at all in assessing a premises on the basis of the Duty, or will it not be relevant to their determination, because it is a matter for the proposed counter terrorism inspectorate to be established under the legislation?

- Model conditions were recommended by the Manchester Arena Inquiry.[10] These included suggested guidance on conditions that might be used for certain event venues in terms of the level of healthcare services that must be provided. Will there be a bank of conditions available as a template for general use?

Conclusion

It remains extremely early days to pronounce with any certainty on either the precise extent or impact of the proposed legislation, whenever it may emerge. Important issues that remain include the size and constitution of the new bespoke enforcement and inspectorate regime that the Government has suggested will be formed. Also, once the new law is embedded, is it possible that at some point in the future such a duty will in due course be extended to all public spaces?

All that can be said with some certainty at this stage is that once in force, the licensing of venues, both large and small, will never be the same again.

Jeremy Phillips KC & Jonathan Welch
Barristers, Francis Taylor Building

6 https://www.protectuk.police.uk/ ProtectUK is a central, consolidated hub for trusted guidance, advice, learning and engagement with experts in security and counter terrorism.

7 Note that the legislation will apply across England, Wales, Scotland and Northern Ireland, as national security is a reserved matter for the UK Government.

8 Here the precedent of HMG's publication *Sensitive Information in Planning Applications* (SIPA) is https://www.gov.uk/guidance/crown-development is likely to be of assistance. Reference ID: 44-035-20140306 Revision date: 06 03 2014.

9 Note that the planning appeals procedure can only protect sensitive information where a formal direction is issued by the Secretary of State.

10 Vol 2: §20.202.

Simple, easy and achievable reforms to taxi legislation

The Government has at last made some changes to taxi legislation but could have done so much more, says **James Button**

There have been calls to update and improve taxi legislation (hackney carriage and private hire) for many, many years - probably since around 1848! It is dismal to acknowledge that the last major attempt to improve the legislation was made 47 years ago with the Local Government (Miscellaneous Provisions) Act 1976 . Since then there have been some minor amendments but no considered wholesale reworking.

It is an area that is desperately in need of complete legislative reform and it is a pity that no government has grasped the nettle, which was the case with the Licensing Act 2003. Indeed a similar approach to gambling in 2005 is itself the subject of a proper review within 20 years, rather than no review within almost half a century. It is true that the Law Commission examined this area, but that is over a decade ago and its recommendations are clearly dead in the water.

The Task and Finish Group made a number of considered recommendations which would not have been difficult to implement, but unfortunately the Government only accepted three:

- The national database (finally brought into effect on 27 April 2023 with the effective implementation of s 3 of the Taxis & Private Hire Vehicles (Safeguarding and Road Safety) Act 2022, but only for England).
- Cross-border enforcement powers.
- National minimum standards.

In early March 2023 it was confirmed by the Transport Minister Richard Holden that there be no introduction of the remaining two commitments until after the next general election.[1]

1 At a meeting between Richard Holden, Sue Nelson, John Garforth and the author.

There has been consultation by the Welsh Government on its Taxi and Private Hire Vehicle (Wales) Bill White Paper, but clearly any implementation of those proposals is some considerable time in the future.

Here are ten suggestions for minor amendments to the existing legislation which would make a significant improvement to the law without requiring enormous amounts of Parliamentary time.

1) Local Government (Miscellaneous Provisions) Act 1976

As enacted, and is currently the position, Part II of the Local Government (Miscellaneous Provisions) Act 1976 is adoptive legislation. Although the Department for Transport asserts that every local authority in England and Wales (with the exception of Plymouth City Council) has adopted those provisions, it remains incumbent on each local authority to prove this in relation to enforcement proceedings. Those provisions should be enacted as national legislation, rather than the current position. This would remove the necessity for each local authority to demonstrate adoption. It would also bring Plymouth into line with the rest of England and Wales and thereby enable subcontracting to and from private hire operators licensed by Plymouth City Council, as well as allowing Plymouth City Council to take immediate action against drivers' licences.

2) Licence fees

The current fee levied powers contained in ss 53 and 70 of the Local Government (Miscellaneous Provisions) Act 1976 are complex, unwieldy and restrictive. Notwithstanding the decision in *R (on the application of Rehman) v Wakefield City Council* [2020] RTR 11 CA, which allows recovery of some enforcement costs, hackney carriage and private hire licensing cannot be entirely self funding. Sections 53 and 70 should be amended to enable the local authority to charge a "reasonable" licence fee. This would enable full cost recovery using the "maintenance charge" approach identified by the Supreme Court in *R (app Hemming and Ors) v Westminster City Council* [2017] 3 WLR 342 SC.

3) Fixed penalty notices

Fixed penalty notices should be available as an alternative to prosecution for minor criminal offences under hackney carriage and private hire legislation. If carefully considered, these could be combined with cross-border enforcement powers to allow action to be taken by remote authorities.

4) Conditions

The Local Government (Miscellaneous Provisions) Act 1976 is unusual in that breaches of conditions attached to a hackney carriage or private hire licence are not criminal offences (with the one exception contained in s 56 (2) relating to private hire operators booking records). In almost every other licensing regime, breach of conditions is a crime. That should be the case in relation to hackney carriage and private hire conditions with a sensible (Level 3) criminal sanction and a fixed penalty possibility. Again, if carefully considered those fixed penalties could be combined with cross-border enforcement powers to allow action to be taken by remote authorities.

5) Statutory penalty points scheme

Many local authorities use penalty points schemes as a means of addressing minor transgressions by licensees. This is recommended by the DfT in *Statutory Taxi and Private Hire Vehicle Standards* and proposed by the Welsh Government. This should be a statutory mechanism that applies universally across England and Wales, thereby providing a consistent framework for enforcement. Once again, if carefully considered those fixed penalties could be combined with cross-border enforcement powers to allow action to be taken by remote authorities.

6) Byelaws

There is a power to enable local authorities to make byelaws in relation to hackney carriages (s 68 Town Police Clauses Act 1847), and most local authorities have used that at some point in the last 176 years. However, as any new or modified byelaws must be approved by the DfT, this is not only a slow process, but also it appears a hopeless one. Despite the DfT saying in 2005 that it would look favourably upon departures from the model, authorities that have attempted to do so have not had those modified byelaws approved. Accordingly, the existing powers for local authorities to make hackney carriage byelaws should be abolished, and all existing byelaws should be incorporated into the primary legislation, with a sensible (Level 3) criminal sanction and a fixed penalty possibility.

7) DBS checks for proprietors and operators

At present, local authorities can only require a basic DBS check for vehicle proprietors (both hackney carriage and private hire) and private hire operators (as recommended by the DfT in *Statutory Taxi and Private Hire Vehicle Standards)*. However, as proprietors have control (to greater or lesser extent) over those who drive their vehicles, and private hire operators have access to significant amounts of personal information, both these occupations should require an enhanced DBS to reinforce public safety in the hackney carriage and private hire industries.

8) DBS checks for drivers and those undertaking school contracts

At present, a hackney carriage or private hire driver requires an enhanced DBS certificate with a check of the child and adult barred lists. This check is for “other workforce” and “taxi”. If a driver undertakes school contracts for an education authority, that is “regulated activity” under the Safeguarding Vulnerable Groups Act 2006 and requires a separate and different enhanced DBS check for “child workforce” with a check of the child barred lists. This is clearly absurd and the 2006 Act should be amended to ensure that all taxi drivers (hackney carriage and private hire) undertake regulated activity, thereby eradicating the need for two enhanced DBS checks. This is not unreasonable as all hackney carriage and private hire drivers are likely to carry unaccompanied children at times: these vehicles are used by parents and grandparents to move children around, as well as by children themselves.

9) Renewal of licences

Unlike almost every other licensing regime where licences need to be renewed, there is no clear mechanism contained within the legislation. As a consequence each local authority has evolved its own system with no consistency and potential risks. The 1976 Act needs to be amended to provide a clear renewal mechanism whereby provided an application to renew a licence has been made before the expiry of the current licence, the existing licence is deemed to continue on the same terms and conditions until the renewal is determined.

10) Clear definition of plying and standing for hire

The law on plying and standing for hire has been considered by the senior courts for well over 100 years, and although the position has been clarified to a large extent by the recent Court of Appeal ruling in *R (App UTAG Ltd) v TfL* [2022] LLR 141 CA, there should be a statutory definition. There are different ways in which this can be approached: the Law Commission in its report suggested detailing activities that could and could not be undertaken by private hire vehicles together with a definition of “there and then hiring”, while the Welsh Government is proposing a revised definition of a hackney carriage, again allied to a definition of “there and then hiring”.

I would suggest that none of these amendments would be particularly difficult to achieve, and would not involve enormous amounts of Parliamentary time. It is difficult to see that any of them would be viewed as overtly "political", which would hopefully lead to a degree of cross-party support which might facilitate early legislation. If those proposals were implemented, it would enable the existing archaic legislation to limp on, at least into the fourth decade of the 21st century, and possibly (although depressingly) into the 22nd century.

James Button
Principal, James Button & Co Solicitors

Taxi & Private Hire related courses

For more information and to book your place(s) on any of the events below please visit our website **www.instituteoflicensing.org** or email **events@instituteoflicensing.org** with your booking requirements.

Taxi Conference

SAVE THE DATE

3rd October 2023

Northampton

East Midlands

Members Fee: £130.00 +VAT

Non-Members Fee: £212.00 +VAT

This one day conference will provide a valuable learning and discussion opportunity for everyone involved within the taxi and private hire licensing field, with the aim to increase understanding and promote discussion in relation to the subject areas and the impact of forthcoming changes and recent case law.

Taxi Licensing - Advanced

5th September 2023

Virtual

Members Fee: £165.00 +VAT

Non-Members Fee: £247.00 +VAT

The course looks in detail at the hackney carriage and private hire licensing regime and the role and functions of the licensing authority.

Taxi Licensing - Basic

9th October 2023

Virtual

Members Fee: £165.00 +VAT

Non-Members Fee: £247.00 +VAT

This course will give new/inexperienced delegates working in the field of taxi and private hire licensing a broad understanding of the licensing regime from a practical and operational perspective to support their day to day role.

Assorted reflections on recent licensing developments

Richard Brown casts his eye over a number of recent issues that deserve further examination

I have been very fortunate during my time writing for the *Journal* that if ever I am struggling for sufficiently stimulating subject matter with an editorial deadline racing towards me, the wide, rich and varied world of alcohol licensing, gambling licensing or sex establishment licensing has thrown me a bone in the nick of time.

Finally, after 35 editions of the *Journal*, I have decided to depart from this tried and tested (some may say tired and testing) method for one issue only, and present instead a miscellany of developments which have caught my eye in the last few months, a compendium of items which may in themselves not be weighty enough to attract a full *Journal* feature but nevertheless may add colour and context to the everyday lives of practitioners.

Levelling Up and Regeneration Bill 2022 and related developments

My last article examined the agent of change principle, changes to the s 182 Guidance issued under Licensing Act 2003, and whether the latter advanced the former in a licensing context.With uncharacteristic naïve optimism, I had expressed the hope that It may be that the passage of Levelling Up and Regeneration Bill 2022 (LURB 2022) through Parliament "will provide clarity or further development of the agent of change, due to an amendment to LURB 2022 tabled by Baroness McIntosh of Pickering with the support of Baroness Henig and Lord Foster of Bath".

The amendment sought to establish the concept in primary legislation for licensing law and planning law rather than, as currently the case, being enshrined only in licensing and planning policy documents.[1] *Hansard* records a revealing nugget which perhaps strikes at the heart of why this process is moving in such a funereal manner: "Developers, perhaps not unreasonably, seek to maximise profit. Enhanced mitigation in the new development to protect local businesses from having unreasonable restrictions placed on them will cost the developer more." As I intimated in my last article, this can lead to local authorities, grass roots music venues and residents becoming ensnared in the crosshairs of the cold, hard bottom line of big business.[2]

Baroness Pickering developed the theme, stating that (it) "is precisely for that reason that it is for the regulatory regimes to impose that where necessary. The imposition of appropriate conditions and obligations must come from primary legislation. The strength of policy guidance is not enough." In other words, the carrot has failed and it is time for the stick.

The proposed amendment was in three parts.

Firstly, in exercising any functions under Town and Country Planning Act 1990 or any licensing functions concerning development which is or is likely to be affected by an existing business or facility, a relevant authority shall have "special regard" to the agent of change principle.

Secondly, that an application for development within the vicinity of any premises licensed for the provision of regulated entertainment shall contain, in addition to any relevant requirements of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (S.I. 2015/595), a noise impact assessment.

Thirdly, in determining whether noise emitted by or from an existing business or community facility constitutes a nuisance to a residential development, the decision-maker shall have regard to—(a) the chronology of the introduction of the relevant noise source and the residential development, and (b) what steps have been taken by the developer to mitigate the entry of noise from the existing business or facility to the residential development.

The first and third of these clearly have implications for licence reviews under s 51 LA03.

1 Paragraph 14.66 of the Secretary of State's s 182 Guidance and para 187 of the National Planning Policy Framework respectively.

2 Levelling-up and Regeneration Bill, Volume 829: debated on Monday 24 April 2023.

The Government has now rejected the proposed amendment. Baroness Scott of Bybrook, Parliamentary Under Secretary of State (Department for Levelling Up, Housing and Communities), specifically rejected the suggestion that, in the face of the profit motive of developers, guidance and policy was not sufficient, reasoning that "policies and guidance already provide strong support for [the agent of change] principle, and we will continue to make sure that authorities have the tools needed to deliver it. The Government therefore do not consider the amendment necessary." With perhaps a similar misplaced optimism to that which I showed in my previous article, Baroness Bybrook concluded by expressing the hope that she has "demonstrated that the Government's policies embed the agent of change principle and that we will continue to make sure it is reflected in planning and licensing decisions in future." The clause of most interest to licensing practitioners in LURB 2022 is of course that relating to pavement licences, which LURB 2022 will enshrine in law permanently.

The Bill is still wedged at the report stage in the House of Lord's from whence it will at a date yet to be specified proceed to a third reading in the Lord's before consideration of amendments in the House of Commons and Royal Assent. There is however insufficient time before Parliamentary recess for the Bill to receive Royal Assent before the current pavement licence regulations expire on 30 September 2023.

Therefore the Government has (at the time of writing) laid before both Houses under the draft affirmative procedure – something which may be described as "light touch" if in the alcohol licensing sphere – the draft Business and Planning Act 2020 (Pavement Licences) (Coronavirus) (Amendment) Regulations 2023.

The regulations ensure that the "temporary" regime which began three years ago can continue until 30 September 2024 with, of course, the lower fee payable by applicants and the reduced notice and determination provisions under Business and Planning Act 2020 (BPA 2020) when compared with the proposals in LURB 2022.

Various amendments in respect of accessibility and "no obstruction" have been proposed (and rejected) in the House of Lords. An important amendment so far as operators and residents are concerned was tabled by Lord Young of Cookham which would ensure that all pavement licences are smoke free.[3] This was essentially a repeat of an amendment which was tabled during the progress of the Business and Planning Bill 2020, but not accepted by the Government at the time.

Although the amendment had some support, it was described as "purely vindictive and entirely punitive" by Lord Moylan.

The amendment was supported by the Local Government Association (LGA), which has said that the amendment:

> *will set a level playing field for hospitality venues across the country, ensure outdoor drinking and dining is a family friendly environment and have the added public health benefit of protecting people from unwanted second-hand smoke. Prohibiting smoking in an area where a pavement licence has been granted will also make the legislation clearer for businesses and easier for licensing authorities to enforce.*[4]

The amendment was not moved and so the current *status quo* under BPA 2020 will remain, namely that the licence-holder must make "reasonable provision" for seating where smoking is not permitted.[5]

That said, the local authority does have the power to set local conditions under BPA 2020.[6] It is therefore in its gift to prescribe a standard local condition banning smoking.

According to Lord Young, ten local authorities in England have such conditions, including Newcastle, Manchester and Liverpool. Manchester City Council's condition is that:

> *Smoking of tobacco is not permitted within the licensed area and at least one 'no smoking' sign shall be visibly displayed within it.*

Remote control

Readers may recall previous debate in these pages over the lawfulness of remote hearings – that is, hearings which take place over platforms such as Microsoft Teams or Zoom (other platforms are available) – and indeed the desirability of hearings taking place in this way, or in hybrid form, that is, some participants attending in person and some participating remotely.

Obviously, during the Covid-19 lockdown, remote hearings were not only desirable but essential in ensuring that licensing processes continued through the pandemic. There was no question as to the lawfulness of this as it was specifically provided for in the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales)

3 Levelling-up and Regeneration Bill, Volume 830: debated on Monday 22 May 2023.

4 https://www.local.gov.uk/parliament/briefings-and-responses/levelling-and-regeneration-bill-committee-stage-house-lords-10.

5 Section 5(6) BPA 2020.

6 Section 5(2).

Regulations 2020. The debate started after the expiry of those regulations when some authorities wished to continue with remote hearings for various reasons either when appropriate or by default.

The case of *R (Hertfordshire County Council) v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1093 (Admin) concerned the lawfulness of remote "meetings" under Local Government Act 1972 (LGA 1972). Dame Victoria Sharp, P, and Mr Justice Chamberlain held that "meeting" referred to an in-person meeting taking place at a particular geographical location. However, this did not comprehensively square the circle with regards to hearings under Licensing Act 2003 (LA 03) as LGA 1972 states that nothing in the relevant section applies in relation to any function under LA 03.[7]

Some authorities therefore continue to hold remote hearings as standard. This has various advantages and disadvantages, an analysis of which is beyond the scope of this article, but the key question is whether such hearings are lawful.

This has now been considered in Bromley Magistrates' Court as a preliminary issue on an appeal from a decision of London Borough of Lewisham. A review of a premises licence was brought on the grounds of prevention of crime and disorder. A remote hearing was convened, at which a Lewisham licensing sub-committee resolved to revoke the premises licence. The decision was duly appealed by the licence holder, and a challenge to the lawfulness of a remote hearing was heard as a preliminary issue.

District Judge Abdel Sayed ruled that remote hearings are permissible (the judgment is available on the Institute of Licensing website[8]). The learned District Judge decided that a "place" for the purposes of the relevant regulations[9] can include a "virtual platform" and "attendance" at such a hearing can include "electronic attendance" and that the power in s 9(3) LA 03 and the concomitant regulations together mean that the decision as to whether a hearing is conducted in person, remotely, or both is a matter for the licensing authority.

As a Magistrates' Court ruling, it is obviously not binding but can and will no doubt be brandished by licensing authorities which wish to hold remote hearings as standard. It remains to be seen whether the decision will be challenged by way of judicial review or case stated.

As an aside, there is obviously a difference between whether something is lawful and whether it is necessarily the right thing to do. My own view is that a straightforward application where all parties agree that a remote hearing is appropriate is different to a complex case, particularly a review, where "live" evidence is being heard. A licensing authority is not of course under any obligation to set its procedures at the behest or convenience of the parties, but its views should be sought on at least a case-by-case basis.

This is supported by research conducted by HM Courts and Tribunal Services (HMCTS) and published in December 2021.[10] During the Covid-19 pandemic, remote hearing of course became *de rigueur* in all courts and tribunals. The HMCTS study found that "[t]he type of hearing, severity of the case, support needs of the parties and length of the hearing were all factors that could influence the suitability of the use of remote hearings".

'Regulatory easements'

Many readers will be aware of and may have responded to the Government's consultation on making permanent the "regulatory easements" concerning off sales of alcohol and increases in temporary event notice (TEN) entitlements which came into being during the pandemic and have been extended to 30 September 2023 in line with extensions to the pavement licence regime.

In July 2020 the Government deregulated off sales of alcohol as a temporary measure to address the effects of the pandemic. The deregulation was initially intended to last until September 2021 but was subsequently extended to September 2022 and then to September 2023.

The deregulation enables premises with no current permission for off sales to nevertheless provide off sales to 11pm in an open container. Premises which have permission for off sales but restricted by condition – eg, an earlier terminal hour / restricted to a certain area / in sealed containers etc – would nevertheless be able to provide off sales to 11pm in an open container.

When the deregulation of off sales was extended to September 2023, the Government committed to consulting on whether and how to make some form of deregulation permanent. The Government is also as part of the consultation seeking views on permanently increasing the number of TENs permitted per year.

The consultation ended on 1 May, and a consultation

7 Section 101(15) LGA 1972.

8 https://www.instituteoflicensing.org/media/vnudyjkn/walk-safe-security-services-v-lb-lewisham.pdf.

9 The Licensing Act 2003 (Hearings) Regulations 2005.

10 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040183/Evaluation_of_remote_hearings_v23.pdf.

response document is awaited setting out the Government's final policy position. It may be that, as with pavement licences, the "temporary" measures will need to be extended again.

Late night levy developments

The Government has also consulted on how to give effect to the power (not yet commenced) in s 142 Policing and Crime Act 2017 (PCA 2017) giving local authorities the power to apply the late night levy to premises which provide late night refreshment (LNR).

The consultation simply posited two options on which to base the charge:

> Option 1: Base LNR charges on the current licence fee system as for alcohol venues, with no option for local authorities to apply a discount.
>
> Option 2: Base LNR charges on the current licence fee system as for alcohol venues, with the option for local authorities to offer a 30% reduction to LNR providers that qualify for small business rate relief (as currently available in relation to premises that supply alcohol for consumption on the premises).

The preference of respondees and the Government was option 2. The government will now seek to commence the relevant provision of PCA 2017.

National Licensing Week and licensing blowing its own trumpet

National Licensing Week took place this year between 12 and 16 June. The annual campaign aims to highlight and raise awareness of the role of licensing in all its iterations in oiling the wheels of everyday life. It now has its own dedicated website, https://licensingweek.org/. Each day of the week focuses on a discreet area:

> Day 1 – Positive partnerships
>
> Day 2 – Tourism and leisure
>
> Day 3 – Home and family
>
> Day 4 – Night time
>
> Day 5 – Business and licensing

I would like to think that part of the reason for National Licensing Week is to celebrate the role of licensing officers and licensing sub-committee members, who I think were on the end of some unfair criticism in the post-legislative report of the House of Lords Select Committee on Licensing Act 2003 back in 2016, certainly in comparison with the way in which planning counterparts were elevated in the report.

So I was cheered by the LGA's recent publication encouraging councillors to consider putting themselves forward for licensing committee membership by highlighting the attractions of doing so.[11] Attracting the most able councillors will lead to better decisions.

Finally, a recurring theme of the Home Office sessions at the Institute's National Training Conference is licence fees under LA 03, which have remained unchanged since 2005. The Home Office has sent out a survey to local authorities only seeking more information about the costs of processing and enforcing licences. It is to be hoped that as many local authorities as possible responded before the deadline of 22 June 2023.

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

11 https://www.local.gov.uk/topics/licences-regulations-and-trading-standards/licensing-committees-why-join.

Gambling and the statement of principles - where LAs get it wrong

Local licensing authorities (have a statutory obligation to publish key information on their websites relating to the Gambling Act 2005 – but not all are doing it correctly, as **Charlotte Meller** explains

Section 349 of the Gambling Act 2005 stipulates that local licensing authorities (LAs) are required to prepare and publish a statement of principles that they propose to apply in exercising their functions under the Act.

Section 349(1) stipulates that the statement must be reviewed every three years, unlike under the Licensing Act 2003 (LA03), and Licensing (Scotland) Act 2005 (LSA05), where it is every five years.

LAs are separately required to review the statement from time to time and make changes, if necessary (s 349(2)).

These clauses are worded to be independent of each other, as echoed by the explanatory notes in the Act: "The policy will have effect for three years, but the authority may review and alter the policy during that period". Therefore the three-year period does not reset if the statement is reviewed within that three-year period.

The Gambling Act (Licensing Authority Policy Statement) (First Appointed Day) Order 2006 set out the original first appointed day as 31 January 2007, with each subsequent new statement due thereafter at three-year intervals, namely January 2010, 2013, etc.

LAs' current three-year statement must therefore be for the period 31 January 2022 – 2025. Even if an interim revision took place after 31 January 2022, the statement will still only run until 30 January 2025, with the next three-year statement due to take effect on 31 January 2025.

The Gambling Act 2005 (Licensing Authority Policy Statement) (England and Wales) Regulations 2006 set out the requirements for the form and publication of the statement and where the statements must be published.

7(2) The statement or revision must be published by being made available for a period of at least 4 weeks before the date on which it will come into effect:

*a. on the **authority's internet website;** and*

b. for inspection by the public at reasonable times in one or both of the following places—

(i) one or more public libraries situated in the area covered by the statement or revision;

(ii) other premises situated in that area.

Similarly, the Gambling Act 2005 (Licensing Authority Policy Statement) (Scotland) Regulations 2006 state:

6(3) The notice shall be published:

*(a) on the **authority's website;** and*

(b) in or on one or more of the following:

i. a local newspaper circulated in the authority's area;

ii. a local newsletter, circular, or similar document circulated in the authority's area;

iii. a public notice board in or near the principal office of the authority;

iv. a public notice board on the premises of one or more public libraries in the authority's area.

Despite these legal requirements for current statements to be published on councils' websites, the following shortcomings have been identified on nearly 100 council websites:

- Statements missing from websites completely.
- Websites carrying out-of-date policies (or in some

cases many out-of-date policies as historic policies have been kept on the website in different locations).

- Draft policies only on websites even though they have been approved by full council.
- Websites directing the reader to contact the licensing team for gambling information.
- Some undated statements so applicants don't know if they are complying with the "current" three-year statement.

Although not a breach of the legislative requirement, a substantial number of statements are not located in the licensing section of the website along with other information about applying for gambling premises licences and permits. As a consequence, potential applicants and others would have to be most persistent to track down the statement within, for example, the council meeting minutes where it was approved, or within the consultation sections of the website even though the consultation had long closed.

The statement of principles acts as the primary vehicle for setting out a local licensing authority's approach to regulation having taken into account local circumstances. LAs without a current and up-to-date statement leave themselves open to legal challenge, their enforcement powers will be hampered, and they are failing in their regulatory responsibilities if they don't have a current statement published on their website.

Application forms and responsible authorities – absent or wrong

The Gambling Act (2005) Premises licences and Provisional Statement) (England and Wales) 2007 and equivalent (Scotland) Regulations 2007 set out in detail the application forms and information which must be included in the accompanying plan for new applications, variations, transfers, reinstatement of licences and for provisional statements.

These regulations also make it clear that an application is not treated as having been made unless the notice to responsible authorities is made on the specified statutory form (regulation 13).

This means that applicants need to know where to find the forms and who the responsible authorities are for each LA.

Application forms

Application forms are hosted on the Gambling Commission website, at the bequest of the Department for Culture, Media and Sport. LAs may add their own logo to these forms, but no other amendments can be made.

It is apparent that some councils signpost the Gambling Commission as the repository for the forms; others host copies of the forms on their own website; some are completely silent on forms; and there are some examples of LAs creating their own forms.

It is worth noting that there are no prescribed forms for unlicensed family entertainment centres, prize gaming permits or licensed premises gaming machine permits. LAs must therefore make it clear how applications for these permits should be made and in what form.

Responsible authorities

Section 157 of the Act sets out those bodies that are to be treated as responsible authorities and must be notified of applications and which are entitled to make representations. They are:

- A licensing authority in England and Wales in whose area the premises is wholly or partly situated.
- The Gambling Commission.
- The chief officer of police or chief constable for the area in which the premises is wholly or partially situated.
- The fire and rescue authority for the same area.
- In England and Wales, the local planning authority, or in Scotland, the planning authority.
- The relevant authority as defined in s 6 of the Police and Fire Reform (Scotland) Act 2012.
- An authority which has functions in relation to pollution to the environment or harm to human health.
- Anybody designated in writing by the licensing authority as competent to advise about the protection of children from harm.
- HM Revenue & Customs.
- Any other person prescribed in regulations by the Secretary of State. (None to date.)

Section 211(4) of the Act provides that in relation to a vessel, but no other premises, navigation authorities would be included within the list of responsible authorities.

While LAs are not obliged to provide contact information for these responsible authorities, it is good practice to do so and indeed many LAs helpfully host the information on their websites and / or within their statement of principles – through the HMRC details are not always accurate.

It is, however, a legal requirement for their statement of principles to include details of the competent body to advise about the protection of children from harm (The Gambling Act 2005 (Licensing Authority Policy Statement) (England and Wales) Regulations 2006 (regulation 5a) and the Gambling Act 2005 (Licensing Authority Policy Statement) (Scotland) Regulations 2006 (regulation 4(a)).

Premises registers

Section 156 of the Act requires LAs to keep a register of premises licences issued and ensure that the location of their premises register, if not already on the website, is clearly stated, along with where and when it can be viewed (such as in the council offices) and if there is a cost for obtaining copies. This information is not always provided on websites.

Using the correct statutory forms, the premises licence application process requires applicants to send the Gambling Commission notice of the application whether new, variation, transfer, etc. (Regulation 12 of The Gambling Act 2005 (Premises Licences and Provisional Statements) (England and Wales) 2007 and equivalent (Scotland) Regulations 2007).

An LA is subsequently obliged to advise the Commission of the outcome of the application, whether granted or refused (ss 164 and 165 of the Act). LAs must notify the Commission of surrendered and lapsed premises licences (ss 192 and 194 of the Act respectively). LAs are also required to notify the Commission of their decision in respect of a review of a premises licence (s 203 of the Act).

The Commission uses the statutory notifications received from LAs to update the publicly available register of premises licences on its website.

Inspection of the premises licence register on the Commission's website will highlight if there are gaps and inaccuracies in the information held.

The information which the Act requires LAs and the Commission to be made available to the public can be extremely helpful to applicants, licence holders and any other person with an interest in the licensing of gambling premises. It is therefore extremely important that the information is not only readily available but is kept up to date.

Charlotte Meller
General Manager, Gambling Business Group

Two public law errors do not new SEV rules make

Bournemouth and Edinburgh councils have both been challenged recently on their SEV licensing policies and both were adjudged to be deficient. **Josef Cannon** and **Ruchi Parekh** explain the cases and their implications

There used to be a saying that things were "like London buses": you wait for one for ages and then two come along at once. London's buses are pretty reliable these days, and the saying appears to have fallen out of use, but (stay with us here) perhaps we can repurpose it to refer to decisions about strip clubs. We haven't really had a meaningful decision on sexual entertainment venues (SEV) licensing since *R (Bean Leisure Trading A Ltd) v Leeds City Council* in 2014, so if you *have* been waiting, you'll have been delighted to see two come along more or less at once.

The first bus

First to arrive was the decision of the High Court (Choudhury J) in *R (CDE) v Bournemouth, Christchurch & Poole Council* [2023] EWHC 194 (Admin). This involved a challenge to a local authority decision to adopt a policy on the licensing of sex establishments in its area. The elements of the policy central to the challenge were that it imposed no cap on the number of SEV licenses that would be granted, preferring to deal with applications on a case-by-case basis with clearly-defined locational criteria, and that there would be a rebuttable presumption of renewal in certain circumstances for the three established SEV operators in the area.

The focus of the challenge was on whether the council properly took into account the sex equality-based concerns raised by objectors during two rounds of consultation. These consultees argued that SEVs have a negative effect on attitudes towards and the treatment by men of women and girls by (among other things) contributing to a culture of objectification, exploitation, discrimination and sex-based violence. This was advanced in two different ways: whether the council had taken into account consultees' objections, and whether it had complied with the Public Sector Equality Duty (PSED), pursuant to s 149 of the Equality Act.

Throughout the year-long process leading up to the adoption of the policy, the consultation responses had been considered in consultation reports, at meetings of a working group as well as the licensing committee and full council. A distinction was drawn at each stage between permissible objections and so called "moral objections", which had been characterised as impermissible – following the decision in *R v Newcastle Upon Tyne CC ex p The Christian Institute* [2001] LGR 165. *The Christian Institute* held that the "moral case against the [sex establishment] activities" was not a relevant factor in decision-making under the legislation, which instead required a focus on "the character of the relevant locality". The claimant's case was that the council had wrongly dismissed the sex equality-based concerns as "moral objections" and had therefore unlawfully left them out of account.

On the first ground, based on consultation, the judge concluded that when all the documents were read together, objectively, it was apparent that the sex equality-based concerns had been wrongly treated as personal or moral views that fell outside the scope of the consultation and were therefore irrelevant. While he recorded that the consultation reports drew a proper distinction between "moral" and other objections, he found that overall the gender-based concerns had been left out of the decision-making process. As a result these concerns had not been the product of conscientious consideration prior to the decision, and the consultation was therefore unlawful.

As to the second PSED ground, the judge applied the well-established *Bracking* principles which required, among other things, a "proper and conscientious focus on the statutory criteria". Those familiar with the PSED will know that the duty requires public bodies to have "due regard" to three statutory aims, namely: the need to eliminate discrimination, harassment and victimisation; the need to advance equality of opportunity between persons who share a protected characteristic (such as sex) and those who do not; and the need to foster good relations between persons who share a protected characteristic (such as sex) and those who do not.

On this ground, the judge noted that while there was reference to the PSED at various stages, at no point was there a rigorous consideration of the duty with a proper focus on the statutory criteria. While equality impact assessment

forms had been filled out, these did not engage fully with the duty either, such that there was insufficient information before full council to properly appreciate the requirements of the PSED. Similarly, while the various reports and documents had considered matters such as dancer welfare and community safety, nothing (or nothing sufficient) had been said about the statutory aims such as the need to tackle discrimination and foster good relations more generally. As a result, the judge also found that there had been a failure to comply with the PSED.

A third and final ground of challenge, which claimed that the presumption favouring the established SEVs was irrational or unlawful, was dismissed.

The second bus

The second "bus" to arrive is a case in Scotland arising from the relatively recent power to adopt the regulatory regime for SEVs contained within the Civic Government (Scotland) Act 1982: *Kaagobot Ltd and Ors v City of Edinburgh Council* [2023] CSOH 10.

There are four SEVs presently operating in Edinburgh. By the Air Weapons and Licensing (Scotland) Act 2015, local authorities in Scotland were given the power to regulate SEVs by adopting the licensing regime set out in ss 45A-F and Schedule 2 to the Civic Government (Scotland) Act 1982. That regime is similar to – but not identical to – the regime for England & Wales contained within Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982. Confusingly, it is a regime that on its own terms applies to sex shops only, but by s 45B(1) a local authority may resolve that it has effect in relation to SEVs.

Edinburgh City Council decided to adopt the regime. It resolved on 31 March 2022, to adopt the provisions and thus bring the regulation of the SEVs in its area into that framework, with effect from 1 April 2023. It also prepared a statement of policy, as it was required to by s 45C(2). Finally, it resolved that the number of SEVs considered appropriate for its area was nil; again, they were *required* to consider this question and ("from time to time") determine the appropriate number of SEVs, by the regime itself (para 9(5A) of Schedule 2, as introduced by new s 45B to the 1982 Act).

Like the regime in England & Wales, it is a specified ground of refusal of a SEV licence that "the number of [SEVs] in the relevant locality at the time the application is made is equal to or exceeds the number which the local authority consider is appropriate for that locality"; ie, on the basis that granting it would mean the cap is exceeded (para 9(5)(c) to Schedule 2).

So, this meant a new licensing regime, which among other things introduced a requirement for annual renewals, and a nil cap on SEVs, all to have effect from 1 April 2023. Unsurprisingly, the operators of the existing SEVs were unhappy, and sought to challenge the decision(s).

The operators of three of them, plus an employee of one of them, brought a claim. The United Sex Workers union was permitted to intervene later as an additional party.

Although the grounds were complex, and manifold, the key point (and the determining factor in the case) was the proper interpretation of the provisions insofar as they related to the "appropriate number". The relevant provisions read:

> *"9 (1) Where an application for the grant or renewal of a licence under this Schedule has been made to a local authority they shall, in accordance with this paragraph –*
> *Grant or renew the licence; or*
> *…*
> *Refuse to grant or renew the licence.*
> *(2)…*
> *(3)…*
> *(4) But without prejudice to sub-paragraph (3) above, the local authority shall refuse an application for the grant or renewal of a licence if, in their opinion, one or more of the grounds specified in sub-paragraph (5) below apply.*
> *(5) The grounds mentioned in sub-paragraph (4) above are –*
> *(a) …*
> *(b) …*
> *(c) that the number of [SEVs] in the relevant locality at the time the application is made is equal to or exceeds the number which the local authority consider is appropriate for that locality.*

Sharp-eyed readers will have noticed that the language of para 9(4) is mandatory:

> *the local authority "shall refuse". In England and Wales, the equivalent provision is "may refuse". This difference really decided this case.*

In presenting the proposed changes to the relevant committee, officers produced a report which, among many other things, strongly implied that the new power to refuse for a breach of the nil cap was discretionary (as it is in England & Wales):

> *4.27 A limit of zero creates a rebuttable presumption against the grant of SEV licences in the council's area, which could ultimately result in the closure of existing premises and a loss of income for operators, performers*

and employees of those premises….The report also contained a wealth of guidance and information on whether to introduce a nil-cap, but in this crucial respect, strongly implied that were such a cap to be introduced, it would not result in the automatic refusal of an application for a licence from a SEV in Edinburgh.

To cut a much longer story short, having identified this as the core issue in the claim, the judge, Lord Richardson, found that this was faulty advice: the legislation in fact created an *automatic* refusal in circumstances where a nil-cap was imposed, and in this respect the council members were misled as to the effect of what they were being asked to do. They thought – or could reasonably be taken to have thought – that what they were voting for was a *discretion* to refuse licences on this basis, but in fact what they were voting for was an automatic refusal of SEV licence applications in Edinburgh after 1 April 2023.

The fact that the vote was close – 5:4 – meant the judge could not say that the result would have been the same absent the misleading advice as to the effect of the resolution proposed. He therefore "reduced" (or quashed) the resolution to adopt the provisions, and the nil-cap.

So: a narrow decision, focusing on the finding that the committee was misled as to the true effect of what it was being asked to adopt. However, the judge went on to address a number of the other wider grounds advanced, notwithstanding that they did not take matters further given his primary finding. Some are just other ways of expressing the "the committee was misled" argument, but of particular note are the following two points (in brief):

- In principle, the introduction of a scheme for regulating SEVs – and indeed, featuring a nil-cap – would not be a breach of the existing operators' Article 1, Protocol 1 rights. It was not unlawful to have had regard to a particular definition of "violence against women and girls" contained in a Scottish Government publication *Equally Safe*. Although a nil-cap had the potential to be indirectly discriminatory against women who work in SEVs, the judge did not express a view on whether such discrimination was or could be justified in the circumstances. There had been no breach of the PSED: in reaching its decision to adopt the provisions, and as to the nil-cap, the council had had due regard to the matters contained within s 149(1) of the Equalities Act 2010; and

- The challenge pursuant to ECHR Article 8 was dismissed: the union (which had advanced this line of argument) was not a "victim".

Where we (seem to) have arrived

It is notable that some coverage of both decisions in the legal and other press has characterised them as either outright wins or losses for the SEV industry itself. The Scottish case, for example, has been painted as a defeat for those seeking tighter regulation of the SEV industry, or indeed looking to do away with SEVs altogether. In reality it seems to point the other way. A defeat, yes, on the attempt to introduce a nil-cap in Edinburgh, for now, but a comprehensive indication that, absent the general public law error contained within the report to committee, adopting a nil-cap would be likely to be lawful. Likewise, with Bournemouth's policy, absent the public law errors infecting the decision to adopt the policy, the case would appear to indicate that a policy containing no cap would have been lawful, irrespective of the strong community objections.

It remains to be seen whether the City of Edinburgh wishes to return to the question of the nil-cap, knowing (as it does now) that it would bring to an end the operation of the four SEVs in its area, probably for good, and result in the number of SEVs in Edinburgh matching what they decided was the "appropriate number" of such venues in their city. Similarly, it will be open to Bournemouth to revisit its policy, but with a fuller consideration of the equality-based concerns. Equally, Bournemouth could choose to adopt no policy, as many councils do, but to leave such matters to individual decision-making as and when an application for a licence or renewal is made.

Ultimately, it is clear that both decisions turned on classic public law errors, that are not in any way unique to the world of sex licensing. What, perhaps, is less clear is where, if at all, the *Christian Institute* line should be drawn. The Bournemouth case did not have to grapple with the more difficult question of where the appropriate line lies between (largely) irrelevant moral considerations versus relevant non-moral objections. This is likely to be a tricky area to navigate, which does raise the question of whether the *Christian Institute* is still good authority on the point. While the ruling in *CDE* was silent on the difficult question, we may start seeing local authorities adopting a cautious approach whereby all objections are taken into account so as to avoid falling into public law error. Alternatively, we may have to wait for a third bus to answer that question.

Josef Cannon & Ruchi Parekh
Barristers, Cornerstone Barristers

From bar to Bar: the notorious case of the Porky Pint

During the height of the pandemic, a strand of US-inspired libertarianism centred briefly on a humble UK boozer, the Porky Pint in Billingham, which has become the first pub in recent memory to be immortalised in the name of an actual High Court case. *The Porky Pint Ltd v Stockton on Tees Borough Council* [2023] EWHC 128 (Admin). It is a kind of legacy, but not one sought by its owner, Paul Henderson, who actually wanted to draw attention to the oppressive tendencies of an overly officious nanny state, imperiously ordering its citizens about without evidence, authority or right, muzzling them by forcing them to wear masks and other strictures. He did so by declaring the Great Reopening, inviting in the world at large to sup and commune, in defiance of the transmogrifying but ever-stern Covid-19 regulations. That attempt washed up on the rocks of the Administrative Court sitting in Leeds, which dismissed his challenge against the revocation of his licence by the licensing sub-committee of Stockton on Tees Borough Council, and which was distinctly unimpressed by the parallel drawn by his erstwhile advocate (someone called Kolvin) between his civil disobedience and that of the suffragettes.

Along the way, Mr. Henderson has done a great service to the licensing profession, by giving the august personage of the Judge, Sir Michael Fordham, an occasion to expatiate on the nature of the public safety licensing objective and the approach to interpretation of the licensing objectives more generally. Are they hard-edged concepts with opportunity for whole cases to fall through the gaps, or are they made of more pliable stuff, a sort of legislative epoxy resin, to ensure seamless control? You guess which.

Learned Counsel to the Porky Pint argued that Parliament had made a deliberate choice to legislate for public safety and not public health, which are distinct concepts, and it was not for a licensing sub-committee to fill the gaps. In essence (I respectfully paraphrase the submission) the sub-committee is not Humpty Dumpty, who notoriously insisted that "When I use a word it means just what I choose it to mean". Rather, the words used by Parliament have an objective, ascertainable meaning. The Scottish Parliament had included a fifth licensing objective of public health, but the UK Parliament hadn't, so however egregious Mr Henderson's conduct may have been, it did not engage any of the licensing objectives, and therefore was not something of which the licensing system could take cognisance.

Some more recondite themes were also pursued including that the Covid-19 pandemic, in reality, was not a great and particular threat and was arguably not a pandemic at all. I note these not for their wider licensing significance, but as a mark of respect to members of my profession, who are obliged to run arguments with a straight face.

Cutting to the chase, the Honourable Mr Justice Fordham was not buying any of it. He was on board with the notion that the meaning of the licensing objective of public safety is a question of law for the court, derived from the words used by Parliament and the discernible statutory purpose. But objectives are not hard-edged: they are capable of overlapping. Just because public health is involved does not mean that public safety is not engaged. There is room for evaluative judgement in the way the objectives are applied. This case, he thought, was not about what the licensing objectives mean, but how they come to be applied.

I have tried to paraphrase a sophisticated judgment by an esteemed public lawyer. At the risk of reductivism, I shall summarise it in this way. Walking into a pub and giving someone your cold is, at worst, public health. Walking in and giving everyone Covid can be public safety: whether it is public safety is a matter for the evaluative judgment of the sub-committee. And there the matter rests.

Time gentlemen please.

Philip Kolvin KC
Barrister, 11 KBW

Institute of Licensing News

Busy times

It's hard to believe that we are already well into the summer – this year has gone so by so fast already. With so many consultations, long awaited White Papers (Gambling and Welsh Taxis), more consultations to come and responses from the Government to follow, 2023 promises to continue to be varied, challenging and as busy as ever.

Board member changes

It has been a pleasure to welcome Michelle Bignell to the Board following her election as Chair of the South West region. This follows Frank Wenzel's decision to step back from the regional committee and the Board after so many years of support and commitment to the IoL. We wish Frank the very best for the future and offer our sincere and grateful thanks to him for everything. Michelle will now join the Board and continue to ensure that the South West region is strongly represented at Board level.

New IT system and website

By now, all IoL members should hopefully have received and responded to communications about membership renewals. This year we have done things slightly differently because we are moving to a new IT system and website. Simply put, the previous system had reached the end of its useful life, and the team have been hard at work with Very Connect, our new system supplier, to implement our new platform, which we hope and expect to offer a fresh, new intuitive user experience for our members and customers.

We expect the new system to include a much-improved document library, a useable discussion forum, more access for members to update and amend their information, and a greatly improved events management system. It will look and feel fresher and more dynamic, enable improved communications ahead of courses and events and deliver efficiency savings for the IoL team.

The changeover and the need to ensure that the new system is properly tested has meant that the normal online membership renewals have not been accessible this year. Instead, our membership administrator Bernie Matthews has been contacting members and advising that the IoL team will process memberships manually initially and then ensure that the information is imported into the new system as soon as possible. There should be very little in the way of disruption to our members – all online training courses and conferences can continue to be booked online, publications will continue as normal and communications will continue unaffected. The only impact should be that the invoicing for membership subscriptions will be later than normal. The membership period will still run from 1 April – 31 March as normal.

In short, we will do everything possible to minimise disruption and we are grateful to everyone for their support and patience while we switch over. Having just outlined the position at the time of writing, I should add that we hope the switchover will have taken place by the end of the Summer.

Briefing note on the Rehabilitation of Offenders Act 1974 (Protected Convictions and Cautions) (published March 2023)

This briefing note has been prepared for the IoL by President James Button and Stephen Turner (Chair of the IoL's Suitability Guidance working group) in response to what we believe is a need to provide some assistance to licensing authorities, applicants and representatives in relation to protected convictions and cautions. ***The briefing note does NOT constitute legal advice.***

It examines the workings and impact of the Rehabilitation of Offenders Act 1974, as amended and its application to licensing, together with the use of the Disclosure and Barring Service (DBS).

The briefing note has been endorsed by LLG, WLGA and NALEO. It can be found on the "Resources" section of the website under "IoL publications". (https://www.instituteoflicensing.org/resources/).

Meetings, Training and Events

23 May - Large Events Conference (Manchester)

We were delighted to finally host our Large Events Conference at the Manchester Arena on 23 May at last! The relief follows having to rearrange the date for this event not once but twice as a result of train strikes.

With a brilliant line up of speakers, we were extremely privileged to welcome Figen Murray as our keynote opening speaker. It was particularly poignant given the venue, and we have enormous respect for Figen and what she has achieved and continues to achieve in the face of the tragedy of losing her son Martyn Hett as a result of the Manchester Arena bombing on 22 May 2017. Almost exactly six years later, we now have draft legislation in the form of "Martyn's

Law" (The Terrorism (Protection of Premises) Bill), which has come about as a direct result of Figen's campaign. She is an extraordinary woman.

Summer Training Conference 2023

It was an absolute pleasure to return to Cardiff for our Summer Training Conference this year. The STC took place at the Cardiff Hilton Hotel on 14 June, and we were delighted to be able to welcome some fantastic speakers, including the Welsh and UK Government discussing taxi licensing and plans for non-surgical cosmetic procedures in England and Wales – both have significant implications for licensing and practitioners. It was a great opportunity as well to hear from other fantastic speakers including our Vice Chairman Gary Grant who provided a legal update, Matthew Phipps and Tim Davies talking us through the terms laid out in "Martyn's Law" (The Terrorism (Protection of Premises) Bill), and Imogen Moss discussing the implications of the Gambling White Paper proposals.

A huge thank you to our Welsh Region for helping us so much in the organisation and running of this superb event. Yvonne Lewis and Gemma Potter in particular have been keenly involved, and it was a delight to ensure that the programme and welcome were provided in both English and Welsh!

Our intention is to move to London for the STC next year, where we hope that our London region will host the event, giving us another opportunity to hear from local leaders about plans, experiences and initiatives.

11 September – Gambling Conference (London)

Following the publication of the Gambling White Paper, we are delighted to confirm that our Gambling Conference will now take place at the Hippodrome in London on 11 September. Spaces are limited and we look forward to hearing from our expert speakers on the impact of forthcoming changes.

3 October – Taxi Conference (Northampton)

The second of our Taxi Conferences for 2023 is taking place face-to-face at the Park Inn by Radisson Hotel in Northampton Town Centre, and we are looking forward to welcoming our expert speakers and delegates. We aim to include a mock hearing (we did this last year and it was extremely useful and illustrative).

15 – 17 November - National Training Conference (Stratford-upon-Avon)

Planning for the NTC2023 is well underway and we are returning to Stratford-upon-Avon for our signature three-day residential training conference. This conference is the biggest event in the IoL's calendar by far, with somewhere in the region of 75 different training sessions delivered by more than 80 expert speakers, discussion panels and session workshops.

This is an unrivalled training and networking event for licensing practitioners and we are proud to run it and incredibly grateful to everyone who makes the event possible. Special thanks to our wonderful sponsors and exhibitors for their invaluable support year on year.

We look forward to welcoming delegates, speakers and sponsors whether seasoned attendees or new to the event. Come along and experience all that the IoL's NTC has to offer – we will see you there!

Consultations

There have been a number of consultations so far this year which the IoL have responded to. Some are summarised or noted below but full details are included on our website:

Statutory licensing scheme for all visitor accommodation providers in Wales (closed 17 March 2023)

This consultation by the Welsh Government sought views on proposal to establish a statutory licensing scheme for all visitor accommodation in Wales.

The IoL responded in support of establishing a statutory licensing scheme rather than a registration scheme.

Mandatory licensing of special procedures in Wales (closed 19 April 2023)

This consultation by the Welsh Government sought views on a mandatory licensing scheme for acupuncture, body piercing, electrolysis and tattooing. The proposals would replace the current legislative controls, via a non-mandatory registration scheme. The existing system is said to have proven to be ineffective in ensuring a consistent approach by all practitioners in Wales to operating safe working practises, or infection, prevention and control procedures. The intention of the new mandatory licensing scheme would be to provide a regulatory framework that applies common national licensing criteria and conditions to ensure a common enforcement approach throughout Wales.

The IoL responded to the consultation, supporting the comments made by Welsh Licensing Expert Panel which were set out in the response from Environmental Health Wales (EHW) and the Directors of Public Protection Wales (DPPW). Much of the IoL response relied on the EHW / DPPW response.

Licensing Act 2003: regulatory easements (closed 1 May 2023)

The IoL responded to this consultation supporting the extension of the provisions which allow on-sales premises licences to also provide off-sales without the need to apply to vary the on-sales licence.

The IoL response stated:

> *This would support businesses without posing any likely risk to the licensing objectives. Should any risks subsequently arise in respect of any individual premises, the LA2003 includes adequate safeguards - the premises licence could be called in for review in the event that the licensing objectives are being undermined. Licensing authorities should be able to expressly exclude off-sales where it is considered appropriate and proportionate to address issues arising at individual premises.*

Welsh Government sets out proposals to modernise taxi services in Wales (closed 1 June 2023)

The White Paper from the Welsh Government on plans to modernise hackney carriage and private hire licensing in Wales sets out core proposals for reforming the legislative framework that are intended to provide:

- The introduction of mandatory national minimum standards for drivers, vehicles and operators applied across Wales.

- Improved enforcement powers for local authorities. This will include provision for local authorities to take enforcement action against any driver or vehicle wherever they are licensed, better information sharing between local authorities and better information for passengers.

The IoL responded to the consultation, assisted by the views from the Welsh Licensing Expert Panel, together with the views from our Taxi Consultation Panel.

Jeremy Allen Award 2023

2023 will mark the 12th Jeremy Allen Award, and nominations are now open (details are on our website).

This is annual opportunity to nominate colleagues working in licensing and related fields, in recognition of exceptional commitment, energy, passion and achievements.

Nominations are invited **by no later than 8 September 2023.** The Award criteria are:

a. Local authority practitioners positively and consistently assisting applicants by going through their licence applications with them and offering pragmatic assistance / giving advice.

b. Practitioners instigating mediation between industry applicants, local authorities, responsible authorities and / or local residents to discuss areas of concern / to enhance mutual understanding between parties.

c. Practitioners instigating or contributing to local initiatives relevant to licensing and /or the night-time economy. This could include for example local Pubwatch groups, BIDS, Purple Flag initiatives etc.

d. Practitioners using licensing to make a difference.

e. Regulators providing guidance to local residents and / or licensees.

f. Practitioner involvement with national initiatives, engagement with Government departments / national bodies, policy forums etc.

g. Practitioner provision of local training / information sharing.

h. Private practitioners working with regulators to make a difference in licensing.

i. Responsible authorities taking a stepped approach to achieving compliance and working with industry practitioners to avoid the need for formal enforcement.

j. Regulators making regular informal visits to licensed premises to engage with industry operators to provide information and advice in complying with legal licensing requirements.

k. Regulators undertaking work experience initiatives to gain a more in-depth understanding of industry issues, or undertaking work experience initiatives to gain a more in-depth understanding of regulatory issues.

l. Practitioners embracing and developing training initiatives / qualifications.

m. Elected councillors promoting change within local authorities / industry areas. Showing a real interest and getting involved in the licensing world.

We look forward to receiving nominations from you. Please email nominations to info@instituteoflicensing.org and confirm that the nominee is aware and happy to be put forward for consideration.

Fellowship

It's worth reminding everyone that in addition to the Jeremy Allen award, nominations can also be made for Fellowship of the IoL. Consideration of Fellowship requires nomination of a person by two IoL members and is intended as a recognition of individuals who have made exceptional contributions to licensing and / or related fields. More information is available on our website (https://www.instituteoflicensing.org/MembershipPersonal.aspx), or email the team via info@instituteoflicensing.org

Sue Nelson
Executive Officer, Institute of Licensing

Nominations for the 2023 Jeremy Allen Award are open!

This award is open to anyone working in licensing and related fields and seeks to recognise and award exceptional practitioners.

Crucially, this award is by 3rd party nomination, which in itself is a tribute to the nominee in that they have been put forward by colleagues in recognition and out of respect to their professionalism and achievements.

The nomination period for the 2023 award runs from 12th June and nominations are invited by 3rd parties by no later than 8th September 2023.

Please email nominations to info@instituteoflicensing.org and confirm that the nominee is aware and happy to be put forward. For full details including the nomination criteria, please click here. We look forward to receiving your nominations.

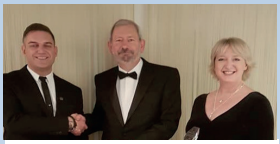
Celebrating our previous JAA winners

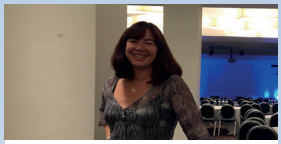

2022
Yvonne Lewis


2021
Andy Parsons

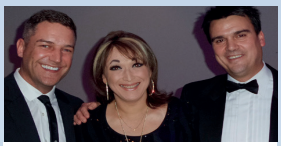

2020
No Award due to Covid-19

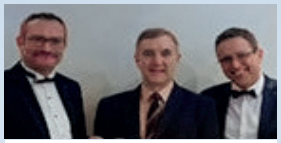

2019
David Lucas


2018
Stephen Baker


2017
Claire Perry


2016
Bob Bennett


2015
Jane Blade


2014
Alan Tolley


2013
David Etheridge


2011
Alan Lynagh


2012
Jon Shipp

Don’t underestimate the vital role of SAGs

With ever increasing pressures on local government and disappearing financial support from central government there are many reasons to consider (and reconsider) what services should be prioritised. Choosing between closing a youth club and a library or turning off the heating at the swimming pool (or all three) is no comfortable discussion. But with ever shrinking budgets and the cycle of assessment of statutory and non-statutory (aka discretionary) services, there is one area which is often forgotten and that is the council’s safety advisory group (SAG) function.

Most SAGs are not funded, unless of course you are fortunate enough to work in a borough with a primary authority arrangement which covers large-scale events on land operated by a willing partner (a rare beast indeed). But even with this additional support, councils are required to plough a huge amount of resource into SAGs throughout the year without adequate financial support.

Consideration of event management plans that can run to hundreds of pages and multiple appendices involves colleagues from highways, building control, environmental protection, licensing, food safety, emergency planning, health & safety and community safety (to name but a few departments), all devoting considerable numbers of hours to plan and prepare the submitted documentation to make sure it is “suitable and sufficient”, and that an impending disaster could be avoided wherever possible.

Add to that the additional resource implications for our already critically wounded public services and blue light colleagues and you can see that this is one area that is incredibly vulnerable.

So why SAG?

Scrutinising the plans of even an experienced and financially stable event organiser is a huge undertaking (even more so for new entrants to the sector looking for a quick buck and those wannabe organisers who really should not even be in the sector). Multiply this time commitment by an average of 50-60 events (based on my experience) each year, and it is no wonder conversations are taking place across the UK between managers, officers, members, services and partner agencies as to why exactly we do this, and who should foot the bill. It is a very valid question, but the answer is pretty simple and a good place to start is with Hillsborough.

Lord Justice Taylor[1] highlighted the importance of a well-functioning SAG in his report in the aftermath of the 1989 tragedy. His executive summary alone is reason enough for me to defend their continuing existence. Obviously, we are talking here about sports ground safety, where the SAG holds a quasi-statutory function supported by the statutory green guide. But the reasons for maintaining an effective SAG for large-scale public events are just as valid. Local authorities have a huge number of statutory duties[2] relating to events under various pieces of legislation. These duties extend to civil contingencies, health & safety, licensing and environmental protection for starters, and that’s even without involving use of council-owned or council-operated land and facilities where the obligations increase exponentially. SAGs are an essential requirement in support of those duties and without SAGs there is a very real and present danger of catastrophe, including death.

One only has to look at the aftermath of the Dreamscape tragedy[3] to realise that there are real consequences for local authorities which fail to adequately assess the risks related to an event.[4] Equally, just look at tragedies abroad, such as the 2010 Love Parade festival in Germany, where four local authority employees faced prosecution for their roles in the event.[5] If the importance of SAGs is not adequately understood by senior management within relevant organisations, there will be further tragedies, future inquiries and even prosecutions arising from missed opportunities to safeguard those people attending events in our areas.

There needs to be a clear understanding of the importance of SAG work, of effective terms of reference, training, minute taking and resolution recording, coupled with a comprehensive consideration of risks and thorough assessment of the dangers posed.

Much of the SAG work is of course conducted on a voluntary basis, with officers attending and participating in *addition* to their day job. But if SAGs aren’t adequately resourced and continue to be run on goodwill, there is a real danger that

1 https://www.jesip.org.uk/wp-content/uploads/2022/03/Hillsborough-Stadium-Disaster-final-report.pdf.

2 Statutory duties placed on local government - data.gov.uk.

3 SHE 10 - Learning the lessons from Dreamspace - SHP - Health and Safety News, Legislation, PPE, CPD and Resources (shponline.co.uk).

4 Dreamspace artwork deaths: Council and charity blamed - BBC News.

5 Ten charged over Love Parade stampede | Complete Music Update.

they will fail and the consequences of such failure will be the real tragedy.

Another concern is event-related expenditure and cost recovery: an outdoor licence for a 5,000 capacity festival will attract a £70 annual licence fee (under review after almost 20 years, apparently). This wouldn't even pay for the co-ordination of the SAG paperwork, let alone holding the meeting, consideration of plans by multiple officers, consultation and site visits etc.

Charging an application fee for SAG is one option but event organisers may simply refuse to engage if a fee becomes due, and without a carrot or a stick how will they engage if they don't have to or don't want to? Even if you have conditions on a licence requiring SAG attendance, there is no obvious easy mechanism for recovering the costs, a hirer's fee for use of council land notwithstanding. And then there is "Martyn's Law" to consider. Once the Government makes a decision on the regulator for the new protect duties, there will clearly be an additional role for SAGs in assisting with the assessment of counter-terrorism preparedness (and training), and even with a separate regulatory body the increased pressure on resources may be the straw that breaks the camel's back.

There is already a significant skills shortage in local authority regulatory services with barely any new blood coming through the system. Recruitment and retention is a significant problem and with shrinking training budgets and pressure on finances the situation will only get worse. Piling the pressure on and increasing responsibilities must be matched by additional resource otherwise it is doomed to fail. Even with the best intentions in the world it is not always possible to "do less with more" or "work smarter" and a review of priorities may be required. "Martyn's Law" is a wonderful development and much needed, but local authorities and partner agencies are already struggling so thought must be given to its practical implications.

John Newcombe
Licensing & Community Safety Manager, Dorset Council

Gambling White Paper - High Stakes: Gambling Reform for the Digital Age

Following lengthy consultation, the Government has at last set out its vision for the future of gambling. **Nick Arron** analyses what's at stake

On 27 April 2023, the Government published its much awaited White Paper on reform of gambling regulation, *High Stakes: Gambling Reform for the Digital Age*. The White Paper considered approximately 16,000 submissions following the call for evidence and Review of the Gambling Act 2005 back in December 2020. In it are proposals for the most significant changes to gambling regulation in Great Britain since the implementation of the Gambling Act 2005 (GA2005), largely in late 2007.

You will have seen the headlines: proposed limits to maximum stakes for online slot machines, potentially with limits defined by a player's age; proposed mandatory levy on gambling operators to fund research, education and treatment of at-risk and problem gamblers; introduction of an ombudsman to protect consumers; changes to the allocation of gaming machines within casinos, arcades and bingo licensed premises; sports betting in casinos; and greater powers for local authorities to regulate premises, with a proposed increase in licensing authority fees and consultation of the introduction of legislation to introduce a formal system of cumulative impact assessments (CIAs). This article will focus on the proposals within the White Paper relating to further powers for local authorities to regulate gambling premises and summarises the increases to Category B gaming machines in gambling premises.

Licensing authority powers

The 2005 Licensing Act (LA2005) established licensing authorities as responsible for licensing and regulation of gambling premises. The Act provides the power for licensing authorities to grant or refuse applications, add and remove conditions, consider variations to existing licences and to review licences when those premises experience issues relating to the licensing objectives or breaches of conditions.[1]

The White Paper describes licensing authorities' "wide range in powers to make decisions on licensing gambling premises in their areas". Section 153 of the Act states that licensing authorities in exercising their functions in relation to premises, shall "aim to permit" the use of those premises for gambling in so far as the authority thinks it satisfies various requirements relating to codes of practice, Gambling Commission guidance, the licensing objectives and the licensing authorities' own policy statement.

Further control is provided by local area risk assessments, which are a requirement under the Gambling Commission's code of practice. Licensing authorities can take local area risk assessments into account when considering the licensing and regulation of gambling premises.

The White Paper describes the aim to permit provision as a key principle of GA2005. The significance of the provision is that it shifted regulation away from the demand test approach, previously adopted. Section 153 specifically prevents licensing authorities from using expected demand for a gambling facility as a factor in making a decision. Aim to permit means that gambling should be permitted unless there is a valid reason why it should not be, and controls, for instance by way of conditions on licences, may be introduced as necessary to minimise risk.

In their responses to the call for evidence, which led to this White Paper, some local authorities expressed concerns that their powers were not sufficient to apply local considerations and to shape gambling in their local areas when making

1 Generally the local authority for an area, although for Wales it will be either the county or county borough council; in Scotland, the licensing board continued in existence by or established under s 5 of the Licensing (Scotland) Act 2005, while for the purposes of Schedule 13 (Licensed Premises Gaming Machine Permits), it will be the Sub-Treasurer of the Inner Temple and the Under-Treasurer of the Middle Temple.

licensing decisions. They commented that factors such as deprivation, crime and public health did not have significant weight in their decision-making process, and that the primary reason they were not able to limit the number of premises was because of the aim to permit principle.

An option suggested by some licensing authorities and by the Gambling Commission was to introduce CIAs as formally applied[2] to the Licensing Act 2003 since 2018. When it comes to alcohol licensing, CIAs consider the negative impact of premises on the licensing objectives in a particular area. In alcohol licensing this is generally in relation to the licensing objectives of public nuisances or crime and disorder. Where the cumulative impact of those premises creates significant negative effect on the licensing objective, applications for new or variations of licences could be refused. Under LA2003 there are around 200 areas subject to CIAs across England and Wales.

Local authorities were of the opinion that extending the CIA regime to GA2005 would enable them to take into account local evidence-based factors in the decision-making process, which could allow them to establish a presumption against granting a gambling premises licence.

Some licensing authorities' submissions to the call for evidence suggested that aim to permit should be removed altogether from the Act. This change would challenge a principle at the core of the Gambling Act – namely, that gambling should be permitted where it is consistent with the licensing objectives. It is worth noting in the White Paper that the Government makes reference to regulation by planning permission which offers a further layer of control to local authorities in respect of gambling premises, with planning able to take into account a greater variety of factors such, as the balance of usage of an area or high street. From our experience, however, planning applications in relation to gambling premises are more challenging for applicants than applications made under GA2005.

The Government is clear that the aim to permit requirement in s 153 of the 2005 Act does not prevent licensing authorities from refusing licences or prevent the introduction of controls, as necessary or desirable, to minimise risk. But it does accept there is merit in bringing the regime for regulating gambling premises in line with alcohol. The Government therefore proposes that it will legislate to introduce CIAs in relation to gambling premises, when Parliamentary time allows.

The White Paper refers to existing licensing authority powers, particularly local policy statements under GA2005, which allow licensing authorities to take into account factors such as public health and crime. However, it recognises that licensing authorities should benefit from the introduction of CIAs, in part because they are familiar with them from alcohol licensing and also in part because it explicitly allows them to consider the cumulative impact of gambling premises in a particular area.

The Government believes that CIAs will complement existing powers by supporting licensing authorities to capture and regularly review a wide range of evidence, such as density of premises in a particular area, health and crime statistics and residence questionnaires. It suggests that CIAs will place some of the ongoing analytical burden on the applicant for the gambling premises licence, as the operator has the option to demonstrate that its proposals will not increase harm in a particular area.

This would require more information than provided in the current local area risk assessment. Rather, the applicant will be required to take a more bespoke approach, dealing particularly with matters raised by the CIA. The Government asserts that CIAs would allow a presumption against new gambling premises in a particular area, based on evidence relating to harm, which may take the form of high impact zones being identified within the licensing authority boundary. We have seen a similar approach in Westminster City Council's gambling policy statement which designated gambling vulnerability zones. The Government goes on to say that CIAs do not prevent the authority from granting a licence, or allow the authority to negatively issue a blanket refusal to applications, and it adds that a CIA encourages the gathering of more evidence for assessing applications and requires the operator to evidence how it will mitigate risk.

In order to introduce CIAs there will need to be an additional requirement under GA2005 at s 349 policy statements and an additional consideration under s 153 and aim to permit, requiring the authority to consider the CIA when assessing applications. This requires primary legislation and the comment is made by Government that this proposal can only be implemented when Parliamentary time allows.

Gaming machines in gambling premises

The major positive proposal in the White Paper for land-based businesses is to increase the number of category B gaming machines permitted in licensed premises. It is suggested that casinos will be subject to a common machine-to-table ratio of 5:1 across the casino estate (increased from 2:1 for small casinos "small casinos")[3] and where 1968 Act

2 By the Policing and Crime Act 2017 s 141(1), (3), which came into effect on 6 April 2018.

3 A casino falls within this category if the combined floor area of those parts used for providing gambling facilities is at least 500 sqm but does not exceed 1,500 sqm. See SI 2008/1330, reg 2(3).

casinos (being by far the majority of casinos in Great Britain) meet the space requirements for a small casino, they would also be eligible, subject to a cap of 80 gaming machines. This will be an increase from 20 machines for those that are eligible, although many will not have the space for significant increases in machine numbers. Those 1968 Act casinos which do not meet these size requirements will also be able to benefit from extra machines on a pro rata basis commensurate with their size.

For licensed bingo and adult gaming centres, the Government commits to consulting on reducing the ratio of category D / C to B gaming machines, from 80 / 20 to 50 / 50. This will allow the removal of older category D / C machines and potentially mean less of the slim machines in operation. Again, owing to space constraints, it is unlikely that there will be a significant increase in the number of category B machines.

In total there are 17 key policy commitments with a potential of 62 workstreams in the White Paper. So, although the Paper is full of good intentions, the detail is yet to be decided. Many consultations will follow, with the Government suggesting the majority will be this summer. Most of the proposals require either secondary legislation, led by Government, or changes to the licence conditions and codes of practice, which will be Gambling Commission-led. As mentioned, there are some potential changes requiring primary legislation and the Government states that these will only be implemented if Parliamentary time allows.

Whether - in the present environment - time "so allows", remains to be seen!

Nick Arron
Solicitor, Poppleston Allen

With thanks to Gerald Gouriet KC and Jeremy Phillips KC for their additional comments.

Barriers and control measures that help keep the public safe

Crowd control barriers assist in controlling and managing the public to keep them safe or prevent entry into prohibited areas. **Julia Sawyer** explains how best to deploy them

When planning an event, it is important to assess what crowd control measures are required to ensure the public can safely enter, move around the event and exit. This assessment should take into account the space that is available, the demographics of the crowd, the actual event that the public are coming to see, the schedule, the weather conditions, how long people will be expected to queue for, and numerous other considerations.

Queuing systems must be carefully designed to be loaded systematically and supervised accordingly. Complex queues are acceptable for large crowds but must have shortcut routes within them for quieter periods.

The queuing space should be designed to accommodate an acceptable percentage of the total event capacity in comfort and safety and be co-ordinated with the opening and event start times to prevent a build-up of crowd pressure. Where possible, there should be an appropriate amount of distance between the front of the queue and the entrance to allow the venue to be opened and managed safely.

It is important to consider that there are often different timescales required to accommodate a crowd as it enters an event (a steady flow over a longer time) and when it leaves (a condensed flow over a shorter time). Depending on the design of the venue, these differences may put pressure on walkways and exits. Late arrivals should also be considered.

Queuing systems may include a combination of signage, stewards, security and the use of barriers to guide people, manage crowd flow and prevent queue jumping. Queuing systems that require the use of barriers should incorporate emergency access points and escape routes.

Where people queuing are stationary for long periods of time, there should be a policy of allowing entry and exit from the queue to access facilities.

Once all of this information detailed above is available, the assessment should consider what type of crowd control barriers, if any, would be needed to assist in managing the crowd.

Crowd control barriers

There is a wide range of crowd control barriers to deploy, depending on the circumstances.

Stanchions to differentiate spaces

Portable stanchions (posts), connected via retractable belts or rope, create visible, orderly lines. Attendees will know where the line begins, and they will efficiently navigate from the beginning of the line toward the point-of-service. The posts can also be set up to block off no-access areas, providing the public with a clear visual message of a closed-off part of the facility or have an opening within the rope and post to indicate the safe route to take. This line management system is easily adjustable to meet just-in-time needs, and lightweight enough to be easily moved from one location to another when necessary.

Heavy duty metal crowd control barriers – low height

Crowd control barrier dimensions vary depending on the type of barrier being used. Standard heavy duty metal crowd barriers generally measure 2.5m long and 1.10m high – with infill bars spaced at 12.75mm intervals. This type of barrier works well in keeping people out, or moving in the right direction and its design also enables people to see where they are going. Nor does it cause an obstruction. The spacing of the bars prevents anyone from squeezing through. The downside of using these is that they are heavy and therefore labour intensive to put out. Some lightweight metal barriers can be used as an alternative but are not as stable in high winds. Items such as branding will also affect the wind loading of the barriers.

Police barrier – low height

This low height barrier, often referred to as a Police barrier,

has a hooped-foot construction and is used extensively at street events, parades and marches. These barriers have little structural strength to withstand crowd pressure. Their main uses are for restricting access, designating routes and as aids to queuing systems. They are normally delivered in stacks and can be deployed very quickly.

Pressure barriers

There are two key locations for pressure barriers: areas that are at risk of high-density crowd volume; and areas where security is required, such as the front of stage to separate the crowd from the performer / celebrity.

Most pressure barriers consist of the following design features:

- Constructed of steel or aluminium, ideally fully welded.
- Individual sections are usually 1.2m high and 1m wide and have load bearing capability.
- With a footplate that the audience stands on to stabilise the system.
- The top horizontal rail should be smooth and fall flush on the front vertical fascia (audience side).
- A step on the rear (stage side) that working personnel can use.

The pressure barrier should be inspected and signed-off by a competent person to ensure that it is both safe and secure prior to use.

Along with the overall strength and stability of the barrier, the organiser needs to consider its shape. Given that barriers are designed to retain and resist audience pressure, it is critical to ensure that barrier location and shape does not lead to the creation of pockets in which people can become trapped, or from which kinetic energy cannot safely be dissipated. So, for example, organisers might opt for a convex and not a concave front face to a stage barrier, thereby allowing crowd energy and movement to be transferred outwards to release pressure rather than it being concentrated in one location.

Pressure barriers, also referred to as stage barriers, can be used as an essential part of certain events in a range of locations where crowd density is anticipated – eg, licensed bars at outdoor events, red carpet area at film premiers, sporting events for autograph sessions, etc.

Plastic Jersey barriers

No longer used solely on highways, plastic Jersey barriers have evolved to provide an effective solution for pedestrian and vehicle traffic flow at events. These barriers can be used to cordon off special areas, assist in the movement of attendees and provide additional perimeters for events. Made of heavy-duty plastic, they can be filled with water or other materials to provide additional stability.

Plastic crowd control fencing comes in 2m by 1m frames, while basic grey crowd control safety barriers come in 2.1m by 1m frames. Both types have hook and eye fixings – with no screws, bolts or rivets – to allow them to be joined together in lines, round bends or to form pens, zig-zag guides or angled fences. The feet on all barriers swivel through 360-degrees, so that they can be angled to fit where the barriers need to go and to provide maximum stability. Plastic barriers, meanwhile, are more adept at being used to visually signal "no entry" as they can be coloured in distinctive red and white markings as outlined by BS EN 8442.

Chapter 8s

High density polyethylene (HDPE) blow-moulded barriers, also known as Chapter 8 road barriers, assist in managing traffic and queuing areas. Their most distinctive characteristic is that they are built colourfully and come with reflective stickers so that pedestrians can easily spot them even at night.

They are also an efficient street solution for marking off hazardous zones. Their strong red and white markings clearly indicate "no entry."

HDPE barrier

This type of barrier is almost similar to the HDPE blow-moulded barrier but is a plain neutral colour. These barriers are easy to set up because of their light weight and hook-and-eye features. Because of its HDPE make, the barrier is corrosion-resistant, recyclable and rust-proof. HDPE crowd barriers do not have sharp edges so as to fully conform to safety protocol procedures, making it safe for pedestrians even if they bump into one of these barriers.

Expanding trellis barriers

Expanding trellis barriers are 1m high and can expand to either 3.6 or 4m wide depending on the model. As they expand, they maintain their height. They provide a quick and easy way of blocking access, marking out entrances and exits and blocking off hazardous areas to all but those permitted to enter. Weighing just 24kg, they can easily be moved into place as needed and slide open and closed as crowd control demands dictate.

Gate barriers

Another alternative are gate barriers. Designed to quickly block-off hazards (though they also could be used for crowd control, protecting staff, or keeping people out of a particular area), these quick- to-assemble barriers can be carried easily and rapidly deployed where needed. They are also highly reflective and so easy to spot, even in the dark or low-light

conditions.

Hoarding

Hoarding fence systems are similar to mesh-panel fencing systems. However, the mesh is replaced with a corrugated thin solid-steel infill. Because of its weight, the panel size is usually reduced to 2m by 2m.

This system should always be installed with the appropriate bracing at right angles to the fence panels and should either be pinned directly into the ground or sufficiently weighted to give stability. Hoarding has limited resistance to lateral loads such as wind or crowd pressure. The manufacturer's instructions and guidelines regarding support systems should be directly followed when installing this type of fencing.

Wire and mesh

This type of fencing is normally constructed of tubular steel frame with a steel-wire mesh infill. Commonly it comes in panels measuring 2m high and 3.5m long. It is supported by inserting the uprights into separate solid plastic or concrete block units and joined together with an independent clip unit. Straight lines of this barrier must always be supported at intervals with diagonal bracing.

Mesh-panel fencing is used extensively at event sites for creating perimeters that can be moved quickly and easily opened for access. It has no structural resistance to crowd pressure. Mesh-panel fencing is often covered with plastic sheeting and, if so, consideration should be given to wind speed and direction, as additional diagonal braces may be required.

When branding or using scrim, additional bracing must be considered, as the wind loading will be increased. When using branding or scrim on a roll, consideration must also be given to regular breaks in the material should the barriers / fencing need to be broken for safety reasons or for emergency exits.

Steel panel fencing

This is a solid-panel system usually used for creating an enclosed perimeter. It offers a reasonably high degree of security. The nature of this product dictates that specialist contractors should be employed to erect it. The fence-panel size is normally 3m high by 2.4m wide and is formed of flat plastic-coated steel over a fabricated steel frame. The overlapping frames are bolted together, secured to the ground with pins and then supported by braces at a right angle. The braces should be positioned at every join of the panels to ensure stability. This system is designed to be load and wind bearing, using calculations that should be supplied by the manufacturer / installer.

Turnstiles

Many events feature turnstiles at their main entry points, as well as the entrances / exits of other areas such as merchandise stores. By providing access control, turnstiles increase the overall safety of an event. They also provide data on the number of people at an event, enabling organisers to stop entry if crowd levels get too high or become unsafe.

Banners or café barriers

Banners or café barriers are constructed with stainless steel and banners inserted in the centre. Typically used outside cafes or restaurants that have pavement space and enable branding, they offer no crowd resistance but work well in defining an area.

Hazard tape

Hazard tape can be used for a very quick temporary aid to direct people away from an area and provide a visual effect which states "no entry". It is temporary and needs someone near to it diverting people away, as it will often be ignored. It should only be used as a quick and easy measure until either more assistance has arrived, a more secure solution has been found or the crowd has dissipated. Although an effective quick control aid, it looks rather tacky so is not favoured by commercial or marketing teams at an event.

Ground markings

Ground markings are an effective way to indicate in which direction people should move. They are also very effective to indicate a safe place to stand if a barrier is not desired because it transmits an unfriendly message. Ground markings have an open welcoming feel but still indicate that the public should go no further. It is effective in areas like an art gallery, where it would be respected by all visitors.

Vivid ground markings, such as those on a pedestrian crossing, highlight this is a safe area for a user while also warning drivers to take care.

What is the most suitable?

It is crucial that the correct method of controlling crowds is applied. So many tragedies have occurred in the past through a lack of planning, the lack of resource, the incorrect use of the space and the wrong type of barrier being used because not enough research was carried out beforehand on the event's demographics, topography, artist / celebrity performing or the weather conditions. Using the most appropriate system for barriers will help ensure the safety of those attending an event and enhance their experience.

Julia Sawyer
Director, JS Consultancy

Remote hearings are lawful … for now

Matt Lewin examines the most up to date views on remote licensing hearings, including what could be a decisive ruling in their favour

The council chamber of the London Borough of Lewisham overlooks the South Circular ring-road as it passes through Catford, South London. On the opposite side of the road to the chamber is a small nightclub with a late licence by the name of Silks. In November and December 2022, members of Lewisham's licensing committee held a series of hearings to consider, first, an application for review and, later, an application for summary review of Silk's premises licence. The licence was revoked.

Had the hearing taken place in the council chamber, members could have popped in for a drink at Silks before making their way home – though I would not have recommended it. However, the councillors were not in the council chamber: they were at home. The hearings all took place online.

Was this lawful? That is the question raised by the case of *Walk Safe Security Ltd v London Borough of Lewisham*, now (at the time of writing) on its way to the High Court.

'Read the standing orders! Read them and understand them!'

In March 2020, during the first national lockdown, the Government made, under powers given in the Coronavirus Act 2020, the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 ("the Flexibility Regulations"). Until then, the consensus had been that local authority meetings took place in person, usually in the chambers and committee rooms which had been built for that very purpose since the modern system of local government was created in the late 19th century. Most of us involved in licensing – and local government more generally – had never heard of, let alone, used Zooms or Microsoft Teams.

Suddenly, however, in-person meetings had become a deadly threat to public health. Parliament's solution, in the Flexibility Regulations, was to expressly permit any meeting to take place "by remote means". The Flexibility Regulations provided that members in "remote attendance" needed, in essence, to hear and be heard, and see and be seen, by other members in attendance and members of the public attending the meeting. That was essential to ensuring the validity of the meeting and the proper functioning of local democracy. In response, local authorities scrambled to update their standing orders to lay down modified rules of procedure for meetings taking place in the brave new world of Zoom and Teams.

The Flexibility Regulations were only ever seen by the Government as a temporary solution and therefore contained a sunset clause which provided for their automatic expiry in May 2021. However, after a few early teething problems, it became apparent that most people involved in local government meetings rather liked the remote format. At least on some accounts, it became easier for busy councillors to attend meetings, and accountability was surely improved immeasurably by the introduction of livestreamed meetings, with the ability to catch up on missed sessions of overview and scrutiny committee at any time on the authority's YouTube channel.

'You have no authority here, Jackie Weaver. No authority whatsoever'

As the deadline for the expiry of the Flexibility Regulations approached, many local authorities – with the notable exception of Handforth Parish Council – began to grow concerned. Letters to the Department for Levelling Up, Housing and Communities urging the government to legislate permanently for remote meetings were essentially brushed off.

With a few months to go, a consortium of local authorities, with the backing of the Secretary of State, issued a claim in the High Court for a declaration that remote meetings would be lawful, even after the expiry of the Flexibility Regulations.

To the disappointment of many, the court – in *Hertfordshire County Council v Secretary of State for Housing, Communities and Local Government (No. 1)* [2021] EWHC 1093 (Admin) – held the opposite, confirming that remote meetings were not permitted by the Local Government Act 1972 and therefore

that, with only a few weeks' notice, all local authority meetings had to be held in-person.

Unanswered questions

From a licensing perspective, what you need to understand about *Hertfordshire* is that it was a case only concerned with the conduct of ordinary meetings of local authorities. As a result, the court's judgment said nothing about hearings taking place before licensing committees and whether these could be held remotely.

The crucial distinction is that – as a matter of law – an ordinary meeting of a local authority is not the same as a hearing before that local authority's licensing committee. That is because a licensing committee is constituted under s 6 of the Licensing Act 2003 (LA2003) with specific statutory functions, rather than by usual system of delegating council functions to committees under the Local Government Acts 1972 and 2000.

Similarly, ordinary meetings are held under the statutory code set out in sections 100 A-K of, and Schedule 12 to, the Local Government Act 1972. This is not the statutory basis for licensing committee hearings, which are required to be held by various provisions of LA2003 and are conducted under the Licensing Act (Hearings) Regulations 2005 ("the Hearings Regulations").

This meant that the ruling in *Hertfordshire* did not apply to licensing hearings – meaning it was an open question whether remote hearings were permitted under LA2003 and the Hearings Regulations.

Two years on, views differed as to whether remote hearings were lawful. Some authorities reverted to in-person hearings, but others continued to hold some or all hearings remotely and others still adopted a hybrid procedure. In the absence of a test case, it remained unclear as to what licensing authorities were and were not allowed to do.

Walk Safe

That brings us to the case of *Walk Safe*, in which the question of whether remote hearings were lawful was squarely raised as an issue in Silks' appeal against the revocation of its licence. Bromley Magistrates' Court issued a direction for a hearing to consider this question as a preliminary issue, which took place in March 2023.

Key to the appellant's case were the following points:

- The Hearings Regulations require a hearing to be held on a particular date and at a particular time and place. "Place", they argued, "self-evidently describes a physical location". Similarly, the right of parties and members of the public to "attend" the hearing indicates "physical attendance or presence at a particular geographical location".

- The Welsh Senedd had expressly legislated for remote licensing hearings in Wales. That would not have been necessary if they were already permitted by the Licensing Act 2003.

- Requiring hearings to take place in-person provides greater certainty for everyone affected by the decision.

In response, Lewisham's argument was:

- There was no definition of a "hearing" in either LA200 or the Hearings Regulations. All that was required was a process which enabled the committee or sub-committee to hear evidence and submissions from the parties before making a decision. Crucially, there was no reason in principle why this has to be done in person. It is perfectly possible for a remote hearing to be conducted fairly.

- All that the Hearings Regulations required was that the hearing be held at a "place". They did not provide any further definition or qualification of that word. Therefore, in principle, a place could be "online" and there was no great practical difficulty in arranging and giving notice of a hearing taking place online. This was in contrast to Schedule 12 to the Local Government Act 1972 which did qualify the word "place", requiring meetings to be held "at such place, either within or without their area…". The court in *Hertfordshire* had found this qualification to be a strong indication that meetings had to take place in a single, physical location.

- Section 9(3) of LA2003 provides that – subject to the basic procedural framework set out in the Hearings Regulations – "each licensing committee may regulate its own procedure". Therefore it was open to the committee to decide, as a matter of procedure, to hold a hearing remotely. The licensing committee had full democratic legitimacy to make the procedural "choices" described by the High Court in the *Hertfordshire* case for itself.

- The Welsh legislation – which resulted in amendments to the Hearings Regulations themselves – was enacted in recognition of the fact that LA2003 and the Hearings Regulations were not explicit in permitting

remote hearings. Thus they were intended to resolve any ambiguity in the legislation. It could also be said to represent a decision to take a more centralised approach than in England, where Parliament had left this – as with so much else in our licensing system – to local authorities to decide for themselves, based on local needs and priorities.

The Judge – DJ Abdel-Sayed – essentially sided with Lewisham on these points:

- She held that "whether a hearing is conducted in person or by remote means is a matter of procedure. Section 9(3) provides each licensing committee with the independence to make its own procedural decisions, subject to the [Hearings] Regulations." She went on to hold that "… the use of the word 'subject' implies that unless the Regulations specifically permit or prohibit remote hearings, then the authority may determine the matter for themselves." Therefore, as a matter of procedure, it was open to a licensing authority whether or not to hold hearings remotely.

- The *Hertfordshire* case was concerned with a different legislative framework and therefore did not assist her in resolving the issue in this appeal. However, she did note that the court in *Hertfordshire* had accepted that "'meeting' can, in some contexts, encompass virtual or remote meetings: since March 2020 it has become common to refer to a 'Zoom meeting'."

- The Welsh legislation made "express provision for remote hearings and clarify any ambiguity in the law." She did not accept the appellant's argument that this meant that, prior to that legislation, remote hearings were not permissible: "It is equally arguable that the Welsh [Assembly] has simply sought to make clear and particular provision for remote hearings. It does not necessarily follow that the legislation applying in England prohibits remote hearings."

- The word "place" was not defined in either LA 2003 or the Hearings Regulations: "A 'place' may be a physical location, but I see no reason why it cannot be a virtual platform. Nor can I see any reason why 'attend' cannot include electronic attendance. There is nothing within the language of the provisions which limits the scope of the word 'place' (as there is in the LGA 1972)."

Her conclusion provides a neat summary: "Since there is no prohibition on remote hearings, the London Borough of Lewisham is able to determine its own procedure. The remote conduct of a licensing hearing is permitted in law."

Shortly before this article was finished, Walk Safe confirmed it had issued an appeal to the High Court by way of case stated, meaning that a definitive answer to this question will be given by the High Court in due course.

In the meantime

For now, we have a decision of the magistrates' court confirming that remote hearings are permitted. It is not technically binding and will eventually be superseded by the outcome of the High Court appeal.

Nonetheless, in the meantime, licensing authorities which are already using remote or hybrid hearings should give thought to adopting a remote hearings protocol. A protocol makes clear what procedural rules apply to remote hearings with the objective of ensuring that the hearing takes place fairly.

That protocol should address, as a minimum:

- Who decides whether the meeting takes place in person or remotely and what criteria are used to inform that decision. Is the default that all meetings take place remotely? Does a party requesting an in-person hearing have to show good reason? Or is at the discretion of the chair?

- How is a "remote hearing" defined?

- What constitutes valid attendance by members of the committee, parties to the hearing, officers and members of the public?

- How will access to the hearing by members of the public be ensured?

Whatever the outcome of the High Court appeal, it should be made clear that this case will apply only to premises licensing hearings. Other licensing hearings, such as SEVs, gambling premises licences and taxis are dealt with under different legislation and therefore may or may not permit remote hearings.

Having said that, it is certainly arguable that gambling applications and reviews could be heard remotely as these hearings are held under specific legislation (the Gambling Act 2005 (Proceedings of Licensing Committees and sub-committees) (Premises Licences and Provisional Statements) (England and Wales) Regulations 2007; note

that amendments to these Regulations applying in Wales expressly permit remote hearings). In particular, Regulation 6 implies that the licensing authority may, in its discretion, regulate its procedure – potentially to the extent of holding a hearing remotely.

For other types of licensing hearings, it is more doubtful that remote hearings would be permitted. For instance, a hearing must be held before refusing to grant or renew an SEV licence: paragraph 10(19) of Schedule 2 to the Local Government (Miscellaneous Provisions) Act 1982. Such a hearing must be held before "a committee or sub-committee of the authority", which appears to be a reference to an ordinary meeting of a general licensing committee exercising delegated powers under the 1982 Act on behalf of the authority.

A local system

One of the complaints made about the use of remote hearings was that, in the absence of express legislation laying down the conditions for holding a hearing remotely, there is the potential for inconsistencies in approach between different licensing authorities.

However, to my mind, that is part of the case for permitting remote hearings. As noted above, although subject to some oversight at a national level, licensing is primarily a local matter. As a result, there are already significant variations between authorities, both in terms of how they want their communities to function and in terms of how they go about making decisions in individual cases.

Why shouldn't licensing authorities be trusted to adopt a procedure which suits the needs and priorities of their members, officers, businesses and residents? Provided that, overall, the hearing is fair, why should it matter whether the members can see the whites of the eyes of the parties?

Matt Lewin
Barrister, Cornerstone Barristers

‘Fit & proper person’: taxi driver licence reviews

The fit and proper person concept is at the heart of the taxi and private hire driver licence regime but is not defined by statute. **Professor Roy Light** sets out the advice licensing officers can take from case law and guidance documents

The hackney carriage and private hire licensing regimes are concerned with protection of the public. The fit and proper person criterion is a key element. A local authority must not grant a driver licence unless satisfied the applicant is a fit and proper person to hold the licence. Once granted, the authority may refuse to renew or may suspend or revoke a driver licence if no longer satisfied the driver is fit and proper to hold the licence.

The fit and proper person test is not unique to taxi licensing. It has been used across a number of jurisdictions and areas of law.[1] Yet despite its centrality there is no legislative definition of fit and proper person for hackney / private hire licensing. Its meaning falls to be discerned from case law and guidance documents. While the term has been discarded by the Licensing Act 2003,[2] useful judicial guidance may be found here:

> *… a portmanteau expression, widely used in many contexts. It does not lend itself to semantic exegesis or paraphrase and takes its colour from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualities reasonably required of a person doing whatever it is that the applicant seeks permission to do.*[3]

The absence of definition serves not to fetter its operation; rather it allows for a wide interpretation by local authorities when exercising their discretion in deciding whether to grant, renew, suspend, or revoke a driver licence. As with the exercise of other licensing decisions, a balance is struck between protecting the public and treating the driver fairly. Recent much publicised offending involving taxi drivers has raised concerns and shifted “the context” and balance. This is made explicit in the 2020 Department for Transport standards considered below.

The law

Legislation

The legislative provisions aim to ensure compliance with the fit and proper purpose criterion both to obtain and retain a driver licence:

> *A licensing authority shall not grant a licence to drive a hackney carriage/private hire vehicle unless they are satisfied that the applicant is a fit and proper person to hold such a licence.*[4]
>
> *A licensing authority may suspend or revoke … or refuse to renew the licence on any of the following grounds:*
>
> *(a) that he has since the grant of the licence-*
>
> *1. been convicted of an offence (dishonesty, indecency, or violence) or*
>
> *2. been convicted of an offence under or has failed to comply with the provisions of the Act of 18476 or of this Part of this Act; or*
>
> *(b) <u>any other reasonable cause</u>* (emphasis added).

The exercise of discretion by a local authority under both sub-paragraph a) (convictions) and b) (“any other reasonable cause”) amount to a consideration of whether the driver is a ‘‘fit and proper person.’’

Case law

Case law supports a wide interpretation of fit and proper on the part of local authorities with protection of the public the primary focus.

In *R v Maidstone Crown Court ex p. Olsen* [5] (indecent assault

1 For example, trustees of charities and NHS directors.

2 The Licensing Act 1964 provided that: *Licensing justices may grant a justices’ licence to any such person, not disqualified under this or any other Act for holding a justices’ licence, as they think fit and proper*. No definition was provided by the Act.

3 *R v Crown Court at Warrington ex p. RBNB* [2002] UK HL 24.

4 Sections 51(1)(a)(i) and 59(1) LG(MP) Act 1976.

5 [1992] COD 496.

– conviction quashed: jury misdirected) it was held that the burden of proof is on applicants to show they are a fit and proper person. It is the civil standard of proof (balance of probabilities) so that an authority is entitled to go behind an acquittal (which would be based on the criminal standard of beyond reasonable doubt).[6]

This is illustrated in *McCool v Rushcliffe BC*[7] (hearsay evidence admitted of indecent assault not resulting in conviction):

> *It is in my view impossible to be prescriptive as to what might amount to good reason. What will be (or may be) a good reason will vary from case to case and vary according to the context in which the words appear … it is appropriate for the local authority or justices to regard as a good reason anything which a reasonable and fair-minded decision maker, acting in good faith and with proper regard to the interests of both the public and the applicant, could properly think it is right to rely on.*
>
> *One must … approach this question bearing in mind the objectives of this licensing regime which is plainly intended, among other things, to ensure so far as possible that those licensed to drive private hire vehicles are suitable persons to do so, namely that they are safe drivers with good driving records and adequate experience, sober, mentally and physically fit, honest, and not persons who would take advantage of their employment to abuse or assault passengers.*

The purpose of suspension was considered in *Leeds City Council v Hussain* [8] (charged with offence of violent disorder):

> *… to prevent licences being given to ... those who are not suitable people taking into account their driving record, their driving experience, their sobriety, mental and physical fitness, honesty, and that they are people who would not take advantage of their employment to abuse or assault passengers ... the council, when considering whether to suspend a licence or revoke it, is focusing on the impact of the licence holder's vehicle and character on members of the public and in particular, but not exclusively, on the potential users of those vehicles.*
>
> *To my mind the phrase "any other reasonable cause" has been specifically selected to show the width of the discretion which is given to a council. Their task of 'making a decision' is very much a jury question for them in which they are entitled to take account of all relevant circumstances.*

It is clear from the authorities that the remit is a wide one and there is no doubt that a local authority can consider failed criminal proceedings when applying the fit and proper person test, as well as any other factors which might be relevant to the fitness or otherwise of an applicant. It is also clear that each case must be judged on its own evidence and particular facts.

Effect on driver

Any personal circumstances said by the driver to "disadvantage him in the labour market" or in any other way are not relevant. As Lord Bingham, cited with approval in *Leeds City Council v Hussain* by Silber J, put it:

> *[T]he council, when considering whether to suspend a licence or revoke it, is focusing on the impact of the licence-holder's vehicle and character on members of the public and in particular, but not exclusively, on the potential users of those vehicles. This does not require any consideration of the personal circumstances which are irrelevant, except perhaps in very rare cases, to explain or excuse some conduct of the driver.*

The decision was applied in *Cherwell v Anwar*[9] where a magistrates' court was held to have been wrong to take personal factors into account when reaching its decision.

Guidance

Over the years, guidance documents from various sources have been produced to assist local authorities in their decision making.[10] Two are mentioned here. Firstly:

> *Guidance on determining the suitability of applicants and licensees in the hackney and private hire trades: SAFE and suitable? 2018.*[11]

Professionally researched and produced by an experienced and knowledgeable group (fit and proper to conduct the task!) and published by the Institute of Licensing in association with other bodies it carries considerable weight. As it makes clear "it need not be slavishly followed but it provides a starting or reference point" (para 1.6). Having noted that "there is no recent Statutory or Ministerial

6 It is also clear from *Nottingham City Council v Farooq* [1998] WL 1044205 (QBD) that the tribunal cannot go behind a conviction.

7 [1998] 3 All ER 889.

8 [2002] EWCH 1145 (Admin).

9 [2011] EWHC 2943 (Admin).

10 For example, the *Councillor Handbook: Taxi and PHV Licensing* produced by the Local Government Association (latest edition July 2021).

11 Institute of Licensing, April 2018, in partnership with Lawyers in Local Government, NALEO and the Local Government Association.

guidance", the Institute guidance is intended to complement any future such guidance and other guidance such as that from the LGA. Statutory guidance has since been produced by the Department for Transport and is considered below. The Institute guidance is being reviewed.

The Institute guidance offers this definition of fit and proper person:

> *Would you (as a member of the licensing committee or other person charged with the ability to grant a hackney carriage licence driver's licence) allow your son or daughter, spouse or partner, mother or father, grandson or granddaughter or any other person for whom you care, to get into a vehicle with this person alone?*[12]

There are few if any other situations where a person will get into a motor vehicle with a stranger who then locks the doors and drives them away. This could be late at night, with a lone young person, perhaps under the influence of alcohol and separated from their friends. Taxis provide an invaluable service in making sure people get safely home in such situations. It is profoundly important that the person licensed to provide this service is fit and proper. This is starkly encapsulated in the test put forward in the Institute guidance. It is a first-rate test routinely cited in driver licence hearings and appeals.[13]

It does its job admirably where the physical safety of the passenger may be at risk and this, plainly, is the principal safeguard which must be put in place. However, could the test effectively narrow the remit of fit and proper person? For example, would financial irregularity on the part of a driver, which may question honesty with the possibility of overcharging, fall within the test?

The second source to note is:

> *Statutory Taxi & Private Hire Vehicle Standards July 2020.*[14]

The Standards are published by the Secretary of State for Transport under s 177(1) of the Policing and Crime Act 2017 and:

> *While the focus of the Statutory Taxi and Private Hire Vehicle Standards is on protecting children and vulnerable adults, all passengers will benefit from the recommendations contained within it (para.1.3).*

It is statutory guidance and:

> *The document sets out a framework of policies that, under section 177(4), licensing authorities* ***"must have regard"*** *to when exercising their functions. (Para.2.6, emphasis in original.)*

The statutory guidance adapts the "Button test" as follows:

> *It may be helpful when considering … fit and proper person to pose oneself the following question:*
> *Without any prejudice, and based on the information before you, would you allow a person for whom you care, regardless of their condition, to travel alone in a vehicle driven by this person at any time of day or night?*
> *If on the balance of probabilities, the answer to the question is 'no', the individual should not hold a licence … the safeguarding of the public is paramount.*[15]

The Standards then go on to lay out the test and how on the balance of probabilities it should be applied:

> *This means that an applicant or licensee should not be 'given the benefit of doubt'. If the committee or delegated officer is only "50/50" as to whether the applicant or licensee is 'fit and proper', they should not hold a licence. The threshold used here is lower than for a criminal conviction (that being beyond reasonable doubt) and can take into consideration conduct that has not resulted in a criminal conviction. (Para.5.14, emphasis in the original.)*

This sets the standard with the civil burden of proof that decision makers have traditionally applied and reiterates the fact that conduct which has not resulted in a criminal conviction may be considered. But here is the conundrum. If the decision is 52 / 48 that the applicant is a fit and proper person the licence should be granted; but with a 48% chance that the driver is not a fit and proper person *would you allow a person for whom you care, regardless of their condition, to travel alone in a vehicle driven by this person at any time of day or night?*

Procedure

How is an authority to deal with a report of potentially unacceptable behaviour by those holding hackney or private hire driver licences? Some matters arising after grant will not require action by the authority. Others may warrant a

12 Paragraph 3.16 - this is effectively the test put forward in *Button on Taxis* Fourth Edition, (2017) Bloomsbury Press.

13 Although to the author's knowledge it has not been considered by the higher courts.

14 Department for Transport: for a commentary see Kolvin P (2022) 'Statutory taxi and private hire vehicle standards' *Local Government Lawyer,* 11 May 2022.

15 Paragraphs 5.12-5.14.

warning or points (if the authority operates a points system).[16] But what of matters which may require a response by way of suspension[17] or revocation?

The primary duty is protection of the public and some matters may require immediate action:

> … ***all licensing authorities should consider arrangements for dealing with serious matters that may require the immediate revocation of a licence***. *It is recommended that this role is delegated to a senior officer/manager with responsibility for the licensing service.*[18]

Suspension / disqualification takes effect 21 days from the day notice is given to the driver (s 61(2A)), or if an appeal is lodged until the determination or abandonment of the appeal. However:

> *If it appears that the interests of public safety require the suspension or disqualification of the licence to have immediate effect, and the notice given to the driver … includes a statement that that is so and an explanation why, the suspension or revocation takes effect when the notice is given to the driver.*[19]

While protection of the public is paramount, it should not be forgotten that a finding of misconduct and loss of licence may have far-reaching direct and indirect consequences for the driver. Public protection is the primary duty, but as the Statutory Standards underline, licensing functions must be discharged with proper account taken of the authority's licensing policy supported by: member / officer code of conduct; the Human Rights Act; the rules of natural justice; and reasonableness and proportionality. Any hearing should be fairly conducted, allowing for consideration of all relevant factors; decision makers should avoid bias (or the appearance of bias) and predetermination; and data protection legislation should be observed.

An avenue of appeal is also required and provided for in the legislation. However, magistrates' court waiting times may be lengthy. Taxi licensing appeals may take a year or more to be heard. This means that a driver with a question mark over them will continue to drive, and where immediate revocation is imposed it could be said that such a wait offends against the maxim "justice delayed is justice denied".

Policies should be used as internal guidance but cannot be applied rigidly or inflexibly and reasons for departure should be given. Each case must be considered in the light of the policy but not so that the policy automatically determines the outcome.

Proceedings before the licensing authority may be informal, but procedure must be followed. So, although an interview under caution may not be required, the driver should be offered the opportunity to give their version of the facts.

Whether a person remains fit and proper to hold a driver licence must be decided on the evidence and it is essential to ensure all relevant evidence has been collected and presented. The tribunal is not bound by the rules of evidence applicable in civil and criminal matters, for licensing is the exercise of an administrative discretion. Hearsay evidence is admissible;[20] but the weight to be attached to such evidence must be carefully evaluated:[21]

> *…the Appellant had called no live evidence but had relied upon a case summary provided by the police.*

The court ruled that hearsay evidence is admissible and the authority:

> *were entitled to rely on any evidential material which might reasonably and properly influence the making of a responsible judgment in good faith on the question in issue.*[22]

Adequate reasons for the decision should be given based on the evidence. Findings of fact should be made and the decision supported by the facts - which should be sufficient to allow the reason(s) for the decision to be understood. As well as demonstrating the fairness of the procedure this also allows a driver unhappy with the decision to be better informed on whether to lodge an appeal. If an appeal is made, sound reasons will assist the court's understanding of the basis for the decision. This is important for:

> *In 'very general terms' the Court of Appeal held that 'the magistrates' court should pay careful attention to the reasons given by the licensing authority' and before departing from that decision must be satisfied that the judgment below was wrong … but that 'the*

16 *R (application of Singh) v Cardiff City Council* [2012] EWCH 1852 (Admin) considers the legal position of penalty points schemes.

17 For a discussion of the case of *Singh* and suspension see Light R (2013) 'Suspension of taxi drivers' licences', *Local Government Lawyer*, 18 December 2013.

18 Statutory Standards, (*ibid*) para.5.11 – emphasis in original.

19 Section 61(2B) Local Government (Miscellaneous Provisions) Act 1976.

20 *Kavanagh v Chief Constable of Devon and Cornwall* [1974] QB 624; 2 All ER 697 CA.

21 *Westminster City Council v Zestfair L*td (1990) 88 LGR 288 DC.

22 *Hussain ibid.*

weight which the magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the decision'.[23]

Burden of Proof

The party with the burden of proof must prove its case. If it fails to do so the appeal will fail. The burden of proof in an appeal lies on the party bringing the appeal unless the burden has been shifted to the respondent by case law or legislation.

Appellants sometimes argue that the case of *Kaivanpor* shows that while the burden of proof lies on the driver to show he is a fit and proper person when applying for a licence, it shifts to the respondent where the respondent's finding that the driver is not fit and proper is challenged on appeal.[24]

It is generally agreed that *Kaivanpor* was wrongly decided and in any event cannot be used as an authority. The burden of proof is on the appellant to show that the decision below is wrong in the light of the evidence at the appeal.[25]

23 *R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31.

24 *Kaivanpor v Director of Public Prosecutions* [2015] EWHC 4127 (Admin) and see also LGL November 6, 2015.

25 For a consideration of the legal basis of the decision, see Light R (2022) 'Taxi driver licence appeals: burden of proof' *Local Government Lawyer* 25 November 2022.

Summary

The concept of fit and proper person has long been the centrepiece of the taxi and private hire driver licence regime. Although not defined by statute, guidance may be taken from the case law and the guidance documents.

The local authority has a duty to implement a licensing regime aimed at protecting the public. It must have regard to the Statutory Standards issued by the Department for Transport and clear reasons should be given for departure from the Standards. The authority should have in place procedures for matters which on public safety grounds it considers require immediate investigation with possible suspension or revocation of the driver licence.

Procedures should be fair and transparent and affected parties should be given the opportunity to address any concerns / allegations. Adequate reasons must be given for decisions. The burden of proof is on the driver both in the original application and any proceedings in relation to whether they continue to be fit and proper.

Professor Roy Light
Barrister, St John's Chambers

Will recent planning changes boost Scotland's café culture?

Licensing changes to outdoor eating and drinking should help some businesses but hardly constitute far-reaching change, suggests **Lynn Simpson**

Recent changes in planning rules mean that planning permission will no longer be required to use a public pavement to create an outdoor street café. The changes have been lauded for providing businesses with more flexibility to offer outdoor eating and drinking, by simplifying the process and removing some of the red tape in a similar way to the temporary relaxations permitted during the pandemic, but will it really make a difference to Scotland's café culture?

There will undoubtedly be businesses which will benefit from this change, particularly where planning permission for an outdoor area would have been difficult to obtain. However, the planning relaxations only apply where part of a public road or footpath is being used, so planning permission may still be required for outdoor areas on private land, depending on the locality.

If nothing else, removing the need for planning permission will reduce the costs involved in setting up such an outdoor area but operators must be aware that other permissions will still need to be obtained, particularly if the outdoor area is to be used for the consumption of alcohol.

Section 59 consent

Consent from the appropriate roads authority, under s 59 of the Roads (Scotland) Act 1984, is required before any furniture can be placed on a public footpath or road. There are likely to be restrictions on the size of any permitted outdoor area, as well as the types of furniture that can be used, in order to ensure that the use of the pavement by pedestrians is not impeded. Removable barriers are also required by many local authorities to clearly delineate the extent of the outdoor seating area.

Operators should check what their local authority's requirements are, as processes and costs can vary significantly throughout Scotland. This is evident simply by comparing the differences between obtaining such consents in Edinburgh and Glasgow.

Edinburgh: In Edinburgh, a tables and chairs permit is required for such outdoor areas. A permit allows tables and chairs to be put on the public pavement between 9am and 9pm, seven days a week, with the option to add a further hour (until 10pm) for an additional £150 fee. The option to add an additional hour is not available in the central Grassmarket, which has different standard hours (12 noon – 9pm daily) to the rest of the city.

The cost of a tables and chairs permit varies according to the size of the area being occupied and whether or not it lies within the World Heritage Site. For premises inside the World Heritage Site, the cost is calculated at £155 per square metre but outside of the World Heritage Site that cost is £125 per square metre.

Permits are only granted where the primary business carried on in the premises is the serving of food and drink. Operators must show they have sufficient public liability insurance to cover the outdoor areas where tables and chairs are being placed.

It is also a mandatory requirement of all such permits that solid barriers be placed at each end of the outdoor area. Those barriers must meet various criteria, such as being at least one metre in height, extending to the full width of the tables and chairs area, incorporating a tapping rail or other demarcation to guide blind or partially sighted pedestrians, and be capable of withstanding Class B winds blowing from any direction. In order to show compliance with the criteria, a detailed description of the barriers to be used must be submitted with the permit application.

If any coverings are to be included within the outdoor area, such as parasols or gazebos, permission from the council for those will also be required. Full details of the coverings, along with a wind management plan, will need to be submitted in order to demonstrate that any such coverings meet the council's safety and appearance requirements. The standard conditions attached to each permit also prohibit the use of barbecues, rotisseries, ice cream machines, drinks machines, fridges or any other equipment for the preparation or sale of food and drink within the designated outdoor area.

Glasgow: In Glasgow, operators must obtain an s 59 permit for the purposes of operating a temporary street café.

The most noticeable distinction between Glasgow and

Edinburgh is the cost for such permits, with Glasgow being significantly cheaper. The cost structure in Glasgow was changed in April 2023, to allow fees to be based on the size and location of the proposed area, rather than simply a flat rate fee for all applications. Glasgow City Council clarified that the change was made to make the permit costs more proportionate to the level of resource required to assess, process, issue and enforce these consents, and also to ensure that smaller street cafés were not disproportionately disadvantaged by the costs associated with managing larger installations.

The costs for an s 59 permit are now calculated per square metre, depending upon where in the city the area is located and which of the three new charging bands applies. For areas within the city centre boundary, that cost will be £60 per square metre. Areas falling within the "major town centre" will cost £30 per square metre, and for the wider "neighbourhood" area that cost falls to £10 per square metre. An interactive map showing the different areas is available on Glasgow City Council's website. While this change may be welcomed by some, for city centre operators with large outdoor areas it will likely mean a significant increase in costs from the previous flat rate fee of £450.

Applications for s 59 permits must be made via an online portal. Evidence of sufficient public liability insurance, with a minimum cover of £5 million, as well as a detailed layout plan showing the dimensions of the proposed area, must also be uploaded to the portal with the application.

The s 59 permits are subject to an annual agreement, with which all operators must comply. That agreement contains various conditions and obligations, including a requirement for the outdoor area to be delineated by removeable barriers which must be designed so as to allow access for disabled persons, as well as ensuring that at least 1.5 metres of the pavement is available for use by the public. Furniture must not be placed in the area before 7am and must be removed no later than 10pm (or earlier, if the area is not in use until 10pm).

In contrast to Edinburgh, advertising signs and food preparation equipment are permitted within outdoor areas in Glasgow but must not be placed in a manner that may distract or confuse drivers or pedestrians at any adjacent roadway, road junction or pedestrian crossing

Alcohol in outdoor areas

Whilst an s 59 consent authorises an outdoor area to operate on part of the public footpath, it does not include permission for alcohol to be consumed in that area. If the outdoor area is to be used for alcohol consumption, operators will also need to consider how the area will be licensed.

If the outdoor area is temporary, it can be covered using occasional licences, which is a relatively straightforward process. The application fee for each occasional licence is just £10 and this is the same fee Scotland-wide, although it's likely that fee will rise in the near future. Each occasional licence can run for up to 14 days at a time, but many licensing boards restrict the number of consecutive occasional licences that a premises can obtain each year. Depending on the number of days or weeks the outdoor area will be used for, occasional licences are not always a suitable solution.

If the outdoor area will only be used during certain times of the year, some licensing boards will allow occasional licences to be used to cover those specific periods. For example, Glasgow Licensing Board allows seasonal occasional licence applications to be lodged for a period of six months, which streamlines the process significantly.

Otherwise, some licensing boards will insist that an outdoor area must be included within a premises licence. Operators should be mindful that adding an outdoor area to a premises licence will require a variation application, which will need to be considered at a licensing board meeting, and that process can take anywhere between two to nine months depending on where in the country the premises is located.

The restrictions on when and how outdoor areas can be used also differ between licensing boards, and those constraints can go further than the conditions attached to the s 59 consents, so what is permitted by one board may not be accepted by another.

Will it make a difference?

While the relaxation in the planning requirements is definitely a welcome change, particularly if it reduces the costs for operators looking to create new outdoor spaces, the suggestions that it will provide more flexible use of outdoor spaces and help the hospitality industry recover from the pandemic seem overly optimistic.

Operators will still be required to obtain s 59 consents and comply with the various conditions and restrictions stipulated by the relevant local authority. Separate permissions will also still need to be obtained if operators want to have alcohol in any outdoor area.

It is unlikely that Scotland's café culture will be revolutionised solely as a result of removing the need to obtain planning permission for some outdoor areas.

Lynn Simpson
Senior Associate, TLT Solicitors

Phillips' case digest

PREMISES LICENSING

King's Bench Division, Administrative Court
Mr Justice Fordham

Case stated concerning a public house which lost its licence after remaining open despite Covid-related restrictions

The Porky Pint Ltd - v - Stockton on Tees Borough Council [2023] EWHC 128 (Admin)

Decision: 27th January 2023

Facts: The licensing sub-committee had not been persuaded that the premises would act in a different way should there be any further lockdowns or restrictions imposed in the future. The Committee was satisfied that this was a case where revocation of the premise licence was a necessary and appropriate sanction. After considering and weighing up all of the evidence the Committee resolved to revoke the premises licence.

Points of dispute: [1] On appeal had the District Judge Hood ("the Judge") sitting at Teesside Magistrates' Court been entitled to consider matters of 'public health' when considering the four licensing objectives? [2] Was he right to take into account behaviour which did not result in a criminal prosecution for the purposes of determining an appeal against revocation of a premises licence? [3] Was the Judge right to conclude that the Appellant had no lawful right to withhold CCTV footage on request by the Respondent?

Held: (1) The legally correct interpretation of section 4(2) was a question of law for the Court, to be derived from the words used by Parliament and the discernible statutory purpose. The Court has no role in seeking to expand the statutory reach beyond that position. The licensing objective was "public safety", and not "public health". The fact that "public health" is not present as a licensing objective does not 'strip out' anything which could be said to be "public health" from what properly falls within "public safety". Giving the words "public health" their ordinary and natural meaning, and in light of the circumstances of the pandemic at the relevant times, there was nothing incorrect – still less unreasonable or unjustified – in the Judge concluding, as the Committee had before him, that the crime and disorder licensing objective was engaged and relevant. Fordham J noted that the sub-committee was "satisfied that in particular the licensing objectives of crime and disorder and public safety were engaged and relevant to the evidence presented".

(2) The HRA argument advanced in the case as a putative defence to criminal proceedings could not have availed the Appellant had there been a prosecution. These conclusions were very clear, based on the authorities which the Appellant relies (*Tre Traktorer Aktiebolag v Sweden (1989) 13 EHRR 309* and *R (Mott) v Environment Agency [2016] EWCA Civ 564 [2016] 1 WLR 4338*), and in light of the evidence and materials placed before the Court.

(3) The licence condition should be interpreted so that a request for CCTV must be met within 24 hours as routine. If serious crime was alleged, less than 24 hours is appropriate. The ordinary and natural meaning was that urgency was linked to investigation of serious crime. The Judge had convincingly rejected reliance on so-called data protection justifications. Further, argument that the Police investigation of potential breaches of the coronavirus regulations had "nothing to do with" the Appellant (as licensee) or Mr Henderson (as the "Designated Premises Supervisor"), was plainly unsustainable in light of both the relevant Licence Condition and licensing objective section 4(2)(a).

The court answered each of the Questions in the Stated Case in the affirmative.

Appeal dismissed.

Obiter: As John Howell QC sitting as a Deputy Judge of the High Court had suggested in *Lalli v Metropolitan Police Commissioner [2015] EWHC 14 (Admin)* at §41iii, the provisions governing a review and its outcome were compatible with licensees Article 1 Protocol 1 Convention rights because they enabled a fair balance to be preserved, subject to appropriate safeguards, between the public interest and the licensee's interests in the proper regulation of licensed premises.

Costs: Appellant to pay the Respondent's costs in this appeal summarily assessed at £4,650; and (ii) the Respondent's outstanding costs as ordered and summarily assessed by the Judge on 16 March 2022 in the sum of £6,275.00. A broad-brush reduction from the £5,820 in the Respondent's costs schedule would be applied; not because the costs were unreasonable but because costs were not being awarded on an indemnity basis.

TAXIS

King's Bench Division
Mr Justice Bourne

No duty on a Council to take care to avoid causing a licensee psychiatric damage when advising that a particular vehicle would be suitable

Wokingham Borough Council Appellant -v- Muhammad Sohaib Arshad
[2022] EWHC 2419 (KB)

Decision: 29 September 2022

Facts: Mr Arshad was a taxi driver who had held a hackney carriage vehicle licence ("HCVL") from the Council since 2006. In late 2016 he needed a new vehicle. The Council required all such vehicles to comply with its licensing policy. Mr Arshad provisionally decided to purchase a second-hand Ford Galaxy. He contacted the Council's licensing team which suggested that a Ford Galaxy would be an appropriate vehicle. In due course the Council became aware that the car might not comply with its policy as there was inadequate headroom for a wheelchair user. The Council drafted a revised policy which would make clear the size of wheelchair that vehicles must accommodate and the necessary dimensions of the interior of vehicles. The Local Government Ombudsman, found that the Council was at fault because it had given him wrong advice. It recommended a fresh appeal hearing which resulted in the issue of a new licence. Mr Arshad's earlier loss of his licence and his consequential loss of livelihood and status precipitated a Depressive Disorder. Mr Arshad brought a claim in the County Court alleging: i. Discrimination on the grounds of race or religion; ii. Negligence (in the provision of advice that the Ford Galaxy would be an appropriate vehicle); iii. Breach of duty (in the carrying out by the Council of their statutory duties relating to hackney carriage licensing). The trial resulted in damages for pain, suffering and loss of amenity ("PSLA") in the sum of £42,500 and £290 for prescription charges and sundry litigation expenses. Additionally, the judge ordered the Council to pay costs of £6,270.60 to Mr Arshad.

Point of dispute: (1) Was the judge wrong to find that the Council, when giving Mr Arshad the advice that the Ford Galaxy was a suitable vehicle, owed him a duty to take care to avoid causing him psychiatric damage. (2) Was psychiatric illness, as opposed to mere anxiety, upset or distress, a 'reasonably foreseeable' consequence of the negligent advice. (3) Had the necessary chain of causation been proved.

Held: (1) It was fair, just and reasonable in these circumstances to impose a duty of care upon the Council to avoid the economic loss which plainly would be a reasonably foreseeable consequence of any negligence (2) Whilst any serious setback may be capable of causing a degree of psychiatric harm to anyone, psychiatric injury in this case was not so reasonably foreseeable as to make it appropriate for a local authority, giving discretionary pre-application advice on a licensing matter, to owe a duty of care not to cause pure psychiatric harm (despite Mr Arshad's very real reasons for being aggrieved by the Council's conduct towards him). (3) As a matter of law, there was no obstacle to recovering damages where bad advice has led to a person entering a flawed transaction which in turn causes them to suffer loss of a reasonably foreseeable kind. It is normal for the loss to flow not directly from the actual giving of the advice but from its immediate consequences. The barrier to the present claim was foreseeability, not causation. There was no error in the judge's conclusions as to this element and ground 3 therefore failed. (4) & (5) Whilst these grounds (quantum) were now academic they, too, failed, as did Mr Arshad's application for permission to cross-appeal.

The Council's appeal would be allowed.

SEXUAL ENTERTAINMENT VENUES

King's Bench Division
Mr Justice Choudhury

Whether SEV 'nil' policy arrived at unlawfully
The King (on the application of) CDE v Bournemouth, Christchurch and Poole Council
[2023] EWHC 194 (Admin)

Decision: 3 February 2023

Facts: The Claimant sought judicial review of the Defendant Council's decision of 9 November 2021 ("the Decision") to adopt a new Sexual Establishment Policy ("the Policy"). The Policy had two features relevant to the challenge: the first was a policy to impose no cap on the number of Sexual Entertainment Venue ("SEV") licences that may be granted to establishments in the Bournemouth, Christchurch and Poole ("BCP") areas ("the No Cap Policy" or "the NCP"); the second was a policy that those SEVs already licensed to operate in BCP enjoy a presumption in favour of annual renewal of their licence for the duration of the Policy ("the Acquired Rights Policy" or "the ARP"). The Defendant conducted two consultation exercises in respect of the Policy. The majority of responses were unfavourable. Many of these responses raised concerns that the presence of SEVs had a negative effect on attitudes towards, and the treatment by men of, women and girls, by, amongst other things, contributing

to a culture in which women and girls are objectified, commodified, exploited, harassed, discriminated against and subject to sex-based violence. These concerns are referred to, collectively, as "sex equality-based concerns" or "SEB concerns".

Point of dispute: (1) whether the Defendant erred in that it failed to have regard to and/or conscientiously engage with these SEB concerns by dismissing them as amounting to "moralistic" objections which could not be considered in determining whether to adopt the Policy and the NCP in particular. (2) whether the Defendant also failed to comply with the Public Sector Equality Duty ("PSED") under s.149 of the Equality Act 2010 ("the 2010 Act"). (3) whether the effect of the ARP was unlawfully to fetter the Defendant's discretion in respect of licensing decisions which Parliament had decreed should be reviewed on an annual basis.

Held: (1) It was not open to a local authority to exclude SEVs from their area on the sole basis that it considered them immoral: to take such a stance would be to disregard Parliament's intention that such venues are permissible subject to the conditions for licensing such premises being met. That may have the effect, during a consultation exercise, that responses expressing an objection only on terms that such venues are immoral, will not carry much or any weight in the local authority's decision. However, a local authority is not thereby precluded from taking into account objections from the local community as to whether there should be SEVs in the locality for other reasons, even if such reasons could be said to derive from or amount to a particular moral stance or outlook on SEVs more generally. *R v Newcastle Upon Tyne CC ex parte The Christian Institute* [2001] LGR 165 was not authority for the proposition that SEB concerns should not be taken into account by a local authority.
(2) Whilst there was mention of the PSED at various stages, the court not satisfied on the material available that there was rigorous consideration of it with a proper and conscientious focus on the statutory criteria.
(3) The ARP did no more than give due weight to the fact that the Existing Licensees had held licences for a number of years. That is perfectly permissible and indeed appropriate. (see *R v Birmingham City Council ex p Sheptonhurst Ltd* [1990] 1 All ER 1026).

Decision: Grounds 1 and 2 of the claim succeeded. Ground 3 failed and was dismissed.

Defendant's Policy quashed.

SEXUAL ENTERTAINMENT VENUES

Court of Session (Outer House)

Opinion of Lord Richardson

Sexual Entertainment Venues. Determination fixing "nil" as the appropriate number. Statutory provisions introduced by the Air Weapons and Licensing (Scotland) Act 2015.

Kaagobot Limited (1); Y11jtr Limited (2); Netherview Limited (3); Piotr Arkadiusz Szulc (4) v City of Edinburgh Council [2023] CSOH 10

Decision: 10 February 2023

Facts: The parties sought declarations in respect of the present law under Civic Government (Scotland) Act 1982 as introduced by the Air Weapons and Licensing (Scotland) Act 2015.

Points of dispute: (1) whether on a construction of the statutory provisions introduced by the 2015 Act the respondent's determination fixing "nil" as the appropriate number of sexual entertainment venues (SEVs) for the whole city of Edinburgh was unlawful; (2) whether there should be an order modifying the respondent's determination and awarding the petitioners expenses against the respondent for the process to date and for the petition to be continued relative to the petitioners' damages claims.

Held: (1) Contrary to the respondent's suggestion that the nil determination only created a rebuttable presumption against the grant of an application which could still be granted by the respondent in its discretion, the petitioners and the additional party were correct on their submission that such a determination made under paragraph 9(5A) of Schedule 2 of the 1982 Act had the effect of constituting a ban on SEVs in the respondent's area. This was consistent with the legislation's stated policy objective, increasing the ability of local authorities to regulate matters within their areas.
(2) In order for the local authority to decide whether the ground provided in paragraph 9(5)(c) applies, it requires only to compare two numbers: first, the number of SEVs in its area; and, second, the number it has determined in accordance with its duty in terms of paragraph 9(5A). In the event that the first number is equal to or greater than the second number, then the ground will apply and, as a consequence, the local authority must refuse the application. Construed in this way, the exercise which the local authority requires to carry out in considering the application of the ground contained in paragraph 9(5)(c) is simply arithmetical. It could not properly be considered to represent an exercise of discretion by the local authority. The Committee was wrongly advised by its officers that in the event that it made a nil determination in terms of paragraph 9(5A) that would not constitute a ban on

SEVs.
(3) Following the court's determination, the correct approach to the exercise of its discretion was helpfully set out by Lord Boyd of Duncansby in the recent case of *McHattie v South Ayrshire Council* [2020] CSOH 4; the fundamental principle at stake was the rule of law. An illegal decision was an affront to the rule of law. The erroneous decision would be quashed.
(4) The court would be addressed on further procedure in light of its decision.

Determination: fixing "nil" as the appropriate number of SEVs would be quashed.

Obiter: (1) the respondent's decision would also have fallen to be reduced on the basis that no adequate reasons were provided for it. (2) The challenge based upon the respondent's obligation to inform itself of the relevant facts prior to making its decision was not well founded. The Committee had before it responses from operators, performers and organisations including the additional party. (3) The petitioners' arguments based on an alleged unjustified interference with their rights under Article 1 of the First Protocol did not add anything to their position. In reaching this conclusion the court was heavily influenced by the analysis contained in *Belfast City Council v Miss Behavin' Limited* [2007] 1 WLR 1420. It saw no good reason for present purposes in distinguishing between the right to use one's property to sell pornography (considered in Miss Behavin') and the right to use one's property as an SEV (*R (Bean Leisure Trading A Limited) v Leeds City Council*). The court rejected the additional party's challenge based on Article 8 of the Convention. (4) The additional party's challenge based on indirect discrimination contrary to section 29(6) of the Equality Act 2010 was not disputed. The Decision represented a provision, criterion or practice for the purposes of the definition of "indirect discrimination" in terms of section 19 of the Equality Act. The respondent also accepted that the Decision would put women who work in SEVs at a particular disadvantage in comparison with others who do not share their protected characteristic of sex. Whilst the court was sceptical as to the extent to which the position of the UK Government in relation to the EU Settlement Scheme which confronted the English court in the 3Million case was truly analogous to the position of the respondent, it was ultimately not necessary for it to reach a decision on this part of the additional party's argument in order to resolve the parties' dispute. (5) No breach of the Public Sector Equality Duty had been made out. (6) The two features upon which the court had upheld the challenge distinguished Schedule 2 as it applies to SEVs from other Scottish licensing regimes such as the regime under the Licensing (Scotland) Act 2005 applicable to the sale of alcohol which was considered in *Martin McColl Limited v West Dunbartonshire Licensing Board* 2018 SLT (Sh Ct) 322. The same could also be said for taxi licensing under section 13 and Schedule 1 of the 1982 Act which was considered in *Coyle v City of Glasgow Council* 1997 SC 370.

Costs: The Court reserved all questions of expenses pending consideration of on further procedure in the case.

GAMBLING

First-Tier Tribunal General Regulatory Chamber (Gambling)
First-Tier Tribunal Judge J Findlay

Consideration of Gambling Commission financial penalty and warning

Daub Alderney Ltd v The Gambling Commission
[2022] UKFTT 00429 (GRC)

Decision given on: 01 December 2022
Amended on: 03 January 2023
Amended Decision given on: 04 January 2023

Facts: on 1 November 2014 the Appellant was granted an operating licence with the usual conditions relating to anti-money laundering and terrorist financing ("AML") and social responsibility ("SR"). In 2018 the Respondent took regulatory action against the Appellant and undertook a Licence Review ("LR"). On 6 November 2018 the Respondent's Regulatory Panel ("the Panel") sanctioned the Appellant for serious regulatory failings relating to AML and SR. In applying the Statement of Principles for determining FPs the Panel considered that a FP of £12,500,000 reflected the seriousness of the breaches, but reduced it to £7.1 million to reflect aggravating and mitigating factors and overall proportionality. On 4 October 2019 the Rank Group ("Rank") acquired ownership of the Appellant. The Respondent undertook a LR in 2020 and the Appellant admitted further breaches of conditions 12.1.1, 12.1.2, and 16.1.1 of the Respondent's LCCP operating licence conditions, and of paragraphs 1.1.2, 3.4.1, and 5.1.6 of the Respondent's SR Code. On 15 December 2020 the Respondent proposed a FP of £3,000,000. At a hearing on 21 June 2021 full submissions regarding the new breaches were made by the Respondent and the Appellant. On 2 July 2021 the Panel issued a detailed 32-page statement of its decision, imposing a penalty of £5,850,000, remarking that the FP imposed in 2018 had not been an effective deterrent. Following representation from the Appellant the Panel had confirmed the decision on 22 July 2021.

Points of dispute: Whether all the circumstances of the case the FP was excessive, unfair and disproportionate, failing to take account of the mitigation advanced and to have

proper regard to the public interest. Further, whether the decision failed to take account of the financial position of the Appellant at the point of the imposition of the FP when it was unaffordable.

Held: Decisions of statutory regulators are not to be lightly reversed and the burden of proving that they are wrong lies on the Appellant. The Panel had issued detailed reasons for its decision, including the details of aggravating and mitigating factors, and how the Statement of Principles had been applied. The Panel and the Respondent took into account that the Appellant had previously been found guilty of serious breaches of AML and SR requirements, for which it had received a FP at a level intended to deter further breaches. The Panel and the Respondent took into account that the Appellant was guilty of further serious breaches of AML and SR requirements which had continued over a long period of time commencing almost immediately following the imposition of the first FP. The evidence before the FTT that was not available to the Panel and the Respondent was not sufficiently different in nature to persuade the former that the decision was wrong. The serious breaches of the AML and SR requirements in the Money Laundering Regulations and Licence Conditions and Codes of Practice including the following:

- failure to have an appropriate risk assessment in place;
- failure to conduct ongoing monitoring of a business relationship;
- failure to apply enhanced customer due diligence;
- failure to keep appropriate records of evidence as part of due diligence checks;
- failure to have appropriate policies and procedures to prevent AML and CT;
- failure to provide relevant staff with appropriate training to recognise and deal with activities which may relate to money laundering or terrorist financing;
- failure to put into effect procedures to protect vulnerable people;
- failure to put into effect procedures for self-exclusion so as to protect vulnerable people; • failure to put into effect a written procedure for handling customer complaints.

The Appellant was given the opportunity to make representations address the increase in the FP from £3,000,000 to £5,850,000. That the statements given by the Respondent's officials on 20 May 2019, at a pre-acquisition meeting between Rank and the Respondent's officials were given on the basis of the information provided by the Appellant. The assurances were because the Appellant had misled the Respondent about the true compliance position. Rank's Board made the decision to acquire a smaller company that turned out to be in breach of licence conditions undermining AML and SR objectives and placing individual gamblers at risk. This was a financially costly decision made in the course of business and it was for Rank to weigh the commercial and financial costs of the Acquisition.

In summary, the FTT found that there were serious breaches which were similar to the breaches for which a substantial FP was imposed in 2018 and there are no new facts which persuade it that the decision was wrong. The Panel did not err in law and complied with its statutory obligations. The Appellant was given the opportunity of a full and fair hearing and had been given the opportunity to challenge the Panel's decision before it was finalised. The Panel correctly applied the principles in its own Statement of Principles. The Panel made an evaluative decision which it was entitled to do. The facts of the case were not in dispute. The decision of the Panel was a decision of a regulator put in place by Parliament to make decision of this nature and such a decision should not be lightly reversed. The FTT would attach weight to the decision because it was detailed and gave extensive reasons and there are no new facts for consideration. The Panel had provided adequate reasons to explain its departure from the position adopted by the Respondent, when it was plainly incumbent upon the Panel to do so.

Appeal dismissed.

COSTS

Supreme Court

Costs – Starting point – Regulatory bodies

Competition and Markets Authority v Flynn Pharma Ltd and Another; Competition and Markets Authority v Pfizer Inc and Another

[2022] UKSC 14

Decision: 25 May 2022

Facts: Flynn Pharma Ltd and Pfizer Inc were successful in an appeal that they brought before the Competition Appeal Tribunal ('CAT') under s 46 of the Competition Act 1998. That appeal challenged a decision adopted by the Competition and Markets Authority ('CMA') fining them for an infringement of competition law. The CAT allowed the appeals in part, set aside part of the CMA's decision and remitted that decision to the CMA for reconsideration. They applied for their costs of

the appeal and the CAT made an order that the CMA pay the appellants a proportion of those costs. The Court of Appeal set aside the CAT's costs order and directed that there be no order as to costs. The Court of Appeal held that the CAT had erred in ordering the CMA to pay the appellant companies' costs because it had disregarded a principle derived from a line of cases starting with Bradford Metropolitan District Council v Booth [2001] LLR 151. That principle was the Court of Appeal held that where, as here, a tribunal›s power to make an order about costs does not include an express general rule or default position, the starting point is that no order for costs should be made against a public body that has been unsuccessful in bringing or defending proceedings in the exercise of its statutory functions. Flynn Pharma and Pfizer appealed to the Supreme Court.

Points of dispute: Whether there was a generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest. Should there be a starting point of no order as to costs in particular jurisdictions.

Held: (1) Rule 104 of the Competition Appeal Tribunal Rules 2015 applies to proceedings before the CAT and was different both from the generally applicable rule under the Civil Procedure Rules governing costs in High Court litigation and from the rules applicable in many other tribunals.
(2) There is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest. The principle supported by the Booth line of cases is, rather, that where a public body is unsuccessful in proceedings, an important factor that a court or tribunal exercising an apparently unfettered discretion should take into account is the risk that there will be a 'chilling effect' on the conduct of the public body if costs orders are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application.
(3) This does not mean that a court has to consider the point afresh each time it exercises its discretion in, for example, a case where a local authority loses a licensing appeal. The assessment that in the kind of proceedings dealt with directly in Booth, Baxendale-Walker v Law Society [2007] EWCA Civ 233 and R (Perinpanathan) v City of Westminster Magistrates' Court and Metropolitan Police Commissioner [2010] EWCA Civ 40, there is a general risk of a chilling effect clearly applies to the kinds of proceedings in which those cases were decided and to analogous proceedings.
(4) An appeal is not sufficiently analogous to the Booth line of cases merely because the respondent is a public body and the power to award costs is expressed in unfettered terms. Whether there is a real risk of such a 'chilling effect' depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending – it cannot be assumed to exist.
(5) The assessment as to whether a chilling effect is sufficiently plausible to justify a starting point of no order as to costs in a particular jurisdiction is an assessment best made by the court or tribunal in question, subject to the supervisory jurisdiction of the appellate courts.
(6) The substantive legislative framework in which the Competition Act appeals arise means that the level of decision-making activity of local authorities, the police and the professional disciplinary bodies concerned in the Booth line of cases is of an entirely different order from that of the CMA.
(7) The Baxendale-Walker authority remains important for the continued proper functioning of the Solicitors Regulation Authority and this judgment should not be seen as casting any doubt on the correctness of that decision.
(8) By contrast the way that the functions of the CMA are funded dispels any plausible concern that its conduct will be influenced by the risk of adverse costs orders. Before accounting to the consolidated fund for the penalties it collects during the year, the CMA can deduct its own external legal costs and any disbursements not recovered from the appellant together with any costs it is ordered to pay to a successful appellant.
(9) Experience of earlier costs decisions made by the CAT showed that it was well aware of the many competing factors pulling in different directions in the different jurisdictions in which it operates. It had developed a sophisticated approach to costs awards, building on the original guidance provided by the President of the Competition Commission Appeal Tribunal about the need to strike a balance between maintaining flexibility whilst providing predictability, and between ensuring that costs awards do not undermine the effectiveness of the competition or regulatory regime whilst ensuring a just result to both parties.

(10) The analysis in the CAT's costs ruling and the order it made disposing of the costs of the appeal brought by the appellants was a proper exercise of its costs jurisdiction, arrived at after considering all relevant factors.

Appeal allowed.

Jeremy Phillips KC, FIoL
Barrister, Francis Taylor Building

Phillips' case digest is based upon case reports produced by Jeremy Phillips KC and his fellow editors for *Paterson's Licensing Acts*, of which he is Editor in Chief.

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JOURNAL OF LICENSING - CONTRIBUTOR PROFILES

NICK ARRON

Solicitor, Poppleston Allen Solicitors

Nick is a solicitor and lead partner in the Betting & Gaming Team at Poppleston Allen. He acts for a wide variety of leisure operators from large corporations to single-site operators and has particular expertise with web-based operations. He is retained as legal advisor by the Bingo Association.

JAMES BUTTON

Principal, James Button & Co

James is a solicitor and runs his own practice, specialising in licensing, environmental health, public health, criminal investigations and prosecutions and human rights. He has a wealth of experience advising and representing councils, as well as the licensed trades, and is the author of *Button on Taxis: Licensing Law and Practice*.

LEO CHARALAMBIDES

Barrister, Francis Taylor Building & Kings Chambers

Recommended in *Chambers and Partners*, Leo advises local authorities on all licensing issues, and niche areas such as garage forecourts and sexual entertainment venues. His licensing practice has developed to include wider aspects of associated local government law, and he recently contributed to Camden's licensing scheme for street entertainment and buskers.

PHILIP KOLVIN KC

Barrister, 11 KBW

Philip is one of the country's most eminent licensing QCs. His practice spans all fields of licensing, including alcohol and enteKtainment, gambling, sexual entertainment, taxis, sport and the security industry. He is Patron of the Institute of Licensing, a board member of the Sports Grounds Safety Authority and an Associate Fellow of Westminster University's Centre for Law, Society and Popular Culture.

PROFESSOR ROY LIGHT

Barrister, St John's Chambers

Roy is a specialist licensing barrister. He acts for local authorities, police forces, independent operators and public corporations throughout England and Wales. His practice covers all areas of licensing. Consistently recommended in the leading legal directories he is highly rated for his legal knowledge, advocacy and advice.

JOHN NEWCOMBE

Licensing & Comm. Safety Manager, Dorest Council

John has 20+ years' experience of establishing, chairing, attending and advising on safety advisory groups, and chaired the Newham Events Safety Advisory Group and was Vice-Chair of the Olympic Stadium and Park safety advisory, noise advisory and transport advisory groups.

He has written many local authority policies for licensing, event safety, gambling and taxi licensing and now sits on the SE IoL regional committee.

JEREMY PHILLIPS KC

Barrister, Francis Taylor Building

Jeremy Phillips KC is a barrister following a career as a solicitor, both in his own practice and subsequently handling teams in leading international law firms. He offers expert advice in licensing, regulatory and environmental issues, public inquiries and judicial reviews, and is Editor in Chief of *Paterson's Licensing Acts* and a General Editor of *Smith & Monkcom - The Law of Gambling.*

LYNN SIMPSON

Solicitor, TLT Solicitors

Lynn is Senior Associate at TLT LLP in Edinburgh, specialising in licensing and property. In her spare time, she is Chairperson of the Trampoline & DMT Technical Committee (Scottish Gymnastics) and is deeply involved in all things trampoline related, including coaching, judging and developing trampolining in Scotland. She studied law and German at Dundee University.

RICHARD BROWN

Solicitor, Licensing Advice Centre, Westminster CAB

Richard is an adviser at the Licensing Advice Project, Citizens Advice Westminster. The Project is an innovative partnership between the public sector and the third sector, providing free advice, information, assistance and representation at licence hearings to residents of City of Westminster regarding their rights and responsibilities.

JOSEF CANNON

Barrister, Cornerstone Barristers

Josef Cannon is a graduate of Kings College, London, and was called to the Bar by Lincoln's Inn in 2002. For Licensing, he is ranked as a Band 1 Junior by Chambers & Partners 2020, where he is described as "a rising star in licensing and is comfortable either promoting or opposing applications"; and in the latest Legal 500, which notes that he "Goes beyond what is required for the client – you can be assured of an excellent service."

DANIEL DAVIES

Chairman, Institute of Licensing

Daniel is a co-founder of CPL Training Group. Until its recent sale, Daniel was a hands-on member of the team and developed allied businesses to support CPL's growth. He sits on the House Committee and Council of UK Hospitality and is on the board of the Perceptions Group. He is spearheading a major regeneration project in Merseyside's New Brighton.

MATT LEWIN

Barrister, Cornerstone Barristers

Matt is a barrister at Cornerstone Barristers and practices in all areas of licensing, with a particular focus on premises and taxi licensing. His clients include licensing authorities, music festival promoters, nightclubs and the police. Matt also acts as legal adviser to Licensing Committees and provides training for councillors and officers.

CHARLOTTE MELLER

General Manager, Gambling Business Group

Charlotte Meller joined the Gambling Business Group (GBG) as General Manager in September 2022. The GBG represents a broad cross section of land-based businesses with a common goal of improving the land-based gambling business and consumer environment for all, with social responsibility at the heart of everything that they do. She has a wealth of regulatory services policy experience in local and central government.

RUCHI PAREKH

Barrister, Cornerstone Barristers

Ruchi has a broad public law practice with particular expertise in planning, information, property and election law, together with a growing practice in licensing law.

Ruchi is regularly instructed by public bodies, including central and local government, private organisations, developers and individuals.

JULIA SAWYER

Director, JS Consultancy

Director of JS Safety Consultancy, which she set up in 2006, Julia is a qualified safety and health practitioner. She spent 19 years in local government, with her last five years managing safety and licensing at Hammersmith and Fulham. Julia provided the fire risk assessment for the opening ceremony of the London 2012 Olympics.

JONATHAN WELCH

Barrister, Francis Taylor Building

Jonathan was ranked last year as one of the top planning barristers under the age of 35. He acts for a broad range of clients, including local authorities, developers, utility companies, statutory undertakers, interest groups and local residents. He regularly appears in the High Court, public inquiries and hearings, both on his own right and as part of a team.

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