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Celebrating 10 years of the Journal of the Institute of Licensing

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Daniel Davies MIoL
Chairman

You should have received the previous edition of the *Journal of Licensing* around the time of the fourth and final step in the Prime Minister's roadmap out of lockdown for England. Mask-wearing would not be mandatory but would be encouraged in certain places. The Prime Minister urged caution and restraint for the populace. The same sentiments could have been directed at anybody who thought that the hospitality industry's woes would immediately be remedied. Still, the intervening period prior to the publication of this issue at least marks an uninterrupted period of licensed premises operating close to "as normal".

So as we approach a return to Stratford-Upon-Avon for the 25th anniversary National Training Conference (NTC), I am minded to view the glass as half-full. It will be fabulous to see so many people in attendance, a reminder of how the event has expanded from the inaugural conference in 1996. In many ways it is unrecognisable in scale but retains its core purpose - which is also its strength - of bringing practitioners together in a spirit of mutual learning and collaboration. The amount of work from so many people behind the scenes which has enabled the NTC to take place annually (even last year, albeit remotely) should not be underestimated, and we thank them once again.

We have the usual top-notch roster of expert speakers from the full gamut of licensing regimes, and high-level speakers from beyond the licensing world who bring a wider contextual perspective in keeping with the broad church approach which the Institute has always been keen to foster and which the NTC is a vital means of so doing.

The NTC is a landmark event for another reason - it marks the 10th anniversary of the *Journal of Licensing.* The very first edition was distributed to delegates at the 2011 NTC in their welcome packs, and this custom has continued for each subsequent autumn edition. The *Journal* has attracted contributions from a veritable who's-who of licensing, all of whom give their time and expertise for free. Leo Charalambides has edited the *Journal* since its inception, and his energy, vision and enthusiasm have been vital in ensuring a consistent high-quality stream of articles and contributions. The Institute owes him a debt of gratitude.

The *Journal's* birthday is marked by a guest editorial from Jeremy Phillips QC, the general editor of the mother of all licensing publications, *Paterson's Licensing Acts.* What follows that is a bumper issue of the *Journal.* We are very fortunate to have a lead article from Philip Kolvin QC which outlines the Global Nighttime Recovery Plan, a truly ambitious, eye-opening and world-wide analysis of how to revive the sector after the challenges of the pandemic. The Institute always aims to illuminate the bigger picture, and the canvas does not get much bigger than this.

A strength of the *Journal* is that it provides the space for contributors to properly analyse and debate issues - as Michael Rhimes does in his article, which offers an alternative perspective on remote hearings. In a time of pandemic, it is no surprise that the public health licensing objective (actual in Scotland and putative in England and Wales) is under scrutiny. Stephen McGowan and Gary Grant offer insight from both sides of the border. This is not to forget Northern Ireland, where an important and overdue modernisation of licensing laws is highlighted by Orla Kennedy and Eoin Devlin. As ever, space prohibits mention of all contributors to this edition but we also, of course, have contributions from our cadre of regular writers, Nick Arron, Julia Sawyer, James Button and Richard Brown.

I am looking forward to the NTC - and don't forget the "silver" theme for the Gala Dinner in honour of the 25th anniversary conference!

Institute of Licensing

JOURNAL OF LICENSING ISSUE 31

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Jeremy Phillips QC, FIoL
Barrister

2021 - a year for many to forget, yet there's been cause for celebration too. The amazing Emma Raducanu storming the US Open. The performance of our elite athletes across the Olympic and Paralympic Games. The achievements and dignity of the English football team. And, not least, the 10th anniversary of the *Journal of Licensing*.

It hardly seems possible that in just ten years the *Journal* has so firmly established its place in the forefront of influential thinking, publishing topical and influential pieces on the great licensing issues of our age: from EMROs to CIPs; from Summary Reviews to (for the licensing nerds among us) a minute analysis of *The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) (Amendment) Regulations 2020*.

The *Journal* is, of course, the latest in a long and distinguished line of licensing publications which began with the progenitor of them all, *Paterson's Licensing Acts*. Looking forward, next year is the 150th anniversary of that great tome (as well as, incidentally, the 25th anniversary of my appointment as a General Editor of *Paterson's*).

Halfway through Victoria's reign, 1872 was a notable year. It saw the First English FA Cup Final, the creation by John Blondel of his (fiendishly clever) patent doughnut-cutter, and important legislation securing the first secret ballots in British elections.

And James Paterson, MA and barrister-at-law, proudly announced:

> *The Licensing Act, 1872, recently passed, and which has made so many important changes in the laws relating to the sale of Intoxicating Liquors, was intended to settle some questions of domestic policy long agitated, confessed to be extremely difficult of treatment, and probably destined after a few years to be again and again made the subject of discussion. It was originally desired by the Government to introduce a consolidation of the multifarious laws on the subject; but practical difficulties prevented the realisation of so desirable an object, and the present Act thus adds one to a group of somewhat incongruous Statutes, and increases the difficulty of its own interpretation.*
>
> *The Editor, after much consideration, has embodied his views of the leading difficulties that will arise under the new Act, and has suggested some solution of most of them. This Edition also contains a complete collection of the existing statutory law on the subject.*

I apologise for reproducing the whole text. I have to confess to being somewhat in love with that strange and peculiarly Victorian combination of prolixity, humility and ambition! Either way, I am sure that Mr Paterson would be extremely proud that his creation has become the Bible for all licensing lawyers, being cited in over 60 cases in the High Court, Court of Appeal and the House of Lords as the authority for a particular proposition.

Remaining in pole position has not always been easy. Many excellent textbooks have been produced over the years, coming at licensing from every angle: from the loose-leaf, to the academic, to the essentially practical. What has distinguished *Paterson's* has been the unique way in which it combines (in the words of our eponymous predecessor) "a complete collection of the existing statutory law on the subject", a comprehensive analysis of the "leading difficulties" and – where possible – "some solution of most of them".

Where alcohol is concerned, we are, of course, living in a liberal age. It is difficult to imagine how different attitudes used to be. Today, *YPs* are a key demographic for the ambitious bar operator; in 1836 *The Youthful Teetotaller* was the publication of choice for the responsible parent! Methodist central halls were grand buildings attracting thousands of temperance followers. Now many have become

bars and nightclubs. In 1900 most villages could boast a temperance hall. Public houses have come and tragically gone. And at times alcohol has itself been centre stage in British politics. In 1915 Lloyd George famously declared:

> *We are fighting Germany, Austria and drink, and so far as I can see the greatest of these deadly foes is drink.*

Public opinion towards music, alcohol and gambling has changed dramatically. The early '80s saw many of us criss-crossing the country to persuade licensing justices to allow shoppers to self-select their own beers and wines! In some areas even the likes of M&S and Tesco were not trusted to oversee such an irresponsible practice. There were set-piece battles between the great beasts of the licensing world and their brewer, off licence chain or casino clients. Establishing "demand" for their services was the holy grail. More recently there was the - initially tentative - suggestion that petrol stations should be permitted to sell alcohol. Could it get any worse!

However violent the public debate, *Paterson's* has been there at all times: a scrupulously neutral arbiter to be relied upon by the senior courts, licensing authority, regulator and operator alike. And alongside it sits its younger and trusted colleague, the *Journal of Licensing*, always there to offer an opinion on the latest government, judicial or trade initiative.

If the past year and pandemic has taught us anything, it is that people really need the company of others, whether in the coffee house, the pub garden, the bingo hall, the nightclub or the festival. To get there they might need a safe and affordable taxi, or PHV. And having arrived they need honest, well-trained door staff, controlling entry to a safe and legal venue.

It seems that whether your interests lie in football and the FA Cup, secret elections and voter fraud, or maybe just the humble patented doughnut, 2021 – and 2022 - is likely to have more in common with the past than you might think….

Note from the Editor

Leo Charalambides gives his thanks to all those involved in the *Journal of Licensing* over the past 10 years

From the outset the *Journal of Licensing* has been a collaborative effort. All our contributors freely and generously give us their time and their effort but most importantly they give us their carefully considered views on the licensing issues that matter. To be acknowledged as a "trusted colleague" to *Paterson's Licensing Acts* is well earned praise that belongs to us all.

There are many instances where our articles are used and quoted in licensing hearings and appeals – though we have *yet* to reach the attention and mention of the higher courts. Our ambition remains, to continue to develop as a trusted and practical reference source for all who work in the licensing field. This depends on contributors and collaborators. Our ten-year anniversary provides an opportunity to thank all those who have helped make the *Journa*l the success that it has become: Thank you.

Leo Charalambides FIoL
Editor, Journal of Licensing

The Global Nighttime Recovery Plan - a guide for us all

A group of night-time economy experts has come together to produce a blueprint for recovery and rejuvenation. One of the participants, **Philip Kolvin QC**, outlines its key messages

Cometh the hour, cometh the plan, in this case the Global Nighttime Recovery Plan (GNRP). While the night-time sector effectively collapsed as the pandemic took hold, former Amsterdam Night Mayor Mirik Milan and Berlin Club Commissioner Lutz Leichsenring set out with a simple but grand ambition to assemble leading thinkers from around the globe and put them to work on a group of principles to revive the sector. The benefits of the resultant text will long outlast the pandemic which inspired it.

The GNRP amounts to seven chapters, each with a different writing team, which combine to build a comprehensive guide for those whose concern is a vibrant and sustainable leisure economy. The homely aim of this article is to convey the essence of the work, while interposing hopefully helpful comment along the way.

Chapter 1: The Great Outdoors

From the outset, it was clear to city governors, the leisure sector, customers, health professionals and, ultimately, governments, that so far as possible leisure would need to migrate outside. Here in the UK, the Grand Outdoor Summer Café campaign, loosely allied to hospitality trade associations, persuaded ministers to action, resulting in the Business and Planning Act 2020 and its creation - the pavement licence - which circumvented much of the bureaucracy and cost of table and chairs licences, planning and premises licence variations, thus facilitating outdoor service and safe leisure environments. This has not been without consequence, with some blowback from local residents and others regarding noise and the reduction in free passage for motor vehicles. The experience has been replicated globally.

In Chapter 1 of the GNRP, a group of writers from Vilnius, Paris, Orlando, Berlin and New York examine the migration to the great outdoors and workable mitigations.

The measures adopted were a function of local regulatory regimes. In Vilnius, the aim was to permit any outdoor, municipally-owned space to be used for outdoor dining, with businesses sorting out allocations by talking among themselves. The scheme involved redirecting traffic to peripheral roads, thereby eliminating motorised transit through the city centre, creating parklets out of parking spaces and simplifying the food truck permit system. In New York, the application process for pavement licences was simplified and takeaway alcohol was increased. In Paris, there were temporary street closures.

These measures came with some costs - planning, signage, communication and loss of parking revenue - which increased burdens on municipalities. They also spawned a degree of resentment among local residents. And the economic benefit for the sector was often nil (for those bars with no pavement space) to marginal (due to social distancing and extra staff costs). Nevertheless, the sense of life and wellbeing such measures brought are perhaps to be felt, not measured.

A number of cities laid on special events such as concerts and cinema, recognising the reality that it is better to provide controlled events than stand by as young people devise their own entertainment in an uncontrolled manner. Clashes in Paris between illegal ravers and police were well-documented. So, Vilnius provided free stages to encourage controlled outdoor events, while outdoor film screenings were shown on closed airport territory with commercial sponsorship. Berlin permitted informal gatherings of up to 1,000 people, including dancing and music; a welcome consequence was to keep the dire financial situation of Berlin's clubs, venues and culture workers at the fore of political discourse. As Lutz Leichsenring, former Club Commissioner and a principal architect of the GNRP put it: "Outdoor gatherings seem to have a significantly lower risk of Covid-19 infections than indoor events. Now it's the time to create a framework for safe and sustainable open air policies to provide legal alternatives to illegal events."

The Berlin example touches on an important nerve regarding the role of municipalities and the purpose of regulation. As the authors say: *"…* cities can choose to fall back on tactics of policing, control, and 'business as usual'. Or they can rise to the occasion with small-scale experiments and creative tactical urbanism: through communication, collaboration, and partnerships between city administration, nighttime advocates, event producers and local residents. This willingness to work together, experiment and rethink

uses of open spaces will be essential for the months and years ahead."

Alongside all the blue sky thinking and innovative urbanism, proponents have to recognise that a key concern regarding outdoor events is noise. This cannot be left to chance. It is imperative for businesses to engage with local communities, for municipalities to take on a convening and monitoring role, and for good practice to be disseminated and encouraged. In Paris, an NGO named Les Pierrots de la Nuit took on the task of raising public awareness and helping professionals develop good practices, while in Philadelphia open data dashboards were used to publish regular feeds of crime and other incidents, spatial data and so forth. In Berlin, event organisers were encouraged to measure their own noise levels using phone apps to show goodwill and encourage responsible behaviour while in New York an infographic campaign entitled "It's up to you, New York" explained the rules and encouraged responsible behaviour.

All this requires new thinking by local government, what the authors term "local government by the people for the people", so "city authorities need to be close to their populations, to communicate clearly with their residents, to win the trust of their business communities and to encourage genuine partnerships and co-operation between all interest groups." This implies a more nuanced and flexible model of city governance than a command and control regulatory framework.

Chapter 2: Gotta Dance

As is well known, no economic sector has suffered as much during the pandemic as the nightclub industry. In the UK, clubs were the last venues permitted to re-open, with many not surviving the Long Mothballing. Even now, venues are not secure, with patchy reports of customers not willing to return in the same numbers as previously, adding to the foreboding of many owners saddled with unsustainable levels of debt accumulated during the period of closure.

In Chapter 2, entitled *The Future of Dancefloors*, authors from the UK, Italy, USA and Belgium correctly point out that late-night venues were already under pressure from gentrification, competition (including from unlicensed events) lack of institutional support and many other factors, with Covid-19 simply accelerating and exacerbating these trends.

Such is the pace of development of the pandemic and the global response that the chapter, written last year, already has an historic feel, with interim measures advocated including use of outdoor space, test events, and time-limited shorter events including live concerts to a seated audience, to test and refine hygiene measures. In London, Village Underground went the extra mile by converting itself to a cycle park and workshop, and used its alcohol licence by opening a bottle shop and exterior bar.

Others used their spaces to stream live events, which helped to keep hope alive and maintain a connection, however virtual, with their audience. Turin took it one step further, creating a virtual nightclub, hosting artists from around the world, and enabling customers to attend the club through their customised avatar, and to interact with other avatars, play with gigantic doughnuts and other toys and even create their own drinks. In a weird echo of real life, avatars queued for bathrooms and complained about taller avatars blocking their views of performers. The experiment will continue with the use of VR goggles to promote different levels of interaction between avatars, real people and artists.

Back in the real world, the authors recognise the important role of dancefloors as spaces for cultural self-determination, social inclusion, diversity and imagination and, conversely, the structural inequality (particularly for LGBTQ+ and BAME communities) engendered by their loss, a loss hastened by strict licensing schemes, surveillance and rigid policing. For practitioners, it remains perplexing that licensed venues are the only private, let alone public, spaces where disorder by non-compliant individuals results in closure and loss of livelihood. Their closure costs jobs, cultural content and onward horizontal and vertical impacts on the economic supply chain.

Solutions to this long-standing and well-understood issue are addressed only briefly in Chapter 2, with the authors advocating more informal night-time networks to foster partnership between business and regulators, co-ordinate communication strategies and respond to misinformation. They also recommend that venues develop common ground rules for safer spaces, based on crowd control, and atmosphere management and body language, with an emphasis on understanding the narrative of the evening, from customers' arrival at the building, staff behaviour, circulation control, the exit process through to departure from the area.

Looking forward, the authors correctly point to an opportunity for cities to rethink how nightlife creators and businesses participate in the wider city development conversation. But the lack of any prescription in the context of dancefloors feels like a missed opportunity. Everyone with experience in the field knows forging a positive public agenda for late-night businesses is difficult, involving not just the co-ordination of multiple urban planning levers, but political engagement too in a world where there is little capital to be

gained by genuinely supporting nightlife and, most of all, making hard choices which will not always please an older, often entitled and politically connected local community.

However, dancefloors are not just emblematic of the night-time economy: they are a petri dish where youth, music, art, tech and the creative industries in general feed off each other and find new expression. Like glaciers, their gradual loss has been noticed only by cognoscenti before slowly being clocked by society at large. Plans to save these spaces are now coming into focus. In the UK, Agent of Change places obligations on incoming developers to design dwellings so as to prevent future friction between their residents and neighbouring nightspots. In London, the Mayor took it a step further, by requiring housing developers to incorporate protection for the famous gay venue, the Joiners Arms. In Amsterdam, nightclubs were planned around the periphery of the city to reduce the scope for conflicts, and clubs were encouraged to diversify to sweat their buildings for 24 hours rather than relying on a few hours of alcohol sales on weekend nights. Good practice in this sphere continues to develop and should be noted and acted upon by municipal authorities.

Chapter 3: Innovation

This chapter's title - *Innovating for 24-hour Cities* – proclaims its broad scope. Led by UK's own Ali Turnham of MAKE Associates and Leni Schwendinger of International Nighttime Design Initiative, it advocates: (i) the activation of streets and spaces in the nocturnal hours; (ii) foregrounding the undervalued but critical role of illumination; and (iii) the development of more inclusive approaches to movement around cities after dark.

i) *Activation*

The authors commence with the encouraging point that Covid-19 has shone a light on the marginalisation of the night-time economy, on the Joni Mitchell principle that you don't know what you've got till it's gone. Their message is that this is a time of enforced experimentation, the best of which may be integrated permanently into our night spaces. They argue that it is important to act at a micro-level, eg, by making bars safer. But we also need innovative, macro city-scale activation strategies that draw people back to cities at night, alongside communication plans to tell them what is going on and how they may access it safely.

Debate in the UK and elsewhere often poses the false dichotomy of an early hours, strictly regulated economy or a free for all. The authors make the obvious but often ignored point that there is a middle ground in which there are "shades of night", which are adaptable to different uses and regulations. So, for example, in Asia and Latin America, eating, drinking and shopping late into the night is common. And, cohering with the need for social distancing, they point out that longer hours might increase the footfall while reducing concentrations of people and therefore noise. This need not just be bars: health centres, municipal services, night markets and galleries might all take advantage of longer hours. Provided that this is promoted in a strategic away, taking account of residential sensitivities and alongside late-night public transport options, the economic and cultural harm of Covid could be the foundation of new regeneration efforts.

In many cities, the rise of home working and the loss of retail has greatly increased the stock of empty properties and therefore made more urgent the debate about the appropriate balance of uses to maintain the vitality and viability of centres. The authors advocate land use studies to understand the possibilities, which should be based around placemaking rather than an "anything goes" mentality such as the one which has characterised the relaxation of the need for residential permissions in the UK. They celebrate Paris for the "15 minute city concept" espoused by its mayor Annie Hidalgo, but comment that it is meaningless if it does not also apply at night.

The academic and practitioner Andreina Seijas sums up the theory. She suggests that post-pandemic, central business districts might gain new residents, while peripheral neighbourhoods might see a renaissance of their cultural and entertainment offer, decentralising amenities such as nightlife, which could help create medium-intensity entertainment hubs rather than congested areas characterised by conflicts between residents and revellers.

Perhaps the greatest reversal from darkness to enlightenment has come in Sydney, whose infamous lockout laws from 2014 have transmogrified into its new "Sydney 24-Hour" economy strategy, the achievements of which include: the recognition of providing connected transit, shopping, healthcare and public services for night workers; a grant mechanism for neighbourhoods to expand their night-time offer, and the appointment of a 24-hour "Coordinator General".

ii) *Illumination*

Turning to lighting, the authors have not written a guide to lighting a city at night, but do underline some of the key benefits of lights, including safety (both in the centre and in the last mile), the promotion of a recognisable identity for a district, the raising of awareness for local initiatives, the identification of a welcoming venue and, of course, emphasis that the district is cared for. Lighting should be well-considered but does not need to be expensive, and cheap

pilots can be used to test for later, permanent installations.

The authors point out that one priority is to use lighting to make city spaces safer for workers, be they transit workers, street cleaners or nightwatchmen. They also recognise that the community will often create its own atmosphere, whether Iranians bringing gas lights to picnic spots at night or strips of restaurants place-making with strings of fairy lights. And they highlight celebratory light night events such as Salford's "Lighting the Legend", a lantern parade organised by a community arts organisation. My personal observation is that a modicum of lighting of a bridge, underpass, building or along well-used pedestrian routes can transform a place, more than similar capital or revenue-based interventions. This chapter provokes the thought that, as the leisure sector gravitates outdoors, an understanding of the possibilities of light is an essential discipline for town planners and managers.

iii) *Movement*

The authors posit the following touchstone for night-time transit: it must be safe, affordable, efficient, reliable and inclusive. It would be hard to disagree with that, or with the immediately following sentiment that most cities were playing catch-up, even before the pandemic. They remind us that night-time transit is not just for revellers, but also for those working in the night-time economy, who go far wider than just leisure sector employees. Among many examples, they highlight Abu Dhabi, which has provided a free, on-demand microtransit service and Bogota which has supported free-e-bikes, in both cases for the benefit of healthcare workers. And they celebrate the holistic approach of Mumbai, whose "SafeCity" project, based on 10 core principles, is directed specifically at women, but results in a safer transit experience for all.

It is a difficult moment to reactivate night-time transit systems, since there is a lower demand and coffers are depleted, but it is right to stress that there is now a chicken and egg situation which needs to be dealt with. Just as businesses have borrowed to the hilt to stay alive, so transport providers need to pump-prime the system. If they don't, businesses, jobs and cultural value will continue to decline. But if they do, the night-time economy may increase commensurately.

Again, the authors offer cost-effective, albeit partial, solutions in what are straitened times: longer-term free or low-cost bike leasing, buddy-system walks, well-lit car parks, installation of on-street emergency call systems, safe havens and so forth. They also advocate ensuring funds are well-directed by planning for "movement inclusivity", ie, ensuring that transit systems properly serve particular sections of the community, such as women, night workers, minority community, disabled users and those intimidated from travelling through fear of infection. They rightly point out that the proven incidence of infection on public transport is low, but there is a critical need to communicate this to those who have switched to using private motor vehicles out of misplaced self-protection.

In the UK, a major change has been the rise of low traffic neighbourhoods, which have been accompanied by significant modal shift towards walking and cycling, as well as pavement widening and parklets in town centres to accommodate seated customers. Local opposition in some areas has been trenchant, but on analysis these have tended to be vocal minorities, sometimes taxi trade associations, whose many legal challenges have been exposed as vapid. Visiting cities such as Copenhagen and Paris underlines that UK on the whole has some way to go in promoting diversity of travel methods and that those who consider that their motor-driven convenience trumps every other consideration are on the wrong side of history. Rather, enlightened towns and cities will be promoting active mobility and transit by updating transport and spatial plans. Modal shift is where climate protection, health protection and leisure planning meet. Now is the opportunity to drive that agenda.

Chapter 3 is the heart of the GNRP, with its clear-sighted analysis matched and fleshed out with inspiring examples from around the world. Its concluding message, that there is a newly urgent need for visioning, planning, designing and measuring for the night-time economy, represents a call to arms to town and city planners worldwide.

Chapter 4: Supporting workers

This important chapter focuses on an oft-forgotten topic in night-time economy discourse - the position of workers. As the authors point out, there are well-documented inequities between the producers and consumers in cultural industries, with a neologism "the gig economy" coming to exemplify the vulnerability and insecurity of night workers. Their dispersal across micro-workplaces makes unionisation difficult, and they tend to pass under the radar in national and local political debates. Nevertheless, the discomfiting picture of Barking and Dagenham workers shipped in nightly at minimum wage to serve wealthy customers in Westminster is replicated in towns and cities worldwide. For millions around the world, the pandemic removed even that basic living.

The chapter grimly reports the impact of the virus on night work, and the aid which night workers received. A survey across 11 countries showed that fewer than half received any aid at all, and only one in six said it was enough. The loss, of course, was not just income. For many workers, including in

particular artists and musicians who lost their occupation, the toll was also to their mental health. The authors emphasise that popular culture is as worthy of support as symphony halls and opera houses, but is not always seen in that way by government. They find the appointment of night mayors to be largely gestural, with no underpinning in legislative or regulatory power. And so, many night workers have simply found themselves cut adrift.

Not unnaturally, the authors advocate direct monetary grant schemes such as the USA's Coronavirus Aid, Relief and Economic Security (CARES) Act as the key short-term governmental support measure, while underlining grassroots efforts such as crowdfunding by NYC Nightlife United and mutual aid schemes such as United We Stream Asia.

But over the longer term, they focus on the necessity for government to recognise the precarity of night work, the need for data-gathering exercises to include night workers, state benefits to support them as they support day workers, and labour reform policies to accord night workers, who are frequently forced to be self-employed, the same rights as employees.

More ambitiously, they counsel private patronage for the creative industries, such as the COSIMO Foundation scheme in the Netherlands, which permits businesses to treat their funding of specific creative projects as tax deductible, in a way which would be familiar to users of Gift Aid in the UK. They also highlight Patreon, which allows fans of specific artists to pay to engage more directly with their work, through accessing exclusive content distributed via the platform. There are now over 200,000 creators on Patreon, updating a concept which originated in Roman times and is apparently recrudescing as a major form of support.

Most importantly, as the authors point out, while night-time governance is frequently consumer-oriented, municipal strategies must cease to neglect the workers on whom the whole construct depends.

Chapter 5: Night-time governance

The very existence of the term night-time governance is a hard-won triumph, signifying that the night, just like the day, has to be managed in a strategic way, with the management of urban spaces at night involving a broad ecosystem of state and non-state actors. The former include government and public service organisations. The latter include businesses, workers, artists and residents. Successful municipalities co-opt all stakeholders in the endeavour, sometimes through groupings such as business or residents associations, sometimes through schemes such as Purple Flag or BIDS.

Many cities wishing to make a statement have followed the lead of Amsterdam in appointing night mayors. Whether the appointment is anything more than an empty gesture rides not just on the personality and abilities of the incumbent, but also on the powers and resources they are given. As the Chapter 5 authors state, the night mayor is, in essence, an advocate, bridging night-time operators and local government, often arguing for better infrastructure or more sympathetic regulation, and sometimes acting as a mediator between various interests. They may be wholly independent of government, as in Amsterdam and Berlin, or funded by local government, as in New York or Paris. But however they are constituted, successful night mayors have tended to bring the main players together, diagnose the issues and propose solutions to local government to promote sustainable night-time economies.

It is fair to say that night mayors have not been universally acclaimed, with some questioning their utility, and even in places where incumbents can point to success, the exigencies of pandemic control have meant that the needs of the leisure sector have been pushed to the margins. Recently, the city of Melbourne ditched its night mayor proposal altogether, instead announcing a more conventional advisory committee, while in France a number of city mayors have instead appointed deputy mayors dedicated to the night-time economy. In other cities, the need for an appointee has been obviated by a committed and effective advocacy group, such as the Japan Nighttime Economy Association in Tokyo.

The conclusion of the chapter incorporates a useful toolkit, presaging Chapter 6, which recommends the establishment of a vision, data collection, team-building, pilot projects and so forth. The authors rightly resist the temptation to preference night mayors over other collective or political efforts to deliver such processes.

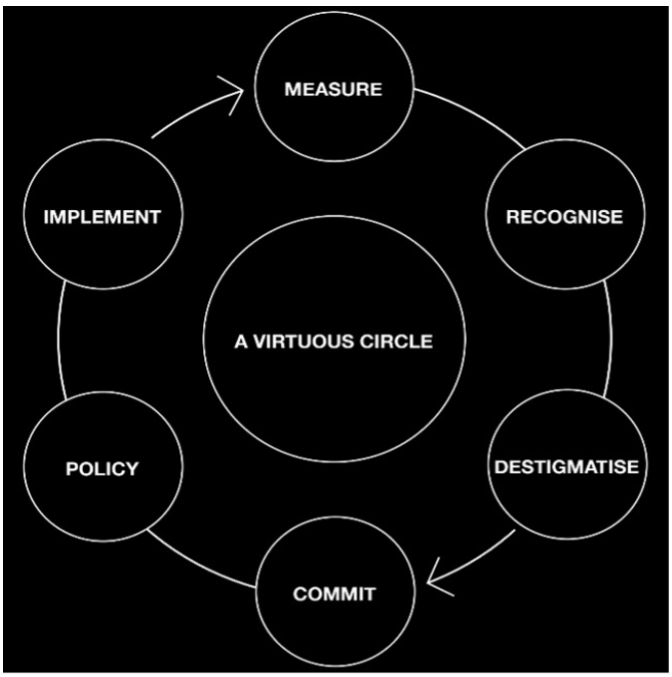
Chapter 6: State assistance

This chapter's thesis is that the state, whose role has traditionally been regulatory, needs a new mindset based on creative partnership. This means thinking strategically, using all its levers to create the conditions for revival and growth.

The chapter propounds a virtuous circle of activity, suggesting a series of steps for a disciplined, economic approach by state actors.

Measure

The first step is to build data sets to understand the make-up of the sector, assess benefits, identify gaps and ultimately measure success. This may include types, numbers and hours of venues, number and nature of jobs, footfall, age and demographics of customers, together with impact data



Role of the state: the steps to take

covering environmental and criminal. A periodically updated evidence base forces concentration on characteristics, benefits and impacts, rather than political or journalistic soundbites about the sector, which all too often characterise public discourse.

Recognise

The authors ask national and local governments to accept three simple propositions:

- The hospitality and nightlife sector is a social good.
- It is part of what makes us human.
- It is worth supporting.

The purpose of presenting the argument in such reductive form is to encourage a change of mindset. If a council leader accepts that, then everything else of worth follows. It is, therefore, the most important step of all.

Recognition may happen in myriad ways. The authors suggest: headlining the night in relevant strategy documents, alongside other social goods such as housing, education and the environment; creating a post for a leader of the night-time sector; establishing a certification or accreditation programme to recognise quality in the sector such as Purple Flag in the UK and *Sello Seguro* in Bogota; and putting the night at the heart of social media messaging. Some cities have even sloganised the night with varying degrees of success. One notable example is Austin Texas, whose #KeepAustinWeird is a source of pride for a city whose revival has been built around tech and music.

The authors foreground Germany's Bundestag which in May 2021 reclassified music venues and clubs with "demonstrable cultural connection" as cultural venues alongside theatres, concert halls and opera houses. This carried regulatory benefits for the venues concerned, but had a far greater symbolic value in terms of state recognition of the sector.

Destigmatise

The authors argue that habitual stigmatisation of the night-time economy, seeing it as a negative force to be tamed, has led to curfews, lockdowns, prohibition and, in the UK, legislating for Alcohol Disorder Zones. Destigmatising it involves: renaming it (eg, "social economy", "hospitality sector"); redefining it (eg, 6-6); celebrating it; supporting it, and partnering it. All research shows that the sector is an important reason for people to want to live, work and invest in an area. So to stigmatise it is self-defeating.

Commit

In recent years, as city governments have recognised the importance of the sector, examples have abounded of the transition from regulator to committed supporter and partner. San Francisco created an Entertainment Commission. Toronto wrote a Nightlife Action Plan. Berlin produced a Free Open Air Charter. London produced a vision, *From Good Night to Great Night*, whose ten founding principles were intended as a gathering point for later, more detailed implementation activity.

Policy

The process of incorporating the night into policy is critical, since it bakes in the commitment and moves support from words to action. The authors suggest that night policy should support a wide variety of businesses at night, creating a diverse offering attractive to a wider demographic. This provides greater resilience to the sector, while drawing in spend from a wider proportion of the population, and insulating against crime by keeping a mix of age-groups on the street into the night.

For policy to be effective, it needs a sturdy evidence base, which will have been developed earlier in the process, and proper public consultation, recognising all stakeholders. In consulting, authorities should realise that many groups, including young users of the night-time economy and workers, are marginalised and hard to reach, or will not respond to traditional methods of consultation. Publishing a 100-page policy document online and then asking for comments will result in ascertainment of the views of those who have the time and inclination to respond to 100-page policy documents. More imaginative engagement is called for.

An exemplar recent policy is Sydney's 24-hour economy strategy, mentioned above, which completes the about-face from its lockdown (curfew) days. The strategy is built around the attributes of an ideal night-time experience as ranked by Sydney residents: safety, hygiene, personal space, affordability, transport, diversity, discoverability and welcome. It then systematically sets out the main opportunities for the city to pursue, including: place-making; diversification; cultural development; connectivity, and changing the narrative. The strategy is a demonstration of intent from a world city which has experienced the down-sides of a restrictive, over-regulated approach. It provides a model which UK towns and cities would do well to study.

Implement

The authors acknowledge that there is no global blueprint for implementation, since the most apposite measures will emerge from data-gathering, research, consultation and policy. They present ideas across four themes: financial, regulatory, promotional, and physical, echoing examples from earlier in the GNRP.

Financial support, it is said, goes beyond handing out cash. It might involve reviews of licence fees, rating, night travel charges and so forth. The authors highlight Colombia, which recognised tourist and leisure activity as a social and economic right, contributing to a healthy, productive life and the cultural identity of communities, and restructured its property taxes accordingly. It also canvasses business improvement districts (BIDs) and hotel levies as means of leveraging funds into support of the sector.

The review of regulation is not the same as deregulation. It might mean doing things in a different way. Pre-warned multi-agency visits are less burdensome on operators than multiple visits from different agencies. The introduction of pavement licensing simplified but did not remove the consent process for outdoor provision. The relaxation of cumulative impact policies, as occurred recently in Liverpool, does not mean that the sector is not regulated: rather it throws focus on the record of compliance of each venue. Agent of Change principles do not disregard nuisance but prevent it. What underpins all of this is the change from regulation as "doing to" to "doing with".

Examples of promotional work by towns and cities are legion, from organisation of light nights (ie, public realm events based around illumination) to street festivals to city of culture schemes, the establishment of night BIDs, the introduction of street hosts, the creation of cultural quarters, and social marketing of the sector. All the while, it is of course important to measure the impact of such activity, in terms, say, of footfall, economic return or customer satisfaction, in order to plan effectively and economically for further activity.

Physical provision need not equate with major development. The introduction of pavement licensing provided more space for leisure at often nil or modest cost. Repurposing warehouses, print works, rail depots and multi-storey car parks comprises sustainable recycling of infrastructure, often out of earshot of sleeping citizens. Even in centres, creating community-run pop-ups out of former retail units maintains vitality, provides jobs and builds community cohesion. As retail declines, so leisure can help to fill the void.

The authors point out that the night-time sector has been at the forefront of economic casualties of the pandemic. This has forced the recasting of the role of the state as a partner to investors and creators in the sector. The pandemic has accelerated several trends, including the falling away of retail and the growth of home entertainment. In some cases, councils will need to reimagine or even repurpose their centres to create a culture-led revival. The flight of cash to suburban areas provides a real opportunity for towns and cities to strengthen local communities, reduce reliance on public transport and promote active travel.

These are seismic changes, but the authors end on a note of optimism: "By embarking on a structured process and taking a strategic approach, city elders can harness the ingenuity of the industry to their own levers of power to create sustainable leisure economies for the post-Covid generation."

Chapter 7: Measuring the night

The distinguished authors of this chapter, led by Michael Fichman of University of Pennsylvania, bemoan the dearth of data regarding the night-time economy, pointing out that governments need data to devise policy and govern in a responsible manner, and that communities need data to enable them to participate in public discourse. Without data, one governs blind. That, they say, was the common order pre-Covid, and must never prevail again.

As anyone who has tried to do it knows, the measurement of the night throws up intractable initial difficulties. Are we measuring all life at night, including, say, the caring professions and call-centre workers? Or are we just measuring the night-time economy, and if so how? Is every pub worker a night worker? Or just those who work at night? And where does that begin and end, and so on? And even if you know what you are after, is there data to cover it? So, as they say, someone marketing a music venue may be recorded in a broader job category in official data. It is important to recognise both the limitations of the data collated and that measurement is a process not an end-point.

The authors echo the argument in Chapter 6, stating that a data-driven night-time governance approach can be a virtuous circle of policies, programmes and outcomes, which can be used to combat the reactive or intuition-based policies and narratives which have long characterised discussions about night-time issues. They give a clear example of local regulatory decisions being driven by a place-based fear of crime, but the fear being driven by exposure to media stories about crime rather than objective incidence data.

With relevant data, however, a government office can conduct night-time specific analyses to understand the dimensions of the economy, undertake public messaging, calibrate strategy, allocate resources, execute programming, document outcomes and so on. While the authors could not adduce evidence of completion of a virtuous circle in the night-time domain, they explain that there are good examples from adjacent public health fields of cyclical decision-making, and that the approach has become relatively standard in the world of business.

In what will (I predict) become a checklist for city analysts, the chapter appendix lists dozens of night-time data sources, including those relating to mobility and transportation, safety and public health, sound, regulation, economic activity, creative space, built environment, public space and communities including their demographics, values and needs.

The authors advocate open data portals for access by communities, NGOs, state actors etc, one example being London's Night-time Data Observatory established by the Greater London Authority. They do, however, caution that care needs to be taken in how data is collated, and also in publishing the collection methodology so that its reliability can be tested. And they make the important point that data without any comparison prevents one charting the success or otherwise of one's interventions, hence the need for longitudinal collection. Better still if common methodologies can be used regionally or nationally, to enable meaningful comparisons between cities or regions.

What data one collates is, of course, a function of what one is trying to find out. For example, Sydney's 24-Hour economy strategy adopts a measurement framework with key social, economic and cultural indicators linked to the plan's objectives. The first prompted a participant demographic study, a night-time economy satisfaction score, sentiment analysis and a measure of alcohol- and drug-related violence. The second was informed by analysis of raw numbers of night-time businesses, the sector's value and growth and its contribution to gross state product, total consumer spend in the 6-6 witching hours, and the number of people employed in Sydney's night-time economy. The third was associated with the number of cultural activities taking place, the number of tickets sold, the city's cultural reputation score, additional public space created and public space activated at night. As may be seen, this was an innovative and systematic way of measuring the night-time economy to inform policy decisions.

While government agencies are a principal source of data, they enjoy no exclusivity. Increasingly, data sources from non-government actors are becoming more common and available. Third party data sets can include business listings, mobility data sets, eg, from Uber, credit card data, marketing data etc, all of which can be bought, scraped or accessed via API software. The authors rightly caution, however, that use of third-party data carries serious data protection issues which require consideration. Hence, they advocate a nightlife-specific data protection standard, building on ideas in the European GDPR.

Furthermore, as the authors point out, not all data is quantitative. To ignore qualitative data is to miss "the stories and unquantifiable feelings [which] make nightlife, music, culture and community truly what it is…" They strongly support the collation of qualitative data while counselling against reliance on anecdotes and single-method studies of qualitative data. Instead, they suggest studies bringing together many sources and methods, including interviews, focus groups, field research and literature reviews, citing examples from around the world where this has been done to great effect. One notable study conducted across six countries in Africa and the Middle East, which gave voice to local stakeholders and grassroots communities in a way which standard consultation methods never could, revealed the important message that digital infrastructure, access and know-how were their top needs. Hence, a qualitative study has helped to inform government policy and ensure that money is spent wisely where it will make most difference.

Finally, despite the expertise underpinning the production of this important chapter, the authors recognise that data is the servant and not the master of nocturnal governance. They end with a quote from urban theorist Shannon Mattern: "The city of the night is too joyously vibrant and too complicated and multi-faceted to be completely quantified. You cannot put a number on that joy."

Conclusion

Publication of the GNRP is a revolutionary moment for politicians and practitioners, academics and activists. In one stroke it has turned support and promotion of the night-time economy into a discipline, worth of study alongside other elements of urban geography. The expertise has been

there for many years in individual towns and cities, but now it is visible and accessible to all, replete with real life experiences from cities across the world, with each chapter suggesting further reading on the topics covered. The benefit for policy-makers is that their interventions can be planned based on evidence and data rather than guesswork, and measurements of success can inform future initiatives.

My personal observation is that the UK has much catching up to do, having been locked for some time in stifling debates about cumulative impact areas, as though these are the only medicine on the shelf, medicine which great northern cities such as Manchester and Liverpool are abjuring, without terminal effects. The kind of progressive thinking coming out of Germany, Australia, Colombia and the Netherlands leaves our nation looking isolated, and not splendidly.

The GNRP recognises pros and cons in all of its examples. To imbibe it, as everyone interested should, is not to drink the Kool-Aid, but to inform ourselves of the possibilities, and to promote them in the places we care about. The message is simple: leisure is culture, and worthy of our attention.

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Action against taxi licences

The considerations facing a local authority when weighing up disciplinary action against taxi drivers are set out by **James Button**

The vast majority of licensees in the taxi trade (hackney carriage and private hire; "taxi" is used in this article in a collective general sense) are honest, safe, hard-working, conscientious and dedicated professionals who provide vital services to all those in our society.

Sadly, however, as with every profession, there are those who fall short of the expected standards of behaviour during the currency of their licence. What can and should be done by local authorities in these circumstances?

The detail in relation to taxi licences is contained in the Local Government (Miscellaneous Provisions) Act 1976 and all references to legislation refer to that Act unless otherwise stated (the Town Police Clauses Act 1847, which is the basis of hackney carriage licensing, is remarkably light on action against licences).

A local authority cannot grant a person a driver's licence unless they are satisfied that they are "a fit and proper person to hold a driver's licence" (see s 51 in relation to private hire drivers and s 59 in relation to hackney carriage drivers). The same requirement applies to private hire operators (see s 55). In relation to vehicle proprietors, there is no fit and proper person test, but as the authority has a complete discretion as to whether or not to grant a vehicle licence, it is not only permissible for the authority to consider the character of the proprietor themselves, but is also recommended in the latest Department for Transport Guidance. That discretion exists under s 48 in relation to private hire vehicles and s 37 of the 1847 Act in relation to hackney carriages, and is referred to at paras 7.2 to 7.6 in the DfT *Statutory taxi and private hire vehicle standards* (*Statutory Standards*).[1]

Although there is no concept of reviewing a taxi licence within the legislation (which can be contrasted with the Licensing Act 2003 and the Gambling Act 2005), the local authority can suspend, revoke or refuse to renew any of these licences (s 60 in respect of vehicles, s 61 in relation to drivers and s 62 in relation to operators). The ability to suspend or revoke an existing licence means that the requirement to be a fit and proper person is a continuing one once a licence has been issued, notwithstanding that the legislative references relating to fitness and propriety are only connected to the grant of a licence.

That is the legal structure. The question then is how should local authorities exercise these powers?

Public safety

The whole purpose of taxi licensing is public safety. This is stated quite clearly in both para 3.2 of *Statutory Standards*:

> *When formulating a taxi and private hire vehicle policy, the primary and overriding objective must be to protect the public,*

and at para 8 of the earlier guidance *Taxi & Private Hire Vehicle Licensing: Best Practice Guide* (*Best Practice Guide*):[2]

> *The aim of local authority licensing of the taxi and PHV trades is to protect the public.*

As a consequence, when a licensee's behaviour does not meet the local authority's acceptable standards, action will need to be taken. It is vital to recognise that any behaviour after a licence has been granted which would have prevented a licence being granted initially must result in action being taken. If the person would not be fit and proper for a new licence, they cannot be fit and proper to retain that licence.

Revocations

Actions which directly affect public safety should result in revocation of the licence. If there is any concern, on the balance of probabilities, that the licensee poses a risk or threat to public safety, they should not hold a licence, and in these circumstances suspension should not be used. The licence should be revoked. This can be used for all types of licences.

Where a vehicle itself (as opposed to the vehicle proprietor or licensee) is a danger to the public, an authorised officer

1 2020 available at https://www.gov.uk/government/publications/statutory-taxi-and-private-hire-vehicle-standards.

2 DfT 2010 https://www.gov.uk/government/publications/taxi-and-private-hire-vehicle-licensing-best-practice-guidance.

of the local authority that licensed the vehicle, or a police constable located anywhere, can immediately suspend the vehicle licence under the powers contained in s 68. This can then be lifted when the vehicle defects are rectified.

In the case of a driver presenting a risk to public safety, immediate revocation of the licence using the powers contained in s 61(2B) is the correct course of action.

Many local authorities seem reluctant to use immediate revocation.

This is often based on concerns about the licensee's livelihood and the impact on their family. These are not considerations that can be taken into account and this has been made very clear by the High Court in 2 cases: *Leeds City Council v Hussain*[3] and *Cherwell DC v Anwar.*[4] In *Leeds*, Mr Justice Silber put it like this:

> *25. There is indeed no authority on this point, but as Lord Bingham explained in the passage in McCool*[5] *that I have already quoted [at page 891F, quoted at para 13 of the judgment: "One must, as it seems to me, 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 the power of suspension is to protect users of licensed vehicles and those who are driven by them and members of the public. Its purpose, therefore, is to prevent licences being given to or used by 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. In other words, 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.*
>
> *26. 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.*

This of course became authority on the point, and was followed in Cherwell where His Honour Judge Bidder QC (Sitting as a Deputy High Court Judge) determined:[6]

> *. . . I therefore conclude that they [the magistrates] regarded the hardship to his wife and children as a completely separate factor to the issue of the safety of the public and, . . . clearly regarded it as an important reason for differing from the council's decision. That is simply not in line with the Hussain case.*

and

> *It is really quite impossible for me to conclude that the magistrates did not place any significant weight on the hardship point. Indeed, looking at the decision fairly and as a whole, they plainly regarded the hardship to the wife and children as important enough to differ from the council. They took into account an irrelevant reason, which no reasonable court would have done.*

It is important to consider the point made by Silber J in *Leeds* at para 26. He said:[7]

> *26. 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.*

It is suggested that it is almost impossible to think of any situation where public safety can be regarded as secondary to the personal circumstances of driver or private hire operator.

A criminal conviction is not required before a local authority can take action against a licence. Action can be taken on the basis of police action, including charging prior to any conviction. Equally, matters that resulted in an acquittal or which were not prosecuted can be taken into account. This is clearly shown in the High Court decisions in *R v Maidstone Crown Court, ex p Olson,*[8] *McCool v Rushcliffe Borough Council*[9] and the previously mentioned case of *Leeds City Council v Hussain.*[10] This was summarised by Lord Bingham CJ in *McCool* in this way:[11]

> *The decision maker may take account of hearsay (as*

3 [2003] RTR 199 Admin Crt.

4 [2012] RTR 15 Admin Crt.

5 *McCool v Rushcliffe Borough Council* [1998] 3 All ER 889, QBD.

6 At paras 25 and 27.

7 [2002] EWHC 1145 (Admin), [2003] RTR 199.

8 [1992] COD 496.

9 [1998] 3 All ER 889, QBD.

10 *Leeds City Council v Hussain* [2002] EWHC 1145 (Admin), [2003] RTR 199.

11 At 896A.

already indicated), provided it is hearsay which is not unreasonably thought to be worthy of credence, and such evidence need not be evidence which will withstand scrutiny according to the formal rules of a court of law. It is not a good reason if a local authority or justices rely on prejudice or assertions shown to be ill-founded or gossip or rumour or any other matter which a reasonable and fair-minded decision maker acting in good faith and with proper regard to the interests both of the public and the applicant would not think it right to rely on. But 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 both of the public and the applicant, could properly think it right to rely on.

Another reason why local authorities do not use immediate revocation is because the power delegated to officers is only to immediately suspend a driver's licence, with the power to revoke (either immediately or after the appeal period) only delegated to a regulatory committee or sub-committee. Delegation to an officer in consultation with the chair or deputy chair of the regulatory committee is a sensible approach which allows urgent action to be taken, whilst still involving elected councillors, who can then also support the decision which was made.

A third reason often cited to justify reluctance in the use of immediate revocation is the risk of financial sanctions in the form of compensation being claimed against the council in the event of a successful appeal. As there is no mechanism whereby any compensation for loss of earnings can be claimed, even if a subsequent appeal against immediate revocation is successful, this is a completely spurious reason.

Whenever a hackney carriage or private hire driver's licence is revoked, those details should be entered on the NR3 database. This is another important reason why revocation should always be used in preference to long periods of suspension.

It should be noted here that there is no power to take immediate action against a private hire operator's licence, irrespective of the nature or standards of unacceptable behaviour or actions by the operator; the decision will not take effect for the 21-day appeal period and that is extended until after the determination of appeals (Magistrates' Court and Crown Court).

Suspensions

Suspension is the mechanism that should be used where the situation does not threaten public safety. This could be used for enforcement and disciplinary purposes, or to overcome a particular issue, problem or failing.

Enforcement and disciplinary

The issue becomes more difficult where the behaviour does not threaten public safety but has been unacceptable by the council's own standards, whether those standards are contained in the policy, the conditions, a Code of Conduct or, absent any of those when considered from first principles as to what would be expected from a licensee.

Clearly, minor transgressions which do not directly affect public safety should be dealt with less harshly than those which do.

A lot of local authorities use graduated enforcement. This could be based on a penalty points scheme or a series of increasingly serious warnings. The problem arises if these warnings are not heeded, or the number of penalty points permitted is met or exceeded. At this point the council must consider taking action against the licence. Failure to take action would simply demonstrate to the wider taxi trade that no consequences follow unacceptable behaviour.

It is unlikely that these failures on the part of the licensee will actually present a threat to public safety. It is more likely to simply be a case of non-compliance for whatever reason. Revocation would not be appropriate in most circumstances, unless this is a repeated series of events. Suspension would appear to be the more likely course.

It has been made clear by the High Court that the power to suspend a licence can be used as a punishment. This is important, because otherwise the council has to satisfy the Magistrates' Court on an appeal against the suspension that at the time of the decision, the licensee was not a fit and proper person, but that after, eg, three weeks' suspension, they would regain that status. In the case of *R (on the application of Singh) v Cardiff City Council*[12] the court put it like this:

103. In my judgment, the way in which the concept of suspension is used by Parliament is section 61 of the 1976 Act is not, as it were, to create a power of interim suspension, it is rather after a considered determination in other words a final decision on whether a ground for either revocation, or suspension of a licence is made out, for there to be either revocation or, as a lesser sanction, a sanction of suspension.

104. By way of analogy, one can envisage for example in a professional context a solicitor or a barrister can

12 [2013] LLR 108 Admin Crt.

be disciplined on grounds of his conduct. The relevant disciplinary body may conclude that even if the misconduct has been established, that the appropriate sanction should be something less than complete revocation of the practising certificate for the relevant lawyer. It may be, for example, a suspension for a period of 1 year, will constitute sufficient sanction in the interests of the public.

105. It is in that sense, in my judgment, that Parliament uses the concept of suspension in section 61 of the 1976 Act. It does not use, as it were, to create an interim power, before a reasoned determination has been made, that the grounds in subsection (1A) or (1B) have been made out. It is not, as it were, a protective or holding power. It is a power of final suspension, as an alternative to a power of final revocation.

In these circumstances, the question then is what length of suspension should be imposed?

There is no statutory limit on the length of suspension that can be imposed, and in theory it could be for the remaining period of the licence. However, unless the licence has a very short period left to run (possibly less than a month) that amounts to a revocation, and in those situations, revocation should always be used. In cases where suspension is appropriate, there are significant considerations to be take into account.

Does the punishment fit the crime? Although these may not be crimes, the old adage is a useful touchstone in determining the length of suspension to be imposed. Any sanction must be proportionate and determining proportionality can be problematic.

It is useful to consider the financial impact of a suspension on a licensee. This could reasonably be contrasted or compared with the potential fine that might be imposed on a conviction, if the matter was a crime. Financial penalties for local authority prosecutions are notoriously low, and in any event the maximum penalty for any offence under taxi legislation (either the 1847 or 1976 Act) is a level 4 fine (currently £2,500) which is for unlawfully plying for hire contrary to s 45 of the 1847 Act. That is the only level 4 penalty with all other penalties being levels 1, 2 or 3 (currently £200, £500 and £1,000 respectively).

There is no reason why a local authority could not ask a licensee what their earnings are, together with their outgoings, in the same way as a court would do. The licensee does not have to provide this information, but it is clearly in the interests to do so as that will then inform the authority. As the average weekly wage across the UK for 2020 was £585 (which equates to roughly £30,000 per year assuming paid holidays) that could be taken as a starting point. A level 3 fine would equate to roughly two weeks' work, and would therefore attract a two-week suspension.

On this basis, a suspension of more than four weeks starts to look like a disproportionate imposition for disciplinary matters where a driver or operator is earning an average wage, even when the deterrent effect is also be taken into account. Obviously, repeated transgressions would justify lengthier suspensions, up to a point where it becomes clear that non-compliance is such an issue that the question as to whether or not this person remains a fit and proper person must be considered.

To overcome an issue

Suspension can also be used where there is a shortfall or deficiency that needs to be overcome. For example, where there are concerns about a driver's driving ability, the licence could be suspended until such time as they pass a specified driving test. The same could apply in relation to other issues such as training for CSEA (child sexual exploitation and awareness), county lines training, English language requirements and so on. As it will be up to the licensee to ensure that those requirements are met as quickly as possible, it will be in their hands as to how long the suspension will last.

The situation with medical issues is slightly different, but, again, suspension could be imposed until such time as a satisfactory medical certificate is produced. The difficulty here is that the licensee may not have any control over that outcome.

Interim suspensions

It will already have been noted from the judgment in the *Singh* case that suspension cannot be used as an interim measure. It is the decision of the authority in relation to those particular circumstances, and once that decision has been made and suspension imposed, no further action in the form of revocation can take place on the same facts. This was clearly restated by the High Court in *Reigate & Banstead Borough Council v Pawlowski.*[13]

As a consequence, suspension should not be imposed pending the outcome of criminal proceedings. If the allegations are sufficient on the balance of probabilities to lead the authority to believe that the licensee is no longer a fit and proper person, then the licence should be revoked. If the matter does not result in a criminal conviction, that does not automatically mean that the licence should be reinstated

13 [2017] LLR 875.

on application, but it will clearly be a factor for the authority to consider.

Conclusion

Where licensees do not comply with the requirements placed upon them, uphold suitable standards of behaviour or present a threat to public safety, action must be taken against their licences. Failure to do so by local authorities lets down the good, compliant, hard-working professionals in the taxi industry and leads to reduced public confidence in the overall safety of taxis as a form of public transport.

This must be recognised and acknowledged by local authorities and they must ensure that a consistent and reasonable enforcement regime is applied.

James Button
Principal, James Button & Co

Is it really lawful to conduct licensing sub-committee hearings remotely? A sceptical view

"Laws speak the same language in pandemics as they do in times of health" says **Michael Rhimes** as he argues that the Hearings Regulations, despite what has been happening over the past year and a half, do not permit remote hearings

The lockdowns imposed as a result of the Covid-19 pandemic forced most of our lives online. This article addresses only one out of the many legal issues raised by such lockdowns, namely: is it lawful to conduct a licensing sub-committee hearing remotely, that is, where the parties and councillors are not all in one physical, geographical space but instead participate by electronic means?

By way of background, the High Court in *R(oao Hertfordshire CC) v SSHCLG* [2021] EWHC 1093 (Admin) held that local authority meetings under the Local Government Act 1972, Schedule 12 could not be conducted remotely.

The Licensing Act 2003 (and associated instruments) institute a different scheme for licensing sub-committee hearings. Forceful arguments have been made by leading practitioners contending that such hearings can be conducted remotely.[1] I take a different view, which I set out in this article.

Overview

Licensing sub-committee hearings: the Licensing Act 2003

Hearings under the Licensing Act 2003 are governed by the Licensing Act 2003 (Hearings) Regulations 2005/44 (see LA 2003, ss. 9(3), 183(1)). Other hearings are subject to similar regulations, but for clarity, I focus on the Hearings Regulations.[2]

The Hearings Regulations provide for "hearings", for notice to be given of the "time and place" of such hearings (Regs 6 and 7), for parties' "attend[ance]" at such hearings (Reg 8(1)(a)), and for such hearings to "take place in public" (Reg 14(1).

Local authority meetings: the Local Government Act 1972 and the Coronavirus Act 2020

The Local Government Act 1972, Schedule 12, governs the meetings and proceedings of local authorities in England. In general terms, it refers to local authorities having meetings "at such place, either within or without their area, as they may direct", where participants are "present" or which they "attend" and which take place in "public".

The Coronavirus Act 2020, s 78(1), entitled "local authority meetings", conferred powers to allow for remote local government meetings under the LGA 1972 - but by s 78(3), only until 7 May 2021:

> *78 Local authority meetings*
> *(1) The relevant national authority may by regulations make provision relating to—*
> *[…]*
> *(c) the places at which local authority meetings are to be held;*
> *(d) the manner in which persons may attend, speak at, vote in, or otherwise participate in, local authority meetings;*
> *[…]*
> *(3) The regulations may make provision only in relation to local authority meetings required to be held, or held, before 7 May 2021.*

1 See the opinions of Philip Kolvin QC: *Remote licensing hearings are lawful* (25 March 2020), retrievable here: https://www.localgovernmentlawyer.co.uk/licensing/316-licensing-features/43179-remote-licensing-hearings-are-lawful and *Can remote licensing hearings continue?* (29 April 2021), retrievable here: https://www.publiclawtoday.co.uk/licensing/316-licensing-features/46612-can-remote-licensing-hearings-continue.
Charles Holland: *Virtual local authority meetings: Coronavirus Bill amended, ruling out uncertainty* (23 March 2020), retrievable here: https://www.cholland.com/single-post/2020/03/23/virtual-local-authority-meetings-coronavirus-bill-amended-ruling-out-uncertainty.
Gary Grant: *Licensing Hearings During the Coronavirus Crisis* (18 March 2020), retrievable here: https://www.ftbchambers.co.uk/news/licensing-hearings-during-coronavirus-crisis.

2 See, for example, the Gambling Act 2005 and the Gambling Act 2005 (Proceedings of Licensing Committees and Sub-committees) (Premises Licences and Provisional Statements) (England and Wales) Regulations 2007 SI No. 173.

The so-called Flexibility Regulations duly provided for remote local government meetings until 7 May 2021.[3]

Hertfordshire CC

Hertfordshire County Council - and others - sought a declaration that meetings under the LGA 1972 could be conducted remotely after the 7 May 2021. The High Court (Sharp P, Chamberlain J) refused to make that declaration, holding that there was no power under the LGA 1972 to hold remote local government meetings.

First, while a meeting could refer to a remote meeting, the meanings of the terms "place", "presence" and "attending" in that Act did not naturally encompass an online location, or of persons attending from multiple locations [76] [83].

Second, the court also rejected the "updating" construction urged upon it. On that approach, a statute is interpreted in line with evolving technological and social advances [77].[4] However, Parliament made it clear, in passing s 78 of the Coronavirus Act 2020, that it considered the LGA 1972 to not permit remote hearings.

Remote proceedings: a contextual approach

Each jurisdiction - whether Supreme Court, Tribunal, or administrative committee - is governed by its own rules. Whether it can conduct proceedings remotely is a matter of interpretation of those rules, understood as a whole and in context.

For some jurisdictions, it has been clear - indeed for some time - that remote hearings are permitted. The relevant rules for the Employment Tribunal, for example, allow "hearings by electronic communication" (and have done so since 2013).[5] Similarly, the term "hearing" in the Asylum and Immigration Tribunal rules includes "a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication".[6]

It cannot realistically be argued that the phrase "hearing" of itself requires proceedings to be in-person. The term hearing can, in principle, cover remote proceedings. In my view, however, the question is not whether the term hearing is sufficiently elastic to allow remote proceedings; it is whether the relevant legislation and the *Hearings Regulations* when read as a whole allow for the same.[7]

In my view, the Hearings Regulations do not. This is for three reasons:

i. There is no statutory power to hold remote licensing sub-committee hearings.

ii. The text of the Hearings Regulations precludes remote hearings.

iii. Recent amendments in Wales to the Hearings Regulations (allowing for remote hearings) confirm that, in their unamended form, they do not permit such remote hearings.

i) There is no express statutory power to conduct licensing sub-committee hearings online

There is no express statutory power to hold a remote licensing hearing.

The Licensing Act 2003 does not regulate such hearings, but entrusts the regulation of hearings to the Secretary of State: LA 2003 ss. 9(3) and 183(1). Subject to a prohibition on awarding costs, the LA 2003 is essentially agnostic on how licensing hearing sub-committees are run (LA 2003, s 183(2)). That Act, therefore, provides no express power to conduct hearings remotely.

Licensing hearings were left untouched by the Coronavirus Act 2020. Section 78 is confined to "meetings" of local authorities. Licensing sub-committee hearings are not meetings. If further confirmation were required, LGA 1972, s 101(15) (itself inserted by the Licensing Act 2003, Schedule 6, para 58) illustrates the distinction between local government meetings and licensing sub-committee hearings. As such, there is no authority under the Coronavirus Act 2020 for remote licensing sub-committee hearings.[8] In any event,

3 The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 No. 392.

4 As in *Attorney General v Edison Telephone Co of London Ltd* (1880) 6 QBD 244, considered in *Hertfordshire CC*, [59], where the Exchequer Division held that a telephone was a "telegraph" within the meaning of the Telegraph Act 1863 (26 & 27 Vict c 112) and 1869 (32 & 33 Vict c 73) even though the telephone had not been invented or contemplated by 1869. See, also, *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 where the House of Lords considered the term "family" in the Rent Acts 1977 in line with the acceptance of same-sex relationships.

5 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237, Reg 46.

6 Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014/2604, Reg 1.

7 This was clearly recognised in *Hertfordshire CC*, which considered the proper interpretation of meeting in the LGA 1972 as a whole, rather than definition of meeting in the abstract: [75].

8 See, also, Kolvin (fn 1): "Hearings under the Licensing Act 2003 are conducted under that legislation. The Local Government Act 1972 is not relevant at all". Grant also distinguishes hearings under the LA 2003 from meetings under LGA 1972, stating that "the specific relevant legislation under the Licensing Act 2003 and its regulations will generally trump any inconsistent provisions contained in [the LGA 1972]". I would respectfully disagree with Holland (fn 1) on this point.

even if it did confer such a power,[9] it would have lapsed on 7 May 2021. Moreover, the fact that it was perceived necessary to legislate for such remote hearings in the Coronavirus Act 2020 would confirm that remote hearings were not lawful prior to that Act.[10]

There is, accordingly, no express statutory power to hold remote licensing hearings. If such a power exists, it must be found in the Hearings Regulations themselves.

ii) The text of the Hearings Regulations

The lexicon of the Hearings Regulations (concerning hearings) is not identical to that in the LGA 1972 (concerning meetings). But there are some clear similarities. Both involve attendance, in public, and, critically, at a place.

A hearing at a place does not cohere, in my view, with a remote hearing. A place is a physical location, as emerges from the leading online dictionaries:[11]

> *A place is any point, building, area, town, or country.*[12]
> *An area, town, building, etc. […] a position in relation to other things or people:*[13]
> *1 Place*
> *a: physical environment*
> *b: a way for admission or transit*
> *c: physical surroundings.*[14]

The natural meaning of that term implies that the hearing is conducted in a defined geographical location, as opposed to (i) with parties in multiple locations or (ii) in an online or non-physical realm. *Hertfordshire CC* confirms this point in the context of the LGA 1972, Schedule 12:

> *[76] In our view, a "place within or without the area" is most naturally interpreted as a reference to a particular geographical location and would not naturally encompass an online location; and a requirement to send out "notice of the time and place of the intended meeting" is inconsistent with the idea of a meeting taking place at multiple locations (e g in the homes of all participants).*

While there is no express requirement for a hearing to proceed in a place under the Hearings Regulations (contrast LGA 1972, Schedule 12, paragraph 4), hearings are inseparably associated with a requirement of place. Authorities must arrange for the date on which and "time and place at which a hearing is to be held" (Reg 4); notice must be given of the "time and place at which a hearing is to be held" (Reg 6(1)); and when adjourned, authorities must forthwith "notify the parties of the date, time and place to which the hearing has been adjourned" (Reg 12(2)).

The Hearings Regulations also refer to parties attending the hearing (Reg 7(1)(b), and such hearing taking placing in public (eg, Reg 14(2)). I do not suggest that these requirements necessarily exclude a remote hearing: one can conceivably "attend" an online webinar; and Twitter advertises itself as "serving the public conversation" (my emphasis). But taken together, these requirements make it more difficult to accept that the Hearings Regulations permit remote hearings. Both support the contention that a hearing is a proceeding that takes place in one physical location, with parties and the public in attendance at that location.

Even if one were to adopt an updating construction to the term "hearing", that would not necessarily overcome the textual obstacles outlined above

First, it is not just the term "hearing" that would have to be updated, but the notion of a hearing at a "place", with parties in "attendance" and in "public". Any construction - whether updating or not - is constrained by the text itself. The term "hearing" when taken in conjunction with the requirements of "place", "attendance" and "public", is not sufficiently general, in my view, to allow for remote hearings.

Second, any contention that the Hearings Regulations should be subject to an "updating" construction is difficult to sustain in light of the amendments examined in the next section.

Third, in any event, it is the Hearings Regulations that would have to be subject to an updating construction, as the LA 2003 does not itself govern licensing sub-committee hearings. An updating construction may be justifiable when interpreting the language of a *statute* in part to avoid the legislator having to constantly re-enact and update such

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9 The Flexibility Regulations provide for remote "local authority meetings" in Reg 4. A local authority meeting extends to "a committee or sub-committee" of a local authority (Reg 3). That term cannot extend to a licensing committee hearing – at least not without being potentially *ultra vires* s 78 Coronavirus Act 2020.

10 As was held in *Hertfordshire CC,* [86] in respect of Coronavirus Act 2020, s. 78, and the LGA 1972.

11 For print dictionaries, albeit more dated, see *Shorter Oxford English Dictionary*, 6th Edition (2007): "A particular part or portion of space or of a surface, whether occupied or not; a position or situation in space or with reference to other bodies"; *Chambers' 21st Century Dictionary* (1999): "A geographic area or position such as a country, city, town village, etc. (3) a building, room, piece of ground, particularly one assigned to some purpose"

12 *Collins online dictionary*. Retrieved here: https://www.collinsdictionary.com/dictionary/english/place.

13 *Cambridge University online dictionary*. Retrieved here: https://dictionary.cambridge.org/dictionary/english/place.

14 *Merriam-Webster online dictionary*. Retrieved here: https://www.merriam-webster.com/dictionary/place.

legislation.[15] However, it is at least open to discussion whether such updating construction can apply as readily to *secondary legislation* such as the Hearings Regulations. It could be expected that the Government - free from Parliament's constraints on its legislative time - will regularly update secondary legislation.[16] Indeed, if anything the Government's response to the Covid-19 pandemic is characterised by a proliferation of secondary legislation. A number of measures amended rules to allow for remote hearings.[17] In my opinion, it is not easy to apply an "updating construction" to the Hearings Regulations to allow for remote hearings.

iii) The Welsh Amendments

The Local Government and Elections (Wales) Act 2021 (Consequential Amendments and Miscellaneous Provisions) Regulations 2021/356 amended the Hearings Regulations for Wales to provide for remote hearings.

Wales has its own arrangements for local governance.[18] Already in 2011, Wales allowed for remote attendance at certain local government meetings.[19] In November 2019, prior to the Covid-19 pandemic, the Welsh Government noted that remote attendance was "very difficult to introduce" and sought to encourage such attendance in the Local Government and Elections (Wales) Act 2021.[20] That Act imposed a duty on local authorities to make arrangements to ensure they can conduct "local authority meetings" remotely (LGEWA 2021, s. 47). By s 47(6), such local authority meetings include licensing sub-committee hearings. As a result, the Welsh Amendments amended the Hearings Regulations to allow for remote licensing hearings.

Two points emerge from this.

First, it was considered necessary to amend the Hearings Regulations in order to allow for the remote hearings. So much is clear from the explanations to the Welsh Amendments, which explain that they are designed to "give effect to provisions in s 47 of the 2021 Act".[21] The clear implication is that the Hearings Regulations, unamended, do not permit remote hearings.

Second, the way in which the Hearings Regulations were amended shows that hearings, at present, cannot be conducted remotely. The Welsh Amendments do not simply provide that a hearing extends to a hearing conducted remotely (see Reg 1(2A) of the Hearings Regulations, defining a hearing). They systematically amend the Hearings Regulations to remove the reference to "place" in relation to remote hearings. Regulation 4 provides a good example:

> *(1) An authority in England shall arrange for the date on which and time and place at which a hearing is to be held in accordance with regulation 5 and shall give a notice of hearing in accordance with regulations 6 and 7.*
>
> *(2) An authority in Wales must—*
> *(a) in the case of a hearing which is held through remote means only, arrange for the date and time at which the hearing is to be held in accordance with regulation 5;*
> *(b) in the case of a hearing which is held partly through remote means or not through remote means, arrange for the date on which and the place and time at which a hearing is to held in accordance with regulation 5;*
>
> *[...]*

In England, the duty to arrange a hearing extends to the "date on which and time and place at which a hearing is to be held" (Reg 4(1)) (my emphases). By contrast, in Wales, where remote hearings are concerned, arrangements do not need to be made for the place at which the hearing is to be held. Rather, arrangements must be made for "the date and time at which the hearing is to be held" (Reg 4(2)(a)) (my emphases). This excision of the term "place" when referring to remote hearings is repeated throughout the Hearings Regulations (see, eg, 6(1A), 12(2A), 20(4A)). Moreover, where a hearing is partly in person and partly remote (as contemplated in Reg 4(2)(b), above), reference is made to place in relation to the in-person part of the hearing (but not in relation to the remote part).

15 *R(oao N) v Walsall MBC*, [2014] EWHC 1918 (Admin), [45] – [46] (Leggatt J). *R v Ireland* [1998] AC 147, 158C (Lord Steyn): "[S]tatutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes."

16 It is in principle possible for secondary legislation to be given an updating construction, see *Ryanair Ltd v HMRC* [2014] EWCA Civ 410, [39] (although such a construction was not appropriate in that case).

17 See, for example, Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) (Amendment) Regulations 2021/579, Reg 2; Health and Care Professions Council (Coronavirus) (Amendment) Rules Order of Council 2021/27, Schedule 1, para. 1.

18 Considered in summary in *Hertfordshire CC*, [14]-[15], [45]-[47].

19 Local Government (Wales) Measure 2011 Nawm 4, s 4. A measure becomes law when passed by the Welsh Assembly and approved by Order in Council, see s 93, Government of Wales Act 2006. See also Local Government (Democracy) (Wales) Act 2013, s 59 (meetings of principal councils).

20 Local Government And Elections (Wales) Bill, Explanatory Memorandum, paras 3.111 to 3.114 (November 2019).

21 SL(5)757 – Local Government and Elections (Wales) Act 2021 (Consequential Amendments and Miscellaneous Provisions) Regulations 2021, under Background and Purpose. See also Explanatory Notes to the Welsh Amendments: "These Regulations […] give effect to s 47 of the 2021 Act relating to remote attendance".

The Welsh Amendments thus confirm the textual arguments put forward above. The association of "hearings" with "place" makes it difficult to accept that the Hearings Regulations allow for remote hearings.

They also cast doubt on any updating construction. If the Hearings Regulations were to be given an "updating" meaning, it is difficult to see why they would have been amended.

Flexibility, practicality and remedial discretion

A number of broader arguments have been canvassed by practitioners to justify holding hearings remotely. These include the fact that the Hearings Regulations are flexible, the practical consequences, and scope for defective proceedings to be "saved" by remedial discretion.

On *flexibility,* it is of course true that licensing sub-committees are designed to operate flexibly. They may regulate their own procedure (LA 2003, ss 9(3), 183(1); Hearings Regulations, Reg 21), and proceedings take the form of a discussion (Reg 23, Hearings Regulations). Such flexibility is crucial to the licensing scheme as it facilitates debate within the local community on what is in the public interest.[22] However, licensing sub-committees are not given a procedural *carte blanche.* The Regulations prescribe, in mandatory terms, the procedure to be followed at hearings (s 183(1) LA 2003). Their power to regulate their procedure is "subject to the provisions of [the Hearing Regulations]" (Reg 21; LA 2003, 9(3)). To appeal to flexibility in the Hearings Regulations does not, in my view, answer whether Hearings Regulations themselves preclude remote hearings.

On *practicality,* it is true - as has been observed - that some hearings must be conducted within a fixed period of time. If the hearings could not be conducted remotely, they could not take place at all (the relevant rules prohibiting travel to such hearings and / or the gathering necessary to conduct such a hearing). However, such hearings must still be conducted as "hearings" within the meaning of the Hearings Regulations. While the practical arguments appear powerful, there is a risk of putting the cart (whether the Hearings Regulations permit remote hearings) before the horse (the practical consequences of *not* holding proceedings remotely).

Finally, on *remedial flexibility,* a failure to comply with the requirements of the Hearings Regulations does not result, in and of itself, any determination being void (Reg 31). Thus, the argument runs, a remote hearing would not necessarily be set aside. This is an attractive argument. Although the precedents so far have related to formal defects,[23] it is indeed unlikely that a court would - other things being equal - invalidate a determination reached after a fair (albeit remote) hearing. This is especially so given that, in many cases, it would have likely been a criminal offence under the relevant coronavirus rules to have held the hearing in accordance with the Hearings Regulations (ie, in person).

But it must be recognised that an appeal to the improbability of a remote hearing being set aside is distinct from such hearings being lawful under the Hearings Regulations. The fact a licensing sub-committee might get away with it does not mean it is permitted. It is certainly not easy to reconcile with that sub-committee's duty to behave "in accordance with the rule of law".[24]

And then?

A disappointed applicant has, generally speaking, two potential routes of challenge to a licensing sub-committee's decision: an appeal to the Magistrates' Court or judicial review before the High Court. An appeal to the Magistrates' Court is, in reality, a complete re-hearing with the applicant and local authority both free to adduce further evidence (see s 181 LA 2003, and Schedule 5). Schedule 5 provides for rights of appeal where applications are refused. While this provides an appellant with a valuable second bite at the merits, it is not immediately apparent how the *procedure* (and its *legality*) as opposed to the *merits* could be challenged. The question is how a disappointed applicant could challenge the fact that a hearing was held remotely. It is this question that I briefly explore.

Typically, it is judicial review that is concerned with procedure and legality. Indeed, review of the merits of the decision (as would be done on appeal to the Magistrates' Court) is the "forbidden appellate approach" that judicial review will not touch (*R v SSHD, ex parte Brind* [1991] 1 AC 696, 767G (Lord Lowry)). Judicial review - other things being equal - would seem the ideal candidate to challenge a decision reached following remote hearing. This is the terrain of legality and procedure, familiar to all public lawyers. Plainly, the High Court could consider whether a licensing sub-committee was empowered to hold a hearing remotely, and, if not, it would have the power to quash the decision (subject to the remedial discretion discussed above).

However, the scope of appeals (and their interaction with

22 *R (oao Hope and Glory) v City of Westminster Magistrates Court* [2011] EWCA Civ 31, [41] and [42].

23 In *R (oao D&D Bar Services Limited) v Romford Magistrates Court* [2014] EWHC 344 and *R (oao Akin) v Stratford Magistrates Court* [2014] EWHC 4633 (Admin), respectively, decisions were not set aside where the notices (i) failed to give the grounds for review of license and failure to use the correct font size in the application form; and (ii) failed to give grounds for review of licence.

24 Id, [41].

judicial review) in this area remains moot. In *Hope & Glory* the District Judge hearing an appeal in the Magistrates' Court found that he was to disregard "the way in which the licensing sub-committee approached their decision or the process by which it was made". That, found the District Judge, was the province of judicial review; not of an appeal. This might suggest an appeal against a hearing on the grounds it was held remotely would not be entertained in the Magistrates' Court.

The Court of Appeal in *Hope and Glory*, albeit *obiter* as they had not heard argument on the point, suggested that the District Judge was wrong and that the Magistrates' Court, on appeal, could indeed consider how the decision was reached: [52]. This was supported by the fact that the Magistrates' Court could remit the decision for reconsideration by the licensing sub-committee in line with its directions (see s 181(2)(c)). Further, the (now current) Guidance provides, in paragraph 13.6:

> *The court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law or address both.*

On the *obiter* in *Hope and Glory,* a Magistrates' Court could consider whether it is lawful to conduct licensing proceedings remotely.

Of course, on practical notes, raising such a point on appeal to the Magistrates' Court would not likely be advisable because (1) the Magistrates' Court (compared to the High Court) may not be the ideal forum for the likely complex legal debates on the powers of a licensing sub-committee; and (2) the appellant will be primarily concerned with overturning the decision of the licensing sub-committee on its merits, as opposed to attacking the procedure by which it was reached.

But the point remains that a Magistrates' Court on appeal *could* arguably consider how the decision was reached. It could, for example, rule on whether it was lawful to reach the decision following a remote procedure. For the reasons given above, the appellant would not likely invite the Magistrates' Court to embark on that difficult question. But the appellant could also conceivably ask the Magistrates' Court to give less *weight* to a decision which was taken remotely. It could invite the court to, for example, place less emphasis on part of a discussion at the hearing (or cross-examination, if there was any) because the appellant was not able to participate as effectively as if it were in person.[25] The same point could, arguably, be made even if it were lawful to hold the hearing remotely. This will raise interesting questions, given what I understand was the near-universal adoption of remote hearings during the pandemic.

Conclusion

I have the relative luxury of writing in a time when a number of effective vaccines have been developed, and after a concerted effort to vaccinate the population. The prospect of the entire licensing system - and its important public objectives of crime prevention - grinding to a halt during the lockdown periods was an unpalatable one.

That said, in my view, for the reasons given above, there is no express power for remote licensing sub-committee hearings - whether under the Licensing Act 2003 or under the Coronavirus Act 2020 (and associated instruments). As to whether there is a power to do so under the Hearings Regulations, that is a matter of construction of the Regulations as a whole. One might very well wish there to be a power to conduct remote hearings. But at the risk of grandiosity in this comparatively modest context, I recall Lord Atkin's dissent in *Liversidge v Anderson* [1942] AC 206, 244:

> *In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.*

Laws speak the same language in pandemics as they do in times of health. The Hearings Regulations, when examined as a whole, simply do not, in my view, lend themselves to any natural construction that permits remote hearings. A hearing conducted at a place, with parties in attendance, and in public, militates against proceedings conducted online with participants in multiple locations. Further, the Welsh Amendments highlight the fact that the Hearings Regulations, in their current form in England, preclude remote hearings.

As to whether it should be possible to conduct licensing hearings remotely, that is a different question entirely, on which I offer three concluding observations.

First, the motivation behind the Welsh position, which predates the Covid-19 pandemic, shows that the flexibility that comes with remote licensing hearings may be desirable. While comparatively novel, we should carefully consider whether the flexibility that comes from such remote hearings justifies their adoption.

Second, in my view, the licensing system should aim to increase rather than stifle public participation in order to take decisions that affect the public at local level. Licensing is by its nature community-driven. It makes good sense to

25 Indeed, the District Judge's holding in *Hope and Glory* (that an appeal could not consider how a licensing sub-committee's decision) was reached in the context of a discussion of how he should approach the decision of the sub-committee on the hearing of the appeal, see [7].

maximise community input in licensing hearings - not only for the instrumental reasons (licensing decisions with input from multiple sources are more likely to be better decisions) but for non-instrumental ones (unpopular decisions are more likely to be accepted by the community if they have had a say in the decision). Remote hearings might well facilitate such an aim by: (i) reducing or eliminating the cost of attending licensing sub-committee hearings; (ii) encouraging those with jobs or child-care responsibilities to participate; and / or (iii) generally making it less onerous to attend such hearings.

Third, such proceedings must, of course, be fair. But the world (and with it the legal profession) has grown accustomed to the rise of remote hearings in other forums. It would be increasingly difficult to argue that a licensing sub-committee hearing could not be fairly conducted remotely. The debate - should it be considered appropriate to allow remote hearings - is not *whether* they can be fair, but *how* to make them fair.

It may be that the experience of remote licensing sub-committee hearings so far - even if not permitted by the Hearing Regulations - is the best argument in favour of allowing them. If so, they should be amended as matter of priority.

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Pavement licensing and off-sales

Next summer will be the third under the pandemic-driven pavement licence provisions and the deregulation of off-sales of alcohol. **Richard Brown** casts a quizzical eye over how the initiative is working and how it should move forward

Back in early summer 2020, the Business and Planning Bill 2020 was making its way rather tortuously through the legislative machinery. Not unduly so – it takes as long as it takes – but every day must have felt like a week for premises waiting for clauses 1 - 10 and clause 11 to come into force, desperate as they were to increase their capacity to mitigate social distancing restrictions by trading outdoors.

The Business and Planning Act 2020 (BPA) received Royal Assent on 22 July 2020. The provisions of particular interest to the hospitality industry were said to be "temporary",[1] set to expire on 30 September 2021, a date which seemed like aeons away. Covid would all be over by then, surely?

Narrator: Covid is not over.

The 30 September 2021 date has come round very fast. On that day, there were 31,925 confirmed cases; 650 hospitalisations; and 91 deaths within 28 days of a positive test.[2] By way of (totally unscientific) comparison, on 30 September 2020, there were 7,108 confirmed cases; 452 hospitalisations; and 57 deaths within 28 days of a positive test. On 22 July 2020, the day BPA came into force, there were 794 confirmed cases; 158 hospitalisations; and 17 deaths within 28 days of a positive test.[3]

I am under no illusions that statistics, and numbers are my forte; hence I became a lawyer. The figures and overall trends which I am told can be gleaned from the linear graphs, pie charts and tables have been much debated. The removal of almost all lockdown restrictions on 19 July 2021 is however interesting when seen in the context of the reasons for BPA being enacted, and its extension.

For it became evident some months ago as the shifting sands of lockdown release dates were delayed or obfuscated that the provisions of Business and Planning Act 2020 would indeed be extended. Both the hospitality industry and local authorities were keen to have clarity on an extension, and there was widespread support for it.

Fortunately, the mechanism to do so was straightforward. Unlike the Regulations under s 78 Coronavirus Act 2020 permitting local authority meetings to take place remotely,[4] which expired on 7 May 2021, BPA was drafted with "enabling provisions" meaning that secondary legislation could extend the provisions in ss 1-10 (pavement licences) and s11 (deregulation of off sales).

Section 10 BPA provides that:

> *(1) Sections 1 to 9 expire at the end of 30 September 2021.*
>
> *Section 11(2) BPA inserted a new s 172F to L into Licensing Act 2003 ("LA03"). S172F(10)(d)(i) set the "relevant period" during which the off sales deregulation would have effect as ending on 30 September 2021.*

The new s 172L(13) stated that:

> *Subsections (1) to (10) expire at the end of 30 September 2021.*

However, both s 10 and s 11 provided for an extension to these longstop dates[5] if the Secretary of State considers it "reasonable to do so to mitigate an effect of coronavirus".

Thus, snappily-titled draft statutory instruments (SIs) were laid before Parliament on 9 June 2021: *Business and Planning Act 2020 (Pavement Licences) (Coronavirus) (Amendment)*

1 Defined in the *Collins Dictionary* as "something that is temporary lasts for only a limited time".

2 See https://coronavirus.data.gov.uk/ for daily figures for cases, hospitalisations and deaths.

3 I ended up down a rabbit hole on this. By way of comparison, the figures for 12 April 2021 (licensed premises able to open for outdoor service) the figures were 2,714; 208; and 27 respectively. For 19 July 2021 (when most lockdown restrictions were lifted entirely) the figures were 46,904; 874; and 83 respectively.

4 *Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020* (SI 2020/392).

5 Section 10(2) BPA and s 11(14) BPA2020 respectively.

Regulations 2021 ("pavement licence Regulations") and *Alcohol Licensing (Coronavirus) (Regulatory Easements) (Amendment) Regulations 2021* ("alcohol licensing Regulations").

Both SIs were very brief and to the point, simply extending the provisions of ss 1-10 and s11 BPA 2020 for a further year. The former came into force on 20 July 2021, the latter on 16 September 2021.

The alcohol licensing regulations also amended s 107(4) and (5) LA03 to permit an increase in temporary event notices from 15 to 20, and the number of days in the calendar year on which a single premises can be used to carry on licensable activities, from 21 to 26 days, for 2022 and 2023.

The reference to 2023 in this latter provision perhaps reminds us that the enabling provisions in BPA are not limited to one year. They would allow ongoing extensions beyond 30 September 2021, although the Government has said that this is not its intention. Whether this alleviates the concerns of the Local Government Association (see below) is unclear.

It was of course widely expected that provisions of ss 1-10 and s 11 would be extended. Nevertheless, it is legitimate to consider whether these extensions, and particularly unamended extensions and any further extensions which may occur notwithstanding the Government's "intentions", are justified in the context of the reasons for the provisions in BPA being enacted in the first place. The popularity of outside drinking / dining is not, in my view, an appropriate reason for extending the provisions in this way.

The Local Government Association had issued a briefing note on 2 July 2021 addressing the draft pavement licence regulations.[6] They highlighted that the procedure had created challenges for local authorities and that there must be a balance between supporting the hospitality sector and other considerations such as the impact of outdoor hospitality on local residents, highways and pedestrian access. They agreed that, "While emergency measures were appropriate in the midst of the pandemic, the context in which these provisions are now being extended is very different to that of last year as we look ahead to entering stage 4 of the roadmap and the end of most restrictions." They went on to propose a "fundamental review" of the regulations and highlight the financial costs to some boroughs. Finally, they confirmed that "Many councils have also reported an increase in complaints from local residents linked to pavement licensing for tables and chairs, due to the noise caused by outdoor hospitality and blocking footpaths, for example. This has an impact on broader regulatory services who have to spend time investigating these complaints."Perhaps the provisions would more appropriately have been renewed following an impact assessment, which may or not have suggested tweaks to the system rather than a wholesale and verbatim reproduction.

It is instructive to remember what the intention of the provisions of ss 1-10 and s 11 BPA were when enacted. This did not escape the attention of the House of Lords when the regulations were debated in Grand Committee on 8 July 2021.[7]

Whilst it was expected that the provisions of BPA 2020 would be extended for a further year, it was not the case that they were simply waved through by Parliament. As when the Business and Planning Bill was being debated, there were forceful voices seeking a total ban on smoking in areas covered by pavement licences. Others remained concerned at the integrity of disability access on crowded pavements and streets. There was also a recognition of the difficulties local authorities found themselves in when administering the regime. There was acknowledgment that there had been issues experienced by residents living amongst this utopian café society. Some authorities had processed hundreds of applications and renewals, and would presumably be dealing with similar numbers leading up to and after 30 September 2021. In particular, the purpose of the provisions as enacted were recalled by Baroness Blake of Leeds (my emphases):

> *We have learned that, when introduced last year, this was going to be a* ***temporary streamlining*** *of the pavement licence application process and that it* ***would be in place for only as long as social distancing was necessary****. However, the Government are today legislating for the extension of the provisions until September 2022, despite legal requirements on social distancing coming to an end this month. I begin by asking the Minister to clarify whether this represents a change in policy by the Government, and is he certain that there will be no further extension beyond September 2022?*
>
> *On a similar point, the Minister will be aware that under the Business and Planning Act, an extension is legally permissible only if it is for the purpose of mitigating an effect of the coronavirus. Can he detail how this extension meets that requirement? I understand that* ***the temporary nature of the measure was due to concerns raised by local authorities, as well as by community and campaign groups.*** *There was*

6 https://www.local.gov.uk/parliament/briefings-and-responses/business-and-planning-act-2020-pavement-licences-coronavirus.

7 https://hansard.parliament.uk/Lords/2021-07-08/debates Volume 813.

concern about the process leading to more anti-social behaviour and creating noise and nuisance for local residents, as well as the issues we raised about impaired mobility. Can the Minister confirm that the Government have assessed whether the increase in pavement licences has led to those issues, and will he outline exactly what consultation has taken place with those groups on extending the provision?

These questions pick up on the stated reasons given in the explanatory memorandum to BPA (my emphasis in each case):[8]

The Act includes a range of measures to help businesses adjust to new ways of working as the country recovers from disruption caused by Covid-19. The measures support ***the transition from immediate crisis response and lockdown into recovery*** *and getting the economy moving again.*

And then, under the heading *Outdoor Seating*:

4. *This Act includes* ***temporary measures*** *to support businesses selling food and drink through economic recovery* ***as lockdown restrictions are lifted but social distancing guidelines remain in place.*** *Once cafes, pubs and restaurants are permitted to open,* ***current social distancing guidelines will have considerable impact on the capacity*** *to accommodate customers.*

5. *The measures in this Act are designed to support businesses selling food and drink such as cafes, pubs and restaurants by introducing a temporary fast-track process for these businesses to obtain permission from the local council for the placement of furniture such as tables and chairs on the pavement outside their premises.* ***This will enable them to maximise their capacity whilst adhering to social distancing guidelines.***

Finally, under the heading *Alcohol Licensing:*

6. *The measures included in this Act modify provisions in the Licensing Act 2003 to provide automatic extensions to premises licences that only permit sales of alcohol for consumption on the premises ("on-sales") to allow sales of alcohol for consumption off the premises ("off-sales").* ***It will be a temporary measure to boost the economy, with provisions lasting until the end of September 2021.***

7. *These measures will make it possible for licensed premises that have only an on-sales licence to sell alcohol for consumption off the premises. This will allow businesses to trade* ***whilst keeping social distancing measures in place inside.***

Of course, at the time, the provisions of BPA were aimed at premises reopening as of 4 July 2020 with social distancing restrictions very much in place. It was not known at that time that cases would increase to such a level that tiered restrictions would subsequently be necessary, which had further impact on the hospitality industry, followed by a further closure of all licensed premises ending on 12 April 2021.[9]

The explanatory notes to both sets of regulations duly set out that "The amendments are made to mitigate the effects of the coronavirus pandemic" but noted that a full impact assessment had not been produced because "no, or no significant, impact on the private, voluntary or public sector is foreseen." This is debatable.

Is this a moving of the goalposts? Does it matter? Certainly, the social distancing aspect of the push for external drinking / dining seems to have been glossed over - legally mandated social distancing having ended on 19 July 2021. The focus has instead been entirely on economic recovery.

Lord Greenhalgh, the Minister of State, Home Office and Ministry of Housing, Communities and Local Government, had introduced the regulations in this way: "As I previously stated, this extension is considered necessary and vital, as it will provide businesses with much needed certainty to help them to recover economically and will support them in planning for the extended period."The Minister's response to the probing of Baroness Blake sought to reassure that *"…*there has been no change in policy. We have not made a decision on the future of the temporary provisions; it would be premature to make any commitments on potential changes to the policy in future. However, I reassure noble Lords that we will continue to engage with stakeholders. We are committed to ensuring that the needs of all highway users are taken into account."

I do not say that there should not have been a focus on economic recovery. Clearly, the hospitality needed and needs this support. I do say that as the *necessity* to add external capacity for reasons of social distancing has gone (and it would require a considerable *volte face* for it to return) that experiences of local authorities and affected residents and lessons learned as to the workings of ss 1-10 and s11 BPA

8 https://www.legislation.gov.uk/ukpga/2020/16/notes/division/3/index.htm.

9 17 May 2021 for indoor hospitality.

could and should have been incorporated into an extension of such measures. If a week is a long time in politics, a year is a long time in licensing. This could have included:

1. A power to be able to grant licences other than precisely as applied for, rather than to refuse entirely.

2. A longer period for the decision-making process, to reduce the burden on local authorities.

3. Increased fees based on cost recovery, to enable local authorities to recover shortfalls.

4. Address concerns about, eg, entirely smoke-free areas.

5. Address and clarify concerns about disability access raised by stakeholders.

6. Update the starting point for "disqualifying events" under s 172F(1)(c).

7. Clarify the effect of s 172F(7).[10]

8. Address the seeming anomaly / unfairness of s 172F(12).[11]

9. Address the concerns of some local authorities as to the "pre-cut off time".

10. Address concerns about restaurants being able to operate as bars externally as they do not need to comply with any "ancillary to a table meal" conditions.

The Government may consider that the commitment not to extend the "temporary" measures beyond 30 September 2021 will alleviate the concerns of residents who have been affected by external operations. As we are now moving into cooler weather, the impact may be lessened. However, 2022 will see the third summer of the pavement licence provisions and the deregulation of off-sales of alcohol. It is to be hoped that this will cumulatively provide all stakeholders with sufficient experience of the workings of BPA to be able to put forward balanced arguments as to whether and how any such licensing scheme should move forward in future.

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

10 "The references in subsections (3) and (6) to an authorisation or condition having effect include the authorisation or condition as subsequently varied or modified in so far as it has effect in relation to the relevant period."

11 "Where a premises licence authorises the sale by retail of alcohol for consumption in an outdoor area of the licensed premises at some, but not all, of the times when it authorises the sale by retail of alcohol for consumption elsewhere on the premises, times when the premises are not open for the purposes of selling alcohol for consumption in the outdoor area of the premises are to be regarded for the purposes of this section as times when the premises are not 'open for the purposes of selling alcohol for consumption on the premises'."

Scotland's public health objective and the conflict between research and evidence

Research studies on the effects of alcohol may be helpful when making some licensing decisions but must never overrule observed facts, says **Stephen McGowan**

There is no doubt that public health is an important factor in the context of the Licensing (Scotland) Act 2005. Yet early attempts at interaction with the licensing system by health practitioners were ineffectual, with many representations to licence applications erroneous and unspecific, and therefore rejected within a quasi-judicial setting that must have been a steep learning curve for those brave representatives. This vanguard learned that a licensing board hearing is not like an academic debate or exchange of policy ideas.

Public health actors have become frustrated that the evidence they seek to rely on and present has not in many cases led to a more rigid licensing policy or greater numbers of refused applications. But this sense of being thwarted rests somewhat on a "different understanding" as to what constitutes reliable evidence. An important part of this is the legal requirement for licensing decisions to be reached with regard to causal evidence.

It is long established in licensing law that there is a difference between causation and correlation, and this is very relevant in licensing decisions. The weight to be attached to the strength of evidence is a key part of a licensing board's decision making. The starting point, therefore, should be the apparent observation that "causal" evidence should attract more weight than "correlative" evidence when a licensing board deliberates on the outcome of applications as well as on policy.

The fact that causality is a higher level of evidential threshold was criticised by Alcohol Focus Scotland as setting the bar "too high" and "unhelpful". The (un)helpfulness of a causality test to those who wish to see applications refused or a more restrictive policy framework is neither here nor there. Creating a hostile environment for existing or new licensed premises is not the purpose of the 2005 Act, nor is it the function of the licensing board to seek to do so as a default aim or end. It is the function of the board to make decisions and decide on policy based on material fact and other evidence that can lawfully be relied upon and justified. The licensing board is not governed by aspirational or positional policies favoured by any stakeholder: what they are governed by is the rule of law.

Scottish case law on the public health objective

The underlying law of causality applies to all of the licensing objectives; it is not a doctrine affecting public health alone. It may be that the causality test is unhelpful to those who wish to see more applications refused, but that is not the point. The point is that licensing boards must observe the correct legal tests in their decision-making and the health objective is but one of five.

In *Deejay's Nightclub v Aberdeen Licensing Board* [2007] CSOH 188 the court said:

> *Here the issue, thrown into stark relief by the vandalism offences report, is whether the material put before the board does show any causative link between the premises being open and the incidents of vandalism reported. By causative link I do not mean necessarily that the applicants are to be considered at fault. It may be . . . that the vandalism occurs simply because at certain times a large number of people, possibly the worse for wear, are leaving the premises. The question at issue here is not whether, if such causative link is shown, the applicants can show in respect of individual cases that they were not at fault. Rather, it is whether the material put before the board demonstrates any causative link.*

This pre-2005 Act case is important because it reminds us of the requirement to look at the specific premises and the alleged detriment arising from those specific premises. Another judicial example of the requirement for causal evidence can be found in the earlier case of *Maresq T/A La Belle Angele v Edinburgh Licensing Board* 2001 SC 126. Here, the Court of Session accepted the argument of the appellant that:

…there had to be a causal connection between the mischief perceived and the use of the premises for the licensed activity... The objectionable activity... was not a consequence of the use of the premises for the sale of alcoholic liquor during any extension of permitted hours.

The requirement for a causal connection is also discussed in *Aquilla Clark v North Ayrshire Licensing Board* (28 January 1998, unreported) and, of course, another seminal licensing decision, *Risky Business Ltd v City of Glasgow Licensing Board 2000* SLT 923, in which Lord Prosser famously said:

…the mere possibility of some undesirable sequel to the grant of the application [is] not a ground for refusal: the test [is] one of likelihood or probability.

The first appeal decision which looked at the public health objective under the 2005 Act was *Galloway v Western Isles Licensing Board* [2011] LR 814. *Galloway* specifically deals with the issue of a refusal based on the health objective and discloses a number of points that are of clear interest to those seeking to grasp the health objective, namely:

- It is not for the applicant to demonstrate that greater availability would not be inconsistent with the public health objective:

  It is clear from the passage from the Statement of Reasons which I have quoted above . . . that having apparently decided that granting the application would result in the increased availability of alcohol, (which the Board says would not be consistent with protecting and improving public health) the Board has qualified that by saying that the applicant had not demonstrated that such increased availability would be consistent with that licensing objective. That qualification leads me to the view that the Board has introduced into its exclusive decision-making process a requirement on the applicant which has no basis in the statutory formula. It discloses a clear error of law.

- Licensing boards must base their policies on causality:

  It is essential that when applying its licensing policy a Licensing Board must find and demonstrate a causal link between the particular mischief apprehended and the general terms of the policy itself.

- In order to make a decision based on health evidence, it must be focused on the particular premises:

  The Board did not focus (as it should have done) on the Club itself, its members and guests and its activities; and it failed to explain how granting the application would be detrimental to public health. Now I accept that a part of the Board's Licensing Policy is to protect and improve the health and welfare of patrons of licensed premises; and of course such a policy is laudable. But to apply that general policy to a particular application without examining its specific merits (or demerits) amounts to an arbitrary application.

Another example of this is to be found in the case of *Martin McColl Ltd v Aberdeen City Licensing Board* (Aberdeen Sheriff Court, 30 November 2016, unreported). This case has important points to make about causality and the dichotomy of possibility and probability. Here, an off-sale application was refused on the grounds of over-provision and the licensing objective of protecting and improving public health. The appeal as regards the public health objective was upheld by the sheriff court: in refusing the application based on the licensing objective of protecting and improving public health, the board looked to whether the application "may" be inconsistent with that objective; whereas the legal test in section 23(5)(c) of the 2004 Act is that the grant "would" be inconsistent. The difference between "may" and "would" is critical. The sheriff says:

It is very clear that [the Board] require, when applying such factors as are relevant, to come to a view that these would be inconsistent with one or more of the licensing objectives (Section 23(5(c)) and in that event that the board must refuse the application. That is, however, a completely different test from a set of circumstances which may be so inconsistent. This is the difference between possibility and probability.

The defenders have adopted a substantially lower test than required.In short, speculation about potential health harm (or indeed, speculation about imperilment of any of the objectives) is not sufficient grounds on which to refuse an application.

Refusing a licence on the basis that it is possible that it may lead to inconsistency with the licensing objective is therefore not good enough. A board requires to have sufficient evidence that that the inconsistency is not merely possible but is probable. Considering the wider jurisprudence, such evidence would have to be targeted in terms of the specific application and premises, and would also require to be probative and capable of independent

assessment even where concerns are "real and genuinely held".

This brings sharply into focus the contrast of certainty and speculation, and the contrast between causation and correlation. There is a higher evidential threshold to demonstrate causation and probability as compared with correlation and possibility.

Academic studies and research in licensing hearings

It is clear that there is a sizeable body of academic research in relation to alcohol, and also (but perhaps less so) in relation to how the licensing system affects health harms. It also seems to me that the robustness of research can vary greatly and that there are studies which reach different outcomes on the same topic. How any of this might assist a licensing board remains to be seen: one might argue that studies can be presented to argue both sides of a debate. Ultimately, and as a matter of law, academic studies are of lesser evidential value than material fact because there are always subjectivities, whereas a material fact is black and white: either it is or it isn't.

In August 2014, Alcohol Focus Scotland published a paper entitled *Using Licensing to Protect Public Health: From evidence to practice*. This interesting paper posits a smart summary of the dilemma thus:

. . . licensing board members often appear to struggle to apply scientific evidence to policy and decision-making in practice. There are also challenges in effectively merging the perspectives and practices of licensing and public health: public health considerations tend to concern population level indicators and long-term trends, whereas licensing operates in an environment characterised by case-by-case decision-making, negotiated settlements and complex legal argument.

A key academic paper in this area, which is referred to in various licensing policy statements and often in public health representations, is commonly referred to in licensing circles as the CRESH Report.[1] This is a reference to the academic paper *Alcohol-related illness and death in Scottish neighbourhoods: is there a relationship with the number of alcohol outlets?* The basic proposal of this paper was that the greater the concentration of licensed premises in a particular locality, the greater numbers of negative health outcomes there will be. The CRESH Report, which was often presented to licensing boards to encourage them to adopt policies of overprovision, is often criticised by licensing solicitors on several grounds. There is a disconnect between the amount of alcohol available and the amount consumed in that the data of how much alcohol is actually sold from premises in a locality is not available. There is also a disconnect in displacement of purchasing trends: if there are two shops where before there was one, this does not mean I will buy twice the amount of alcohol. The report also suffers from a further disconnect with licensing policy in that it only looked at numbers of premises licences, and not capacity (of any hue). The report also pre-dated the impact of the minimum pricing condition, which did not come into effect until 1 May 2018, and which may have had some influence, but it does not predate the Scottish multi-pack ban condition which came into effect in 2011.

The most commonly cited passage at licensing board hearings, however, was the following caveat:

Finally, we should caution that our study was cross-sectional – it looked at a single point in time – hence while it suggested significant associations between outlet availability and alcohol-related harm we cannot conclude that the relationship is causal. Further analyses over time will be required to establish whether the links are causal, but currently alcohol outlet data for Scotland are only available for a single point in time. Better quality time-series licensing statistics, disaggregated into finer categories than simply on or off-sales, would allow for research into longitudinal relationships between availability and harm.

This concession brings us to the point that academic studies can only take a licensing board so far. In my experience of appearing in licensing board hearings, board members are less reluctant to place credence in more targeted forms of evidence such as witness testimony – for example, a neighbour who has actually witnessed an operator sell alcohol to "street drinkers" as the CRESH Report puts it, or on a police report detailing persistent complaints of such activity with dates and times.

Conclusions

Trying to draw all this together, I think it is fair to say that the public health objective has attracted the most commentary out of all the objectives of the Scottish Licensing Act. Increasingly, beneficial health evidence and studies should be an accepted and welcome part of the process. The best decisions of a licensing board are almost always the best-informed decisions. The public health objective is of course central to Scottish licensing, but licence applications should not be viewed through the prism of the public health objective alone. There are five licensing objectives under the 2005 Act and each has an equal footing; it is the job of the

1 CRESH is the Centre for Research on Environment, Society and Health, a virtual research centre set up by the universities of Glasgow and Edinburgh.

licensing board to assess independently all information put before it, and add such weight to that information as it thinks appropriate. The application of the public health objective and all of the objectives is not ultimately governed by academic studies, media or popular opinion but by the rule of law, and therefore evidential principles which underpin that rule: causality, sufficiency, probativity, reasonableness, natural justice and proportionality.

Stephen McGowan
Partner TLT LLP

This article is an abridged and edited excerpt from Chapter 3 of McGowan on Alcohol Licensing Law in Scotland *(Edinburgh University Press, July 2021).*

Institute of Licensing News

10 Years of the *Journal of Licensing*

This edition of the *Journal of Licensing* marks 10 years since its debut first edition in November 2011! A huge thank you to our editorial team, regular feature authors, authors and advertisers for their work and commitment to the *Journal*, which has long been well established as the professional journal for licensing practitioners.

Covid-19

At the time of writing the IoL pages for the November 2020 *Journal of Licensing*, we were still in the throes of the Covid-19 pandemic with a 3-tier alert system in England, a 5-tier alert system pending in Scotland, and Wales was part-way through a 2-week 'fire break'. Northern Ireland announced a new 'circuit breaker' lockdown effective from Friday 16th October 2020 for four weeks, and others followed soon after.

With some false starts in between, 19th July 2021 was hailed as 'Freedom Day' by some in England with restrictions finally lifting. Wales followed on 7th August lifting most restrictions and on 9th August Scotland moved beyond level 0. Northern Ireland has only recently announced further relaxations to come into effect in October.

As a country we are far from back to normal. Scotland and Wales are currently operating under a vaccine passport system, with Northern Ireland's relaxations coming with "strong recommendations" around passports and England consulting on a passport scheme as part of its "Plan B".

In the meantime, the hospitality industry is already operating under extreme challenges, resource shortages (hospitality and security staff), supplier chain issues and a reportedly lower customer demand – potentially the result of caution within the community and changing habits following extended periods without access to the normal night-time economy. Working from home is much more prevalent now, and meetings which would previously have taken place face-to-face, continue to be held online in many cases, in recognition of the savings in time and travel, and the overall convenience for many.

IoL Training and Events

We were delighted to return to our first face-to-face conference on 6th October, with the Gambling Conference held at the Grosvenor Casino in Manchester. A fantastic event in a brilliant venue, and we are grateful to Steve Smyth and Rank Leisure Group for hosting the event and helping to make it a welcome return to in person conferences. We enjoyed a fantastic Taxi Licensing Conference held shortly afterwards on 21st October at the Holiday Inn Birmingham City Centre.

The 25th National Training Conference

Most importantly, this edition of the *Journal of Licensing* will be handed to delegates arriving at the Crowne Plaza Hotel for our National Training Conference this year. This will be the 25th National Training Conference, and we can't wait to welcome everyone to the hotel from 17-19 November 2021.

It is such a pleasure to again be able to offer a programme of fantastic training sessions presented by expert speakers from government, local authorities, police and legal sectors, covering all areas of licensing and other relevant subjects. The programme is carefully structured to allow delegates to choose the sessions most relevant to them, with just a sprinkling of plenary sessions across the three days.

Covid safety is, of course, of the utmost importance, and delegates have been asked to ensure personal testing ahead of arrival and self-awareness during the conference. A big thank you to the Crowne Plaza hotel team, in particular Lottie Stokes, who has been in regular discussions with the IoL team in the planning of the event, and in doing so has made the event possible.

What's online

For the time being, many IoL courses will remain online, although the position will be kept under review. Feedback from course delegates suggests that the convenience and accessibility of online courses is extremely valuable, and often makes the difference in whether delegates can attend courses or not.

Reopening and Recovery Webinars

We were delighted to work with Best Bar None, ATCM, UKH, BBPA, National Pubwatch and many other excellent organisations and speakers bringing their insights and experiences to you online via Zoom in the form of the Reopening and Recovery Webinars between March and September this year.

We hosted 20 webinars in all, with nearly 3,000 attendees in total. The webinars covered regulations, best practice, preparation for reopening and finally the Global Nighttime Recovery Plan where we were joined by the chapter leads

from all over the world to share their expertise with attendees.

We hope to continue to provide similar collaborative webinars going forward, and one example is the Tax Conditionality Webinar provided in collaboration with HMRC, the Licensed Private Hire Car Association (LPHCA), the National Private Hire and Taxi Association (NPHTA), and the British Metals Recycling Association (BMRA). This webinar took place on 22nd October and we were delighted to welcome over 400 attendees online to hear from panellists about the incoming requirements, view prototypes of the online system, and to answer questions.

BTEC Level 3 Certificate for Animal Inspectors (SRF)

Our Animal Inspectors course is going from strength to strength, with well over 170 delegates so far enrolled on the course. This is the first IoL course to be accredited through an awarding body (Pearsons) and we are in discussions about developing other courses in a similar way.

Councillor Training and Responsible Authority Courses

Our councillor training courses have worked extremely well online and are consistently well attended. We have delivered a number of bespoke councillor training courses, restricted to a particular organisation and with tailored training content where requested.

In addition, our responsible authority training enables us to reach out to responsible authority practitioners, to increase understanding of the Licensing Act 2003 and the role of responsible authorities, explain how to engage in the process and importantly how to address concerns including those raised at committee hearings. The courses have proven popular, and we are delighted with feedback from delegates.

Awards

Fellowship

We are excited to be announcing new Fellowship Awards this year. The awards will be announced at the Gala Dinner during the National Training Conference on Thursday 18th November.

Fellowships are awarded, following nomination by two members of the Institute, to individuals where it can be demonstrated to the satisfaction of the Board that the individual:

- *is a member of the Institute or meets the criteria for membership; and*
- *has normally made a significant contribution to the Institute and has made a MAJOR contribution in the field of licensing, for example through significant achievement in one or more of the following:-*
  - *Recognised published work*
  - *Research leading to changes in the licensing field or as part of recognised published work*
  - *Exceptional teaching or educational development*
  - *Legislative drafting*
  - *Pioneering or taking a leading role in licensing initiatives or developments leading to significant changes or having a significant impact.*

Nominations for Fellowship can be made at any time to the IoL via email to info@instituteoflicensing.org or via your Regional Chairman/Director. The Awards are announced annually at the Gala Dinner.

The Jeremy Allen Award

The 10th Jeremey Allen Award (JAA) will be announced at the Gala Dinner held during the National Training Conference this year. The JAA was originally launched in 2011 as a tribute to the life and professional career of Jeremy Allen, whose dedication to partnership working and best practice in licensing made him one of the most respected and popular figures in the industry. Jeremy sadly passed away shortly after becoming Chair of the Institute of Licensing, and we are pleased and proud to continue to support this award by Poppleston Allen as an ongoing tribute to him.

2020 would have been the 10th Award, but we reluctantly took the decision to postpone until 2021, due to the COVID-19 pandemic which meant we were unable to proceed with the National Training Conference and the Gala Dinner / Awards night.

Chairman's Special Recognition

This year will see the first Chairman's Special Recognition awarded at the Gala Dinner. The Chairman's Award is made at the discretion of the serving Chairman based on nominations from Board members.

There are no set criteria for the Chairman's Special Recognition. They are open to nomination from Board members and every nomination will be judged on its merits. Final decisions will be confirmed through the Chairman's Committee.

The Chairman's Special Recognition can be made to

individuals or groups. Anyone wishing to suggest a worthy recipient should contact their Regional Director.

Consultations

Hidden economy conditionality – Northern Ireland and Scotland

The IoL responded to the Tax Conditionality consultation for Scotland and Northern Ireland.

Northern Ireland

In Northern Ireland, the responsibility for taxi licensing is outside of the local authority regulatory scope, and the tax conditionality proposals do not extend to scrap metal due to the absence of a distinct licensing regime. As a result, the IoL did not comment specifically in relation to the proposals for tax conditionality in Northern Ireland.

Scotland

The basic principles of the proposals in England are:

- New applicants are signposted to HMRC guidance on tax obligations and obtain confirmation that the applicant is aware of the guidance.
- Renewal applications will require proof of completed tax checks. Licensing authorities will be unable to complete the renewal process until such proof is obtained.

When responding to the initial proposals in England, the IoL's main concerns were to ensure that:

- The process is as simple as possible for both licensing authorities and licence applicants with clear guidance and signposting.
- Assistance is available to licence applicants where needed to assist them in completing their tax checks, either online or manually.
- Licensing authorities are not faced with licence appeals (i.e., not required to refuse licences due to the absence of proof of tax checks.

The consultation questions are below, together with the IoL response:

Question 1. Do you have any comments about, or evidence of, the suitability of applying the existing conditionality policy model to taxi driver licensing in Northern Ireland and taxi and private hire car drivers, booking offices and metal dealers in Scotland?

We consider that the Government will need to satisfy itself as to whether the conditionality policy model may conflict with the underlying principal purposes of the Civic Government (Scotland) Act 1982. The Scottish licensing system sits within separate legislative and jurisprudential soil to that in England and Wales. There is in our view a question as to whether the 1982 Act and provisions can be put to a non-licensing, ulterior motive.

Question 2. Do you agree that we should seek to apply conditionality using the same model as England and Wales, if not, why not, and what alternative model do you suggest?

Subject to our comment above, we consider that the model for England and Wales should be the same in Scotland and Northern Ireland for consistency and simplicity.

Question 3. Are there any features of the licensing regimes or processes used by licensing bodies in administering them, which are incompatible with conditionality or the policy model outlined in chapter 2?

The Scottish licensing system has a deemed grant provision. If an application has not been determined within certain timescales, the Act requires it to be granted. An assessment of how this provision might clash with the conditionality policy model needs to be undertaken.

Question 4. Do you have any comments on the suitability of safeguards outlined in chapter 2 and are there any further safeguards needed in addition to those outlined in chapter 2 for the licences outlined in chapter 3?

When responding to the proposals for England, the IoL also asked about a 'grace period' arrangement for licence renewal applications, to enable initial signposting and a period of time allowed to complete their tax check. The forthcoming arrangements for England provide a safeguard to protect applicants from undue delays, but only where the delay is on the part of HMRC.

Question 5. Are there any licence holders who may need additional support to engage with the tax check and what support do they need?

We consider it highly likely that some applicants will need additional support. This may be due to inability or lack of confidence with online systems, fear of reprisals for previous non-compliance and general uncertainty and fear of the tax regime. We also consider there to be a real concern over what might be termed digital exclusion. It is our understanding that the demographic of these licence

types may have difficulty where the process is entirely digital.

Protect Duty

The IoL response to the Home Office on the Protect Duty consultation advised that there appears to be a general consensus (with exceptions) from our members in support of a Protect Duty, and the need for venues and organisations responsible for or utilising public locations to be aware of, to adequately risk assess and finally to be able to respond appropriately to the threat of a terrorist attack. Most supported the use of capacity to determine those venues to which the Protect Duty should apply, as this would appear to be the most consistent and readily understood of the possible criteria that could be applied. The suggested threshold of 100 as the venue capacity was generally supported although there were some suggestions that this figure could be higher.

When considering the local authority functions which have the potential to result in the best protective security and organisational preparedness outcomes at public spaces, responses acknowledge that the licensing function (including sports grounds licensing) is one which should be considered, alongside Health and Safety, fire safety and building control processes, Safety Advisory Groups (for event planning), and Local Resilience Forums.

Proposal for mandatory Covid certification in a Plan B scenario

The IoL responded to the Department for Health and Social Care in relation to the call for evidence on mandatory Covid certification, submitting the results of the IoL member survey.

Survey results illustrated that the issue of mandatory Covid certification (vaccine passports) an emotive subject, with strong feelings both in favour and against the proposals. There are concerns about the potential criteria for premises to fall under the requirements, and further concerns about enforceability, interpretation, exemptions and increasing the burden on an already struggling industry.

Sue Nelson
Executive Officer, Institute of Licensing

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Public health - a suitable objective for England and Wales?

The LGA thinks introducing a fifth licensing objective is a good idea. **Gary Grant** is not so sure

During a premises licence review hearing before a London borough's licensing sub-committee a few years ago, the delinquent bar owner insisted to members that he was a man who "read the licensing laws every night before bed" just after he had said his prayers. "I know *all* of the *five* licensing objectives, I *love* the five licensing objectives, I *live* by the five licensing objectives!" he assured the sub-committee.

It is unclear to this day whether our impassioned bar operator simply did not know what the licensing objectives were or was simply very bad at counting. Either way, he no longer has a premises licence to fret over.

But the recent call by the Local Government Association on 6 August 2021[1] for the Government to introduce a fifth licensing objective – "the promotion of public health" – seeks to provide some posthumous vindication to our hapless (former) bar operator. The proposal is not a novel one. Legislators and other interested parties have previously sought to introduce a public health objective into the Licensing Act 2003 on a number of occasions but have been rebuffed by governments of different colours time and again.[2]

As every reader will know, the Licensing Act 2003 compels licensing authorities to carry out their functions "with a view to promoting the licensing objectives".[3] The current four licensing objectives are the prevention of crime and disorder, public safety, the prevention of public nuisance and the protection of children from harm. These objectives have become the mantra of licensing practitioners. However it would be naïve to suppose that licensing authorities *only* consider the four licensing objectives when deciding what action to take in any particular case. If they did, there would be little need for human intervention in the process: algorithms and AI could do the job more swiftly with a microprocessor replacing human judgement. Wisely, Parliament insisted that contested applications must be determined by democratically accountable councillors rather than by the coding efforts of Silicon Valley-based techies. There are myriad considerations that go through councillors' minds when exercising their judgement in an individual case. The four licensing objectives are the paramount factors, but not they are by no means exhaustive. The Court of Appeal summed it up well in the famous case of *Hope and Glory* as follows:[4]

> *Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on.*

For some years our colleagues in Scotland have grappled with their own fifth licensing objective: protecting and improving public health. On the level of pure principle, but perhaps only at that level, there is a logical argument for a public health objective in England and Wales too. The reason that certain lawful activities (namely the sale of alcohol, regulated entertainment and late- night refreshment) are deemed to be licensable activities subject to the regulatory controls of the Licensing Act 2003 is because of the risk that one person's enjoyment may disproportionately harm the interests of the wider community. So, while I may drink in a pub until my wits are frayed, I may not then use my fists as a means of communication. Similarly, I may listen to music in a nightclub until my ear drums ache, but if I then debouch into the adjacent residential streets in the early hours and start singing sea shanties which wake up the neighbourhood kids on a school night, then the licensing regime has an important role to play in mitigating those harmful consequences of my drinking and vocalising activities.

In short, where an otherwise lawful activity poses a high risk of harm to others then the State, through the licensing

1 https://www.local.gov.uk/about/news/lga-licensing-powers-need-cover-public-health.

2 Most recently, in 2016 Lord Brooke of Alverthrope tabled an amendment during the passage of what is now the Police and Crime Act 2017 seeking to introduce a further licensing objective "to promote the health and wellbeing of the locality and local area". The Government argued against the amendment, which was later withdrawn. Further, the House of Lords Select Committee Report of the Licensing Act 2003 (published in April 2017) rejected calls to introduce a public health objective (see paragraphs 260-261): https://publications.parliament.uk/pa/ld201617/ldselect/ldlicact/146/14602.htm.

3 Section 4 of the Licensing Act 2003.

4 [2011] EWCA Civ 31 at para 42.

regime, has a moral and legal right to intervene in a proportionate manner. In the case of the proposed public health objective, its proponents argue, that where the drinking of alcohol - an enjoyable but dangerous intoxicant if drunk in excess - poses a serious risk to the public's health, then surely the licensing regime should also take this into account as a licensing objective on the same logical basis that alcohol's impact on crime and disorder is taken into account? It has also been argued that the role of the Director of Public Health as a responsible authority under the Licensing Act 2003 will be more meaningful if there was a public health objective for it to aim at.

However, in practice the impact of a new public health objective may be far more problematic. Whereas the current four objectives focus on harm to *others*, a public health objective focuses more on harm to the *individual* drinker. To what extent should the state intervene, like a nanny, to protect adults from their own voluntary choices? Public health advocates will point to the costs, both financial and social, arising from the impact of alcohol on public health. These include the huge costs to the NHS in dealing with alcohol-related illnesses, and the devastating impact on the health and life-chances of children whose mothers or fathers prefer to consume alcohol rather than face up to real-life problems with an unclouded mind in order to find workable solutions. In the words of George Bernard Shaw, for some "alcohol is the anaesthesia by which we endure the operation of life".

A further important real-world issue is that licensing decisions must focus on the impact of a specific licensed premises on the licensing objectives. It may well be that in a particular area levels of liver cirrhosis have risen alarmingly. But how will the grant or refusal of a premises licence to a new off-licence or bar affect that situation? Will the problematic drinkers not simply buy from an existing off-licence or visit another bar in the area?[5] Since alcohol is rarely "good for you" in terms of bodily health (despite the entreaties of Guinness adverts from the past), many fear that a public health objective would permit more puritanically-minded licensing authorities to refuse all and any applications that seek the sale of alcohol. The more sober (but not teetotal) among us may view that scenario as hardly being conducive to the public good.

On most accounts, the introduction of a public health objective in Scotland has not made a real difference to the way individual cases are actually decided. There are huge evidential difficulties in establishing that the grant or refusal of a particular licence application will have a measurable impact on public health.[6]

What is increasingly indefensible is that the four licensing objectives (or five if the public health objective gains favour) are all framed in terms of the *negative* effects of licensable activities: crime, disorder, nuisance, harm to children, and risks to public safety and possibly public health. But where do the licensing objectives speak of the *positives* of licensable activities as something to be promoted? The closure of nightclubs and restraints on bars, restaurants and other hubs of social interaction during the Covid pandemic has led to an overall diminution of human enjoyment and social togetherness. Aristotle was right, Man is a social animal. Market reports suggest that some 7,000 venues where we once gathered, laughed, found comfort and inspiration, did not re-open on "Freedom Day". Quietly these doors, once open and welcoming, had been closed for good.

There are compelling arguments both for and against a public health objective. However, a more pressing objective as our towns and cities seek to recover and bounce back from the pandemic would be to promote access to and enjoyment of social and cultural activities by the public. I shan't hold my breath, but a man is permitted to dream.

Gary Grant
Barrister, Francis Taylor Building

5 In rebuttal, the public health lobby will point to evidence that the wider availability of alcohol is linked to increased problematic drinking because the competition drives down prices.

6 See House of Lords Report of Licensing Act 2003 (ibid) at paras 258-259.

Licensing law change in Northern Ireland means opportunities for breweries, distilleries and others

The liquor licensing laws in Northern Ireland are changing to move closer in line with other jurisdictions, as **Orla Kennedy** and **Eoin Devlin** explain

The planned changes in licensing laws in Northern Ireland will have a significant impact on breweries, distilleries and other local producers in the province, not least allowing them to sell their products directly to the public.

The Licensing and Registration of Clubs (Amendment) Act (Northern Ireland) 2021 received Royal Assent on 26 August 2021. The Act amends both the Licensing (Northern Ireland) Order 1996 and the Registration of Clubs (Northern Ireland) Order 1996 and represents the most significant reform of licensing laws in Northern Ireland in over 30 years.

The current position

At present, there is no specific licence category for breweries or distilleries in Northern Ireland to sell to the public from their own premises. If local producers wanted to sell to the public in this way, they have to use the occasional licence system or apply to the court for a licence in the same way as an off-sales or public house.

The application for an off-sales or public house licence involves surrendering a subsisting licence and can cost upwards of £100,000 – a potentially prohibitive cost for many small breweries and distilleries. The process also involves the need to demonstrate adequacy and can be fraught with difficulty, particularly if there are objections from other licensed premises in the vicinity.

For a long time, the Department for Communities has recognised the need to change the current law to help local distilleries and breweries, and to correct the difficulties they have encountered compared to their counterparts in Scotland, England and Wales.

The new legislation

A new category of licence is being created in Northern Ireland for local producers of alcoholic drinks, such as beers, ciders and spirits. If granted by the courts, a local producer's licence will:

- Permit local producers to sell their own products from their own premises for consumption on and off the premises, during specific hours. This will include online sales.

- In respect of consumption on the premises, allow local alcohol producers to apply for a new licence to operate as a taproom during limited hours (between 4pm and 10pm) for 104 days in any year. The sale of alcohol will be limited to that produced on the production premises only.

- Four samples will be permitted for consumption on the premises following a tour between 10am and 7pm. The volume of that sample will be set by regulation.

- Local producers will be allowed to sell their own products from certain other licensed premises for consumption off the premises, at events such as food and drink fairs.

New opportunities

The Act will now allow breweries and distilleries to sell their products directly to the public in limited circumstances. The proposed changes will see local breweries and distilleries being able to introduce taprooms where customers can enjoy an alcoholic beverage that has been produced on-site.

Taprooms are a common feature in other jurisdictions like Scotland, England and Wales. This change will finally enable producers in Northern Ireland to access this market and exploit the associated economic and tourism benefits.

If applying for a local producer's licence, a brewery or distillery would not have to purchase and surrender a subsisting licence so it would also remove that significant cost.

It would be equivalent to the process for obtaining a restaurant licence in Northern Ireland, albeit with some additional limitations in terms of opening days and hours. It will be less cumbersome than the occasional licence process currently used by some local producers, which is often associated with objections from statutory bodies such as the Police Service of Northern Ireland.

It will provide Northern Ireland's hospitality and tourism sector with a welcome opportunity to compete economically with the other jurisdictions by making Northern Ireland a more attractive tourist destination, with modern and accessible social opportunities that have not been available before now.

It will also provide an opportunity for local breweries and distilleries to expand their offering and reach into markets that until now have not been a financially viable option owing to the limitations imposed by existing licensing laws. The opportunity for online sales and selling at certain fairs, markets and events will be very welcome following the pandemic.

Do the changes go far enough?

While these changes represent a positive step forward, it is recognised that there are a number of limitations when compared with other jurisdictions.

In respect of taprooms and off-sales, local producers will be restricted to selling their own products. The opening times of any taproom would also be limited to between 4pm and 10pm and for a maximum of 104 days per year. This contrasts with the position in Scotland, England and Wales, where these limitations do not apply, leaving Northern Irish producers at a disadvantage.

The legislation does include a number of in-built review processes over the coming years. It is hoped that if there is a significant uptake amongst local producers of this new licence then some of these limitations may be reviewed and removed in the future.

Timescales

The changes will not all come into effect at the same time; they will be phased in over the course of the next few years.

A date has not yet been set to introduce the local producer's licence but work is ongoing to identify the most appropriate time for the remaining changes to come into operation and it is hoped this will be in the coming months.

It is apparent that the local producer's licence could be a lifeline for local businesses. The sector therefore impatiently awaits the introduction of the applicable parts of the Act so that they can grasp the economic and tourist benefits.

Orla Kennedy
Solicitor, TLT

Eoin Devlin
Legal Director, TLT

How safe are outdoor heaters?

Outdoor dining hours can be extended by using gas and electric heaters but these present many safety issues that operators must always be conscious of, as **Julia Sawyer** explains

For hospitality operators to serve food and drink outside their premises (if defined as part of the highway) they need a pavement licence. This allows a business to place removable furniture over certain parts of the highway adjacent to the premises, as long as a clear access route is maintained at all times.

The provisions for temporary pavement licences were simplified during the pandemic to support the recovery of the hospitality industry and the high street, and these provisions look set to continue.

The pavement licence stipulates removable furniture can be used, and this includes:

- Counters or stalls for selling or serving food or drink.
- Tables, counters or shelves on which food or drink can be placed.
- Chairs, benches or other forms of seating.
- Umbrellas, barriers, heaters and other articles used in connection with the outdoor consumption of food or drink.

There are safety aspects to consider for the use of all temporary furniture: it must be stable, secure and robust enough to be regularly moved. Given their potential for accidental harm, outdoor heating appliances require special consideration.

Using outdoor heaters safely

There is a wide variety of outdoor heaters available on the market, using electric, gas or wood, and varying opinions as to which are the most environmentally friendly.

When deciding what the correct heater is for your premises the following hazards should be considered:

- The potential to cause fire, burns or explosions.
- The stability of the heater.
- Any trailing cables or hoses.
- The movement of the heater.

As outdoor heaters can cause fires, burns or explosions if not handled correctly, the following control measures would need to be considered:

- The heater is used externally only.
- It is positioned away from any flammable materials such as furniture and fabrics.
- The heater is maintained and regularly visually inspected.
- Only trained personnel operate the heaters.
- Manufacturer's guidelines are followed at all times.
- The heater is used when the weather requires it, not left on permanently.
- The heater is not moved when in operation; it should be turned off, left to cool and then moved safely when no public are in the vicinity.
- The heaters are positioned at a distance from the seating and tables externally to prevent anyone accidently touching any hot parts: at least 1m width and height from any fabric or structure is recommended.
- Nothing is stuck to the grills of the heaters – this should be checked prior to each use.

The positioning of the heater is important. As it needs to be stable, the risk assessment would need to consider:

- Bottom of heating unit weighted and wider than top.
- LPG cylinder in the base to provide additional stability.
- Not used in weather where the wind speeds exceed 23mph (37 km/h or 10 m/s). This will vary depending on the appliance; the manufacturer's information will have the maximum wind speed it can operate in.
- Heater placed on level and firm ground.

A heater may have gas hoses or electrical leads that could pose a slip or trip hazard. If gas-powered, the cylinder should

be positioned within the housing of the heater, not stood outside of it, and the heater should be placed in a position where any hoses or cables do not cause an obstruction. If electric, the cables need to be inspected to ensure there are no signs of deterioration.

Some heaters can be heavy or awkward to lift or move, so a procedure needs to be planned and communicated to all those who may have to move the heater as to how it can be done safely. If gas, the heater should be moved when cold by taking the gas cylinder out and then moving the heater where it needs to be and then placing the cylinder back inside. This can be done with one or two people when no public are in the vicinity. Manual handling training should be given to all employees. The work area should be kept free from obstructions and adequately lit. During manual handling training each employee should be taught to assess the task, the load and the environment so they can move heaters safely.

Heaters should be kept clean, with no waste built up around them. For a gas heater, the ventilation holes should be kept clear of debris. No waste or other items should be stored within the heater area. The heater should only be cleaned when cold and should be wiped down with soapy water to remove any dust or grime.

As with all plant and equipment it should be maintained in line with the manufacturer's guidance. If gas, a competent gas safe engineer should inspect the heaters once a year. If electric, they should be regularly maintained by a competent electrician. Visual checks should be regularly carried out by personnel to ensure there are no signs of deterioration to the heater, the unit, the cables and hoses or any gas leaks.

These procedures should be reviewed annually as well as after any reported incident or change in procedure.

Gas outdoor heaters

With gas heaters, in addition to the above considerations the following matters need to be assessed:

- The gas cylinder is stored securely in the base of the heating unit so that there is no unauthorised access to the cylinder.
- Ventilation holes in the base are not obstructed, and are positioned so that they remain clear.
- The flexible hose is regularly checked to ensure it is not damaged, worn or cracked. If it is showing signs of deterioration it should be removed from use until the hose is replaced.
- Ensure the maximum size gas cylinder is not exceeded.
- Heaters should be checked annually by a gas safe registered person, and a leak test carried out during this inspection.
- When not in use, as part of the close-down procedure the gas valve to the cylinder should be shut off.

When changing a gas cylinder the following control measures need to be considered:

- Do it in the open air.
- Never change the cylinder on a stairway or other escape route.
- Extinguish all sources of ignition such as cigarettes.
- Make sure the valve on the empty cylinder is closed before disconnecting the heater. Do not open the valve on the new cylinder until the connection to the heater is secure.
- Look for any gas leaks by brushing soapy water onto the flexible hose and fittings and looking for bubbles. If you find a leak do not use either until the faulty part is replaced.
- Store spare cylinders upright, and outside wherever possible. Never store them in basements, near drains, under the stairs or in a cupboard containing electricity meters or electrical equipment. Ideally, minimum gas cylinders should be stored on site; when a cylinder runs out of gas the appliance should be switched off and a replacement cylinder delivered, swapped over and the empty gas cylinder taken away from site.

A gas heater may have the potential for a gas leak. If there is a smell of gas the cylinder should be shut off. If when in use the smell of gas continues, the heater should be taken out of use, and the gas valves to the cylinder shut off and removed from use until inspected by a competent person.

British weather

The most environmentally friendly way to eat outside in cooler times is, of course, to wear extra layers and wrap up in a blanket. However, the ever-changing British weather means additional heat is sometimes needed to give the warmth and glow that customers want, so an outdoor heater is a valuable aid to hospitality. But it really is essential that the measures listed above are put in place to protect your employees and customers from harm.

Julia Sawyer
Director, JS Safety Consultancy

Protecting staff as the UK hospitality sector reopens

As the UK hospitality sector reopens, employers must consider how to safeguard the mental health of their workforce, writes **Hannah Burton**

Employers have for some time had a legal duty to protect workers from stress in the workplace. They must undertake a risk assessment and put any necessary control measures in place. Failure to do so can result in enforcement action and fines.

This requirement is all the more important now, as post Covid, the Health and Safety Executive (HSE) is stepping up its focus on workplace mental health issues. It is essential therefore that employers put in place support mechanisms and create a culture where workers feel able and equipped to take on the unique challenges that Covid-19 has created for the hospitality sector.

The scale of the mental health challenge

The hospitality sector has been particularly badly affected by the pandemic. Many establishments were forced to close for months, with prolonged uncertainty around reopening. The toll that this will have taken on the mental health of many workers cannot be underestimated and may well be exacerbated on reopening.

New requirements for staff to be able to police strict controls such as limited time slots, social distancing, face covering and so on must be included in the employer's risk assessment, with appropriate mitigation measures put in place. These measures could include additional training on dealing with the unique circumstances of the reopening, and the provision of support for workers struggling with the additional responsibilities required of them as they encourage customer compliance with the rules. This is especially so where customers' alcohol consumption may impair their rational decision-making.

Hospitality employers' duties

UK health and safety legislation requires employers in the UK to ensure the health, safety, wellbeing and welfare of workers but, historically, there has been a greater focus on physical health and safety. While the law has not changed, there is an emerging change in emphasis. The HSE has emphasized the need for employers to consider "psychosocial" risk as part of the risk assessment which is undertaken to ensure a Covid-secure workplace, with organisations with over 50 employees also expected to publish the findings of this assessment on their website.

Additionally, the World Health Organisation (WHO) has warned that the need for mental health and psychosocial support is expected to "substantially increase in the coming months and years" in light of the anxieties, pressures and stresses related to the Covid-19 crisis, in line with past experiences of emergencies. It has called for investment in mental health programmes at both national and international levels to ensure appropriate support is available to meet the anticipated additional demand.

In fulfilling their general health and safety obligations, employers with five or more employees are required to undertake an assessment of the risks employees are exposed to at work and to act on it. This includes the risk of work-related stress. Employers also owe a common law duty to their employees to take reasonable care in respect of foreseeable risks of harm.

Health and safety regulators have made it clear that the health and welfare of workers must be appropriately managed during the current crisis. There is likely to be a period of particular interest and enforcement appetite by regulators in respect of health and welfare issues as the country returns to something approaching business as usual.

The HSE frequently uses targeted inspections in order to drive up standards, and this is no less so in cases involving work-related stress. It has issued new guidance on stress which states that it will investigate if it receives "evidence that a number of staff are experiencing work-related stress or stress-related ill-health (ie, that it is not an individual case)". This is a significant marker that the regulator takes its duties in relation to workplace mental health seriously, and that it expects employers to do the same.

Organisations found to be at fault can expect enforcement action and, given the priority status of workplace mental health at both the HSE and beyond, it may well only be a matter of time before we see a prosecution before the UK courts.

Public safety

Further to the health and safety requirements, the premises licence holder also has a duty under the Licensing Act 2003 to uphold the licensing objective of public safety. It is clear that this licensing objective relates to the safety of persons on the premise, including customers and also those directly affected by the premises. Therefore, its employees and also contractors, such as the SIA door staff, would also arguably be included here.

Would a licensing authority seek to raise a concern as to the upholding of this licensing objective if staff were not receiving the correct support and training to deal with the new hospitality landscape? Yes - it could. It is therefore important for premises licence holders to show that they have a fit for purpose risk assessment and have provided their employees with the tools to enable them to navigate the changes that have been made.

Hannah Burton
Associate Solicitor, Pinsent Masons

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For more information on course dates and to book a course please contact the team via events@instituteoflicensing.org or call us on 01749 987 333

Gambling ten years on...

Ten years of gambling regulation have seen many changes, and many more are on the way, as **Nick Arron** reports

The summer months are always quieter from a regulatory perspective. Since my last article in July, Parliament has been in recess, and with the move out of lockdown this lull has been exacerbated, as businesses concentrate on opening and operating. So forgive me if I do a little reminiscing and look back over the 10 years of writing for the *Journal*.

Changes to the Gambling Act 2005

Reflecting on gambling regulation since the first edition in November 2011, it is the speed of the change of gambling regulation which strikes me. The majority of the Gambling Act 2005 took effect on 1 September 2007. Significant change to the Act came quickly. As the Institute was launching the *Journal*, government was announcing proposals to Parliament that would introduce the need for overseas operators, based anywhere in the world, to obtain a Gambling Commission Operating Licence to enable them to transact with British consumers and to advertise in Great Britain. This led to the Gambling (Licensing and Advertising) Act 2014. Until this change, online operators only required licensing under the Act if they had servers here or their business was based here.

Only 10 years on and we are considering another significant change to the Gambling Act 2005, with one possibility that the Act could be replaced by more modern regulation. In March of this year, the DCMS's consultation over its review of the Gambling Act 2005 closed.

The consultation contained 45 questions, which went to the very core of gambling regulation, seeking opinion on the role of the Gambling Commission, on increasing protection online, limiting stakes, speed and prize limits, and on harm caused by gambling advertising. It sought opinions on changes in the rules to land-based gambling, and the powers attributed to licensing and local Authorities in their responsibilities in respect of premises licences granted under the Gambling Act 2005.

The Government has said it will respond to the call for evidence and publish a white paper before the end of the year.

Changes at the helm of the Gambling Commission

The theme of change continues. The Gambling Commission has recently appointed both a new interim Chief Executive and a new Chairman.

The previous Chief Executive, Neil MacArthur, left his role in March this year, and the Gambling Commission Board decided to recruit an interim CEO in order to allow the successor to the then Chairman Bill Moyles, whose term of office ended in September 2021, to appoint a permanent Chief Executive.

In June the Commission appointed Andrew Rhodes as the interim Chief Executive. He will be in post for 18 months, while the Commission finds a permanent Chief Executive. Andrew has held senior roles at a range of organisations, including the Department for Work and Pensions, the Food Standards Agency and the DVLA and, most recently, he was the Registrar and Chief Operating Officer at Swansea University.

The new Chairman is Marcus Boyle, who has been appointed for a five-year term. Marcus is a former strategy chief at the accountancy firm Deloitte. It is thought that his experience at Deloitte, dealing with clients transferring their business, has been seen by the DCMS as crucial in modernising the Gambling Commission, with changes expected following the Government review of the Gambling Act. His role has been seen by the industry as a more neutral appointment, compared to others who were shortlisted for the role, including Lord Chadlington (who founded the charity Action Against Gambling Harms) and Anna van de Gaag, Chairwoman of the Advisory Board for Safer Gambling. Andrew and Marcus will both play crucial roles bringing the Gambling Commission through any forthcoming changes.

Affordability

Looking back again, at 2011, we were reluctantly getting to grips with the Gambling Commission concept of primary purpose. Since then, we have happily said goodbye to it. The current big topic in gambling regulation, which will have a much greater impact across the industry, is affordability.

Affordability has recently been the subject of two consultations by the Gambling Commission; it was a subject of the call for evidence and review of the Gambling Act 2005 by Government, and the Gambling Commission has recently announced its intention to introduce a consultation on thresholds to identify key financial risks, major losses over a short period of time, a lengthy period of time and general financial vulnerability. By the time you read this, that consultation will most likely have been published. Affordability is highly contentious subject; it is not going away, and will be the subject of numerous future articles.

Increase in operating licence fees

In June this year the DCMS published changes to Gambling Commission operating licence fees, which took effect from 1 October. These changes include:

- A 55% increase in operating licence annual fees for remote operating licences.
- A 60% increase in operating licence application fees.
- Changes to simplify the fees system, including removing annual fee discounts for combined and multiple licences.

The increased fees are to help the Gambling Commission respond to new risks and technological developments and help with the escalating costs of existing regulation. The Commission is having to manage more complex corporate structures of licensees, with changes in the size and shape of the market partially caused by consolidation meaning that the operators the Commission regulates are increasingly global operators. There are also increasing risks associated with unlicensed operators and the need to protect consumers and the industry from black-market encroachment.

The DCMS response also confirmed that the annual fees for non-remote operators will increase by 15% to reflect the difficulties caused to the land-based sector over the past year by the Covid-19 pandemic. The main fees payable by existing non-remote operators (annual licence fees) will remain unchanged for 2021/22, with the uplift coming in April 2022.

Regulatory action against Daub Alderney

One area of significant development in gambling regulation since the first *Journal* in November 2011 has been the increasing level of fines issued by the Gambling Commission. As just one example, in September Daub Alderney was issued with a £5.85m fine after a Gambling Commission investigation revealed social responsibility and anti-money laundering failures.

Daub Alderney - which runs aspers.com, kittybingo.com, luckypantsbingo.com, luckyvip.com, magicalvegas.com, regalwins.com and spinandwin.com - had previously received a formal warning for the failures which occurred between January 2019 and March 2020. This partially explains the high level of the recent fine.

The social responsibility failings identified by the Commission included neglecting to put into effect policies and procedures for customer interaction where it has concerns that a customer's activity may indicate problem gambling.

Examples included:

- One customer was allowed to lose £43,410 in four months despite displaying problem gambling harm indicators such as using four different payment cards in one day and reversing £133,873 in requested withdrawals.
- During a month-long relationship a second customer lost £40,500 but the operator sent the consumer just two safer gambling messages and a pop up, which were not evaluated for effectiveness.
- During a three-and-a-half month period a third customer lost £39,000 but received just one safer gambling message and two pop ups, which were not evaluated for effectiveness.

Additionally, anti-money-laundering failures at Daub Alderney included having inappropriate policies, procedures and controls in place to prevent money laundering and terrorist financing.

Examples included:

- One customer was allowed to deposit £50,000 before the operator sought source of funds evidence
- A second customer was allowed to deposit £41,500 in a month without supplying adequate source of funds evidence
- Over an eight-month period a third customer was allowed to lose £53,000 but during that time the only source of funds evidence obtained by the operator was to establish that the customer lived in a house estimated to be worth £233k.

The Rank Group (operators of Mecca Bingo and Grosvenor Casino) acquired Daub Alderney in October 2019. The

Commission reported that it recognised that a good proportion of the failures occurred before Rank took control of the business and that there had been improvements since acquisition.

According to a Rank Group news release in March 2020, a routine compliance assessment was carried out by the Gambling Commission regarding Daub Alderney Limited. As a consequence, the Commission levied a £3 million fine on Daub, which Rank does not believe fairly reflect the findings nor the significant remedial action taken by Rank following the acquisition. Rank sought an appeal on the size of the penalty to the Gambling Commission's Regulatory Panel, and the fine was increased to £5.9 million. Rank considers that there are both equity and public policy issues raised by this case and will be seeking an appeal to the First-tier Tribunal.

I highlight this regulatory action after having heard representations from both the Commission officers and Rank / Daub. Clearly the Commissioners had much greater concerns than the Commission officers. The case will undoubtedly take on major regulatory significance.

Nick Arron
Solicitor, Poppleston Allen

Swinger clubs – how best to minimise potential harms

A report on this often neglected area of licensing has revealed many interesting aspects of the swinging lifestyle which are of interest to licensing practitioners, as the report's author **Professor Sarah Kingston** explains

Swinging is a form of recreational sex that typically involves the swapping of sexual partners or the act of engaging in group sex. This takes place in private residences or commercial premises, some of which are licensed as sexual entertainment venues (SEVs) under the Local Government (Miscellaneous) Provisions Act 1982 as amended by the 2009 Policing and Crime Act.

Although it attracts media interest, this is a seriously under-studied area of licensing: to date, no previous research has studied how clubs are licensed to protect the sexual health and wellbeing of staff and club customers, nor how physical, sexual, and emotional risks are managed in these environments. Without such knowledge, the nature and extent of physical and sexual violence in swinger clubs is unknown and appropriate interventions to minimise harm and manage risk remain absent.

What we do know about swinging stems from research undertaken in parts of Europe, the United States and Canada (Friedman et al, 2008; Niekamp et al 2013; Spauwen et al 2015).[1] This research, while useful in understanding the sexual health risks of partner swapping, the characteristics of swingers, and the activities involved in swinging, has told us little about club licensing, nor how clubs can be better regulated to protect health and safety.

To address this gap in knowledge I led a small study involving ten interviews with licensing officials, sexual health workers, swinger club staff and customers in the north of England. This study identified significant county differences in how swinger clubs are licensed and regulated, with some parts of England and Wales licensing swinger clubs as SEVs and others as hotels. The impact of these licensing variations has become pertinent in the context of the Covid pandemic when clubs licensed as hotels were able to open before lockdown was eased in July 2021. Hotels were able to open in May 2021 as part of the four-stage easing of restrictions after the third national lockdown, whereas SEVs could not.

Being licensed as hotels enabled some clubs to open as a traditional hotel through the week and as a swinger club at weekends. As a club owner explained, "You get a few hotels that do it part time because they think it is huge money. So they have swingers' weekends, and they have families in the week".

Licensing variations can also impact on restrictions and conditions attached to licences, with some clubs licensed as SEVs required to install CCTV technology and provide police with access to video footage when requested (for example, Sheffield City Council 2011).[2] Increased visitation and monitoring of those licensed as SEVs compared to hotels was also noted.

The study also found variations in the club policies and practices (such as access to free condoms, and locks on doors), which for some club customers led to negative experiences caused by other customers who became pushy or would enter their room uninvited. As one club owner explained, they had previously barred a problem male customer who entered rooms uninvited and attempted to engage in group sex without the consent of others. For customers in other clubs, problem customers were not tackled because staff were unaware of their behaviour due to lack of reporting and their inability to monitor such large venues.

Evidence of violence and coercion in some clubs and swinging relationships was also documented in interviews. Swinger club owners stated that they would sometimes hear arguments in rooms, find broken items following such rows, and have had to deal with physical altercations. As one club owner explained: "Violence … we do see … fighting together

1 Friedman SR, Bolyard M, Khan M, et al. (2008), *Group Sex Events and HIV/STI Risk in an Urban Network*. JAIDS - Journal of Acquired Immune Deficiency Syndromes 49: 440-446.

Niekamp A-M, Mercken LAG, Hoebe CJPA, et al. (2013), *A sexual affiliation network of swingers, heterosexuals practicing risk behaviours that potentiate the spread of sexually transmitted infections: A two-mode approach*. Social Networks 35: 223-236.

Spauwen LWL, Niekamp A-M, Hoebe CJPA, et al. (2015), *Drug use, sexual risk behaviour and sexually transmitted infections among swingers: a cross-sectional study in The Netherlands*. Sexually Transmitted Infections 91: 31.

2 Sheffield City Council. (2011) Licensing Act 2003 - Premises Licence Register: La Chambre https://licensing.sheffield.gov.uk/1/LicensingActPremises/Search/3099/Detail?APP_ID=94165 [accessed 5 February 2021].

against each other, where something has gone wrong … we get the occasional one. Sometimes you don't know until they have left, [and there is] damage to the room. Normally if people tell us they have broken this or that we don't tend to worry. You start to worry when they don't tell you."

Two owners explained that some men would persuade their often initially reluctant woman partners to engage in swinging. These reports were supported by two women swingers who claimed that their male partners had persuaded them to visit swinger clubs and engage in sex with others. Yet, as they and the club owners explained, these men would very quickly realise that swinging is "a woman's world" where women choose who they want to have sex with and dictate the nature of swinging activities. This realisation, club owners believe, led some men to feel frustrated and disappointed, subsequently taking out that annoyance on their women partners.

Club owners suggested that successfully managing violence and coercion in clubs relied on experienced staff, with some clubs having licensed door staff who are trained to deal with problems in clubs. As one owner stated, "A lot focuses on who is running the night staff". A firm "No means no" policy exists in some clubs, and those breaking or undermining these club rules would be evicted from club premises and permanently barred. Many clubs have policies that customers must agree to and sometimes sign when they visit clubs for the first time. Others operate an online booking system where customers must agree to club policies before being able to book a visit.

Sexual health risks were also noted in clubs, with evidence of deliberate attempts to remove condoms. One swinger club customer stated: "The man tried to encourage me to not use the condom as soon as my partner left the room, which really was not on and on one occasion I found he didn't have one on when he was trying to penetrate me." This behaviour was also noted by one club proprietor who said, "We have had the odd instance where a guy has tried to take a condom off. They get kicked out straight away."

A lack of awareness of sexual health risks and safe sex was also evidenced, with public officials who visit clubs for sexual health purposes claiming that "There is quite a lot of ignorance in the [clubs] as people don't not know about sexually transmitted infections (STIs) and don't know they can pass on STIs through unprotected oral sex … the majority of people don't use protection for oral sex, either condoms or dental dams."

Some clubs invited sexual health practitioners into their premises to provide customers with advice and sexual health testing. With those that don't, some officials believed that club owners were reluctant to invite health practitioners to their settings due to the "misguided belief" that it would deter potential clients who may be concerned about confidentiality or positive tests results from customers at their club. Public health officials were clear that any sexual health testing or advice is strictly confidential, and no swinger club customers would be identified. Sexual health practitioners' visibility, support, and advice at clubs, they felt, promoted safer sex practices and reduced the risks of unsafe sex.

Despite some of the risks evidenced in swinger clubs by this pilot study, club owners, customers and public officials who visit clubs were keen to stress that, on the whole, swinger clubs were generally safe and fun environments where, as one club owner put it, "socialising is a big part of it, it is not all about sex."

Public officials who visited clubs stated that they had not experienced any "threatening situations", and one noted, "On the whole I was usually very comfortable." Club owners reported only a few incidents of sexual or physical violence. Likewise, while sexual health risks were noted in clubs, sexual health practitioners reported very few positive STI test results. Although there are often assumptions that those who engage in promiscuous sexual behaviour such as swinging may be more likely to practise unsafe sex, as one public official explained: "From screening … with the swingers … I personally would say that they are a bit more careful [in terms of practising safe sex] … They're being open and honest with their partners, because obviously they are there … whereas you get people coming into clinics and saying, 'Oh, I had a one-night stand' and stuff like that."

This small study has identified important issues in relation to licensing, club practices, sexual health and violence and further work in this area is needed. Building on this important research, I am seeking further funding to undertake a larger national study to examine the sexual health and safety in swinger clubs in England and Wales. The project, *Minimizing Harm, Managing Risk: Enhancing Health and Safety in Swinger Clubs,* will involve a national survey and interviews with public officials who are involved in the licensing and regulation of clubs, club customers and club owners. The aim of this larger, mixed-method study is to investigate good practice, lost opportunities for interventions, and to identify areas for strengthening sexual health and safety provisions in swinger clubs. Through working with key stakeholders, the project seeks to develop resources and training to raise awareness of safety strategies, risky sexual behaviour, and safety enhancing licensing and regulatory provisions.

Professor Sarah Kingston
School of Justice, University of Central Lancashire

A cautionary tale for developers and planners

In the hospitality sector, all possible noise issues and amenity impacts should be thoroughly assessed before new planning permissions are granted, says **Peter Rogers**

An important case emerged in January 2021, with potentially serious repercussions for development proposals sited near noise sources, particularly within the night-time economy.

R (oao) Parkview Homes Limited (Claimant) v Chichester District Council (Defendant) & Sussex Inns Ltd (Interested Party) [2021] EWHC 59 (Admin) builds upon the increasingly vigorous application of the agent of change principle, set out in paras 180 and 182 of the National Policy Planning Framework (NPPF).

The interested party, Sussex Inns, operated the Vestry as a bar / nightclub / music venue in Chichester. The Vestry had a certificate of lawfulness for use as a pub / restaurant and a premises licence, which did not restrict its noise output.

The claimant, Parkview Homes, a property owner and developer, owned the property next to the Vestry, and was granted planning permission for residential development there by the local council. The Vestry resisted this on the basis that its actual operation went beyond its permission and the certificate of lawfulness for existing use of development (CLEUD), and that it was, in fact, a nightclub with significant noise output that would be very difficult to control or mitigate with planning conditions. Nonetheless, the council granted the residential permission.

The Vestry then sought to regularise its own position, by applying for a s 73 variation of its conditions to secure a planning permission that reflected its actual nightclub operation. Parkview objected on the basis that it now had residential permission next door, and the noise from the Vestry was already at a level that could be expected to cause problems, and this ought not to be regularised.

The council's environmental health team were satisfied that the noise mitigation proposed for Parkview's residential development would be adequate to mitigate against the lawful (CLEUD) use of the Vestry, namely "a pub / restaurant type environment, where lower levels of amplified music co-exist with raised voices and laughter". They also concluded that the mitigation proposed would *not* be good enough to control the intrusion of the Vestry's current, actual activities as a nightclub, as described by the Vestry. There, the EHO considered that:

> *the level of sound transmission here is of a different order of magnitude where sound levels at source are approaching 100dB(A) with powerful bass tones … It is debateable whether any reasonable noise mitigation between the properties would be totally effective in protecting new dwellings from intrusive noise from music levels found in a nightclub. … The protection of residents from excessive noise intrusion through the party wall is dependent on the adjacent property reverting to its lawful planning use and significantly reducing sound levels generated within to a level more typically expected within a pub/restaurant environment.*

The delegated planning report for the s 73 application accepted this assessment but concluded that the issue of noise impact so far as the Vestry's application was concerned should be determined on the basis of the authorised (CLEUD) use of the Vestry. It added:

> *[S]hould the occupiers of the Vestry seek to regularise (by submitting a planning application) their current use and opening hours, it will be necessary for them to, amongst other things, demonstrate what the impact of the proposed activities would be on both the existing and prospective residential occupiers. In this respect it is reasonable to assume that a likely pre-requisite of any planning permission to broaden the Vestry's use and opening hours would be that any potential noise and disturbance would be mitigated by, for example, additional noise insulation and/or the adoption of appropriate management practices.*

For the Vestry's application, the environmental health office (EHO) stated that:

> *[O]ur objective… is to ensure that appropriate and viable control measures are secure so that*

neighbouring activities to the Vestry's operations are afforded adequate amenity. If this is unable to be realised, then we would not be in a position to support any application.

The EHO did not approve of the conditions that the Vestry was proposing to put on the new permission, although they stated that there might be other appropriate conditions and noise control measures that could be imposed. But effectively, no one had suggested what those could be.

The EHO also gave a number of technical reasons why adverse impact on residential amenity was likely. This included the view that the separating structure approved as part of Parkview's development had been designed to mitigate against anticipated levels in the Vestry of 70dB. Internal music levels measured by the independent noise consultants exceeded this and gave rise to a real potential for disturbance.

Unsurprisingly, Parkview objected to the Vestry's s 73 application on the basis that the proposed variation would intensify the noise impact on its residential units, and that it was unlikely that any level of mitigation could be provided to safeguard amenity. The council was clearly aware of, and acknowledged the need to protect the future residents from noise generated by the Vestry. This was reflected in the permission granted to Parkview, but also in email exchanges from the EHO. The concerns raised by the council and the EHO were no secret, and there was no clear solution on the table.

Nevertheless, the council granted the s 73 permission to the Vestry under delegated powers. The s 73 permission was granted with the following description of development:

Change of use of 23 Southgate (The Vestry) from Class A1 (retail) to Class A3 (food and drink) at ground floor with ancillary hotel accommodation at 1st floor and external works (variation of condition 5, 6, 8, 14, and 17 of permission CC/00/001070/FUL – extension of opening hours on Thursday to Saturdays).

The conditions imposed included also:

2) The building shall be used for A4 (food and drink) purposes on the ground floor with ancillary hotel accommodation and managers flat on the first floor and for no other purpose (including any other purpose in Classes A, C1, C3 or D2 of the schedule to the Town and Country Planning (Use Classes) Order 1987 or in any provision equivalent to that class in any other statutory instrument revoking and re-enacting that Order.

3) No part of the A4 food and drink use on the ground floor shall be used for the sale of takeaway food unless a specific planning permission is granted for such a use.

10) Within one month of the date of this permission, all the noise control measures as identified within the approved Noise Management Plan (19.11.2019) shall be implemented and thereafter maintained fully in accordance with the approved plan. Any alteration to the plan will first require written consent from the Local Planning Authority.

11) Music Noise Levels, as measured in any residential neighbouring habitable room, used for resting and sleeping, shall not exceed the following criteria:*

Bedrooms: Noise Rating Curve NR20

Living Rooms: Noise Rating Curve NR30.

**The Noise Rating Curves shall be measured as a 15 minute linear Leq at the octave band centre frequencies 31.5 Hz to 8 kHz.*

The noise management plan (NMP) included a number of measures concerning the operational management of the premises, eg, keeping windows closed, operating a lobby door system, specific hours for disposing of glass waste, dispersal of customers and measures to control the risk of noise escape from the premises in the period up to closing. By their nature, most of the requirements were not clear cut and depended to a large extent on the effectiveness of day-to-day management which, in turn, would not be simple or easy to enforce.

It was agreed by all parties that the retention of the original A3 description, "(food and drink)", after "A4" in the revised condition 2 was an error, and that this should in fact have read "A4 (drinking establishments)" given the amendments to Use Class A3 in 2005. However, for reasons explained by the judge, this error was not the most significant, and the s 73 permission could not have been saved anyway.

The judge found the permission unlawful, for all four reasons in the grounds of challenge.

Ground 1: The s 73 permission amounted to an unlawful variation of the original permission that was beyond the scope of the council's powers under s 73 of the 1990 Act. This was because the condition (2) imposed changes to the original permission, which it cannot do. The s 73 Permission infringed the *Arrowcroft* principle, since the restriction imposed by the new condition 2 was inconsistent with the

description of the development in the original permission, as repeated in the operative parts of the s 73 permission. It is clear that the operative terms of a permission cannot be changed pursuant to s 73 and although the s 73 permission did not purport to amend the operative words, it sought to create the same effect by imposing conditions inconsistent with it. The s 73 grant purported to be for a mixed restaurant and drinking establishment use but the new condition sought to take away one of the two principal components of that mixed use by limiting the use of the ground floor to A4 use only.

Ground 2: The council should not have placed reliance upon informatives attached to the s 73 permission to secure mitigation necessary to make the development acceptable. Informatives are not conditions, and are not enforceable.

It is notable here that the reason the council imposed informatives only was because it acknowledged that conditions in the same terms would have been unenforceable.

Ground 3: The failure to publish the additional EHO consultation responses or consult Parkview on the revised noise mitigation proposals was procedurally unfair.

Ground 4: This is possibly the most important of the four grounds for future developers to note. The judge agreed that it was irrational to conclude that the proposed noise mitigation measures would ensure that there would be no harmful impact on the future residential occupants of the Parkview development, in light of the council's previous conclusions and in the absence of any further assessments to demonstrate that acceptable noise levels could in fact be secured.

In other words, it was not acceptable to impose a condition for future noise control and mitigation in situations where there could be no confidence that those measures would actually work. This was also an acknowledgment that it is not always possible to identify measures that will definitively work to control noise, and "batting the issue off into the long grass" for future solutions in a condition may not be appropriate, or indeed lawful.

The judge found that the condition was irrational in this case, since council officers clearly understood and acknowledged the importance of ensuring the protection of residential amenity from noise generated by the Vestry but failed to identify a clear path to achieving this.

The Vestry tried to say that, regardless of the informative, Condition 11 (utilising noise rating curves) had been imposed and "stood on its own two feet". They argued that their route to compliance with that condition, whether through the guidance in the informatives, or by any other means was a matter for them. The Vestry argued that the council was entitled to consider that the use of noise rating curves as an absolute noise ceiling was an appropriate manner in which to ensure that the proposed use of the Vestry was not permitted in such a way as to cause any unacceptable noise impacts at neighbouring residential properties.

The judge disagreed, and found that the problem with this was that the council officers / EHOs clearly were not satisfied with Condition 11 alone, as the informatives, not least, demonstrated.

The judge found that it could not be said that amenity could be protected simply by imposing the standards that the Vestry had to meet as a noise ceiling. The council did not think that the imposition of such a ceiling was enough, without specifying some means by which the Vestry could meet it. Nevertheless, the council acknowledged that it could not hold the Vestry to meeting the ceiling through conditions. It was an unenforceable impasse.

The judge found that there was a breakdown in the logic of the decision in failing to follow through that need to resolve the potential impact on residential amenity. The judge found that "it was perverse of the council through its officers to note the importance of the limiter but to fail to secure compliance by some means, or to consider deferral or even refusal, if compliance could not be secured. The informative itself recognises the difficulty and acknowledged that 'the applicant shall not be beholden to the aforementioned informative' but perversely added that 'it is considered important that they (*the informatives)* are specified on any final decision notice in order that the reasoning for the conditions are explicitly explained'."

The judge found that it was not strictly necessary for him to deal with Grounds 3 and 4 in any detail having already determined that the decision was unlawful on Grounds 1 and 2. However, he found substance in both Grounds 3 and 4, and with regard to Ground 3, he found that there had been insufficient consultation. He noted that there would have to be further consultation as a result of the quashing of the decision, and that the council would be obliged to ensure that Parkview was fairly consulted with regard to the measures to be taken to secure the amenity of their development, and to be provided with an opportunity to address the issues raised.

The judge found that the errors which he had identified were significant, and that he could not say with confidence that the case would have been decided in the same way had the errors not been made. Indeed, he found that it appeared

unlikely that this would have been the case since the proper consideration of sound mitigation could have yielded a number of different outcomes, and various possible exercises of the planning balance judgement, from the inclusion of an enforceable mechanism to secure appropriate noise limits or even refusal of the application if nothing suitable could be identified.

The judge found multiple errors in the decision-making process, including in the consultation process, and in the substance of the permission issued, and therefore quashed the decision and the s 73 permission.

This case is a cautionary tale for developers or planning decision-makers who are tempted to defer detailed consideration of sound mitigation measures to some point after permission has been granted, and to rely on "holding" conditions to submit mitigation assessments and proposals in the future. Based upon the principles clearly set out in this case, that is not an appropriate course, and councils should be alert to ensuring with confidence that there is an identifiable solution to noise issues and amenity impacts before granting permission. The spotlight on these issues becomes ever more acute as night-time economy licensees enter the planning arena ever more frequently, to argue their corner regarding new residential development on their doorstep. All of the *Parkview* principles apply with equal vigour if deployed by a licensee against a developer, and this case is a useful heads up about some of the problems that are commonly encountered.

Peter Rogers FIoA, MIoL
Managing Director, Sustainable Acoustics

Weddings and civil partnerships

Ifsa Mahmood provides us with an update on the regulations for weddings and civil partnerships

On 1 July 2021, the Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2021 came into force legalising outdoor civil wedding and partnership ceremonies in England and Wales. The amendments permit civil wedding and partnership ceremonies to take place within the "linked outdoor areas" of an approved premises, which are defined as "any areas within the boundary of the land of which the built premises form part, which are not indoors and which may be used in common with the built premises". In effect, they offer an additional setting in approved premises where ceremonies can take place without the need for such venues to re-apply for approval.

Previously, under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005 legal weddings or civil partnerships were required to take place in an approved room or permanent structure. Couples were unable to marry outdoors, not even in the garden of licenced premises. The restrictions introduced as a result of the coronavirus pandemic thus led to the postponement of many weddings. As outlined in the Government's press release dated 20 June 2021, the amendments to the regulations were brought in with almost immediate effect and seek to offer greater flexibility to the marriage sector. They are, however, time limited and will expire at the end of 5 April 2022. A review will then take place in Autumn 2021 "to consider the practical impacts of this policy in detail and to enable a later amending statutory instrument which is not time limited".[1]

Ceremonies will be able to take place fully outdoors or under a partially covered structure if this has an area which is at least 50% open. The location for a ceremony must be assessed to establish it is seemly and dignified. Other requirements for public access and signage must also be met.[2] With the exception of Jewish and Quaker weddings, which for historical reasons can already take place outdoors, the changes do not enable outdoor weddings on the grounds of religious premises. The Government has, however, indicated its intention to introduce legislation in order to allow religious marriages to take place outdoors.

Readers will recall that, on 3 September 2020, the Law Commission published the *Getting Married: A Consultation Paper on Weddings Law* which looked at the rules governing weddings in the UK and identified the constraints and inconsistencies within them. The paper also set out provisional proposals for large-scale reform of the system governing weddings which moved away from what was termed a "buildings-based" approach and instead recommended the regulation of officiants.

The changes introduced by the amended regulations will be welcomed by many licenced venues. However, they are limited in scope as they remain focused upon where a wedding must take place in order to be considered valid.

The press release of 20 June 2021 refers to the final report on weddings law by the Law Commission, which will be published later this year. The report therefore seems to be awaited and it is clear that the recommendations envisaged will be much broader in scope. The Government has indicated its intention to consider further reforms carefully. It is therefore likely that further changes to the systems governing weddings are on the horizon.

Ifsa Mahmood
Barrister, Kings Chambers

1 https://www.gov.uk/government/news/outdoor-civil-wedding-and-partnership-registrations-to-be-legalised?utm_medium=email&utm_campaign=govuk-notifications&utm_source=2e961415-c300-4978-a252-56103e10cca6&utm_content=daily.

2 Ibid.

Share your trip → Driver profile → 24/7 customer support → Driving hour limits → Speed limit alerts → Phone number anonymization → Safety toolkit → DBS background check → PIN verification → Real time driver ID check → Driver face covering verification → Door to door safety standard → Covid-19 checklist →
Safety never stops

Uber

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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.

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.

HANNAH BURTON

Associate Solicitor, Pinsent Masons

Hannah Burton is an Associate Solicitor in the Regulatory and Licensing team at Pinsent Masons. Hannah has over 10 years' experience in both private practice and local authority licensing work.

JAMES BUTTON

Principal, James Button & Co Solicitors

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.

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.

EOIN DEVLIN

Solicitor, TLT Solicitors

Eoin is a Legal Director with TLT in Belfast and has worked with TLT since 2015. Eoin advises supermarkets, restaurant businesses, catering companies and hoteliers on a range of licensing matters. In addition to handling liquor licensing and any subsequent hearings, he also advises on entertainment and associated licensing with local Councils.

GARY GRANT

Barrister, Francis Taylor Building

Gary is a licensing barrister, practising at Francis Taylor Building. He is top-ranked in the leading independent legal directories, and represents the trade, residents, police forces and local authorities alike. Clients have ranged from the Tate Modern to Pacha nightclub, and from the Commissioner of the Metropolitan Police to Spearmint Rhino. He is a Vice-Chairman of the IoL.

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ORLA KENNEDY

Solicitor, TLT Solicitors

Orla qualified as a solicitor in 2018 and has worked at TLT since 2019. Orla represents clients in a broad range of liquor licensing matters. In addition, she also has considerable experience in contentious matters and often attends Court to deal with Hearings, Reviews, and Applications.

PROFESSOR SARAH KINGSTON

Professor of Criminal Justice and Policing

Sarah is Professor of Criminal Justice and Policing, Director of the Centre for Criminal Justice Research and Partnerships, and Head of Research for the School of Justice, The University of Central Lancashire. Sarah also currently leads research secondment contracts with two police constabularies. Sarah's research has focused on sexual offences, the sex industry, sexuality, sexual health and policing.

PHILIP KOLVIN QC

Barrister, 11KBW

Philip is one of the country's most eminent licensing QCs. His practice spans all fields of licensing, including alcohol and entertainment, 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.

IFSA MAHMOOD

Barrister, Kings Chambers

Ifsa is building a varied public law practice and has worked on issues including the many of iterations of the coronavirus regulations and the public sector equality duty. Before commencing her practice, she worked as a lawyer at the European Court of Human Rights and as a Judicial Assistant to Irwin LJ at the Court of Appeal, where she assisted with decisions concerning planning and environmental law.

STEPHEN MCGOWAN

Partner, TLT Solicitors

Stephen's expertise in licensing law is recognised at the highest levels. He has sat on a number of Scottish Government expert groups including those which oversaw the update to personal licence refresher training, and training for licensing board members. He is also a member of the Scottish Alcohol Industry Partnership (SAIP), the Scottish Alcohol Licensing Advisory Forum (SALAF) and has been a member of the Law Society of Scotland Licensing Sub-committee since 2010.

SUE NELSON

Executive Officer, Institute of Licensing

Sue joined the IoL as Executive Officer in October 2007. Sue is heavily involved with the Summer Training and National Training Conferences and continues to undertake the Company Secretary duties. She was previously Licensing Manager for Restormel Borough Council (now part of Cornwall Council) and has over 18 years' experience in local government licensing.

JEREMY PHILLIPS QC

Barrister, Francis Taylor Building

Jeremy Phillips QC 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*.

MICHAEL RHIMES

Barrister, Francis Taylor Building

Michael is a barrister whose main areas of interest include licensing, planning law, enforcement, local government, infrastructure and environmental law, in particular with an EU law dimension. He has experience in acting for a range of parties in licensing matters, both at committee and Magistrates' Court level. And he has represented the Metropolitan Police in a summary review under the Licensing Act 2003.

PETER ROGERS

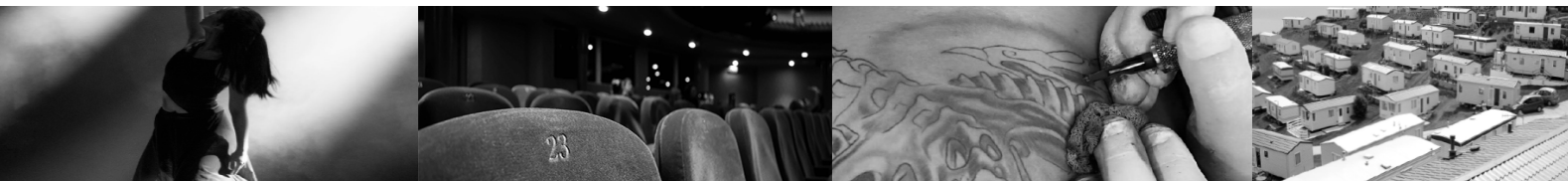
Managing Director, Sustainable Acoustics

Peter has over 25 years' experience delivering noise and vibration solutions on a wide variety of projects. He began his career in the local authority world before becoming a consultant specialising in building acoustics, environmental noise and vibration control. As well as being an expert witness, he has worked on many major projects including the Millennium Stadium, Wimbledon Centre Court, O2, Guys & St Thomas Hospital and the Olympic Park.

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. An active member of the IoL - London Region, Julia provided the fire risk assessment for the opening ceremony of the London 2012 Olympics.



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