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Welcome to the Spring 2019 edition of the IoL's *Journal of Licensing.*

Last year was a busy one for the *IoL* and we can look back with some pride at how we are increasingly recognised as the authentic professional voice for licensing practitioners.

Our signature event, the *National Training Conference*, took place over three days in November and was once again a sell-out. Even in these financially difficult times, our membership recognises and values the content of this event and continues to support it.

The development of new training and qualifications continues apace, with training for councillors and police licensing offi ers now in the final stages of discussion and development.

As ever we have a wealth of courses lined up for the coming year - from our Professional Licensing Practitioners Course, Animal Licensing, Scrap Metal Dealers, SEV Licensing and Zoo Licensing through to our popular Taxi Licensing courses (Basic & Advanced) and our Taxi Conferences.

This year we will also be hosting two Safeguarding in Licensing conferences, one in Taunton and the other in Doncaster.

Please note our membership year comes to a close on 31 March, and members will then be invited to renew. The *Institute's* membership subscriptions will remain the same as 2018 / 2019 for the 2019 / 2020 membership year.

In November 2018 we launched a new publication, *LINK* (Licensing, Information, News and Knowledge), which will further improve our regular engagement with you, our members.

This edition of the *Journal* contains numerous articles that will be of great interest to licensing practitioners. Philip Kolvin QC writes about bright line policies; Tara O'Leary brings us up to date on the Welsh taxi & private hire consultation; Jeremy Phillips QC writes on mediation in the licensing process; Jon Collins gives us his thoughts on realising opportunities the night-time economy has to offer; Charles Holland gives us an overview of costs in licensing appeals; James Button considers the Government's thoughts on the taxi reform and assesses the long awaited consultation on the Statutory Guidance. We also have Opinion pieces from Gary Grant on the use of cross-examination in licensing hearings and Sarah Clover on the use / misuse of expert witnesses.

In addition, we have all our regular features: James Button on the outcome of the *Reading v Ali* case in the High Court; Nick Arron on gambling; Stephen McGowan with an update on animal licensing developments in Scotland; Richard Brown on the interested party in the licensing system; Julia Sawyer's public safety and events update and IoL news from Sue Nelson.

I hope you enjoy this latest edition of the *Journal* and find it a stimulating read. As always, we welcome your feedback.

Institute of Licensing

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The successful launch and reception of *LINK* has provided us here at the *Journal of Licensing* with an opportunity to review and revise our editorial policy. Our approach since we began in 2011 has been to focus on the policy, law, procedure and administration of local government licensing law (alcohol and entertainment, sex establishments, gambling and taxi and private hire vehicles along with the less common and contentious local authority licensing regimes). Additionally, the *Journal* has sought to provide a space in print to highlight the life and work of the Institute and of our membership. The opportunity afforded by *LINK* to focus on these matters allows the *Journal* to free up space and explore further and more deeply our core interests.

Moving forward, the *Journal* will continue to focus upon the policy, law, procedure and administration of local government licensing law and practice. Above all, the aim remains to provide updates, articles and opinions that are of practical use to our membership. This 'practical use' goes beyond general interest and continuing professional development. The goal – which we re-commit to – is for the content of the *Journal* to be of such quality and content that it can be used as a reference tool in training materials, development of policies, during town hall hearings and on appeals in the Magistrates' and Crown Courts.

It is very much hoped and understood that we already deliver in this regard. In this issue alone our leading article is by Jeremy Phillips QC, Editor in Chief of *Paterson's Licensing Acts* and both our past-Chairmen and current patrons Philip Kolvin QC and Jon Collins contribute: these three certainly provide content to read, re-read and reference. However, this re-commitment to making the *Journal* a journal of reference (albeit in our modest way) will be evident in the subject-matter of future articles, which will be increased in length to allow our contributors greater scope to express and articulate their views.

The regular features will continue to provide overviews and commentary of up-to-date developments. This issue particularly demonstrates the efforts that our regular contributors make to ensure current content: James Button - having already submitted a draft of his taxi and private hire update - at very short notice and up against our print deadline reworked and redoubled his efforts in order to comment upon *Reading v Ali* [2019] and the Government response to the Finish Group on Taxi and Private Hire Vehicle Licensing.

The one-page Opinion pieces have naturally and gradually become longer and more provocative, though this may say as much about our two key contributors – Sarah Clover and Gary Grant – as our editorial policy. Both Gary and Sarah can always be counted on to provide submissions where time and conflicting commitments hinder others from contributing. This is a trait shared by our regular contributors, who give up so much time and effort to ensure the success of our *Journal.*

Increasingly, and with ever greater visibility, the *Institute* is called upon and participates in consultations which will continue to be highlighted in our IoL News pages.

As part of the next phase of our development, I am pleased to welcome Charles Holland (Barrister, Trinity Chambers) and Richard Brown (Solicitor, Westminster Citizen Advice Bureau) as Assistant Editors to the *Journal*.

It seems to me that Charles's contributions epitomise what I look for in articles. His views on experts in the last issue have encouraged three responses in the current issue on the ways in which we question and cross-examine participants in hearings (see: Grant), purported experts (see: Clover) and the relationship between offi ers and residents (see: Brown). Richard's views are similarly stimulating. Almost uniquely in the licensing world, by acting for residents, he offers a rare view from his position as a fulcrum between operators and responsible authorities. I look forward very much to both Charles's and Richard's increased involvement and contributions.

All-in-all, it seems to me that the print output of the Institute goes from strength to strength.

The (underutilised) role of mediation in licensing

As a way of resolving disputes, mediation has proved its value in civil cases but has yet to make its mark in the licensing field. **Jeremy Phillips QC** examines why this is so, and suggests practitioners should consider its merits more closely

Mediation is unlikely to be the first thing which springs to mind when one prepares for a heavily contested licensing hearing concerning the grant of a premises licence - indeed, the possibility of any value being derived from mediation at this stage in the process might seem to be remote. The parties appear to be firmly entrenched. Contrary to expectation, however, that is precisely the time when thoughts ought to be turning to mediation as a process where all parties can emerge as "winners" - or at least not as losers in the conventional sense. In this article we will seek to argue that mediation offers a significant number of benefits which ought to be more readily exploited by licensing practitioners and those before whom they appear.

The article will proceed in four parts. Part I will define mediation, before going on to sketch out its proliferation in recent years. Part II will discuss some of the challenges and opportunities posed by mediation. Part III will describe a typical licensing case in which mediation was successfully utilised. Part IV will conclude with some brief observations on the road ahead for mediation in licensing.

Part I: Mediation - what is it? Why haven't we heard much about it?

Mediation is a form of alternative dispute resolution[1] where an independent and neutral third party - the mediator - actively assists the parties in working towards a *negotiated* agreement of the dispute or difference under consideration. The process is conducted confidentially so that the parties can engage in a frank exchange of views amongst themselves and between themselves and the mediator. Throughout the process, the parties retain complete control both over any decision to settle and the terms upon which any such settlement is achieved.[2]

Beyond this, it is difficult to define mediation with any particularity in the abstract; it is a fundamentally flexible process, which will be tailored to meet the particular needs of the parties. Its definition takes colour from the dispute under consideration in practice; there is a wide range of issues - from the selection of the mediator and process to be followed during the mediation, through to the means by which any agreement will be reached and recorded - over which the parties, in consultation with the mediator, have a wide degree of discretion.[3]

Despite the difficulties associated with speaking about mediation in general terms, it can, nevertheless, accurately be stated that the uptake of mediation - in all its different guises - has sharply increased over the last two decades; this increase forms a small part of what has been identified by Sir Rupert Jackson as a "...pan-European, indeed global trend..." in favour of alternative dispute resolution.[4] In England and Wales, this trend was ushered in by the Woolf Reforms of the civil justice system in the late 1990s and later placed on a solid footing by a series of judicial decisions which endorsed the use of alternative dispute resolution - and in particular, mediation - in the context of civil litigation.[5] Although the

1 Often abbreviated to ADR, which can take the form of mediation, negotiation, collaborative law, conciliation and arbitration. Indeed, within these broad categories there are sub-categories, so that mediations, for example, may take the form of "Facilitative Mediation", "Evaluative Mediation", or "Transformative Mediation". Space does not admit of a more comprehensive exposition of these different forms of ADR in this brief article.

2 For an informative overview of the definition of mediation, see: S Blake, J Browne & S Sime, *A Practical Approach to Alternative Dispute Resolution* (4th Edn, OUP 2016) Ch 14.

3 For an example of how a mediation might be run in practice, see the resources on the Centre for Effective Dispute Resolution (CEDR) website: < https://www.cedr.com/about_us/modeldocs/> (accessed 7 December 2018).

4 Jackson, "Civil Justice Reform and Alternative Dispute Resolution" (Chartered Institute of Arbitrators, 20 September 2016) <https://www.judiciary.uk/wp-content/uploads/2013/03/lj-jackson-cjreform-adr.pdf> accessed 5 December 2018; Blake, Browne and Sime (n1) at 14.16.

5 For example, see: *Dunnett v Railtrack* [2002] 1 WLR 2434; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; *Faida v Elliot Corporation* [2012] EWCA Civ 287.

courts have generally[6] thus far fallen short of requiring parties to mediate before bringing disputes to court, the law as it stands means that parties who unreasonably refuse to engage in mediation before commencing litigation are more likely to be penalised in costs; this has, unsurprisingly, focused the minds of many litigants and their advisors on the benefits associated with mediation.[7] Furthermore, with the recent transposition of the so-called ADR Directive into domestic law, it is clear that the future of mediation in England and Wales is increasingly rosy.[8]

What, then, of mediation in licensing? It would be wrong to state that mediation is alien to licensing practitioners; to give just two examples: some licensing authorities explicitly recognise that certain disputes are best resolved by mediation, while most, if not all, recognise that the reaching of some form of an agreement between objectors and applicants is best practice;[9] and secondly, legal advisors with a specialist licensing practice have, unsurprisingly given their training and experience in civil courts, been keen to emphasise the benefits of mediation.[10] However, it would be misleading to suggest that mediation has gained a foothold in licensing equivalent to that which it has gained in civil litigation. There is both a practical and a principled reason for this: the practical reason, is that money influences behaviour and in the context of first instance hearings before licensing sub-committees there is no equivalent to the adverse costs orders that caused civil practitioners to pause for thought before dismissing mediation; the principled reason is that there appears to be a relative lack of knowledge in the sector about how mediation can be utilised effectively so as to deliver the best result for clients.

Nothing further will be said about the practical reason in the remainder of this piece; however, with respect to the principled reason this piece now turns to consider and address the opportunities and challenges associated with mediation in licensing.

Part II: Mediation in licensing - challenges and opportunities

Mediation throws up a number of challenges in practice which those advising clients need to be aware of; however, as discussed below, it is rarely the case that these challenges act as insurmountable barriers to success.

It is useful to start by briefly addressing a fundamental concern, related to subject-matter - namely, that certain subject-matters are *prima facie* unsuitable for mediation irrespective of the circumstances. That this challenge has force in certain contexts - for example, constitutional law disputes - is undeniable; but it is important not to overstate its extent. The reality is that "mediation is suitable for almost all disputes, whatever the subject-matter of the underlying cause of action".[11] And in the context of disputes arising from licensing applications, there is no reason why mediation cannot be deployed successfully. Of course, it is not open to applicants or objectors to agree to grant a licence; but that does not mean that applicants and objectors cannot influence that process through mediation - in fact, both applicants and objectors can exert a significant degree of influence over this process when mediation is carefully deployed.

Given the importance of this point, it is worth sketching out two examples.

Where an applicant is faced with an objection, they may decide to engage in mediation with the objector with a view to convincing the objector to formally withdraw or dilute their objection. They may convince the objector to do so by, for example, making minor amendments to their operating schedule, by paying a sum of money to the objector for some ancillary project, or by offering some form of assurance or apology. If the objector ultimately agrees and formally

6 A notable exception was an experiment carried out by the Central London County Court in the 2004/5 when the Automatic Referral to Mediation (ARM) pilot scheme was set up to run for a year. The intention was to randomly select 100 cases each month to be referred to mediation. If one or both of the parties objected, they had to justify their reluctance to a judge. The judge would have the power to override their objections if he or she felt the case was suitable for mediation. A research project was set up to explore what happened when people were, in effect, compelled to mediate. A few weeks after the pilot began, in May 2004, the *Halsey judgment (Halsey v Milton Keynes General NHS Trust etc.* [2004] EWCA Civ 576) was made public. Lord Justice Dyson said, "It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court." This had an immediate impact on the pilot ARM project, as the court could no longer insist that parties tried mediation.

7 See the discussion in: Blake, Browne and Sime (n1) at 14.06 – 14.12.

8 Council & Parliament Directive, 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

9 See for example Dover District Council, who state: "...if a representation (objection) is received, which appears to be resolvable by means of discussion and negotiation, the Licensing Offi er will make every effort to resolve the issues by acting as a *mediator* between the parties..." (emphasis added) < https://www.dover.gov.uk/Business/Licensing/Alcohol,-Entertainment--Late-Night-Food/Objections.aspx> accessed 10 December 2018.

10 For example, the basis of this paper was a panel discussion at the Institute of Licensing National Training Conference 2018 during which the *Paterson's* panel discussion on mediation was led by eight leading licensing barristers.

11 Blake, Browne and Sime (n1) at 14.13.

withdraws their objection, then the effect is that the licensing authority comes under a duty to grant the licence in the absence of any representations (s 18(2) Licensing Act 2003), instead of having a duty to determine the application in light of outstanding representations (s 18(3) Licensing Act 2003). In this particular situation, mediation allows the applicant to eliminate the very real possibility that they will not be granted a licence; the only outstanding matter will then be the imposition of conditions (s 18(2) Licensing Act 2003).

To give an example from the other side, where an objector is concerned about a particular aspect of an application - for example, antisocial behaviour outside a prospective nightclub - they might propose mediation with a view to guaranteeing a compromise solution. In exchange for a promise to withdraw the objection, the objector might ask the applicant to reduce the opening hours in their operating schedule, to pay for CCTV to be installed around their home, or to pay them a sum of money to install double-glazing. Such an agreement is beneficial for both parties, who can walk away satisfied, without having to risk it all before a licensing committee.

No consideration has been given to how an applicant, or less likely, an objector, could engage in mediation with a licensing authority. Although not impossible, this is made more difficult by the fact that the licensing authority must act within the constraints set by the Licensing Act 2003 and more generally within the constraints of its public law powers; navigating these issues is a matter which would merit an article of its own.[12]

Turning now towards the practical challenges associated with mediation, the issue of timing is one encountered in virtually every dispute[13] - namely, the need to undertake mediation at precisely the right stage in the dispute. This is a matter which has attracted judicial comment, the punchline being that mediation should be undertaken at a point when the dispute between the parties is sufficiently well-formulated but has not reached a stage where the parties' positions have become entrenched.[14] In the context of licensing, mediation will generally be best pitched when the objections to an application are known, but before the application has gone in front of a committee. At this point the parties will know the points of contention between them, but will hopefully not have reached an entrenched position with the result that they will still be mindful of the time and resources that could be saved if the matter was settled prior to that stage. That is, however, no more than a general rule; timing will ultimately be a matter of judgement for individual practitioners.

Closely linked to this is a belief that some disputes are simply beyond mediation because the parties are so far apart or so entrenched in their positions that mediation is hopeless. While there are indeed some cases where mediation is unlikely to achieve a resolution, the statistics available in the context of civil litigation tell us that these cases are very much in the minority; there is no reason to believe licensing is any different.[15] The ability of a skilled, dispassionate third-party mediator to navigate the parties to an agreement should not be underestimated even - and perhaps particularly so - in cases where a sensible compromise seems unlikely.[16]

So much for the challenges, what then of the opportunities? Mediation offers practitioners and their clients a number of opportunities that are not otherwise available through the ordinary licensing process - in short, it provides a means by which the parties may retain a degree of control over the process with a view to reaching a timely, cost-effective and innovative resolution of the dispute.[17] It may be helpful to break down these opportunities in some detail….

It is clearly advantageous to all parties to retain as much control over the licensing process as they possibly can; mediation can help reduce, or eliminate entirely, the risks (and, to some degree, the costs) borne by both applicants and objectors when leaving an application to be decided by a committee. Perhaps the primary risk for an applicant is that their application will be rejected outright by the licensing authority. To state the obvious, if, however, as a result of mediation, the objectors withdraw their objections then this risk will no longer exist. Similarly, for an objector, although they will likely wish to see the entire application

12 Those minded to might draw parallels with planning law, where some literature exists considering mediation between local planning authorities and applicants. See, for example: H Brooke, *Mediation and Planning: The Role of Mediation in Planning and Environmental Disputes* [2008] JPL 1390; J Parmiter and J Phillips, Finding Common Ground Planning magazine 21 March 2008; A Grossman, *Mediation in Planning – From Talking the Talk to Walking the Walk* [2009] JPL 24; *Mediation in Planning* – a Report commissioned by the National Planning Forum and the Planning Inspectorate by Leonora Rozee OBE & Kay Powell (June 2010); and most recently, ADR and Civil Justice, the Final Report of the CJC ADR Working Group (Nov 2018).

13 Blake, Browne and Sime (n1) at 14.24 – 14.35.

14 See: *Nigel Witham Ltd v Smith* [2008] EWHC 12 (TCC) at [32]; *Bradford v James* [2008] EWCA Civ 837 at [1]; *Egan v Motor Services (Bath) Ltd* [2008] 1 WLR 1589 at [53].

15 For a discussion of some of the statistics available, see: Blake, Browne and Sime (n1) at 14.15 – 14.19.

16 See the comments of Brooke LJ in *Dunnett* (n4) at [14] and Elias LJ in *Faida* (n4) at [39] to a similar effect.

17 For useful overview of the advantages of mediation, see: Blake, Browne and Sime (n1) at 14.14.

fail, they may, in private, be more concerned about a particular issue, such as anti-social behaviour; better for them, then, to secure concessions through mediation to deal with those specific concerns, than to risk gaining nothing at a committee hearing. As these two perspectives demonstrate, the desire to leave as little as possible to chance in front of a licensing committee will often serve as a powerful motivator for settlement during mediation.

The benefits in relation to cost and time effectiveness can be briefly stated: if a mediated settlement in the form of an agreement or memorandum signed between the parties can be reached at an early stage in the process, then it is likely that a licence will be granted earlier than would otherwise have been the case. This will ultimately be advantageous in two respects: first, the client will forgo the cost and time implications of having to fight the matter at a committee hearing; second, the cost benefits associated with having the licence earlier than they would otherwise have done will accrue to the client. In light of the length of time it can take for contested matters to come before a licensing committee, in some cases this benefit may turn out to be very significant.

The final opportunity is one which is often underestimated - the ability to reach innovative solutions not otherwise possible in the ordinary course of a dispute. The options open to a licensing authority faced with an application are limited by statute (s 18 Licensing Act 2003) and are in all instances influenced by the licensing objectives (s 4(2) Licensing Act 2003); parties engaged in mediation are not so confined. It is open to applicants and objectors to strike innovative deals that would otherwise be beyond the power of the licensing authority - for example, an applicant could agree to apologise for previous anti-social behaviour, to enter into a contractual undertaking to indemnify in respect of any damage caused to the property, or agree to pay for the installation of security features at a house etc. The opportunities are endless from the perspective of an objector; and although an applicant is hamstrung by the fact that what he ultimately wants is a licence - something which only a licensing authority can grant within the powers conferred upon it - the flexibility open to him during a mediation to settle objections on innovative terms provides him with an important opportunity to influence the licensing process in his favour.

In short, it is evident that the opportunities are many and the challenges few; those challenges which do arise are easily navigable by practitioners. Mediation is best viewed as a tool, capable of serving the best interests of clients; how useful and effective that tool is will ultimately depend on its user. What follows is an example of how this tool has been effectively used in practice.

Part III: Mediation in licensing - an example

Examples of mediation in the context of commercial disputes and civil litigation are legion. This is primarily because they relate to *inter partes* disputes where the courts have either yet to be invited to adjudicate, or have agreed to suspend that process pending discussions between the parties. In such cases the courts have no public duty to perform, other than to adjudicate at the invitation of one or more of the parties.

In licensing, as in planning, the position is complicated by the fact that the local authority is performing a statutory duty on behalf of the public. For this reason, members of the licensing authority may not become directly involved in any mediation as to do so would risk compromising their duty to remain wholly independent, or lead to them acting unlawfully by constraining or overreaching their statutory powers.[18]

There have been a number of cases where licensing offi ers have acted as “mediators” between the parties to a potentially contentious licensing dispute. Where they have done so they were, presumably, acting as offi ers to the licensing authority, rather than the “responsible authority” under s 13(4)(za). Even then, it would have been necessary to take extreme care to ensure that no step taken could possibly infect the licensing process, should the mediation be inconclusive and a formal hearing take place.

In an early case, the author was representing a group of residents who had finally lost patience with a national sporting event taking place on their doorsteps in a comparatively rural location. Originally this had been for a very limited duration. In time, however, the owner of the land upon which the event occurred had extended both its duration and scope, to the extent that the previously cordial relations with her neighbours had broken down irretrievably.

18 For an example of illegality as a ground for judicial review, see *R(Unison) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409 and for irrationality, the leading case of *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, which lent its name to the expression “Wednesbury unreasonableness”. For an example of a decision by justices that was unlawful see *R (on the application of Carmarthenshire County Council) v Llanelli Magistrates’ Court [2009] EWHC 3016 (Admin), [2010] All ER (D) 209.* Costs may even be awarded against magistrates where they have appeared in the Administrative Court, having been found to have unlawfully refused to hear and determine an application for the extension of licensing hours: *R v Llanidloes Licensing Justices, ex p Davies [1957] 2 All ER 610n, [1957] 1 WLR 809.*

The licensing authority, which itself had some interest in the important local event, duly extended the premises licence. An appeal was lodged.

On the first day of the three-day licensing appeal it became apparent that insufficient time had been allocated and that at least a further two days needed to be found. The hearing was adjourned. However, at the instigation of the respective advocates it was suggested that the principal protagonists, having been brought together for the occasion, might sensibly sit down to discuss the issues. To cut a long story short, by using counsel for the authority as a *de facto* mediator it proved possible (by 1am the following morning!) to thrash out detailed terms for an enduring settlement, so avoiding the delay, significant cost and uncertainty for all concerned of leaving the outcome to lay magistrates. Although compromises were made on all sides, the benefits of such an approach were very apparent to all concerned.

Part IV: Mediation in licensing - looking ahead

It is clear that licensing has, for too long, lagged behind many other sectors in its uptake of mediation; there is no reason why this should continue to be the case. It is hoped that this piece will cause practitioners to reconsider the role of mediation in their practices and in the sector as a whole.

Whether or not mediation will find a home in the context of licensing must remain a matter of speculation. However, if mediation is to gain the firm foothold in licensing that it currently has in the context of civil litigation, it will require somewhat of a sea-change in opinion amongst practitioners. Such a change will not occur unless a number of so-called "early adopters" rise to the challenge of championing the cause of mediation in this field, with a view to ultimately persuading the reluctant majority of the opportunities which mediation presents. [19]

Those interested in seeing such a change occur would be well-advised to reflect upon the unique opportunities - and indeed challenges - which mediation presents in the context of licensing and consider how these are best explained to clients and applied to their advantage. This will require innovative thinking in many cases, but it will ultimately be to the benefit of individual clients and the sector as a whole.

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Pupil Barrister, Francis Taylor Building

19 On the importance of early adopters and the effect on the market, see: E Rogers, *Diffusion of Inn vations* (5th Edn, 2003).

Reading v Ali - the outcome

Reading's assertion that a parked-up Uber driver was standing for hire has been found wrong in the High Court, as **James Button** reports

The question of what is exactly meant by standing or plying for hire in relation to hackney carriage legislation has never been comprehensively answered by the senior courts. Despite these activities being illegal if undertaken by any vehicle other than a hackney carriage located within the district in which it is licensed for over 170 years, questions still rage as to exactly what is and isn't covered by the prohibition contained in s 45 of the Town Police Clauses Act 1847.

The latest case concerning this is R*eading Borough Council v Ali.*[1] Due to the importance of this case and its implications around England and Wales, this is a lengthy consideration of the judgment.

The facts in this case were fairly straightforward. In January 2017, Mr Ali was a licensed private hire driver, driving a licensed private hire vehicle. Both licences had been issued by Transport for London (TfL), and he was working for Uber under their London private hire operators' licence. He was lawfully parked on the public highway in Reading (Kings Road). He was not near a bus stop or hackney carriage stand, nor waiting in a hackney carriage stand. His vehicle was one of around 60 vehicles operated by Uber appearing on the Uber app as being located in Reading at the times in question (the prosecution concerned two offences, alleged to have been committed either side of midnight on 21 and 22 January 2017).

The vehicle itself:

> *had no markings indicating it was for hire, but it had two small TfL roundels, one in the back window and one on the front windscreen, which were highly visible and which indicated it was licensed by TfL as a PHV. The car did not advertise a number to contact to hire it. The car was not available to anyone hailing it on the street but could only be hired via the Uber app. The respondent was not hooting or flashing his lights or otherwise drawing attention to his car. The respondent would not have taken any passengers other than via the [Uber] app.*[2]

When he was approached by enforcement offi ers, he said that he was waiting for booking to come to him via the Uber app.

The council argued that the appearance of the vehicle on the app amounted to plying for hire because it was a solicitation to hire the vehicle (although as the vehicle was stationary, it is suggested that this should have been a reference to "standing for hire").[3]

The defence argued that such an approach would mean that any booking of private hire vehicle by means of an app would amount to plying for hire, and this approach would fly in the face of significant senior court precedent.

The prosecution was heard by the Chief Magistrate. Mr Ali was acquitted. A comprehensive judgment was issued, and the council appealed by way of case stated to the High Court on the following points (at paragraph 8 of the judgment):

> *The questions of law on which our opinion is sought in the case stated are as follows:*
>
> *(1) As a matter of law did the display of the respondent's vehicle as the outline of a car on the smartphone apps of potential passengers constitute an invitation to book the respondent's vehicle?*
> *(2) As a matter of law did the display of the respondent's vehicle as the outline of a car on the smartphone apps of potential passengers constitute an invitation to book an Uber vehicle in the vicinity, even if it were not the respondent's?*
> *(3) If the answer to questions (1) or (2) is yes:*
> *(a) Did the Chief Magistrate err in law in holding it to be relevant to whether the respondent was plying for hire, that his vehicle had no distinctive markings, was not at a stand and was not available on the street to pick up passengers in the traditional way? and/or*

1 [2019] EWHC 200 (Admin) 7 February 2019 (unreported).

2 Per Flaux LJ at para 4.

3 See *Button on Taxis: Licensing Law and Practice* 4th edition, para 8.8.

(b) Did the Chief Magistrate err in law in holding it to be a relevant consideration that the whole of the transaction between the passenger and the driver, and the passenger and the licensed operator, was conducted via a smartphone app, where the booking process starts, is recorded and the fare estimated?
(4) On the facts agreed and found by her, did she err in law in finding that the prosecution had not proved that the respondent was plying for hire?

The case was heard in January by Flaux LJ and Holgate J, with judgment being given by Flaux LJ. Having summarised the law[4] he then identified the crux of the issue in the following way:

The expression "plying for hire" is not defined in the 1847 Act or the 1869 Act and there has been a series of cases since the enactment of the statutes which have addressed the issue whether vehicles which were not licensed hackney carriages were nonetheless plying for hire and therefore an offence was being committed. The Chief Magistrate helpfully sets out the authorities and summarises their effect in [paragraphs] [18] to [29] of her Decision. I do not propose to refer to all the authorities, but will only focus on those cases from which some principles relevant to the present case can be discerned. Many of the cases turn on their own particular facts.

In his judgment those key cases were *Sales v Lake*[5] *, Allen v Tunbridge,*[6] *Cogley v Sherwood*[7] and *Rose v Welbeck Motors*[8] and:

It is unnecessary to refer to the more recent cases since they can all be analysed as examples of the application to the particular facts of the individual cases of the principle established by Cogley v Sherwood[9] *and Rose v Welbeck* [10]*that to be plying for hire (a) the vehicle must be exhibited or on view and (b) while so exhibited it is expressly or by implication soliciting custom in the sense of inviting the public to use the vehicle without a prior contract. (At para 25.)*

In Sales v Lake[11] a hackney carriage licensed in a different district was used to pick up passengers in other areas. Those passengers had purchased tickets in advance and booked seats and without advance booking no seatbelts available.

The Divisional Court upheld the decision of the magistrate acquitting the driver and company of unlawfully plying for hire. Lord Trevethin CJ at 557 said:
"In my judgment a carriage cannot accurately be said to ply for hire unless two conditions are satisfied.
(1) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and
(2) the owner or person in control who is engaged in or authorizes the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers.

Avory J, referring to the judgment of Montague Smith J in the earlier case of *Allen v Tunbridge*[12] said: "As [the judge] said in [that] case 'plying for hire' is very different from a customer going to a job-master to hire a carriage, and I think [counsel] was right in his argument in that case when he said 'plying for hire' means soliciting custom without any previous contract."[13]

In *Cogley v Sherwood*[14] the situation concerned booking desks at London airport where cars could be hired. The service was advertised throughout the airport but there was no direct access to those cars by members of the public, and there was no indication on the cars that they were available for hire or anything other than private vehicles. A conviction for unlawfully plying for hire was overturned by the High Court and the judgment was summarised and emphasised by Flaux LJ in the following manner [15]:

17. Lord Parker CJ considered at 324 that: "today, as a matter of common sense, I do not think that anyone would say that vehicles belonging to the many car hire concerns are plying for hire in the ordinary sense of the word". Having reviewed earlier authorities, including Allen v Tunbridge [16]*, the Lord Chief Justice said at 325-6:*

"In the ordinary way, therefore, I should, apart from authority, have felt that it was of the essence of plying for hire that the vehicle in question should be on view, that the owner or driver should expressly or impliedly invite the public to use it, and that the member of the public should be able to use that vehicle if he wanted to. Looked at in that way, it would matter not that the driver said: 'Before you hire my vehicle, you must take a ticket at the offi e,' aliter,

4 See paragraphs 9 to 12.
5 [1922] 1 KB 553.
6 (1871) LR 6 CP 481.
7 [1959] 2 QB 311.
8 [1962] 1 WLR 1010.
9 [1959] 2 QB 311.
10 [1962] 1 WLR 1010.
11 [1922] 1 KB 553.
12 (1871) LR 6 CP 481.
13 Per Flaux LJ at paras 14 and 15.
14 [1959] 2 QB 311.
15 At paragraphs 17 to 20.
16 (1871) LR 6 CP 481.

if he said: 'You cannot have my vehicle but if you go to the offi e you will be able to get a vehicle, not necessarily mine.'

18. He then noted that some cases pointed in a different direction, but considered that it was unnecessary to go into them because, in all cases where it was held a carriage was plying for hire, it was in fact there and on view. He continued: "For myself I think that it is of the essence of plying for hire that the carriage should be exhibited". He considered that the cars were not exhibited in this sense. The only cars on view were at one terminal, "they did not appear to be for hire; they appeared to be ordinary private cars with private chauffeurs".

19. In his concurring judgment, Donovan J said at 329:

The term ['plying for hire'] does connote in my view some exhibition of the vehicle to potential hirers as a vehicle which may be hired.

20. Salmon J, also concurring, said at 331:

But for authority, I should have thought that a vehicle plies for hire if the person in control of the vehicle exhibits the vehicle and makes a present open offer to the public, an offer which can be accepted, for example, by the member of the public stepping into the vehicle.

He considered that it was quite wrong to conclude that a car-hire service which was the modern equivalent of the job-master in 1869 was plying for hire. He said at 331-2:

I do not feel compelled by any authority to find that a vehicle plies for hire unless it is exhibited.

Flaux LJ concluded that the overall effect was:

That case is thus clear authority for the proposition that it is of the essence of plying for hire that the vehicle in question is exhibited with an express or implied invitation to hire it. Nothing in Rose v Welbeck Motors,[17] *on which Mr Charles Holland for [Reading BC] placed particular emphasis, detracts from that proposition.*[18]

Rose v Welbeck Motors[19] concerned a red Renault Dauphine (which at that time was as synonymous with a minicab as a Toyota Prius is to a private hire vehicle today) with the identity of the firm on the sides, together with a telephone number and a radio aerial. It was a vehicle which was clearly available for some form hire. This was parked for 50 minutes at a location where buses turned around (it is referred to in the case is a bus stand, but unfortunately it is never specified whether this was actually a statutory bus stop) which was somewhere that passengers would congregate to board a bus. When a bus arrived and wanted to turn round, the driver moved the vehicle but then immediately returned to the same place. He was prosecuted for unlawfully plying for hire and acquitted. The prosecutor appealed and the High Court overturned that decision, and remitted it to the magistrates to continue hearing the matter. As with *Cogley v Sherwood,*[20] Flaux LJ considered this judgment carefully in the following terms:[21]

22. Rather surprisingly, on those facts, the magistrates found there was no case to answer in relation to an offence under section 7 of the 1869 Act. That decision was reversed by the Divisional Court and the case was remitted to the magistrates with a direction that they should continue hearing the case. Lord Parker CJ again gave the lead judgment. He referred to and followed Cogley v Sherwood[22] *saying at 1014-5:*

Again, in Cogley's case this court held that it was essential before one could say that a vehicle was plying for hire, first, that it should be exhibited or be on view to the public, and secondly, that it should while on view expressly or impliedly solicit custom in the sense of inviting the public to use it. The fact that, if those conditions were proved, a ticket had to be obtained from an offi e or a booking made other than through the driver was immaterial. It is right to say that a further possible question, namely, what was to be the result if the obtaining of a ticket or a booking involved a vehicle other than that on view was left open. Reference, however, was made to Gilbert v McKay[23] *and in the argument to* Foinett v Clarke[24]*, which cases suggest that, at any rate in certain circumstances, that fact would not of itself prevent a finding that the vehicle in question was plying for hire.*

That the vehicle in the present case was on exhibition in the sense that it was on view to the public is undoubted. The real question, as it seems to me, is whether a prima facie case was made out that the vehicle in question was impliedly inviting the public to use it. Whether in any case such a prima facie case is made out must, of course, depend upon the exact circumstances, and I certainly do not intend anything I say in this judgment to apply to any facts other than those here. What are the facts here? One starts with the fact that this vehicle was of a distinctive appearance, regarding its colour, its inscriptions, its equipment in the

17 [1962] 1 WLR 1010.

18 At para 21.

19 [1962] 1 WLR 1010.

20 [1959] 2 QB 311.

21 At paras 22 to 24.

22 [1959] 2 QB 311.

23 [1944] 1 All ER 458.

24 (1877) 41 JP 359.

form of radio communication, and its type. Secondly — and this is equally important — it was standing with the driver at the steering wheel for some fifty minutes in a public place on public view and at a place where buses turned round: in other words, at a place where many members of the public would be getting off the buses and where many members of the public would forgather to board the buses. Moreover, when requested to leave, the driver drove away only to return immediately almost to the same place.

23. The Lord Chief Justice then dealt with the argument on behalf of the defendant that the car was merely advertising the owners:

"It is perfectly true, of course, that the inscriptions were advertising the owners, Welbeck Motors, Ltd., and also saying, 'and if you ring up Welbeck 4440 you can have one of the vehicles that they hire known as a minicab.' In my judgment, however the inscriptions on and appearance of the vehicle coupled with the place where it was on view and its conduct during the relevant period were saying more than that. The vehicle was saying: 'Not only do I,' if I may personify the vehicle, 'recommend you to Welbeck Motors, Ltd., where you can hire a minicab, but further I am one of those minicabs and I am for hire.'"

24. Winn J agreed and dealt with a short point of his own, which was that there was no difference as matter of law:
"…whether the vehicle was to be taken to be saying: 'I am here available for you to step into and hire me as a cab,' or whether it must be taken to be saying: 'I am here available to be hired by you conditional upon my owner's approval and his ordering me to take you where you want to go.'
…
At the very lowest, the evidence in the present case discloses behaviour and appearance on the part of this vehicle which amounts to an invitation, 'Get in touch one way or another with my owner and see whether he is willing for you to take me as a vehicle which you are hiring.'

On the facts, the Chief Magistrate had found that there was no offence. In the High Court, Charles Holland for the appellant (Reading Borough Council) argued that the appearance on the Uber app was the equivalent of a "for hire" sign on the vehicle and made it clear that the vehicle was available for immediate hire, and the app simply facilitated that plying for hire. In particular "if exhibition of the vehicle amounted to plying for hire, it made no difference that there was then a booking through the Uber app. That was the modern equivalent to taking a ticket from the offi e before getting in the cab which Lord Parker CJ said made no difference in Cogley v Sherwood". [25]

Philip Kolvin QC for the respondent (Mr Ali) countered that by explaining that the appearance on the app did not identify a particular vehicle and did no more than demonstrate that vehicles were potentially available for hire following a booking being made via the operator through the app. He also distinguished the case from *Rose v Welbeck Motors* [26]because "here the waiting was of a completely different character. It was not waiting for a customer from the street to get into the car, but waiting for the purpose of a private hire booking which would come exclusively via the Uber app."[27]

Flaux LJ concluded that there was no plying for hire in this case. His decision (only edited for brevity) is as follows:[28]

33. In my judgment, there was no unlawful plying for hire in this case for a number of reasons. First, the mere depiction of the respondent's vehicle on the Uber app, without either the vehicle or the driver being specifically identified or the customer using the app being able to select that vehicle, is insufficient to establish exhibition of the vehicle in the sense in which that phrase is used by Lord Parker CJ in formulating the two stage test for plying for hire in Cogley v Sherwood [29]*and* Rose v Welbeck[30] *. That requires not just exhibition of the vehicle but its exhibition expressly or implicitly soliciting custom, inviting members of the public to hire the vehicle.*

34. It seems to me that depiction of the vehicle on the app does not involve any exhibition of that kind, but is for the assistance of the Uber customer using the app, who can see that there are vehicles in the vicinity of the type he or she wishes to hire. I agree with Mr Kolvin QC that the app is simply the use of modern technology to effect a similar transaction to those which have been carried out by PHV operators over the telephone for many years. If I ring a minicab firm and ask for a car to come to my house within five minutes and the operator says "I've got five cars round the corner from you. One of them will be with you in five minutes," there is nothing in that transaction which amounts to plying for hire. As a matter of principle, I do not consider that the position should be different because the use of internet technology avoids the need for the phone call.

35. Second, it does not seem to me that the position is different because, as between Uber and the driver, the latter is a principal and Uber is an agent. Whether this agency analysis is correct has not been finally decided.

25 Per Flaux LJ at para 30.

26 [1962] 1 WLR 1010.

27 Per Flaux LJ at para 32.

28 Paragraphs 33 to 41.

29 [1959] 2 QB 311.

30 [1962] 1 WLR 1010.

However, like the Chief Magistrate and contrary to Mr Holland's submissions, I do not consider that it has any bearing on the issue in this case. On the findings she made as to how the Uber app works, the customer has to confirm the booking after he or she is given the fare estimate and the driver in turn has to accept the booking before either of them knows the identity of the other and before the car actually comes to the pick-up point.

. . .

37. Whatever the correct contractual analysis, in my judgment it has no impact on the question we have to decide. On any view, there is a pre-booking by the customer, which is recorded by Uber as PHV operator, before the specific vehicle which will perform the job is identified. This is all in accordance with the transaction being PHV business, not unlawful plying for hire. There was no soliciting by the respondent without some prior booking, as he only proceeded to the pick-up point after the customer had confirmed the booking and the respondent as driver had accepted the job. Whenever any contract was concluded, I have little doubt that this was not plying for hire, because on the facts found in this case, the customer could not use the respondent's car without making a prior booking through the app. As with the charabanc in Sales v Lake[31], the customer would make a booking to be picked up at a pre-arranged point. On the evidence in this case, all the Uber app did was to facilitate that booking.

38. This leads on to the third reason why this was not plying for hire, which is the character of the waiting. The respondent was waiting in his vehicle until a customer confirmed a booking on the Uber app and he accepted that booking. There was no question of his soliciting custom during the period of waiting. His vehicle did not advertise itself as available for hire nor did he do anything which would have suggested to the public that he was available for hire. Indeed, as the Chief Magistrate found, if a member of the public had approached the vehicle and sought a ride, the respondent would have refused to take such a passenger off the street without a prior booking through the Uber app.

1. 39. The waiting here was of a completely different character to that in Rose v Welbeck[32]*. Unlike in that case, the respondent was not waiting to solicit custom from passing members of the public, but he was waiting for a private hire booking via the Uber app. Putting the example given by Lord Parker CJ in* Cogley v Sherwood[33] *of what would not be plying for hire into the context of the Uber app, if approached in the street, the respondent would have been saying: 'You cannot have my vehicle, but if you register for the Uber app and make a booking on it, you will be able to get a vehicle, not necessarily mine.'*

Conclusion

40. In all the circumstances, the appeal must be dismissed.

41. I would answer the questions posed by the case stated as follows:
(1) No, because the identity of the vehicle could not be seen from the App and the specific vehicle could not be booked;
(2) No, because on the facts found the App merely informed Uber customers who wished to book a private hire vehicle that there were such vehicles in the vicinity;
(3) (a) and (b) No, in any event;
(4) No.

Holgate J agreed with that judgment.

Comment

On the basis of precedent, and on the facts of this particular case it is difficult to see how any other conclusion could have been drawn.

A private hire operator can advertise their services anywhere (see *Windsor & Maidenhead Royal Borough Council v Khan (t/a Top Cabs)* [34]), and a private hire hiring can commence, travel and finish anywhere without any reference to the authority in whose area the Trinity of Licences (private hire operator, private hire driver and private hire vehicle) were issued (see *Adur District Council v Fry* [35]).

As the judgment makes clear, it is well established that for the offence of standing for hire to be committed the vehicle must be exhibited to a prospective hirer, and be available for immediate hire. Had the decision been that the appearance on the Uber app amounted to an exhibition, not only would private hire vehicles licensed by authorities other than the one in whose area they were located be prohibited from waiting for the next booking, any private hire vehicle would have been so prohibited. The logical consequence of that would be that every private hire vehicle would have to be driving around whenever it was not hired. The environmental and ecological impacts of that would clearly be horrendous.

However, this judgment does not mean that every private hire vehicle can park with impunity. The obvious first question is whether the vehicle is parked lawfully, and there is no exemption from private hire vehicles from all normal

31 [1922] 1 KB 553.

32 [1962] 1 WLR 1010.

33 [1959] 2 QB 311.

34 [1994] RTR 87.

35 [1997] RTR 257.

parking restrictions. Secondly, the appearance of the vehicle must be considered. For once, the paucity of signage on TfL licensed private hire vehicles actually assisted Mr Ali. The small roundel which TfL allows on the front and rear windscreens of their private hire vehicles is very difficult for anybody to spot if they are not fully familiar with private hire licensing within London. Many local authorities require significant and obvious signage on their private hire vehicles to identify them as such, to enable legitimate hirers to easily identify the vehicle that they have booked. Such a vehicle would have more similarity to the vehicle in *Rose v Welbeck Motors* than the vehicle in this case.

There is also the question of the location. In this case there was no suggestion that the vehicle was anywhere near a hackney carriage stand, or anywhere where the public would expect to find vehicles available for immediate hire. If that is different, and the vehicle is near a hackney carriage stand (see *Milton Keynes Borough Council v Barry* [36]), or arguably at places where people would anticipate vehicles being available for immediate hire, eg, outside pubs, night clubs, cinemas etc, then the conclusion might be different.

As with every case concerning plying or standing for hire, this turns entirely on its own particular facts. In the future, if those facts were different, and it was clearly identifiable vehicle parked outside a busy pub at closing time, the court might legitimately come to a different conclusion.

Those who hoped that this case would lead to definitive definitions of plying and standing for hire will be disappointed.

James Button CIoL
Principal, James Button & Co Solicitors

36 Unreported, 3 July 1984.

Who saves the saviour?

In today's difficult business climate, the night-time economy can be an engine for growth, but to achieve that growth, says **Jon Collins**, we need to switch the conversation from counting costs to realising opportunities

The challenges facing retailers across the UK and their impact on our high streets are all too apparent. Estimates as to the number of retail jobs lost in 2018 start at 80,000 and head north as retailers felt the impact of shifting consumer habits. Some shoppers simply stopped spending, nervous of the economic outlook. Others shifted spending from "things" to "experiences" as they looked to prioritise holidays and leisure. And, of course, online shopping continued to take an increasing share of spend. Little wonder then that last year saw one casualty after another, from Toys R Us, Maplin and Poundworld through to House of Fraser, Mothercare and Carpetright.

Local authorities, already dealing with the twin challenges of austerity and impending Brexit, are concerned as to how these closures have impacted and will impact their own town centres. Empty units can suck the life out of a high street. Indicating failure, they are a turn off both for customers and future investors.

Perhaps based on prior experience, a significant number of councils are pinning their hopes for an economic upturn (or at least economic resilience) on the night-time economy. Such a view is evident from the research conducted last year by the Portman Group and the Local Government Information Unit (LGIU) which found that almost all councils (92%) believe that the night-time economy will play an important role in preventing the decline of high street retail.

It's a welcome statement of confidence in our hospitality sector, and the night-time economy in particular, but the wider trading environment in 2019 is markedly different to that of the early 1990s or even just a decade ago. When the UK economy slipped into recession during the early years of Sir John Major's premiership, there was pent up demand for sites (soon to be vacated by banks and shops) within the hospitality sector from a nightclub industry keen to move in to more prime positions on the high street and the imminent discovery and expansion of the UK bar industry.

Fast forward to 2008 and those same bar and club operators were caught up in the economic fallout of the global financial crisis (and had their own particular problems to handle in the consequences of the smoking ban and licensing reform). However, once again, the hospitality sector was able to step in to fill vacant sites, this time thanks to the significant expansion in the number of casual dining restaurants across the UK as we Brits discovered a quasi-American love of eating out.

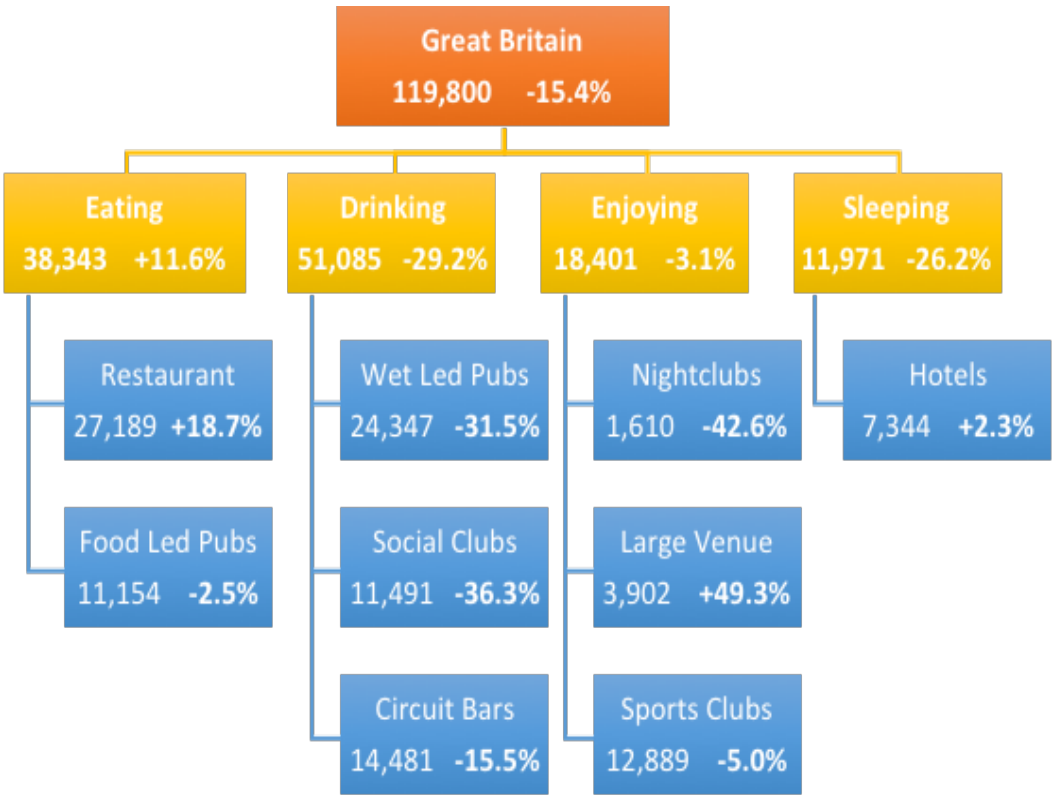
And now, it is the turn of some of those restaurant operators to experience the pain. Witness the significant number of high-profile restaurant chains resorting to company voluntary arrangements (CVAs) to close hundreds of outlets and lay off staff. It's a route taken, no doubt after exhausting all the alternatives, by the likes of Byron, Jamie's Italian, Carluccio's, Gourmet Burger Kitchen and Prezzo.

As the chart opposite shows, the last decade has seen unprecedented churn and change for the licensed hospitality sector with pubs, clubs and bars particularly hard hit. Although, interestingly, and contrary to the historic picture, wet-led venues such as pubs, clubs and bars actually tended to outperform restaurants and food-led pubs last year.

While we do not see an inbuilt, structural demand for sites in 2019 - as was the case during earlier challenging times for the high street - those hospitality businesses that have come through the last decade are still willing to invest. However, this investment is going to be carefully considered, and will show an aversion to areas that appear to be hostile to the night-time economy or even simply ill prepared to support new developments. Entrepreneurs and businesses will be looking for a sign that a well-managed, thriving night-time economy is something to be welcomed.

At the very least, that means an absence of unnecessary barriers to business – which were often introduced in response to other pressures rightly or wrongly prioritised over the need to support the night-time economy.

Financial pressures can prompt calls for authorities to introduce measures such as a tourism tax or late night levy – increasing cost to business and disincentivising tourist spend.



Source: CGA Outlet Index June 2018, GB On Trade Universe & Structure:

Shifting circumstance can create fresh regulatory challenges. For example, the expected further increase in city centre living as empty retail units are converted to residential will inevitably create more noise complaints. The agent of change principle might offer some comfort to existing operators but that is yet to be proven in practice. And what about businesses thinking to invest and create new venues? Will they risk that investment in an area that is likely to then hit them with costly additional work to address complaints from their new neighbours?

And, most importantly, an unpredictable regulatory environment is not going to prove attractive to investors. Operators need to know they are valued as partners alongside their regulators and will not be blindsided by unexpected enforcement. A particular concern here is the tendency in some areas to skip past the stepped approach to enforcement set out as best practice in the s 182 Guidance to the Licensing Act 2003. Immediate closure and summary review can rapidly turn into a permanent closure as social media amplifies rumours and concerns to condemn a venue unfairly.

One key step councils could take to give businesses the confidence to invest is to develop a night-time strategy. Again, the Portman / LGIU research is informative – noting as it does that while three quarters of councils see developing their night-time economy as a key priority, only just over 1 in 5 has a dedicated night-time economy strategy. Interestingly, three quarters of councils say they would welcome national level policy to enable sharing of best practice and information. That suggests to me an opportunity for the Institute to draw on our broad church and expert membership to create such guidance.

London looks to be leading the way, at least in terms of recognising the value of having a night-time strategy, with the latest draft London Plan stating that: “Boroughs should develop a vision for the night-time economy, supporting its growth and diversification, in particular within strategic areas of night-time activity, building on the Mayor’s Vision for London as a 24-hour city”.

I would expect this will mean the increasing development and adoption of such strategies over time across London, with the idea then being picked up by other councils across the UK. In developing a strategy, councils should be encouraged to begin with dialogue and engagement, finding out from local residents, businesses and regulatory partners what they see as the vision for the night-time economy in their area.

After dialogue comes data crunching to understand what space is used at present, what is available and what is offered. The vision should then be about getting from the current to a future offer that meets the needs of all partners without causing disorder or disturbance. Once that small task has been completed, ways need to be found to shout about the

resultant changes as those with the most negative view of the night-time economy often have the least clear understanding of what it can offer.

Issues impacting the night-time economy are many and varied – from transport to the environment, commercial to creative. So a successful strategy should look to draw in multiple partners and build on existing policies – for example, cultural, environmental and transport strategies and the statement of licensing policy. In tailoring the strategy to fit local need, authorities should be encouraged to take the widest possible view of their night-time economy. That could mean the strategy incorporates elements such as the use of civic buildings and spaces at night, addressing social exclusion through activities targeting vulnerable groups or even offering rates reductions to attract particular employers (eg, younger entrepreneurs) or organisations.

Once the strategy is in place, authorities will need mechanisms through which to take action and monitor impact. Across the globe, cities are experimenting with new roles and structures to achieve this. Night czars or mayors, with a brief to engage with all relevant stakeholders, are increasingly prevalent from Paris and Budapest to London and Nantes. Night-time managers are also growing in cities such as Aberdeen, Orlando and Pittsburgh, which recognise the value of having an individual working across multiple departments (often with a focus on safety). Cities such as Berlin, London and Amsterdam have established a council or commission to provide a forum for the discussion of the myriad evolving issues that impact on the shape and nature of the night-time economy.

Interestingly, in San Francisco, the Entertainment Commission established in 2003 has looked to focus in on late-night transport – recognising the significant impact on quality of life, economic vibrancy and employee satisfaction that comes from having a quick, reliable, safe and affordable way to get in and out of the centre (be that for work or play).

Almost all of these initiative have a common goal – to protect and expand the night-time economy in a way that delights users and encourages investment while managing the impact on emergency services and local residents. This being the case, councils in the UK are not short of inspiration as they seek to achieve the same themselves. And there are numerous examples of great work already in place that, while stopping short of presenting a holistic strategy, are successfully tackling one or more of the issues they face.

While speaking last year at a meeting of the London Night Time Borough Champions Network (an excellent initiative chaired by the London Night Czar, with a goal to share best practice across the capital), I was encouraged to hear from the Lewisham representatives about their work in Catford. Team Catford's "Catford Conversation" is an excellent example of a community engagement, urban regeneration and place-making programme. It has been designed to ensure that local people are given a voice as the council prepares a masterplan to regenerate the town centre.

Team Catford speaks up for the community, champions local views and is encouraging everyone who lives, works, socialises, commutes or runs a business to have their say as Catford goes through its biggest change in decades. Central to this regeneration is the evolution of the late-night offer in Catford in a controlled manner, identifying underutilised spaces and opening them up for creative and cultural use, street markets, youth initiatives and theatre. External transport links are minimal so the focus is on understanding and seeking to meet residents' needs. New opportunities for late-night industries have been developed with the freedom to trade through to 6am tied to higher expectations in terms of operator standards.

This engaged and balanced approach should be ripe for adoption more widely across the country. I am particularly taken with Team Catford's willingness to use the flexibility within the Licensing Act 2003 to attract investment and innovation while maintaining standards of operation.

Given the challenges (disparate and related) that councils and operators face, a shared vision and clear strategy on how to achieve it are more important than ever. While London is likely to be first to provide evidence of how successful this new approach proves, it will not just be about the West End but Barking, Bromley and beyond. That means the lessons learned and approaches adopted will be relevant to all areas when adapted to local circumstance. And having some form of forum, czar or simply a working group will provide the vehicle for local level adaptation and adoption.

All of this needs to be underpinned by a genuine and mutually respectful sense of partnership. It is encouraging therefore that the Portman Group / LGIU research found that 8 out of 10 authorities recognised that partnership working is essential in supporting a vibrant night-time economy with local businesses (95%) and the police (93%) named as key partners.

And yet, as was highlighted by Clare Eames of Poppleston Allen and Rebecca Cullum of Stonegate in their expert and informative session at last year's National Training Conference, it is not always straightforward to maintain a partnership approach on the front line as competing priorities, stretched resources and imperfect communication

cloud the issue. The vast majority of IoL members will recognise that driving true partnership, beyond the buzz word, is the most reliable way to create long-term sustainable solutions for the management of both individual premises and our town and city centres generally. Many of those same members will have examples of when and where that partnership approach has been undermined.

During their session, Eames and Cullum underscored the wisdom of a stepped approach to enforcement with lower level, and often informal, early intervention being a simple way to avoid more complicated and expensive action at a later date. Central to that approach, all agreed, was a commitment to clear and consistent communication. In conclusion, the pair noted the central importance of establishing a mutually respectful relationship between the regulator and operator. This would present multiple opportunities to take corrective action short of enforcement activity.

Operationally, for any authority wishing to support and expand the night-time economy in their area, such an approach can only be viewed as sensible. By removing barriers to growth while maintaining communication to nip issues in the bud, enforcement activity can be held back for its proper place, as the last step in the regulatory process.

While the current economic malaise might seem like déjà vu for those of us around for more than a decade or two, this time is different. The night-time economy can be an engine for growth, but to achieve that growth we need to switch the conversation in many areas from counting costs to realising opportunities. Global and national good practice suggests more formality (in policy and personnel) would be a good thing. And partnership, as ever, is the way to ensure that the benefits, once achieved, are enjoyed for years to come.

Jon Collins
Patron, Institute of Licensing

In praise of cross-examination

Contrary to widespread misconception, cross-examination is permitted in licensing hearings and indeed should be positively encouraged, argues **Gary Grant**

In the late 19th century a promising young barrister from Birkenhead, FE Smith, rose to cross-examine a young boy in the witness stand. The boy had, tragically, been run over by a tram operated by FE Smith's client, the tram company. As a result, the boy's right arm was partially paralysed. He would never regain full use of it. The boy's claim for personal injury damages was water-tight. The damages would be massive. FE Smith only asked two questions of the boy. His first question was sympathetic in tone: "You poor boy, can you show us how high you can lift your arm?" The boy winced in pain as he struggled to raise his right arm just above waist level. Exhausted by the effort the boy's useless, crippled arm flopped back to his side. The barrister's second, and final, question was this: "Now show us how high you could lift your arm before the accident?" Eager to oblige, the boy's right arm shot right up vertically into the air high above his head. "No more questions" Smith said as he sat down, case won.

FE Smith went on to become the Attorney-General, Lord High Chancellor of Great Britain, and was created the 1st Earl of Birkenhead in 1922. His best friend, Winston Churchill, worshipped him. Another friend, the newspaper proprietor Lord Beaverbrook, described him simply as "the cleverest man in the kingdom". The historian George Dangerfield called him "without question the most fascinating creature of his times". He drunk himself to an early death aged just 58.

While not every advocate who appears before a licensing sub-committee will possess all the cross-examination skills of FE Smith, it is undoubtedly the case that a well-focused cross-examination can, in an appropriate case, hugely assist a tribunal of fact in reaching a proper and fair decision. The American jurist John H Wigmore observed that:

> *Cross-examination is the greatest legal engine ever invented for the discovery of truth. You can do anything with a bayonet except sit on it. In the same way, a lawyer can do anything with cross-examination if he is skilful enough not to impale his own cause upon it.*

In licensing hearings before council sub-committees, as is well known, the general rule is that "cross-examination shall not be permitted": see regulation 23 of the Licensing Act 2003 (Hearings) Regulations 2005. This flows from Parliament's original intention that modern licensing hearings should be in the form of a "discussion", more inquisitorial than combative in nature so as to encourage participation in the licensing process by residents and other persons who may be put off from ever getting involved if they fear they will be grilled like a hardened villain in the Old Bailey.

But that general rule is not the end of the matter. Licensing sub-committees can, and in appropriate cases should, make exceptions to this rule and permit cross-examination if that is the best way to serve the interests of justice. Regulation 23 specifically provides that discretion to members:

> *Procedure at hearing*
>
> *23. A hearing shall take the form of a discussion led by the authority and cross-examination shall not be permitted unless the authority considers that cross-examination is required for it to consider the representations, application or notice as the case may require.*

It is often said by sub-committee members and their legal advisors that although "questions in clarification" are permitted, cross-examination is not. Now entering my 25th year at the Bar, I confess that I still do not know the difference. Questions to clarify a point are one of the principal aims of cross-examination. Some members fear that if they dare to permit a single question in "cross-examination" then their proceedings will soon degenerate into a shouting match with advocates bullying witnesses, jabbing their fingers towards them as they condemn them as liars. Inevitably the witness, who was just turning up to complain about some litter left by the local kebab shop, will collapse into emotional heap, wrecked and ruined by the forensic experience.

But that is not what cross-examination is about. At least not one worthy of the name. As a pupil barrister I was wisely advised that "to cross-examine well, one does not need to examine crossly". The main purpose of a cross-examination is to elicit essential new information that has not yet come out of a witness, or to properly challenge the reliability of evidence that has come out by reference to other known facts, reason or plain old common-sense. It also permits a witness, in fairness to them, to reply to suggestions that may run counter to their own evidence (known as "putting your case").

What tribunal would not be assisted by that process? After all, licensing decisions, like all judgement calls, are only as

good as the facts upon which they are based. As the great economist John Maynard Keynes wryly observed: "When the facts change I change my mind; what do you do sir?" The quality of that evidence is often best tested by skilful cross-examination or questioning (and to repeat, they amount to the same thing). The sounder the evidence, the better the decision is likely to be. On the other hand, as computer scientists would say: "GIGO" - garbage in, garbage out.

A good cross-examination may fire questions like a torpedo to the heart of the case. Its effect should be more reminiscent of a high-precision sniper shot than a blunder-buss. A scalpel not a machete. It is best done firmly, politely, succinctly and straightforwardly. It is not intended to intimidate or bully a witness. Members should always intervene to protect a witness if the advocate steps beyond what is proper or if the questions are unhelpful in deciding the issues in any particular case. No truthful and accurate witness will ever fail under the testing scrutiny of a cross-examination. Indeed such a witness's evidence is often strengthened as a result of passing the challenge (hence the reason experienced advocates will often decline the opportunity to cross-examine a plainly honest and reliable witness before a sub-committee).

So when an advocate asks a sub-committee to ask a few questions in cross-examination, members would be well-advised not to refuse the request automatically but to consider it on its merits. After all, should the case be considered on appeal, then the Magistrates' Court will have the benefit of seeing those same witnesses cross-examined at length if required. Why should sub-committees routinely deprive themselves of the same advantage?

Gary Grant
Barrister, Francis Taylor Building

Summer Training Conference 19 June 2019 Oxford

The Institute's Summer Training Conference (previously the National Training Day) will return to Oxford for 2019.

The Summer Training Conference will take place once again at The Oxford Belfry Hotel, which is conveniently located near the M40 motorway.

The aim of the training day is to provide a valuable learning and discussion opportunity for licensing practitioners to increase understanding and to promote discussion in relation to the subject areas and the impact of forthcoming changes and recent case law.

Full details of the agenda and training fees can be found in our e-news our Licensing Flash emails and on our website **www.instituteoflicensing.org**

There is a residential option for this event for the night of 18 June. Residential places are limited so book now.

For residents the evidence does not always *Stack* up

The views of residents can be as expert as those of any professional witness, argues **Richard Brown**

"I think that the people of this country have had enough of experts." Rt. Hon. Michael Gove MP.

When the dust settles on Brexit, and the machinations and motivations of the protagonists are dissected by historians, it is likely that Michael Gove's (in)famous prognostication in 2016 will feature prominently for those seeking a hubristic symbol for the folly they feel is about to befall the nation. In fact, Mr Gove's soundbite was itself taken out of context – what he actually said, parcelled up by interruptions from his interlocutor, was "I think that the people of this country have had enough of experts from organisations with acronyms saying that they know is (sic) best and getting consistently wrong, because these people are the same ones who got (sic) consistently wrong." Nevertheless, in keeping with the times, it is not that which is said that matters, but that which is remembered.

Anyhow, Mr Gove's infelicity popped into my mind during an interesting talk at the Institute of Licensing's Annual Training Conference last November. Charles Holland was dissecting a Licensing Act 2003 appeal in respect of a premises to be known as Stack, in which they had acted for different parties.[1] The talk provided a companion piece to an article by Charles in the edition of the *Journal* published to coincide with the conference. The talk and article covered *inter alia* the vexed issue of experts in licensing applications and appeals – or, more specifically, independent expert witnesses. Charles helpfully provided a link to the judgment, which I thought I could usefully skim read for the gist in between sessions. I was soon disabused of that notion as I scrolled through the first few pages, and 133 pages later I came to the end. It is an extraordinarily detailed judgment[2] and covers a great deal more than expert witnesses, although the District Judge's analysis of the independent expert evidence constituted a significant proportion of her judgment. One cannot help but form the impression that the District Judge would be tempted, in this context at least, to see perspicacity in Mr Gove's famous quote.

The District Judge in *Stack* demurred from giving a root and branch exposition of the role and responsibilities of independent expert witnesses, but did nevertheless make some interesting comments of wider applicability during the course of the judgment:

> *6. The purpose of the Court hearing expert or "skilled" evidence is to assist the Court to determine matters about which it cannot be expected to possess an appropriate degree of knowledge or understanding to otherwise do so. The evidence should be relevant to the issues the court has to determine and required to assist the court in making that determination. Such evidence will be used as part of the evidential picture and evaluation of the case as a whole. Given the nature of skilled or expert evidence, it will often form a significant part of that evidential picture and evaluation process.*

The role of experts is of professional interest and relevance to everyone involved in licensing. Why? Because the s 182 Guidance says so[3] (my emphasis):

> *Each responsible authority* ***will be an expert*** *in their respective field, and in some cases it is likely that a particular responsible authority will be the licensing authority's main source of advice in relation to a particular licensing objective.*

In fact, the role of the police was elevated in previous iterations of the Guidance to that of a kind of omniscient sage, in the much-criticised section which has now been deleted but which directed licensing authorities to "accept all reasonable and proportionate objections from the police".

It is also relevant to residents. I often seek in my role representing residents to elevate them to the status of *de facto* experts at licensing sub-committee hearings. Not technical experts with acronyms after their names, perhaps,

1 *Endless Stretch Limited v Newcastle City Council and Danieli Holdings Limited,* Newcastle-upon-Tyne Magistrates' Court, unreported.

2 https://docs.wixstatic.com/ugd/241720_7c6a8499d29b4b629b1943bf4aa94356.pdf

3 Section 182 Guidance para 9.12.

but experts at what actually goes on in their streets and neighbourhoods on a day to day (or night to night) basis. Their "expertise" is in how noise actually does or is likely to in the future emanate from the beer garden at the rear of the premises; what time their children are woken up; what effect customers leaving the premises late at night will have on them. This evidence, appropriately scrutinised, can often be of more value to a licensing sub-committee than an expert report forecasting what is likely to happen or analysing from an academic perspective what did happen, based on what is inevitably a snapshot from the short time the author will have spent at the premises and vicinity. This is why it is important for good and strong decision-making that these resident "experts" are encouraged to put forward their views and contribute fully at hearings. They can fill the contextual gap which can be missing from independent expert witnesses or from responsible authorities who can only be guided by information they have at their disposal, eg, *reported* crimes, or *recorded* noise complaints. Sometimes this does not reflect the situation "on the ground".

The points made by the District Judge in *Stack* apply equally to the evidence of residents – in fact, arguably more so. The s 182 Guidance and the case law are replete with references to the nature of licensing authority decision-making and the importance of the views of residents. The oft-quoted section of the Court of Appeal's judgment in *Hope and Glory*[4] that the decision-making of the licensing authority is the "exercise of a power delegated by the people as a whole to decide what the public interest requires" is one of the touchstones of licensing law. The s 182 Guidance echoes this[5] (my emphasis):

> *In determining the application with a view to promoting the licensing objectives* ***in the overall interests of the community…***

Of course, expert witness reports usually come with a level of experience, relevant qualifications and technical expertise which a resident simply cannot match. On the face of it, expert reports provide objective evidence; residents provide subjective evidence. But it is rarely that binary. I have seen many expert reports and it is quite clear that on occasion the line can seem blurred between true independence, and being little more than a mouthpiece for the applicant. This can often irritate residents more than anything else – residents can feel aff onted that an individual with acronyms after their name (one of the fabled "experts" who were in Michael Gove's sights) purports to know more about their neighbourhood than they do, often on the somewhat flimsy basis of a single visit on an unrepresentative evening. It is particularly galling if a subjective opinion is being given – and especially when presented as fact and / or arguably out with the area of expertise. Sometimes a report contains sections which would not look out of place in an applicant's skeleton argument or pre-hearing submissions.

A typical issue which illustrates the difficulty for a licensing sub-committee in determining whose evidence it prefers is whether there will be noise on dispersal. An independent expert witness may say that noise levels are masked by noise on street, eg, from traffic, and so extending the hours will not add to noise levels and will not therefore add to nuisance. Presented as expert evidence this can be persuasive, yet it often conflicts with residents' lived experience and anecdotal evidence to the contrary – that people noise or the slamming of a door, even if in short bursts (in fact, especially if in short bursts), wakes them up when the "normal" street noise, eg, traffic, does n t.

This is where the acuity of a licensing sub-committee is put to the test. How to plough through conflicting evidence? How to reconcile the inherent paradox of preferring the experiences of "non-experts" to the evidence of "experts"? The answer, or at least a strong steer to and succour for a sub-committee which has deep sympathy for what residents report as their lived experiences, can be found in the case law. The ridicule thrown the way of Mr Gove was of course predicated on this dissonance: who needs to listen to experts? Yet this difficulty is at the heart of licensing. The decision-making process is, again as per *Hope and Glory,* "essentially a matter of judgement rather than a matter of pure fact". [6] Decisions "involve an evaluation of what is to be regarded as reasonably acceptable in the particular location".[7] Who knows the location best? Those who live there, or those who visit for a snapshot? I try to emphasis these points to residents when I advise them. I am sometimes asked by residents: "how many objections do we *need* to get them to listen?"; "how many people *need* to attend the hearing?"; "does it matter that here are more representations in support of the premises than in support of the review?"

My answer is always the same: licensing is not (or should not be) a numbers game. It is not a matter of "they who shout loudest". It is the content of representations that matters. "Hearsay" which can be objectively tested is capable of constituting powerful evidence, as in *Marathon*[8] where focused and specific evidence from a local resident which could be described as "expert", given that he lived adjacent

4 *R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31, para 41.

5 Section 182 Guidance para 9.38.

6 *R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31, para 42.

7 Ibid.

8 *Marathon Restaurant v London Borough of Camden* [2011] EWHC 1339 (Admin).

and actually experienced the nuisance, was key to the judgment:

Had the hearsay been broad in scope, difficult to isolate, vague or shifting in type, and as a consequence difficult or impossible to confront there might be some force in the Appellant's submissions…The DJ used it as he was entitled to do in setting the context of the background upon which he was to base his conclusions.

This does not seek to diminish the value of independent expert evidence of the type critiqued in *Stack*. This evidence, of course, has an important place in licensing and can play a valuable part in assisting a licensing authority in gaining a full, contextualised picture of the likelihood of an application impacting on the licensing objectives. But in my submission, it can usually only augment, not replace or supersede, residents' considered, fair, specific and properly made representations, even if "hearsay". Where such evidence conflicts, a licensing authority should consider very carefully which expert evidence they prefer.

Richard Brown MIoL
Solicitor, Licensing Advice Service, Westminster CAB

Rethinking Welsh taxi licensing

Wales is currently engaged in a major review of taxi licensing which could see some radical reforms, as **Tara O'Leary** explains

In December 2018 the Welsh Government published *Improving Public Transport: A Welsh Government White Paper on proposals to legislate for reforming the planning and delivery of local bus services and licensing of taxis and private hire vehicles and launched an accompanying public consultation*. [1] The White Paper sets out extensive proposals for reform of taxi and private hire licensing in Wales, which are likely to interest readers of the *Journal* from both sides of the border.

The most radical proposal recommends the abolition of local authority licensing powers, to be replaced by a single, centralised Welsh national licensing authority: the Joint Transport Authority (JTA), which would also regulate other forms of public transport. The purpose of the JTA for taxis and private hire vehicles (PHVs) would be to create a standardised licensing area encompassing all of Wales, and to streamline enforcement and information-sharing. The White Paper also puts forward three other key proposals:

1. Introducing national standards to eliminate or reduce existing variations between the twenty two local authority districts in Wales.
2. Strengthening powers to take enforcement action against vehicles operating "out-of-area".
3. Clarifying and improving powers to share relevant safeguarding information, possibly by creating a Welsh database to track refusals, suspensions and revocations.

The White Paper thus represents the most far-reaching attempt to date to implement some of the Law Commission's recommendations from 2014, and in some respects goes beyond the proposals recently made by the Task and Finish Group in September 2018. The consultation therefore offers practitioners an important opportunity to comment (again) on the shape of licensing law to come. The closing date for submissions is 27 March 2019.

Background: taxis and PHV licensing in Wales

Taxi and PHV licensing in Wales is currently regulated by the same legislation which applies in England: namely, the Town Police Clauses Act 1847 in respect of hackney carriages, and the Local Government (Miscellaneous Provisions) Act 1976 (LGMPA 1976) in respect of PHVs.

Historically, there has been a degree of confusion about whether or not taxi and PHV licensing had been devolved to the National Assembly for Wales (the Assembly) under the Government of Wales Act 2006. [2]

The Commission on Devolution in Wales, known as the Silk Commission, was established in 2011 with a remit to review "the powers of the National Assembly for Wales … and to recommend modifications to the present constitutional arrangements that would enable the United Kingdom Parliament and the National Assembly for Wales to better serve the people of Wales". In its final report of March 2014 it came to the conclusion that taxi and private hire regulation had not yet devolved, but supported a recommendation that arrangements were now made to do so. [3]

In May 2012, when the Law Commission published its consultation paper, *Reforming the law of taxi and private hire services* (Consultation Paper No 203), it had stated that regulatory powers in this field had already been devolved to the Assembly. However by May 2014, when it published its final report and draft bill, *Taxi and Private Hire Services* (Law Com No. 347), the Law Commission had changed its position and proceeded on the assumption that powers had not devolved, presumably having considered the findings of the Silk Commission.[4]

The UK government accepted the Silk recommendations on devolution of taxi and private hire licensing in February 2015, [5] pointing out that the Welsh Government was by then responsible for confirming any byelaws applicable to taxis and PHVs made by Welsh local authorities. Those authorities set their own policies and standards for licensing taxis and private hire vehicles, informed by the *Best Practice Guidance* published by the (English) Department for Transport.

1 https://beta.gov.wales/improving-public-transport

2 See Matt Lewin, "Devolving taxi and private hire vehicle licensing powers to Wales", *Journal of Licensing* Issue 13, November 2015.

3 See paragraphs 7.2.17 and 7.3.16: https://webarchive.nationalarchives.gov.uk/20140605075522/http://commissionondevolutioninwales.independent.gov.uk/files/2014/03/Empowerment-Responsibility-Legislative-Powers-to-strengthen-Wales.pdf

4 https://www.lawcom.gov.uk/project/taxi-and-private-hire-services/

5 HM Government, "Powers for a purpose: towards a lasting devolution settlement for Wales", February 2015 para. 2.5.16

The matter has now been clarified and given some finality by the Wales Act 2017. With effect from 1 April 2018, the 2017 Act inserts a new section 108A and Schedule 7A into the Government of Wales Act 2006. Although Schedule 7A lists matters which remain reserved to Westminster, para. 116 creates an express exception (and thereby devolves competence to the Welsh Ministers) for "Licensing of taxis, taxi drivers, private hire vehicles, private hire vehicle drivers and private hire vehicle operators (but not enforcement by means of penalty points)".

Section 28 of the 2017 Act also amended ss 10 and 13 of the Transport Act 1985, giving the Welsh Ministers executive competence to make certain regulations relating to taxis.

Curiously however, competence for "public service vehicle operator licensing" remains a reserved matter: see para. 113 of Schedule 7A. Therefore this area does not form part of the current consultation.

Previous consultations

The Welsh Government first gave some indication of its views on the fitness of the existing system in 2012, when it submitted a formal response to the Law Commission consultation on taxi and PHV licensing.[6] Intriguingly, at that time it appeared to support proposals to remove the "two-tier" distinction between taxis plying for hire and PHVs. Its submissions said:

> *The distinction between taxis and PHVs is meaningless to consumers. Retaining a two-tier system would not in itself result in extra confusion for consumers, but the review provides an opportunity for regulators to take a decision that would help to simplify the industry for consumers. A single-tier system would be preferable. The existence of a two-tier system appears to be a factor more of the age of the extant legislation than any particular merits that system may have.*

There were also indications within that response that the Welsh Government supported proposals to:

- Introduce national safety standards for taxi and private hire services, replacing the local standards which have seen requirements vary from district to district.
- Specify the new national standards for drivers within primary legislation, including the requirement that s / he must be a "fit and proper" person, to ensure common standards throughout the country.
- Remove restrictions on "cross-border" operations for PHVs, on the basis they would no longer be necessary in light of the introduction of national standards.
- Permit local authorities to enforce against vehicles, drivers and operators licensed in other licensing areas (again, thanks to national standards); and
- Establish a statutory requirement in primary legislation for licensing authorities to establish arrangements and procedures for co-operating, including on "cross-border" enforcement cases.

It appears that these views have evolved to some degree in light of the Law Commission's final report and draft bill of May 2014, as well as the limited changes made by the Deregulation Act 2015.

In June 2017 the Welsh Government launched its own consultation on *Taxi and private hire vehicle licensing in Wales,* in anticipation of the planned devolution of licensing powers.[7] This had the stated aim of reconsidering the Law Commission's final recommendations for the purpose of bringing new arrangements into effect in Wales. Most notably it re-consulted on the possibility of removing the distinction between taxis and PHVs:

> *19 As highlighted in the Law Commission's report, a number of persuasive arguments were advanced in favour of removing the distinction between taxis and private hire vehicles. There is recognition that the public does not understand the distinction and advancement in technology means that a booking for a journey can be made within minutes of the journey taking place. Moving to a single tier regime can also better simplify licensing arrangements, the setting of national standards whilst making enforcement more straightforward.*
>
> *20. In London for example, the distinction between the taxi that can be hailed on the street and private hire vehicles is perhaps more understood, with London taxis providing the convenience of immediate hire using fares that are regulated.*
>
> *21. Moving to a single tier system could however, combine the characteristics of both taxis and private hire vehicles, enabling prebooked and "there and then" hires both operating under a regulated fares model.*

With the benefit of hindsight, it is interesting to see that this consultation proceeded on the assumption that local authorities would remain responsible for licensing functions, with no discussion of the possible centralisation of services. Otherwise the consultation again focused on national standards to be set by the Welsh Ministers, with the goal of

6 http://www.lawcom.gov.uk/app/uploads/2015/06/TPHV_331_-_Welsh_Government_response.pdf

7 https://beta.gov.wales/taxi-and-private-hire-vehicle-licensing-wales

making it easier for the trade to operate "out of area" on the one hand, and strengthening local authority enforcement powers in "cross border" cases on the other.

The Consultation Outcome Report, published in January 2018, found that the largest proportion of responses (45%) favoured maintaining the distinction between taxis and PHVs. Unsurprisingly, it seems many of these respondents were drivers, whereas those in favour of removing the distinction (39%) were mainly public authorities. The report noted the submissions made by the Institute of Licensing's Taxi Consultation Panel, the group responsible for the national survey in 2010, which favoured a simplified single-tier system. Most respondents supported the introduction of national standards, although many wanted to restrict cross-border working, particularly drivers in Cardiff who worried about vehicles from other districts operating in the area and undercutting earnings.

Subsequently, in September 2018 the Task and Finish Group published its report on *Taxi and private hire vehicle licensing: steps towards a safer and more robust system*[8] and on 13 November 2018 a debate on the Report took place in the House of Commons. The group's recommendations were largely focused upon improving safety, calling for "urgent" revision of existing legislation "to provide a safe, clear and up to date structure that can effectively regulate the two-tier trade as it is now." The group recommended legislating for national minimum standards and urgent updating of the (2010) *Best Practice Guidelines;* the introduction of licensing authority powers to enforce against "cross border" taxis and PHVs or a requirement that all journeys either start or end within the licensing area; the introduction of statutory definitions of "playing for hire" and "pre-booking"; and the use of licensing conditions to require drivers to comply with requests from compliance offi ers in other local authority districts; and several other measures designed to improve safety.[9]

The group also made no recommendations about centralisation of licensing powers, and it did not recommend removal of the "two-tier" system. Rather, its proposed definitions of "plying for hire" and "pre-booking" were expressly intended to maintain and strengthen the existing divide.

What is being proposed?

Now we have the White Paper, launched in order "to seek views on the Welsh Government legislative proposals for reforming … the licensing of taxis and other private hire vehicles", with the explicit intention of modernising a system which it considers no longer fit for purpose. It aims to address three key identified problems:

- Inconsistent licensing standards between districts, with different costs for operators and variable qualify and safety standards for passengers.
- The absence of a statutory enforcement mechanism to deal with "cross border" operations.
- Difficulties in sharing safeguarding information amongst local authorities, which impedes enforcement against drivers licensed in one area and working in another.

These issues echo most of the recommendations made by the Law Commission and the group as well as the Welsh Government's own previous position. Curiously, however, there are no further references to removal of the "two-tier" system, and thus it appears this recommendation has now been quietly shelved.

There are four key proposals.

Proposal One: Conferring a power on the Welsh Ministers to create national standards, to which the JTA or local authority must have regard when issuing licences. All taxis and PHVs would have to meet these standards, which would be set out in Regulations (and which would themselves be subject to further consultation). The consultation invites comments on matters to be included and excluded from national standards, and practical obstacles which may arise in setting common standards, amongst other matters.

Proposal Two: Amending ss 60 and 61 LGMPA 1976 to allow the JTA or local authorities to suspend or revoke a licence relating to any vehicle operating in its area, ie, even if licensed by another local authority. This measure is intended to permit enforcement where "borders have been eroded by technological advancement", on the basis that "there is no good reason why a local authority should not be able to take action against any taxi or PHV operating in its area".

However it is also proposed "to enable a local authority or JTA to issue a lesser sanction to any vehicle operating in its area". It is unclear what form of lesser sanction is anticipated here (eg, a fine?); whether only a sanction short of suspension or revocation would be permitted (or if lesser sanctions would be one of a range of enforcement options available); and what the objective or justification for a lesser sanction would be. This proposal will need to be considered carefully

8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745516/taxi-and-phv-working-group-report.pdf

9 See James Button, "Taxi and private hire vehicle licensing – steps towards a safer and more robust system", *Journal of Licensing* Issue 22, November 2018.

alongside changes made under Proposal Three (below): what will be the arrangements for the "home" authority to be kept informed of enforcement action taken against one of their drivers by another district? Moreover, will the "full" sanction of suspension / revocation remain available to the "home" licensing authority if another district has already imposed a "lesser" sanction?

These proposals would maintain the present "immediacy" provisions which defer the effect of any decision to suspend or revoke for 21 days, unless it is in the interests of public safety to suspend / revoke immediately.[10] It is not clear whether the White Paper intends to uphold "immediacy" provisions only in respect of drivers' licences (as it only refers to the sections of the LGMPA which deal with drivers), but presumably vehicle and operators' licences will also be considered.

Proposal Three: Imposing a duty on the Welsh Ministers to create a database or make other information-sharing arrangements to ensure that relevant information can be shared for the purposes of safeguarding. There is currently no legal requirement for local authorities to share information with one another to assist their decision-making on issues such as historic refusals, suspensions or revocations of drivers' licences.

A precedent for this type of mechanism is the database of rogue landlords and property agents, created for local housing authorities in England under the Housing and Planning Act 2016.[11] It is intended to allow authorities which enforce HMO (house in multiple occupation), selective and additional licensing regimes to keep track of and share information about landlords and agents who have been convicted of housing management offences, "especially those operating across council boundaries". The database was opened around April 2018, although media reports have indicated that it was still empty as recently as last October.[12] The Mayor of London also operates a "Rogue Landlord Checker", in which all London councils voluntarily participate.[13]

Proposal Four: Creating the JTA to redirect all existing taxi and PHV licensing functions away from local authorities. This would include licenssing, fee and fare-setting, enforcement, hearing appeals arising from licensing decisions, prosecutions and deciding matters such as whether to apply quantity controls to taxis.

The given rationale for this proposal is simply that centralisation represents the best option for solving the three key identified problems and implementing Proposals 1-3. No explanation is given for the genesis of this idea, which was not mooted within the Welsh Government's 2017 consultation. The Law Commission made no recommendation for centralisation of licensing functions, and the Task and Finish Group limited itself to a proposal that metropolitan districts in large cities could emulate London by combining themselves into one licensing area. The White Paper is therefore more ambitious than previous projects in its willingness to shake up the fundamental structure of licensing. Yet it is scant on any details of the structure, form and funding arrangements for the proposed JTA, and offers no analysis of how it might impact (positively or negatively) local authorities' capacity and expertise to deal with their other licensing functions, particularly premises licensing under the 2003 Act.

Importantly, it is unclear whether by "hearing appeals arising from licensing decisions", the JTA might convene an internal panel or adjudicator to replace the Magistrates' Courts as the primary forum of appeal. Any such mechanism would presumably need to have further rights of appeal to the courts, although this might limit the volume of cases which are ultimately litigated.

Although the White Paper's preferred option is to centralise licensing within the JTA alongside implementation of Proposals 1-3, the consultation also seeks views on the implementation of Proposals 1–3 without the creation of the JTA as a delivery vehicle. This would involve legislation for national standards to be implemented and enforced by local authorities, and creating a mechanism by which local authorities can share relevant information.

Many questions arise from this White Paper: those responding to the consultation will no doubt wish to offer answers. Whatever else may be said however, no one is likely to argue that reform in this sector has been rushed or under-considered.

Tara O'Leary
Barrister, Cornerstone Barristers

10 Sections 61(2A), (2B) and 77 LGMPA 1976 read together with s 300 of the Public Health Act 1936.

11 See Part 2, Chapter 3 of the 2016 Act, and Statutory Guidance for Local Housing Authorities of April 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697637/Database_of_rogue_landlords_statutory_guidance.pdf#page=9&zoom=100,0,97

12 https://www.theguardian.com/business/2018/oct/24/government-policing-of-rogue-landlords-labelled-pathetic

13 https://www.london.gov.uk/rogue-landlord-checker

Institute of Licensing News

Membership – it's time to renew

Our membership year comes to a close on 31 March, and members will then be invited to renew. The online renewal function will go live on 1 April, at which point existing members with full year memberships will be able to renew online by logging in and going to "Manage Account" and following the instructions under "Renew Membership".

The IoL team are keen to help and can be contacted via membership@instituteoflicensing.org We will be contacting all members who have signed up for direct debit as well as members who joined part way through the previous membership year to assist with the renewal process.

National Training Conference 2018

It was great to see so many of you at the NTC last year. Once again this proved to be a sell-out event with over 350 delegates, and more than 70 sessions presented by 90-plus speakers! A packed programme delivered a fantastic range of information, opinions, workshops and discussions on all areas of licensing, and the feedback so far has been outstanding. As always, we are so grateful to all our speakers and sponsors who make this event a success year on year, and to all those who attended – some of you are very familiar with the event, while others counted the NTC as their first licensing conference experience.

We return to the Crowne Plaza in Stratford for this year's event which will be held from 20-22 November. Planning is already underway to ensure that the event continues to be the essential licensing conference of the year and we are looking forward to seeing new and familiar faces.

The Jeremy Allen Award 2018

The Jeremy Allen Award is an annual recognition awarded jointly by the Institute of Licensing and Poppleston Allen Solicitors to celebrate excellence in licensing and related fields and to award those practitioners who "go the extra mile".

At last year's NTC, we were delighted to present the 2018 Jeremy Allen Award to Stephen Baker, chairman of National Pubwatch. Stephen's story is fascinating given his involvement in Pubwatch was triggered by a serious incident in licensed premises which he was tasked with addressing through his role as an inspector with Thames Valley Police in 1994. His involvement started when National Pubwatch was first established in 1997 and has been entirely voluntary ever since. He has led the organisation in his role as National Chair for the last 12 years.

This dedication and commitment is exactly what the award was established for.

On receiving the award, Stephen said: "Jeremy Allen was a strong supporter of National Pubwatch and I am honoured to receive this award in his name. It means a great deal to me to have the work of National Pubwatch recognised by such a prestigious organisation as the Institute of Licensing."

Nominations are by third party only. Other nominees and finalists for the Jeremy Allen Award 2018 were:

- Councillor Alan Bolshaw, City of Wolverhampton Council (Finalist)
- PC Jason Hitchcock, Metropolitan Police (Finalist)
- Myles Bebbington, Huntingdonshire District Council
- Daniel Power, London Borough of Lewisham
- Victoria Henley, North East Lincolnshire Council
- PC Steve Pellow, Metropolitan Police
- Sue Abbott-Smith, Cornwall Council
- Bob Patterson, West Yorkshire Police
- PC Neil Parnham, Metropolitan Police

We are delighted to continue this award with Poppleston Allen and look forward to reviewing nominations for the 2019 award. The nomination period opens on 3 June.

Fellowship award

In addition to the Jeremy Allen award, the IoL will consider candidates for Fellowship, which is an award level membership.

Fellowship is awarded, following nomination by two members of the Institute, to an individual where it can be demonstrated to the satisfaction of the Institute's Membership and Qualifications Committee that the individual:

- is a member of the Institute or meets the criteria for membership; and
- has 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:

a Recognised published work

- Research leading to changes in the licensing field or as part of recognised published work
  a Exceptional teaching or educational development
  b Legislative draftin
  c Pioneering or taking a leading role in licensing initiatives or developments leading to significant changes or having a significant impact.

It is stressed that Fellowship is intended for individuals who have made exceptional contributions to licensing and / or related fields rather than those who have simply done their jobs well. If you wish to nominate an individual for consideration for Fellowship, please let us know via email to info@instituteoflicensing.org

All awards are presented annually at the IoL's Gala dinner which is held during the National Training Conference in November each year.

National Licensing Week 2019

This year's National Licensing Week (NLW) will run from 17-21 June. The IoL established NLW in 2016 in part to mark its twentieth year, but also to provide a unique platform for all licensing practitioners to celebrate the role licensing plays in business, home and leisure, keeping people safe and enabling them to enjoy their social and leisure time with confidence.

The work that goes on behind the scenes by licensees, operators and regulators is often invisible to the public - until something goes wrong. NLW is a chance to change that and raise awareness across the country. It's a chance to "shout out" about the work you do on a daily basis and also a chance to celebrate and promote partnership working.

The underlying message of the initiative is that "licensing is everywhere", and we continue to use daily themes to demonstrate how licensing effects daily lives:

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

The aim of the week is to raise awareness on the role licensing plays in everyday life. For full details on the week please visit http://www.licensingweek.org. The last couple of years in particular have seen some stand-out examples of organisations using the NLW initiative to showcase their organisations and their individual roles in licensing; and in the case of local authorities, to raise public awareness of the licensing regime and what it achieves.

There was a marked increase in engagement with the initiative in 2017 and again in 2018 and we are keen to seen the trend continue with more job swaps, planned activities and lots of social media interaction: 2019 is a great opportunity to raise awareness, promote positive partnerships and to engage with all parties.

To find out more and get involved please email NLW@instituteoflicensing.org We look forward to hearing from you! #NLW2019 #getinvolved #licensingiseverywhere

Summer Training Conference

The IoL's Summer Training Conference (previously the National Training Day) will take place at the Oxford Belfry Hotel on Wednesday 19 June.

Taxi courses – in association with Button Training

New for 2019, we are delighted to announce that the IoL will be working in association with Button Training to provide taxi licensing training courses at both Basic and Advanced levels. The first of the Basic courses will run in February and March, and we will follow these courses with the Advanced level courses as follows:

- 9 September - Rushcliffe Borough Council
- 11 September - Basingstoke Borough Council
- 17 September - Taunton Holiday Inn
- 24 September - Preston City Council
- 26 September - Harlow Council

The courses will take account of current Best Practice Guidance and any revisions to it, as well as emerging statutory Guidance (s 177), official reports, current and recent consultations and all relevant case law.

Safeguarding through licensing

Safeguarding continues to be a major concern and an area where licensing is a key tool to obstruct and disrupt sexual exploitation of children and vulnerable adults. The "Safeguarding through licensing" courses bring expert speakers together to discuss how licensing can be used to its full potential, as well as looking at real case studies across the country.

Two safeguarding training events are currently planned as follows:

- 2 July - Taunton
- 2 October - Doncaster

Both events can be booked online via the IoL website.

Consultations and engagement

Tax conditionality – HMRC

The Government has announced that it will consider legislating in Finance Bill 2019-2020 to introduce a tax registration check linked to licence renewal processes for some public sector licences.

Applicants would need to provide proof that they were correctly registered for tax to be granted licences. This would make it more difficult to operate in the hidden economy, helping to level the playing field for compliant businesses.

This follows an initial consultation in December 2017 when HMRC consulted on proposals in their "Tackling the hidden economy: public sector licensing" public consultation.

Having considered feedback from the consultation, the Government intends to introduce legislation applying conditionality in the following licensed sectors in England and Wales:

- The taxis and private hire vehicles (PHVs) sector.
- The waste sector.
- The scrap metal trade.

The Government will develop these proposals for a future Finance Bill and work with key stakeholders in the meantime to ensure that the new process is simple and as easy as possible to administer and comply with.

The Institute of Licensing responded to the initial consultation and has been in contact with HMRC following the Government's response. The IoL will work with HMRC to ensure that IoL members are kept abreast of plans to implement these changes.

Call for evidence: airside alcohol licensing at international airports in England and Wales

The Institute of Licensing has responded to the call for evidence in relation to airside alcohol licensing at international airports in England and Wales.

Much of the call for evidence sought evidence information about the nature and extent of issues related to alcohol sales in airside bars, but also looked at the potential considerations for removing the current exemptions under the Licensing Act 2003.

The call for evidence followed the recommendation of the House of Lords Select Committee following the post-legislative review of the Licensing Act 2003. The report from the Select Committee recommended that the Government revokes the exemption from the Act that currently applies to 24 international airports and to any ports and hoverports in England and Wales:

The designation of airports as international airports for the purpose of section 173 of the Licensing Act 2003 should be revoked, so that the Act applies fully airside at airports, as it does in other parts of airports. The 1964 and 2003 Acts both refer to ports and hoverports as well as to airports, so that the same arrangements can be made portside. Our discussion has centred on airports. Any similar designations made for ports and hoverports should also be revoked.

In its response to the call for evidence, the IoL cited the views from members following the publication of the Select Committee report. Responses were mixed, with around 50% of members agreeing with the recommendation.

Those in support of the Licensing Act applying to airside premises considered that the protections and legal restrictions afforded by the legislation are as applicable and important airside as in other places, and in the main this concerned the sale of alcohol to persons who are underage or drunk, the training of staff selling alcohol and the regulation / control of behaviour within the airport, together with the accountability of the premises management where the premises and alcohol sales are not managed responsibly.

Arguments against the application of the Act airside cited the potential difficulties for licensing authorities to access airside areas to inspect premises, either to ensure compliance or investigate complaints. In addition, it was considered that airside areas are tightly controlled and that there should be more than sufficient means to regulate and control the behaviour of passengers and the responsible management of airside premises without the need to add an additional layer of regulation.

Welsh Government consultation – improving public transport

This consultation from the Wales Government came as a surprise given the complete change in direction compared with a previous consultation in 2017. In summary, the consultation proposed four recommendations, the first three of which are not contentious:

1. National minimum standards for drivers, operators and vehicles.
2. Enforcement powers given to any licensing authority in relation to vehicles or licensed elsewhere; and
3. An information sharing mechanism to promote safeguarding.

National minimum standards will be beneficial, and arrangements should certainly be made to enable cross-border enforcement and continue to improve collaborative working between authorities.

The fourth proposal, however, is of some concern. The proposal is for a single joint transport authority to licence taxis across the whole of Wales. This would cut across the existing infrastructure of 22 Welsh local authorities and undermine local policy, regulation and accountability, to the detriment of local communities. (See article p25)

There is no consideration in the proposal as to how this would work, or the impact on the taxi industry or the population of Wales. If hackney carriages can stand or ply for hire across the whole of Wales, it is not difficult to foresee that a great many will concentrate on Cardiff on rugby and football match days, and other big events. Likewise, the same would happen at the National Eisteddfod, the Royal Welsh show, and possibly even seaside resorts in the summer months.

A single private hire operator could dispatch vehicles across the whole country, and drivers will be free to move wherever they felt the work was available.

The Institute of Licensing will make a formal response to the consultation and has surveyed members across England and Wales to inform its final response.

The consultation will close on 27 March 2019.

Events Calendar 2019

March 2019

18 Taxi licensing (Basic) - Taunton
19-22 Professional Licensing Practitioners Qualification - Birmingham
21 South West Region Meeting & Training Day - Bath
21 Working in safety advisory groups - Eastern region
29 London Region Meeting & Training Day - London

April 2019

2-5 Professional Licensing Practitioners Qualification - Swindon
2 East Midlands Region Meeting & Training Day - Nottingham

May 2019

14-17 Professional Licensing Practitioners Qualification - Birmingham
23 West Midlands Region Meeting & Training Day - Cannock

June 2019

4 South East Region Meeting & Training Day - Winchester
4 Sex Establishment Licensing - London
6 Scrap Metal Dealers Act - Rother
12 North West Region Meeting & Training Day - Manchester
13 Scrap Metal Dealers Act - Preston
17-21 National Licensing Week
19 Summer Training Conference - Oxford
24 Gambling Training - London
25-28 Professional Licensing Practitioners Qualification - Manchester

July 2019

2 Safeguarding through Licensing - Taunton
9 Taxi Conference - Sheffiel

August 2019

8 East Midlands Region Meeting & Training Day - Nottingham

September 2019

3 West Midlands Region Meeting & Training Day - Solihull
4 & 5 Zoo Licensing - Yorkshire Wildlife Park - Doncaster
17-20 Professional Licensing Practitioners Qualification - Leeds
24-27 Professional Licensing Practitioners Qualification - London

October 2019

2 Safeguarding through Licensing - Doncaster
8 Taxi Conference - Swindon
?-? Professional Licensing Practitioners Qualification - Wales

November 2019

20-22 National Training Conference

New proposals for regulating breeding of popular pets

The Scottish Government is consulting on new regulations for the licensing of dog, cat and rabbit breeding activities in Scotland. **Stephen McGowan** explains the key points

The Scottish Government's consultation proposals, issued in September last year, set out a modern system of licensing allowing for independent accreditation for applicants and looked at appropriate thresholds for licensing, linked to the size of the business undertaking and having regard to organisations with multiple premises.

The main features of the modern system as set out in the consultation document are:

- A threshold number of breeding animals determining whether licensing is to be applied.
- Licences should be flexible and may be awarded, on a risk-based assessment, for a period of up to three years.
- An exemption from inspection requirements for businesses assured by a UKAS accredited body.
- Licences to be issued at any point in the year for a fixed term but can be suspended or revoked at any time.
- Discourage the breeding of dogs, cats and rabbits with a predisposition for genetic conditions which lead to health problems in later life.

There is no question that reform is needed. The current licensing regime has not kept abreast of trends and given the size of many litters and the significant sums of money that young animals can command - particularly "fashionable" or so-called "designer" or "hybrid" breed dogs - animal breeding can no longer be regarded as an activity which should be regulated under legislation passed in a very different welfare and economic environment.

Current legal framework

Dog breeding in Scotland is currently governed by the Breeding of Dogs Act 1973 and the Breeding and Sale of Dogs (Welfare) Act 1999. Under these Acts, a licence is required for any individual who keeps a breeding establishment (where a person undertakes the business of breeding dogs for sale, owns or is responsible for breeding bitches or dams which produce a total of five or more litters between them in a 12-month period). The breeding of cats and rabbits is currently unregulated; and in fact the Scottish Government's consultation proposes the first attempt to regulate the breeding and sale of rabbits anywhere in the UK.

The dealing of young dogs and cats is currently regulated by the Licensing of Animal Dealers (Young Cats and Young Dogs) (Scotland) Regulations 2009 which require any individual who sells or acquires a cat or dog at less than 84 days old, with a view to selling, to hold an animal dealing licence.

The current regimes outlined set out standards specific to the licensed activity, provide powers to local authorities to inspect the premises, provide an appeals process to the courts in case of refusal or imposition of onerous conditions and create an offence where licensable activities are carried on without the appropriate licence. There are also a number of disqualifications that are relevant to the local authority when assessing licence applications (such as a conviction for animal cruelty). Finally, they also permit a local authority to recover the costs for inspection, processing and enforcement expenditure through a licence fee.

Third-party commercial sales are a concern in Scotland, similar to the concerns raised in England where a buyer can acquire a puppy or a kitten without any contact with the breeder. Sales via the internet can fuel this problem. As drafted, the consultation does not clearly set out to suggest that such sales should be prohibited.

In its response to the consultation, the Scotland region of the IoL has commended the position taken by the Westminster Government in its commitment to ban third-party sales following the "Lucy's Law" campaign and it is hoped that Scotland will follow a similar approach.

In terms of the threshold for dog breeding, the requirement for licensing currently applies once five or more litters are produced - this is clearly too high. There are number of considerations to factor in to the licensing threshold in order to distinguish clearly the domestic pet owner, who may be

either a "hobby breeder" or where the occurrence of a litter is a genuine accident or "one-off", from those breeders who are operating a business / commercial concern. A balance needs to be set and animal welfare must sit at the heart of the licensing regime and its requirements.

Licensing consideration could be required in relation to anyone in the business of breeding and selling dogs, cats and rabbits regardless of the numbers involved. This could include a further status of persons "deemed to be so breeding and selling" which would reflect the terminology of the 2018 Regulations. Those breeding one or two litters in a twelve-month period and selling puppies would require a licence if they are deemed to be "breeding dogs and advertising a business of selling dogs". The intention should not be for hobby breeders to be caught out under this test.

Temporary licences

With temporary licences, a greater degree of accountability and traceability needs to be introduced into the system. This could be undertaken by means of introducing a temporary licence system.[1] Even if the threshold from five to three litters is reduced, there are still a significant number of puppies being born to unlicensed breeders including those who are "accidentally" breeding and breeding with an intention to supply.

Introducing a temporary licence would be proportionate to ensure that the suppliers are accountable, and that their puppies are traced back to them by introducing a lighter system of temporary registration with the local authority. This would apply to anyone with a litter from a bitch for which they are responsible and who wishes to transfer ownership of a puppy to someone else. It would apply to all those falling under the threshold of the licensing regime for dog breeders, irrespective of whether money changes hands.

The idea of a lighter touch regulation to cover activities falling outside the scope of full licensing requirements is supported by the OneKind Puppy Plan,[2] which suggests that every commercial sale should be subject to licence or registration. The body suggests that the threshold for dog breeding licences is set at two litters a year and that anyone selling a single litter requires registration for a temporary licence. In addition, the Dog's Trust[3] called for anyone breeding, selling or transferring the ownership of a litter, regardless of any financial transaction or gain, to be registered. The Trust supports licences for anyone breeding more than one litter. If there are issues with passing on a puppy without it being registered from the third litter in a 12-month period, it suggests that there would be a requirement for a licence that may seek to address those behaving irresponsibly.

Basic information would be provided through an online form to the local authority, giving the name and address of the person with responsibility for the bitch who wishes to transfer or sell the litter, the age of the bitch, the size of the litter and whether any other litters are under the person's control.

The person would pay a minimal fee which should be sufficient for local authorities to recoup any costs incurred in maintaining that database. A separate registration would be needed for each litter. A registration number would be assigned for each litter and that number would be provided to anyone considering acquiring a puppy. They could check online that the registration number corresponds to the name of the person with whom they are in contact.

The registration would be temporary, lasting only as long as it takes for the litter to be passed on / sold. The owner would be responsible for informing the local authority when the last of the litter had been sold or passed on, and the local authority would maintain a record of each registration for as long as is reasonable, say 12 months. This should act as a mechanism to help identify anyone registering multiple times in a 12-month period while potentially unaware of the need for a licence or even attempting to avoid the need for a licence.

The imposition of a fixed penalty could be considered for someone that was found not to have registered (eg, an enquiry made to the local authority by a member of the public who had tried to acquire a puppy from the person). In keeping with current practice and legislation on dog breeding, dealing and microchipping, the name of the owner of the bitch would be included on the puppy's microchip prior to sale / transfer. As more of the public wishing to acquire puppies become aware of their responsibility to check the breeder is licensed or registered, this will provide a check for those transferring puppies without registering. It would become more difficult or them to sell / pass on the puppies.

Since the consultation's aim is to improve traceability, responsible ownership and overall animal welfare, temporary registration would be a crucial link in achieving that. Whatever form the final proposals take, there will be a need for clear guidance, and the new arrangements should require records to be properly kept assisting in the enforcement and

1 Temporary licences exist in other licensing contexts such as liquor and under the 1982 Act.

2 https://www.onekind.scot/campaigns/stop-the-puppy-profiteers/

3 Public Petitions Committee of the Scottish Parliament in August 2017.

regulation of the relevant limits imposed.

The consultation looks to address concerns about intensive breeding, with a proposal that premises be restricted (through licence conditions) to a maximum of 20 breeding dogs or cats within a calendar year. This is intended to allow individual attention to be given to animals and proper socialisation of offspring as well as minimising the potential for disease spread on the site. [4]

This proposal is supported by the IoL Scotland region, and it is hoped that such requirements would also go some way to tackling the practice of "puppy farming" or other intensive breeding.

The new regime should enable assessment of accommodation for animals, socialisation (particularly for puppies) and arrangements to ensure that where it is beneficial to the welfare of the animals concerned, arrangements can be made and facilitated to keep young animals apart from other animals. Appropriate measures to provide protection from suffering, injury and disease should include a duty to secure veterinary care, and to ensure reasonable precautions in relation to the control of infectious or contagious disease.

The journey in the life of an animal starts at birth, and the first few weeks of life before it is sold to an owner can be crucial in ensuring that it goes to the new home, as happy, socialised and healthy. The standards imposed by the 2006 Act, arguably, should have the same relevance to animal breeders as they do to their ultimate owners.

Applicants for licences under the new regime should be required to demonstrate that they are aware of any relevant code or guidance and can give practical examples of how they would meet the terms.

Suitability of applicants / licence holders

Suitability of applicants must be considered as part of the application process, and local authorities should be required to satisfy themselves that the applicant is "fit and proper" prior to granting a licence. A local authority should be able to take into account any relevant information in making this judgement.

Regulation 9(2) is aimed at considering whether because of past or present behaviour or associations or likely future behaviour, an applicant is likely to meet licence conditions. That introduces an explicit conduct test which is similar to a "fit and proper person" test. [5]

The introduction of wording similar to Regulation 9(2) would make it clear that conduct is a relevant licensing issue, whereas under the 1973 Act that is not the case.

Regulation 9(1)(a) -(d) reflects the sort of issues found in section 1(4)(a) to (i) of the 1973 Act, but nothing in the 1973 Act raises conduct as a basis for refusal. Introducing a similar Regulation 9(2) is a welcome innovation.

Adherence to conditions should be a factor in assessing fitness. Other matters might be considered such as association with family members or other connected persons who have an offending or disqualification history in relation to animals. However, consistent with other licensing regimes assessments of fitness, this should not be overly prescriptive.

A local authority ought to be able to consider knowledge of codes of practice or statutory guidance under the 2006 Act as part of a rounded assessment of competence. This should be bolstered, of course, by knowledge of any statutory guidance issued under these reforms.

A fit and proper test should be one of a range of grounds of refusal, suspension or revocation of a licence.

Licence fees

A meaningful and proportionate fee setting methodology should apply; the current application fee for a dog breeding licence at only £2 under s 1(2) of the 1973 Act is no longer meaningful in the current financial climate. The fees regime should support the administrative costs of the application process for a licence, as well as those costs required to undertake ongoing inspection and enforcement. The regime should ensure that the local authority inspection and enforcement is given the resources it needs, which will include personnel adequately qualified.

To be consistent, similarly meaningful and proportionate fees must also apply for those who breed cats and rabbits.

National database

It seems from the consultation that the Scottish Government is considering the benefit / need for a national database of licensed premises and activities. This is a major step forward and will go a long way towards promoting a transparent and accountable licence system. It will also enable the public to check before buying a puppy, kitten or rabbit to ensure that the breeder is properly licensed and compliant.

4 P8 of the consultation.

5 Regulation 9 was introduced under section 13 of the Animal Welfare Act 2006. It replaces (for Wales) the provisions of section 1(4) of the Licensing of Dogs Act 1973 by creating a more detailed licensing regime.

Harmful breeding practices

The scope of the consultation also extends to seeking to discourage harmful breeding practices. This is entirely appropriate and detailed guidance should be published in consultation with organisations such as the SSPCA, British Veterinary Association and the Kennel Club. A regime built around suitable conditions (and supported by the keeping of full records by the breeder relative to practices, including records of breeding stock) would work as both a deterrent and promotion of general welfare.

Additional conditions might also be considered which would require appropriate health screening tests are carried out prior to mating. They might also ensure that mating is avoided if the test results indicate that the parents are likely to carry or have an inherited disease and should not be bred from.

In addition, an objective system was also being considered which could warrant a role for an animal welfare licensing objective based on the discouraging such breeding practices. Applicants for licences could, for example, be required to show how they would meet this objective as part of their application process.

The consultation referred to independent accreditation, and proposes an exemption from inspection requirements where the breeders are affili ted by UKAS.[6] The IoL Scotland region response considered that accredited breeders would still require to be licensed by local authorities, although it was accepted that there may then be scope for a reduced frequency of local authority inspection rather than any automatic exemption. The region suggested that the "star ratings" and "risk ratings" system in England and Wales might be considered as a template for Scotland, with ratings issued by an accredited body or by the local authority. A local authority could then choose to override any ratings provided by an accredited body provided it had a reasonable basis for doing so. That might be where evidence was found during an inspection of deterioration in conditions.

Internet sales

The IoL Scottish region asked the Scottish Government to consider whether and to what extent the sale of cats, dogs and rabbits via online sites, needs a specific legal framework to combat some of the worst forms of abuse such as where sick or welfare compromised animals are sold to unsuspecting and often inexperienced buyers. The recent report (2 September 2018) from the Kennel Club claims that one in three puppies bought online becomes sick or will die in their first year (source https://www.thekennelclub.org.uk/press-releases/2018/september/puppy-awareness-week-2018/).

Rights of objection and representation

Consistent with other forms of licensable activity such as liquor and civic government licensing, the region suggested that it should be the case that any person is entitled to object to an application for a breeding licence and, in parallel, that any person should be entitled to bring an application for suspension or revocation of a licence.

Currently there is no right of objection by third parties although some authorities do, on a pragmatic basis, permit representations and objections to be made. This is not desirable as the lawfulness of such a practice without a clear statutory basis is unclear. The new regime should enable representations from bodies such as the SSPCA, OneKind, the Dogs Trust or Police Scotland where there are concerns about licence applications as well as existing licences to the licensing authority.

In addition, a buyer who is concerned that the breeder may have sold them an animal whose welfare has been unacceptably compromised should be entitled to bring a complaint relating to that breeder to the local authority. That would of course be independent of any rights at common law or under statute that the purchaser may have arising from the sale. This could help tackle some of the abuses relating to internet sales.

The local authority should have discretion as to whether to refer the suspension or revocation complaint to a hearing, or to channel matters into an alternate route. It may be, for example, that the role of licensing standards offi er, now familiar from other licensing contexts, could be extended to deal with compliance issues. Working in conjunction with animal welfare experts, this could be an appropriate extension of their role. Licensing fees could help support this role.

Advertising licence applications

The region also recommended that applications for licences be advertised in a public manner.

The consultation closed on 30 November and the Government response is expected soon. A new animal licensing regime is welcomed, and it is hoped that the final proposals will take into consideration the responses arising from the consultation.

Stephen J McGowan MIoL
Solicitor, TLT Solicitors

6 UK's National Accreditation Body (UKAS).

Bright line policies: the right to say no is important

Bright line policies can help to drive forward the public protection strategy of licensing authorities, argues **Philip Kolvin QC**

In this article, I shall demonstrate that there is nothing legally wrong with a licensing policy which unequivocally sets its face against a licensing proposal. Whether a licensing policy could go that far was the subject of anxious debate amongst licensing lawyers and authorities for decades. But in recent years the debate has been laid to rest by a recognition that licensing law is no different from general public law in this respect, together with a stiffening resolve of local authorities and even this Institute in using such "bright line" policies.

This article carries an important health warning though. Ability should not be conflated with necessity, any more than the existence of a nuclear deterrent mandates its use.

The purpose and benefits of policy

Why have policies? Why not just allow licensing authorities to make decisions on their merits?

This may be answered by considering what policies do. First, they can set out a benchmark for decision-makers, by describing the likely result, absent other factors. Second, they can set down standards of operation. Third, in those very respects, they provide a guide to prospective applicants as to whether their proposal is likely to meet with approval, and the standards and controls which may help them to their destination.

Put conversely, without policies the licensing landscape would be chaotic. There would be the risk of inconsistent decision-making and an incoherent patchwork of standards. Imagine if there were no clear planning policies on where you could put wind turbines, waste incinerators or heavy industry; if every decision were subject to the presentational skills of the applicant and the wiles of the determining committee. The result would be a mess. The same goes for licensing.

So, we can summarise the benefits of licensing policy as follows. First, a clear licensing policy becomes part of the corporate culture of the council, for both offi ers and members. Second, it is a point of reference for other agencies. Third, it has a role in promoting voluntary action, eg, regarding business improvement districts, business crime reduction partnerships, community alcohol partnerships or schemes to reduce the strength of alcohol sold locally. Fourth, it provides helpful guidance to investors and applicants as to what is likely to be permitted when deciding whether to proceed and what proposals and controls to put into the operating schedule. Fifth, it helps those making representations by setting out tests against which the application can be judged. Sixth, in the same way, it assists the decision-maker to come to a fair, consistent decision. Seventh, it assists appeal courts in exactly the same way, and helps them to judge whether what the decision-maker did was wrong.

I would go still further and say that licensing is a collaborative effort between regulatory systems – planning, licensing, environmental health and the like – and a range of responsible authorities who enforce them. A good policy should be a hub for promoting thinking around the leisure economy.

The law of policy

It used to be thought that strict restraint policies were unlawful. When I started working in licensing 25 years ago there was a collective tooth-sucking at the mere thought that one could write a policy expressing a clear view one way or the other. This resulted in a "heads I win, tails you lose" approach by applicants. Either the policy was strict, in which case it was said it had to be ignored as precluding proper consideration of the merits. Or it was loose, in which case it was said it had to be ignored as too wishy washy to hold any sway.

All that ended with the decision of Scott Baker J in *R (Westminster City Council) v Westminster Crown Court* [2002] L.L.R. 53. The background to that case was that Westminster had a fledgling cumulative impact policy whose phrasing was on the vanilla side of what is now achieved through such policies. It said that there was a "policy presumption against" certain proposals. Applicants were routinely persuading magistrates to displace the presumption on the basis of their good management, good character or the small size of the application or variation. Unsurprisingly, applications by appalling managers of bad character for vast new venues were thin on the ground.

After a routine defeat on appeal, the council took the court to court, in the shape of Scott Baker J in the Administrative Court. There, it persuaded the judge to find that the principles governing policy in licensing law were no different from those governing public law in general. In particular, the decision of Lord Reid in *British Oxygen Co. v Board of Trade* [1971] AC 610 had made it clear that it was perfectly lawful to implement tough policies. He said at page 625:

> *The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application" … I do not think there is any great difference between a policy and a rule. There may be cases where an offi er or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say …*

In short, the decision-maker cannot barricade the committee room door or insert ear plugs to prevent auditory perception. But, having listened, it can say "The policy says no. You have said nothing to displace the policy. The usual rule must apply. The answer is no."

Scott Baker J went on to explain how a strict policy may be drafted. His succinct advice – amounting to a rare judicial masterclass in licensing policy drafting – bears re-reading even by experienced practitioners:

> *34. It is both understandable and appropriate for the Claimant to have a policy in the light of the problems it has identified in the West End. The policy needs to make it clear that it is not directed at the quality of the operation or the fitness of the licensee but on the global effect of these licences on the area as a whole. If the policy is not to be consistently overridden in individual cases it must be made clear within it that it will only be overridden in exceptional circumstances and that the impeccable credentials of the applicant will not ordinarily be regarded as exceptional circumstances. It should be highlighted that the kind of circumstances that might be regarded as exceptional would be where the underlying policy of restricting any further growth would not be impaired. An example might be where premises in one place would replace those in another. The guidance document needs to be redrawn so as to eliminate ambiguities and inconsistencies.*

Taking the judgment as a whole, Scott Baker J revolutionised the law and thinking relating to policy. It is worth setting down what the judgment achieved. First, he made it clear that the policy can be phrased as a rule. It can go further and state that it is intended to be strictly applied, that exceptions must be genuinely exceptional and that certain factors, eg, the good character of the applicant, will not be treated as exceptional. Second, the rationale for the policy may be stated in the policy. Where it is stated, any alleged exceptions must be directed at the reasons for having a policy. So, for example, where the rationale is the reduction of crime, the proposed exception must be directed at crime reduction. Third, and crucially, the Magistrates' Courts are not the place to challenge the policy. They must take and apply the policy in the same way as the licensing authority. Challenges are to be brought by judicial review within the short time periods permitted for such challenges. It should be noted parenthetically that the s 182 Guidance on this point (paragraph 13.9) is simply wrong and cannot override the judgment of the courts.

The Scott Baker judgment enables policies to exercise firm control over a wide field. But it is not a boundless dominion. In particular, a policy does not confer upon licensing authorities new legal rights to refuse. It only permits the authority to act within the legal discretion which it has. So, where a policy gave the impression that if the applicant for a premises licence did not put certain things in their operating schedule the application *would* be refused, the policy was unlawful, because of course the authority only acquired a discretion if there were relevant representations: *R (British Beer and Pub Association) v Canterbury City Council* [2005] EWHC 1318 (Admin).

However, the judge in that case, Richards J, went on to approve a formula whereby a policy "expected" certain matters to be included in the operating schedule, failing which it was more likely that there would be representations and a hearing, followed by refusal or inclusion of the item omitted. It is worth setting out the proposed formula in full:

> *All applications for new premises licences or variations need to be supported by an operating schedule. The schedule must specify (among other things) the steps which the applicant proposes to promote each of the licensing objectives.*
>
> *If no responsible authority or interested person lodges an objection (known as 'relevant representation') to the application, the licensing authority must grant the application as set out in the operating schedule, subject only to mandatory conditions under the Licensing Act 2003 . The steps proposed by the applicant will become*

licence conditions. The licensing authority will have no discretion to refuse the application or to alter or add to the conditions arising from the operating schedule.

Where, however, there are relevant representations, then a hearing before a licensing sub-committee will normally follow. After the hearing, the sub-committee has full discretion to take such steps as it considers necessary to promote the licensing objectives. These may include refusing the application, or adding to or modifying the conditions proposed in the operating schedule.

In exercising its discretion, the licensing sub-committee will have regard (amongst other things) to this licensing policy. Therefore, in drawing up their operating schedule, applicants would be well advised to read this policy carefully. Where an operating schedule complies with this policy, it is generally less likely that an interested party or responsible authority will object to it, or that any objection will succeed. Therefore, compliance with this policy is likely to assist the applicant to avoid the delay and expense of a contested hearing, and the risk of a refusal or the addition of unwanted licence conditions.

This is not to say that an application that complies with the policy will necessarily be granted or that an application that does not comply with it will necessarily be refused. Where there have been relevant representations, the licensing authority will always consider the merits of the case, and interfere with the operating schedule only when, and to the extent, necessary to promote the licensing objectives. Nor will blanket or standard conditions be applied without regard to the merits of the individual case. So, for example, the licensing authority will not interfere with an operating schedule which does not comply with this policy where the steps proposed are sufficient to meet the licensing objectives in the individual circumstances of the case.

However, the policy represents the licensing authority's view of the best means of securing the licensing objectives in most normal cases. It has been drawn up in consultation with other expert bodies and responsible authorities, together with community stakeholders. While the contents of the operating schedule are a matter for the applicant, where there is objection to a schedule which departs from the policy, the licensing sub-committee will normally expect to be given a good reason for the departure if it is to be asked to make an exception to the policy.

In this policy, there are a number of references to the licensing authority's requirements of applicants. As explained above, the policy is only engaged where the licensing authority has a discretion following the receipt of objections. In such cases, the licensing authority will not apply the policy rigidly, but will always have regard to the merits of the case with a view to promoting the licensing objectives.

Subject to inclusion of such a formula, there is nothing wrong with a policy setting out very firm expectations on applicants for licences and variations.

A further warning regarding legality is that in adopting a licensing policy, the authority is bound by its public sector equality duty under s 149 of the Equality Act 2010. This obliges the authority to have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. Authorities need to appreciate that a restrictive policy may impact detrimentally on the young (who are both workers in and users of the night-time economy) and the LGBT community who may have specific needs regarding hours and types of use. While beyond the scope of this article, this is an important aspect of policy-making, and the duties imposed by the Equality Act on licensing authorities have not always been understood or properly observed.

The golden thread of licensing policy

Because of the learning derived from Scott Baker J and Richard J, it is possible to describe a golden thread running through licensing policy.

Through its policy, the licensing authority is able to write down a set of aspirations regarding (i) what type of premises (ii) go where (iii) operating at what times and (iv) according to what standards.

Case by case, applicants are encouraged to make applications which conform with those aspirations. Where they don't, it is more likely that representations will be made by reference to the policy. Where they are, it is more likely that sub-committees will make decisions conforming to policy. Where they are challenged, it is more likely that magistrates will uphold the decision as one made pursuant to the policy.

Therefore, decision by decision, the town or city concerned is inched towards the vision set out by the authority in the

policy. The stronger the phraseology used, the more likely it is that the vision desired by the authority will be achieved over time.

Seven lessons for bright line policies

For those authorities who want to draft strong policies, experience has demonstrated that there are certain drafting principles to help them achieve their objectives.

First, the policy itself needs to be strongly phrased. "The policy is to refuse" is much stronger than "there will be a presumption against grant".

Second, ever since the Middlesex Crown Court case, the phrase "this policy is intended to be strictly applied" has remained in vogue, perhaps augmented by "and applications will only be granted in genuinely exceptional circumstances".

Third, a policy is strengthened by circumscribing exceptions, eg, that the character of the applicant or the size of the proposal will not be treated as exceptional.

More generally, how should the potential for exceptions be phrased? There are three possibilities: strong, medium and weak. The strongest says "exceptions should only be made where the grant would not harm the policy". The medium says "exceptions should only be made where the applicant proves that grant would not harm the licensing objectives". The weak says "exceptions should be made where the authority cannot show that grant would harm the licensing objectives". Even in the medium case, the only achievement of the policy will be to spin the burden onto the applicant to show no harm. The tough policy prevents grant except where there is no harm to the policy and the reasons underlying it. So if the reasons are that there are too many premises, it effectively restricts grants to cases of one for one swaps.

Fourth, if the authority has in mind that only a small category of circumstances are likely to be treated as exceptional, it should say so. For example, it may consider that only applications which do not add to the existing stock of venues are likely to be treated as exceptional, eg, where an applicant is promising to surrender a licence of equivalent scale. If so, this should be stated. Other examples would be where the authority says that an exception might arise where an applicant proposes to substitute one activity for another, or to effect a real reduction in capacity, or to replace vertical drinking with seated consumption and waiter service.

Fifth, if the policy accords with national guidance, this should be stated, since it gives the policy a further imprimatur. If it departs from national guidance, this should be acknowledged and a reason for departure given.

Sixth, the reasons for the policy should be given. The broader the reasons, the less likely exceptions will be found. For example, if the reasons are that there are simply too many premises, it is harder to see what could amount to an exception to the policy.

Seventh, a good policy will set out the evidence base for the restraint, often in an appendix.

A policy hierarchy

We have established so far that bright line policies, which set their face against particular proposals, are lawful. But this is not the same as saying that there is always a good reason to use them. And it is very far from saying that they should be the only medicine on the shelf.

Take one of the key examples of bright line policies – cumulative impact policies. It is all very well for those governing a town or city to say what it does not want. But are they sufficiently creative, business-minded, people-focused and clear-eyed enough to say what they do want? Have they spoken to users, employees, cultural providers, the industry and residents so as to work out their vision for the future development of their area?

Assuming that they are and that they have, they may develop a policy hierarchy which includes some or all of the following:

- The authority will actively encourage abc.
- There will be a presumption in favour of def, unless outweighed by other specified factors.
- The authority will grant ghi subject to satisfaction of defined criteria.
- The authority will take into account the following matters….
- There will be a presumption against xyz unless exceptional circumstances are shown. (State, if necessary, what factors may, and usually won't, be regarded as exceptional.)
- The council's policy is to refuse, except in exceptional circumstances.

Thinking more widely, there are essentially three types of restraint policy under the 2003 Licensing Act. There are cumulative impact policies which lean against particular types of venue in particular places. There are zoning policies which set particular hours for particular types of place, eg, residential areas, high streets, leisure parks etc. And there are more general hours policies, including those which set out borough-wide hours for different sorts of venue. A licensing authority should ensure that if it creates a presumption against a type of venue, it asks itself where such

a venue could be positively encouraged, and make provision accordingly. Otherwise, the demand will be met in a different local authority area, reducing the employment, economic and cultural benefits of the proposal in the first area.

This is not to say that negative, bright line policies are a bad thing. It is just that in many cases, such as in planning town and city centres, they need to be balanced with positive policies, stating what the licensing authority does want to see, where and at what times.

Bright line policy examples

One can now see bright line policies operating across a whole range of licensing fields. The following examples are not exhaustive but indicative.

(i) Westminster's Licensing Act policy

This is the archetypal bright line policy, which has continued to evolve since the Middlesex Crown Court case.

The policy begins by drawing a firm line in respect of defined proposals:

> *It is the Licensing Authority's policy to refuse applications in the Cumulative Impact Areas for: pubs and bars, fast food premises, and premises offering facilities for music and dancing; other than applications to vary hours within the Core Hours under Policy HRS1.*

Then, having explained what the reasons for having the policy are, and the data on which it relies, it continues by saying that its concern is, plainly and simply, the overall number of venues:

> *The Licensing Authority's view is that cumulative impact in the Cumulative Impact Areas arises mainly from the numbers of pubs and bars, music and dance premises and fast food premises. The Licensing Authority wishes to encourage the provision of a range of entertainment where this is suitable and to reduce the extent of dominance of pubs, bars and night clubs in the West End Cumulative Impact Area and of fast food premises in all the Cumulative Impact Areas.*

The policy explains that it is supposed to be tough, by adding:

> *Policies CIP1 FFP2 and PB2 and MD2 are intended to be strict, and will only be overridden in genuinely exceptional circumstances.*

But it safeguards itself from challenge by stating:

> *However, the Licensing Authority will not apply these policies inflexibly. It will always consider the individual circumstances of each application; even where an application is made for a proposal that is apparently contrary to policy.*

It squeezes the territory accorded to exceptions with the following language:

> *However, in considering whether a particular case is exceptional, the Licensing Authority will consider the reasons underlying the Cumulative Impact Area special policies on cumulative impact.*

At the same time, it expressly circumscribes the most common exceptions with:

> *The Licensing Authority will not consider a case to be exceptional merely on the grounds that the premises have been or will be operated within the terms of the conditions on the licence, or that are or will be generally well managed because of the reputation or good character of the licence holder or operator. This is expected in the conduct of all licensed premises. … Neither will the licensing authority consider the case to be exceptional merely because the capacity of the premises, or any proposed increase in capacity is small. The high number of premises in a saturated cumulative impact area means that a small increase in capacity in each premises would lead to a significant increase overall within that area…*

Westminster's policy remains a model of a strongly worded policy. Whether such restraint is right in the entertainment capital of the UK, if not the world, is a socio-political question beyond the scope of this article.

(ii) Sex and the City

Schedule 3 paragraph 12(3) of the Local Government (Miscellaneous Provisions) Act 1982 permits a licensing authority to refuse a licence for a sex establishment on a number of grounds, one of which is that there are already enough in the locality concerned. Paragraph 12(4) specifically says that zero can be enough.

Emboldened, some authorities have created nil policies for their areas. Here is the City of London Corporation's:

> *The Common Council's policy is that there is no locality within the City of London in which it would*

> *be appropriate to license an SEV. Accordingly, the appropriate number of SEVs for each and every locality within the City of London is nil.*

The policy is well-phrased. A policy which rules out licences across the whole local authority area is unlawful, since the Act gives no power to make district-wide assessments. The form of words is in accordance with the judgment of Sir John Donaldson MR in *R v Peterborough City Council ex parte Quietlynn* (1987) 85 LGR 249.

(iii) Liveries in Guildford

Guildford Borough Council's hackney policy requires all vehicles to be liveried in accordance with a design prescribed by the council. The policy leaves no wriggle room. It simply says that vehicles must have the requisite livery.

A local driver, Mr Simmonds, objected to the policy and appealed against the imposition of livery in his case. Having lost in the Magistrates' Court, the Crown Court dismissed his appeal on a preliminary argument since what he was essentially trying to do was to challenge the policy out of time in an appellate court, which Scott Baker J in the Middlesex Crown Court case had said could not be done. The Crown Court refused to state a case, so in an act of supreme persistence Mr Simmonds sought to judicially review the refusal, taking his case unsuccessfully all the way to the Court of Appeal. Along the way, in a case reported as *R (Simmonds v Guildford Borough Council)* [2017] EWHC 3002 (Admin) Supperstone J, having cited Scott Baker J, said:

> *12 I repeat that I quite understand that Mr Simmonds contends that the policy should not be applied to him, and Mr Rostron has emphasised that he is not challenging the policy. But in circumstances where the appellant has not shown that there is any difference between his position and that of anyone else's position it seems to me that there is plainly a challenge to the policy.*

In essence, this was the High Court agreeing that where, properly understood, an applicant is telling an appellate court that s/he just doesn't like the bright line policy, the court can dismiss the appeal on preliminary argument and refuse to state a case about it. While the facts in *Simmonds* were quite extreme, it demonstrates just how jealously the courts will guard the authority's right to pass and uphold a strong licensing policy.

(iv) Security Industry Authority

The Security Industry Authority has a statutory power under s 7 of the Private Security Industry Act 2001 to set criteria for the exercise of its licensing functions. It licenses hundreds of thousands of individuals, and so has evolved clear policies for how it deals with criminality, depending on the actual sentence or disposal of the case and the period since the sentence restriction ended. These are set out in the matrix below.

SIA Matrix

Period since end of restriction	Caution, warning, community resolution, absolute/conditional discharge, admonishment	Fine, community disposal	Suspended sentence	Prison
0-12 months	CAF	Refuse	Refuse	Refuse
>12 months - 2 yrs	Grant*	CAF	Refuse	Refuse
>2 yrs – 4 yrs	Grant*	Grant*	CAF	Refuse
>4 yrs – 7 yrs	Grant*	Grant*	CAF	CAF
>7 yrs	Grant*	Grant*	Grant*	Grant*

CAF = consider additional factors

* All cases of imprisonment of 48 months to life are treated as CAF.

This cut and dried approach was subject to challenge in *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792 (Admin) in which it was suggested that Parliament in enacting the Private Security Industry Act 2001 could not have intended such a self-imposed fetter on the discretion of the authority. This was roundly rejected by the High Court. The dictum of Deputy Judge Parker underlines the value of a rule-based policy:

> *45. In my view, Parliament attached the greatest importance to ensuring, through the Act and the regulation by the Authority, that criminality would be driven out of door supervision. It seems to me that it is a matter of common sense that, at the very minimum, the commission of certain offences of extreme violence for which a person has received a very substantial term of imprisonment (my example being such a case) automatically debars that person for a significant period (the duration of which is largely a matter of judgment) from carrying on an activity, door supervision, which Parliament intends to rid of criminal elements. In my view, other matters - such as the person's other abilities and experience, or any view formed of him by people such as employers - simply could not counterbalance in this statutory context the fact of conviction and sentence. Indeed, it would make a mockery of one of the crucial aims of the Act if such a person were seen to be functioning as an officially licensed and duly badged door supervisor shortly after release from custody for such a seriously violent offence. It seems to me that it would be the failure to have an automatic rule of debarment in such cases that would defeat the purpose of section 7.*

It is not particularly surprising that an authority would wish to set clear rules for whom it is prepared to licence following commission of criminal offences. The case provides endorsement for such an approach. It should be recalled, however, that the case turned on an interpretation of s 7, which refers to criteria, which are really another word for rules. Therefore, where what is in play is a policy, the authority should always allow applicants to argue that their case is exceptional.

> *(v) The Institute of Licensing: guidance on suitability of taxi drivers*

In 2018, the Institute of Licensing published its well recieved *Guidance on Determining the Suitability of Applicants and Licensees in the Hackney Carriage and Private Hire Trades.* The guidance includes a number of examples of bright line policies. Here is one example:

> *Exploitation*
>
> *4.30 Where an applicant or licensee has been convicted of a crime involving, related to, or has any connection with abuse, exploitation, use or treatment of another individual irrespective of whether the victim or victims were adults or children, they will not be licensed. This includes slavery, child sexual exploitation, grooming, psychological, emotional or financial abuse, but this is not an exhaustive list.*

The Institute there makes a strong statement to protect vulnerable people from abuse, which is entirely appropriate in the light of the Rotherham case, among others. At the same time, the Institute draws an appropriate balance, in accordance with what Lord Reid had to say in the British Oxygen case, to ensure that licensing authorities do not simply close their ears to applications:

> *A licensing authority policy can take a 'bright line approach' and say "never" in a policy, but it remains a policy, and as such does not amount to any fetter on the discretion of the authority. Each case will always be considered on its merits having regard to the policy, and the licensing authority can depart from the policy where it considers it appropriate to do so. This will normally happen where the licensing authority considers that there are exceptional circumstances which warrant a different decision. This approach was endorsed by the High Court in R (on the application of Nicholds) v Security Industry Authority.*

The endorsement by the professional body for licensing practitioners of bright line policies is an important step in their evolution, and will undoubtedly empower licensing authorities in generations to come.

Conclusion

In this article, I have shown that over the last 15 years the licensing world has become more comfortable with bright line policies. Provided that they stay within the law, and provided also that flexibility is not entirely abandoned, such policies help to drive forward the public protection strategy of licensing authorities. I have also argued that, particularly where the leisure economy is concerned, such policies should be balanced by a positive vision of what the licensing authority wants to see, not just what it does not.

Philip Kolvin QC
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Q. When is an expert not an expert? A. When crime statistics are cited

So-called expert witnesses are often unnecessary and, shamingly, can be less than expert in the way they present their "evidence", argues **Sarah Clover**

I have been reflecting upon the excellent article by Charles Holland in the November *Journal of Licensing*.[1] It would be hard to disagree with a single word that he says in relation to the use and abuse of expert witness evidence in licensing proceedings. What is most striking in reading his article is not so much the state we find ourselves in with experts procedurally, but the apparent need we are bound to, practically, in requiring all this "expert" material in licensing in the first place. "Light touch regulation", anyone? Those were the days. "Expert" evidence? How has it come to this?

The contemplation of this question drives me to pontificate again from a soap box that I very rarely leave, other than to perform essential life functions. I would love to pack it away for good, but it has not, to date, proven possible.

Mr Holland writes extensively and knowledgeably about who may be an expert, and what they should know in order to qualify. My examination focuses upon what we need from an expert in a licensing case in the first place, and why we now need so regularly to call upon them to contribute. My conclusion is that, in some cases, it should be wholly and entirely unnecessary.

Mr Holland identifies the two most common examples of expert evidence in licensing proceedings as relating to acoustic assessments, and analysis of police crime incident log reports. Upon the former, I have nothing to add. Acoustics undoubtedly comprises expert territory, upon which lay persons are well advised to set no ill-informed, albeit softly shod foot.

Mr Holland comments that police offi ers can be experts. This is true in principle, but by no means in all cases. Mr Holland highlights the distinction between a police offi er giving evidence as an expert, who would have to comply with the applicable criteria that he outlines, and those giving plain evidence, common or garden. He comments: "The evidence of the police as responsible authorities will often be a mix of factual evidence and opinion evidence".

Neither of those elements comprises expert evidence. He elucidates: "Factual evidence will include matters such as crime statistics or noise levels."

Therein lies the rub. Those matters are, first and foremost, of a factual, and not expert, nature. Secondly, the material that is actually presented to the decision-maker, while purporting to be factual, and expected to be nothing less, is often anything but. There is no excuse for this. Very rarely is this evidence, of crime incidents and statistics, given in the innocent belief that it is factual, when it later transpires, shockingly, that it is not. More commonly, the unveracity of it is very much understood by the author at the time of its submission, and is submitted regardless, in the hope that no one else will realise it. As I have said countless times before, this is all very well, and perhaps part of a cunning "cat and mouse" game, when there is equality of representation on both sides, and a legal representative to protect the party on the receiving end of the misleading information. But it is decidedly not OK when the "victim" of this practice is all alone, unrepresented, and, worst of all, unsuspecting. We expect more of our Responsible Authorities, who are trusted. The clue is in the title.

When is this going to end? Everyone reading this knows what I am talking about. That is the shame of it. The crime incident report evidence submitted, week in, week out by police forces up and down the country continues, in some cases (thankfully not all, but too often to avoid this tirade) to be inaccurate to the point of mendaciousness. The problem with this is that absolutely no police crime statistics or evidence can be taken at face value, because it is impossible to differentiate between the reliable and the unreliable until the evidence has been tested to check the point.

This phenomenon has had the most serious of repercussions. It was noted and condemned by the House of Lords, whose committee examining the Licensing Act 2003 specifically noted that the evidence of the police was not to be given any special weight, not least because of the way they handled it. As a direct result, the Lords chose to amend paragraph 9.16 of the s 182 Guidance to take away

1 Charles Holland, *The use and abuse of evidence,* (2008 (JoL22 PP4211).

the special weight and status of police evidence in licensing proceedings.

The old paragraph 9.12 said:

The licensing authority should accept all reasonable and proportionate representations made by the police unless the authority has evidence that to do so would not be appropriate for the promotion of the licensing objectives. However, it remains incumbent on the police to ensure that their representations can withstand the scrutiny to which they would be subject at a hearing.

Now paragraph 9.12 says:

… any responsible authority under the 2003 Act may make representations with regard to any of the licensing objectives if they have evidence to support such representations. Licensing authorities must therefore consider all relevant representations from responsible authorities carefully, even where the reason for a particular responsible authority's interest or expertise in the promotion of a particular objective may not be immediately apparent. However, it remains incumbent on all responsible authorities to ensure that their representations can withstand the scrutiny to which they would be subject at a hearing.

The contrast is stark and deliberate.

The use of an expert witness to address police statistics in licensing proceedings is a necessity born of this unhappy situation. Very often, the expert called in a licensing committee hearing or a licensing appeal will be described as a "licensing consultant", a "due diligence" consultant or independent witness of the "mystery shopper" variety, and commonly, as Mr Holland points out, will be a person with a policing background, even to the extent of a "gamekeeper turned poacher" (or the other way around, depending upon one's point of view).

This type of evidence is rarely unwelcome in principle in the committee or court, although more than one District Judge has commented that it is not really "expert" evidence, and there is some force in that observation. Sometimes, what is required is not expertise of a sort that a lay person could not exercise, but independence of the sort that should have been demonstrated by the Responsible Authorities in the first place, but which is sadly lacking. These independent witnesses are required because the Responsible Authorities in question, and usually the police, have conspicuously failed in that regard. The substitute independent witness records accurate empirical observation on the ground, rather than "spin", or provides a careful, but laborious trawl through the crime log records, to ensure that only those incidents which are really relevant to the case are actually presented as evidence, and that the others are rightly contextualised. This should be entirely unnecessary if the job had been done properly by those rightly responsible for it in the first place.

'Sometimes, what is required is not expertise of a sort that a lay person could not exercise, but independence of the sort that should have been demonstrated by the Responsible Authorities in the first place, but which is sadly lacking.'

One of the key recommendations from the House of Lords Committee Report was enhanced training for councillors and the police and no doubt this vexed issue would form a centre piece of such training, although that begs the question as to how difficult it could possibly be to grasp. This continued poor practice, and the lengths to which parties have to go to correct it is expensive and time-consuming for all concerned, including, of course, the councils and Responsible Authorities themselves, and most particularly when it necessitates the introduction of an expert, or "expert" into the proceedings. Undoubtedly, clients usually do not want to have to call experts: this only represents extra cost and length of process. They would much rather not have to. The fact that they do have to in this particular context is a continuing blight on the licensing system.

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Under-age gaming: issues of concern to the trade

Test purchase operations showing almost 90% of the pubs let under-18s play Category C gaming machines and the Gambling Commission's Consultation on the National Responsible Gambling Strategy are assessed by **Nick Arron**

Those of you who attended the Institute of Licensing National Training Conference last November will recall the Gambling Commission's Helen Rhodes presenting its survey findings. The results are of concern to the licensed trade.

As an aide memoire, pubs, and premises benefitting from an alcohol Premises Licence under the Licensing Act 2003, are permitted to have Category D and Category C gaming machines. Category D gaming machines can be played by under-18s. Category C gaming machines can only be played by those aged 18 or over. Pubs and alcohol licensed premises, along with clubs, are venues permitted to provide gambling, where children have direct access to adult the machines.

During 2018, the Gambling Commission worked with licensing authorities and the police in conducting a number of age verification operations to test whether under-18s could play on Category C gaming machines in pubs and licensed premises.

In all, 61 alcohol-licensed premises were visited, and 89% failed to prevent children accessing the Category C gaming machines. The 89% failure rate compares to an average failure rate of 15-30% for other age restricted products such as alcohol or tobacco. The failure rate did not vary significantly between licensing authorities nor between large or small pub companies or the independent sector.

The Gambling Commission wrote to licensed trade associations such as the BBPA and UK Hospitality, referring to s 46 of the Gambling Act 2005, whereby a person commits an offence if he invites, causes or permits a child or young person to gamble.

Licensed premises have an automatic entitlement under s 282 to provide up to two gaming machines of Category C or D machine. In its letter the Gambling Commission referred to s 284 under which a licensing authority may remove the automatic entitlement if an offence under the Act has been committed on the premises.

Alcohol-licensed premises can apply for a licensed premises gaming machine permit, to authorise Category D and C gaming machines at the premises, where the alcohol licence holder proposes to provide more than the two machines permitted by the automatic entitlement. The Gambling Commission letter made reference to the Code of Practice for Gaming Machines in Clubs, and Premises with an Alcohol Licence issued by the Gambling Commission under s 24 of the Act. The code makes it a condition of the licensed premises gaming machine permit that:

> *All gaming machines situated on the premises must be located in a place within the premises so that their use can be supervised, either by staff whose duties include such provision (including bar or floor staff) or by other means.*

Section 3.1 of the code also sets out good practice in relation to access to gambling by children and young persons, referring to procedures intended to prevent underage gambling which would include procedures for checking the age of those who appear underage, and refusing entry to anyone unable to produce an acceptable form of identification.

The code suggests that permit holders take all reasonable measures to ensure that all relevant employees understand their responsibilities for preventing underage gambling.

The letter emphasises the Commission's wider focus on children and young person, and the support that it will provide licensing authorities in their further actions against operators who fail to meet the conditions of their permits, and it says it will not hesitate to amend the code of practice for gaming machines in clubs and pubs if that proves necessary.

My understanding, and experience with clients, is that no licensing authority has taken formal action against any of the pubs which failed a test purchase operation, although a number have been written to, reminding them of their responsibilities.

We know that further test operations will take place, and if pubs continue to fail to prevent under-18s from playing on Category C gaming machines, then action will be taken by licensing authorities and / or by the Gambling Commission. The Gambling Act, as well as empowering licensing authorities to remove the automatic entitlement, also provides powers to licensing authorities to cancel licensed premises gaming machine permits. They could also potentially take action, by way of review, under the Licensing Act 2003 Premises Licence, under the crime and prevention objective.

The Gambling Commission, as it mentioned in its letter to the trade associations, may decide it is necessary to amend the code of practice for gaming machines in clubs and pubs, for instance to make the good practice code at s 3.1 on age verification a condition rather good practice advice.

It is likely that we will be talking about this subject again in future journals.

Young people and gambling

Also in November, the Gambling Commission published its "Young People and Gambling 2018" research study of 11-16 year olds in Great Britain. The annual survey found that 14% of 11-16 year olds had spent their own money on a gambling activity in the week prior to taking part in the study. This is two percentage points higher than in 2017, but the gambling prevalence is still relatively low by historical standards: in 2011 the study found that 23% of 11-15 year olds gambled.

The common gambling activities of the groups were placing a private bet for money with friends (6%), followed by National Lottery scratch cards (4%), fruit / slot machines in an arcade, pub or club (3%) and cards for money with friends (3%). Underage gambling activity is less prevalent in licensed premises such as betting shops, bingo halls and casinos. The average spend on gambling activity was £16, from an average disposable income of £28, money given to them as pocket money or money earned in the past week.

It is interesting to note that under-18s are permitted to bet or play cards privately with friends, and play on Category D gaming machines. Sixteen year olds, who took part in the study, can participate in the National Lottery, and the study does not provide evidence of an issue with under-18s playing adult gaming machines in pubs or other alcohol licensed premises.

A full copy of the report can be found on the Gambling Commission website.

National Responsible Gambling Strategy

On 4 December last year the Gambling Commission published a discussion paper on the new National Responsible Gambling Strategy and a consultation on the licence conditions and codes of practice. The current strategy comes to an end in March 2019. The aim of the new strategy is to reduce gambling harms. The Commission is seeking views on the strategy's five priority areas for action, which are:

Priority Area 1: Research to inform action – to widen the research base by establishing a central data repository.
Priority Area 2: Prevention – to progress the framework for measuring gambling related harms.
Priority Area 3: Treatment – to ensure that current treatment options are evaluated, and that treatment needs are assessed.
Priority Area 4: Evaluation – to embed a culture of evaluation through the active use of the evaluation protocol.
Priority Area 5: Gambling businesses – to focus industry efforts for safer gambling through targeted collaboration.

The strategy is designed to better co-ordinate the way that action is taken to reduce gambling harms, by focus on gambling safer with the aim of reducing harms, rather than promoting responsible gambling. The Commission refers to the notion of promoting responsible gambling placing an undue focus on individuals who are experiencing harm, and that it does not sufficiently consider products or the environment.

Running alongside the discussion, the consultation relates to a proposed amendment to the licence conditions and codes of practice, to specify that licensees' contributions to research, prevention and treatment of gambling harms, required under social responsibility code provision 3.1.1, are made to one or more organisations that are approved by the Gambling Commission. Currently the contributions can be made to any entity that delivers each of the aspects of research, harm prevention and treatment. In practice the majority of contributions are made to Gambleaware, which seeks a voluntary contribution of 0.1% of licensees' gross gambling yield.

There has been discussion on the introduction of a statutory levy to replace the current requirement under the licence conditions and codes of practice. The intention behind the Commission's proposals is to direct licensees' contributions to the strategy aims.

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Understanding how the costs system works

Charles Holland outlines the principles underlying the awarding of costs, and how they apply to licensing disputes. The contrast with punitive civil litigation awards may surprise many

For much of the time, licensing is a "safe space" so far as costs are concerned.

In most "first instance" licensing tribunals - such as local authority licensing sub-committees - the typical common law principle that costs "follow the event" does not apply.

So, when a party decides to participate in a licensing case, whether as an applicant or an objector, there is generally no risk that if unsuccessful, it will have to pay the legal costs of any other party: what are known as "adverse costs".

Adverse costs risk is a strong disincentive to participation in legal proceedings. Even allowing for his characteristic hyperbole, the late satirist Auberon Waugh perhaps spoke for many litigants (specifically libel litigants) when he wrote:

> *Anyone who goes to law puts himself in the hands of an unscrupulous ring of bandits and thugs who milk both parties as hard as they can until one of them has to pay. If one allows for the stupidity and prejudice of judges, conceit and idleness of barristers, and diffuseness of English law, neither side can have a more certain chance of winning a legal action than on a tossed coin, which is a much cheaper way of settling things.*

It is perhaps surprising that the *absence* of an adverse cost risk does not seem to have had the converse effect of incentivising participation.

The Licensing Act 2003 enfranchised a wide range of interested parties (including local residents and their associations) to make applications, at any time, for a review of a premises licence, with no adverse costs risk. This was a radical reform. I, for one, was rubbing my hands in anticipation of the explosion of work as residents' associations, previously unable to initiate revocation proceedings, got stuck into reviewing the problem premises within their areas, safe in the knowledge that they could not be taken to the cleaners in the event of defeat.

Much to the disappointment of my bank manager, this did not turn out to be the case. My personal experience is that resident-led reviews are the exception rather than the rule.

One such exception was a recent review brought by a single residential household against my client's club in Easington Colliery (the location for the childhood home of *Billy Elliot*). Although a supporting police representation was compromised by way of the addition of agreed conditions, the applicant for the review was not satisfied. The matter therefore proceeded to a full hearing in the main council chambers, attended by the usual gamut of premises management, witnesses and supporters, lawyers, responsible authority representatives, local authority offi ers, elected members and the press. The debate on complaints ranging from the tethering of my client's members' horses to the telegraph pole outside the applicant's house to a parallel war that had been waged on social media was conducted at not insignificant cost to both the operator and the local authority. Yet there was no risk that the ultimately unsuccessful applicant should pay for any of it.

This bubble of safety is almost unheard of in civil litigation, where not just losing but almost every action carries potential costs consequences. Apply for an adjournment, disclose a late document, amend your case, call a duff expert - you can expect to be rewarded with an adverse costs order, even if you ultimately win the case. And like the doubling cube in backgammon, without prejudice offers of settlement and the associated "Part 36" regime can be used to turn cases into games of chicken where the main issue can become costs rather than the actual subject-matter of the claim.

The luxurious cotton wool that surrounds participants in licensing cases at first instance is, however, absent in many appellate tribunals. On appeals, things can get financially unpleasant in the event of a defeat.

A recent example is the *Stack* appeal in Newcastle upon Tyne (*Endless Stretch Limited v Newcastle City Council and Danieli Holdings Limited* (Costs), Newcastle Magistrates' Court, 2 October 2018), where District Judge Kate Meek ordered the unsuccessful trade objector appellant to pay the costs of both the local authority and operator respondents, summarily assessing those costs as £28,923 and £57,984

respectively, so a grand total of £86,907. This was on top of what the appellant had paid the QC, senior junior, licensing consultant and cost consultant it fielded for the appeal (and also on top of representation at first instance). The appellant is currently *en route* to the High Court in an appeal by way of case stated; time will tell whether this improves or worsens the costs position for it.

Stack is an extreme example, but the principles applied by the judge in that case are of universal application in licensing cases. In this article, I will attempt to summarise for licensors those general principles and look at how they operate in particular regimes.

The general rule: costs follow the event

The general rule that "costs follow the event" is codified for the purposes of civil litigation in the Civil Procedure Rules 1998 (CPR).

CPR 44.2(2) provides that:

> *If the court decides to make an order about costs—*
>
> *(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
>
> *(b) the court may make a different order.*

The civil court has a discretion as to costs: s 51(1) Senior Courts Act 1981. S.52(3) emphasises: "The court shall have full power to determine by whom and to what extent the costs are to be paid".

CPR 44.2 picks up that ball and runs with it: the court may decide to make no order as to costs at all, but if it does, the general rule of costs following the event is not the only order that can be made. It is important to remember the width of the discretion and not to treat the general rule as an absolute rule. CPR 44.2(1) makes this very clear:

> *The court has discretion as to—*
>
> *(a) whether costs are payable by one party to another;*
>
> *(b) the amount of those costs; and*
>
> *(c) when they are to be paid.*

That being said, the general rule is a pretty good starting point. In licensing regimes where the appellate court has a similarly wide discretion (the Licensing Act 2003 regime being one such example), then the manner in which the CPR invites the civil court to exercise its discretion is a useful guide for the licensing appellate court.

What is 'the event'?

It is often said, in short-hand, that, where costs follow the event, the loser pays the winner's costs. In fact, this is an oversimplification.

CPR 44.2(4) provides that:

> *In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—*
>
> *(a) the conduct of all the parties;*
>
> *(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and*
>
> *(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.*

It is not therefore simply a matter of looking at who has won (and indeed there can be huge debate as to who is the "winner"). All the circumstances need to be considered, including the three categories of specified circumstances: conduct, success on distinct issues, and the content of admissible offers (so including offers marked "without prejudice save as to costs").

CPR 44.2(5) puts more flesh on the bones so far as what might constitute "conduct". It includes:

> *(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
>
> *(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and*
>
> *(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.*

In short, unreasonable behaviour is likely to be penalised in costs. If the "winner" has engaged in bad conduct on the way to victory, it can expect a costs sanction.

The rule then sets out the sort of orders the civil court can make. CPR 44.2(6) and (7) provide:

(6) The orders which the court may make under this rule include an order that a party must pay—

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

So, it can follow in the civil courts that, despite the general rule, the "winning" party might end up not receiving all or sometimes any of its costs, or indeed end up having to pay the costs of the "losing" party on some issues.

The two-stage approach of liability and quantum

Costs applications should always be determined in a two-stage approach looking at (1) whether costs are payable by one party to another (liability) and, if so (2) the amount of those costs (quantum).

In the civil courts, liability is nearly always dealt with by the trial judge (or the judge hearing any application where costs are at large).

The trial judge may decide quantum there and then (a process called summary assessment) using costs schedules provided by the parties, or may send the matter off to a costs judge for detailed assessment in default of agreement between the parties in the meantime. In general, summary assessment will not be undertaken for cases lasting longer than a day.

In licensing cases, while it might be theoretically possible for the matter to be sent off for detailed assessment, the general practice is to have summary assessment of costs. This is even so when cases last several days (eight days in the *Stack* appeal, where the costs hearing was listed for a separate day, with directions as to service of costs schedules and written representations).

Summary assessment is, by necessity, a more rough and ready approach than detailed assessment (which proceeds almost like satellite litigation, with points of claim, points of dispute, and its own internal costs regime). An issue-based costs order, tricky enough to unpick in the course of detailed assessment, is almost impossible to quantify on the limited information available in a summary assessment. When considering making a liability order that it is immediately going to have to summarily assess, the court is therefore much more likely to use the broad-brush approaches of ordering the paying party to pay all, or a percentage of the receiving party's reasonable costs, or the receiving party's reasonable costs between certain dates.

The indemnity principle

Costs orders cannot be punitive, and it is a general rule (albeit subject to exceptions) that a paying party cannot be ordered to pay any more than what the receiving party is liable to pay its own lawyers.

This is known as the indemnity principle: the costs the paying party pays to the receiving party are to indemnify the receiving party for its costs, rather than to give it a profit or a bonus.

In the civil courts, the schedule of costs form used for summary assessment, form N260 (easily found on by means of your favourite search engine) contains a declaration to be signed by the solicitor stating:

The costs stated above do not exceed the costs which [the client] is liable to pay in respect of the work which this statement covers. Counsel's fees and other expenses have been incurred in the amounts stated above and will be paid to the persons stated.

Although not a strict requirement (see *Tower Hamlets LBC v Thames Magistrates' Court, Lovebox Festivals Ltd* [2012] EWHC 961 (Admin)) it is good and probably productive practice to serve costs schedules in licensing appeals in advance of the hearing where costs are to be determined. This can be either on form N260 or a document adapted from it. It makes sense to include a solicitors' declaration in the N260 rubric. For a lengthy and / or complex appeal it might be worth engaging the services of a costs draftsman to prepare the costs schedule.

One important interpretation of the indemnity principle when costs are claimed by local authorities can be found in *Re Eastwood (Deceased)* [1974] 3 W.L.R. 454 (CA). This

established that the proper method of assessment where government legal services are provided "in house" by employed solicitors is to treat the bill as if it was that of an independent, external solicitor, and so, essentially those are the rates that are recoverable. *Re Eastwood* has survived repeated attack, a recent example being *R (Bakhtiyar) v Secretary of State for the Home Department (Costs)* [2015] UKUT 519 (IAC), which described the "presumed indemnity" that the external rates give.

So far as offi ers' time is concerned, in *Federation Against Copyright Theft v North West Aerials* [2006] 2 Costs LR 361, the Supreme Court Costs Offi e allowed a time-based apportionment of offi ers' salaries as recoverable from central funds in the criminal costs regime as a cost of prosecution. In *R (Ayres) v. Cotswold District Council* (CO/2353/2017), unreported, October 2017, John Howell QC sitting as a Deputy High Court judge ruled that the time spent by a local authority's planning offi ers in assisting with the preparation of an acknowledgement of service in response to an application for permission to apply for judicial review can be recovered. These cases raise an interesting question as to whether apportioned offi er salaries can be recoverable as part of the costs of an appeal. However, an attempt to recover such costs in the Stack appeal did not find favour with the District Judge.

Assessment on the standard and indemnity basis

Just to confuse everyone, the word "indemnity" is used for an additional purpose in the context of costs.

If a costs liability order is made, there are two alternative bases on which quantum can be assessed: the standard basis and the indemnity basis.

The distinction is codified in CPR 44.3, which provides:

> *(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –*
>
> *(a) on the standard basis; or*
>
> *(b) on the indemnity basis,*
>
> *but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.*
>
> *(2) Where the amount of costs is to be assessed on the standard basis, the court will –*
>
> *(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and*
>
> *(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.*
>
> *(Factors which the court may take into account are set out in rule 44.4.)*
>
> *(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.*
> …
>
> *(5) Costs incurred are proportionate if they bear a reasonable relationship to –*
>
> *(a) the sums in issue in the proceedings;*
>
> *(b) the value of any non-monetary relief in issue in the proceedings;*
>
> *(c) the complexity of the litigation;*
>
> *(d) any additional work generated by the conduct of the paying party; and*
>
> *(e) any wider factors involved in the proceedings, such as reputation or public importance.*

So the differences between the two methods are:

- Where costs are assessed on the standard basis, only proportionate costs are allowed; where costs are assessed on the indemnity basis, disproportionate costs are not disallowed;
- Where costs are assessed on the standard basis, any doubt that the costs were reasonably incurred or reasonable in amount is resolved in favour of the paying party; where costs are assessed on the indemnity basis, that doubt is resolved in favour of the receiving party.

Guidance as to when indemnity costs might be appropriate was given in Excelsior *Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879. Lord Woolf C J said (at [32]) that the "critical requirement" was that "there must be some conduct or some circumstance

which takes the case out of the norm". Likewise, Waller L J said (at [39]):

> *The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?*

In the civil courts, the concept of "proportionality" derives from in the overriding objective at CPR 1.1(1) "of enabling the court to deal with cases justly and at proportionate cost".

No similar objective applies in licensing appeals. That has not stopped the High Court finding that proportionality applies in licensing costs. In *Lovebox* Burnett J at [47] recited some of the "general principles when considering the question of costs applications as regards quantum", including:

> *When deciding the amount of costs to be awarded, the court will take account of all of the circumstances of the case but they include the following:*
>
> *(a) What was at stake in the proceedings?*
>
> *(b) What was the importance of the issue to the parties before the court?*
>
> *(c) What was the complexity of the appeal?*
>
> *(d) What skill, specialist knowledge and responsibility did the lawyers concerned require or assume?*
>
> *(e) How much time was actually spent?*
>
> *In the round, the court will be concerned to check that the expenditure actually incurred was reasonable, and ensure that any award of costs is proportionate.*

It was not explained how the proportionality principle had come to be imported into a licensing case given the absence of any equivalent to CPR 1.1 in the Magistrates' Court Rules *1981*. It may be that Burnett J simply assumed that the position would be the same. That being said, it is a brave advocate who stands up and argues that the licensing regime has no concept of proportionality given that this has been the mantra of the civil courts for the last 20 years.

It should be noted that the indemnity basis can apply even on summary assessment (CPR 44.3(1)). In *Stack*, the second respondent argued that the manner in which the trade objector appellant had conducted its appeal was "out of the norm" and brought indemnity costs into play. This was not a submission with which the district judge engaged in her decision, and it appears that she assessed costs on the standard basis.

When the 'unsuccessful' party is the regulator

In *Bradford MBC v Booth* [2001] LLR 151, B successfully appealed Bradford's refusal to renew his private hire vehicle operator's licence to the Magistrates' Court, where he was awarded his costs by the magistrates in the assessed sum of £750. On a point of principle, Bradford appealed by way of case stated to the Divisional Court, where B was not represented.

Bradford argued that because it was the regulator, it should only have costs awarded against it if it had acted unreasonably or in bad faith, suggesting that otherwise a conflict might arise between its duty to protect the public qua regulator, and its concern to protect its position on costs.

Lord Bingham C J rejected Bradford's submission at [22], holding that it went too far and would "deprive the justices of any discretion to view the case in the round which in my judgement is what s 64 intends".

He held that the Magistrates' Court power to award costs (found here in s 64(1) of the Magistrates' Courts Act 1980) conferred a discretion to make such order as to costs as it thinks just and reasonable, applying both to liability and quantum; and that in exercising that discretion, it had to have regard to all of the relevant facts and circumstances of the case.

So, far, so conventional: an identical position as is found in CPR 44.2(1) and (4).

The licensing nuance came in the additional factors which the Divisional Court held the appellate court should have regard in licensing cases. Lord Bingham C J said:

> *Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.*

In *R (Cambridge City Council) v Alex Nestling Ltd* [2006] EWHC 1374 (Admin) (DC) Richards L.J. held at [11] that *Bradford v Booth* principles apply not to just to taxi licensing but to "comparable cases where there is a statutory appeal from a decision of the Local Authority and the court has a broad discretion as to costs". In *Perinpanathan v City of Westminster Magistrates Court* [2010] EWCA Civ 40 the Court of Appeal approved its general application in licensing cases (at [40]). Stanley Burnton L J included amongst a summary of principles the following:

- *Where the principle applies, and the party opposing the order sought by the public authority has been successful, in relation to costs the starting point and default position is that no order should be made.*

- *A successful private party to proceedings to which the principle applies may nonetheless be awarded all or part of his costs if the conduct of the public authority in question justifies it.*

- *Other facts relevant to the exercise of the discretion conferred by the applicable procedural rules may also justify an order for costs. It would not be sensible to try exhaustively to define such matters, and I do not propose to do so.*

So far as the "financial prejudice" factor identified in Bradford v Booth, Stanley Burnton L J in *Perinpanathan* said at [41]:

> *I think it clear that the financial prejudice necessarily involved in litigation would not normally justify an order. If that were not so, an order would be made in every case in which the successful private party incurred legal costs. Lord Bingham LCJ had in mind a case in which the successful private party would suffer substantial hardship if no order for costs was made in his favour.*

As initially analysed *Bradford v Booth* merely identified certain specific factors, which, amongst all the circumstances of the case, the appellate court has to consider when exercising its discretion as to costs.

So, it was held that *Bradford v Booth* does not establish a presumption one way or the other: *Law Society v Adcock* [2006] EWHC 3212 (Admin) (DC) *per* Waller L.J. at [39]. Nor, it was held, did it establish a "test" *Perinpanathan v City of Westminster Magistrates Court* at first instance [2009] EWHC 762 (Admin) at [32]

However, it has been suggested that the Court of Appeal's decision in *Perinpanathan* has "strengthened" the formulation (per George Leggatt QC sitting as a Deputy High Court Judge in *R (Newham LBC) v Stratford Magistrates' Court, Saron and Dodds* [2012] EWHC 325 (Admin) at [31] by making no order for costs against an unsuccessful local authority respondent the "default" or "starting" position (which looks rather like a presumption), and focusing on "substantial" hardship to the successful party if no order is made.

Those seeking costs against a local authority which has not acted unreasonably or in bad faith might wish to remind themselves (and the costs awarding tribunal) of rejection by Lord Bingham in *Bradford v Booth* at [22] of the suggestion that costs may only be awarded against authorities that have behaved in that manner. This point has been emphasised in subsequent cases: see *R (Borough of Telford and Wrekin) v Shrewsbury Crown Court* [2003] EWHC 230 Admin *per* Moses J. at [16] (although "It is difficult to conceive of circumstances in which it would be just and reasonable to award costs against an authority acting in a licensing capacity, unless there was a good reason to do so."); *Crawley BC v Attenborough* [2006] EWHC 1278 (Admin) (DC) *per* Scott Baker L.J. at [13]; and *R (Cambridge City Council) v Alex Nestling Ltd* (per Richards L J: "Although as a matter of strict law the power of the court in such circumstances to award costs is not confined to cases where the Local Authority acted unreasonably and in bad faith, the fact that the Local Authority has acted reasonably and in good faith in the discharge of its public function is plainly a most important factor.").

Given that the costs discretion is exercised on all the circumstances of the case, costs decisions are highly fact-specific, and only limited guidance can be gained from previously decided cases. With that health-warning duly delivered, here are 10 previously decided cases where the public role of the unsuccessful local authority respondents was considered.

R (Gorlov) v Institute of Chartered Accountants [2001] EWHC Admin 220 - irrational not to award costs in favour of appellant - per Jackson J. at [37]:

> *The Institute is a professional body which, acting in the public interest, brings disciplinary proceedings against accountants. That is a factor which points against any automatic award of costs in disciplinary proceedings which fail. The present case, however, has special features. The disciplinary proceedings brought by the Institute were a shambles from start to finish. … The conduct of the Institute throughout the disciplinary proceedings was of course honest and well intentioned. That conduct was, however, misguided. Mistake was piled upon mistake. In my view, the Institute's conduct was unreasonable.*

R (Swale BC) v Boulter [2002] EWHC 2306 (Admin) - award of costs against local authority following dismissed complaint in respect of a dangerous dog not upset on appeal - magistrates reasons stated "we did not consider that it would be reasonable to order the Appellant to pay the full costs because of its role as a public authority in acting as prosecutor on behalf of members of the public. However, the complaint had been dismissed and it was proper that the unsuccessful party should pay a significant portion of the successful party's costs."

Powell v The Chief Executive of the City and County of Swansea [2003] EWHC 2185 (Admin) - *per* Pitchford J. at [10] "the justices erred in concluding that the decision was made on grounds that reasonably appeared to be sound. In view of their findings this was plainly a case for an award of costs, since the respondent had purported to apply to the applications a policy which it could not apply".

R (Uttlesford District Council) v English Heritage [2007] EWHC 816 (Admin) *per* Pitchford J at [16] purpose of guidance in *Bradford v Booth* was to draw attention to the public role reposed in certain authorities whose position required careful consideration. Public nature of the role may or may not be critical in the balancing exercise, given the facts of the case. Costs order not overturned - here a fully contested hearing was unnecessary, and had been caused by the local authority's refusal "to engage in useful negotiation on the main issue which was resolved in favour of [the appellant]".

Waveney DC v Lowestoft (North East Suffolk) Magistrates' Court, Witham Oil & Paint (Lowestoft) Ltd [2008] EWHC 3295 (Admin) - costs order against local authority not irrational in circumstances where the council "had effectively not completely thrown their hand in, but just stood back and taken no active day-to-day part" and "had put up no effective resistance … but had not given up".

Ware v Hackney LBC [2009] EWHC 1698 (Admin) - costs should have been ordered against local authority which had "a fundamentally mistaken view of the way in which the statutory provision that was in fact engaged operated".

Tower Hamlets LBC v Ashburn Estates Ltd (Trading as the Troxy) [2011] EWHC 3504 (Admin) - costs order against local authority quashed as too much weight placed by district judge on the "ample time" the local authority had to consider offers of settlement "because of the time factor involved in considering the compromise offer made, sensible though it may have been, and because of all the competing interests that would need to be considered in the evaluating of it. This is not like an ordinary piece of civil litigation where it ought to be possible to form a view about a settlement reasonably quickly."

Lovebox [2012] - costs order against local authority upheld; it was unreasonable for sub-committee to have found that dispersal from a festival caused significant disturbance to residents when the evidence it relied upon was generic in nature without linking to specific adverse events or incidents or the evidence of a previous festival.

Luton BC v Zeb [2014] EWHC 732 (Admin) - award of £2,500 costs against respondent local authority not set aside - although no financial evidence to support assertion of "substantial hardship" on part of successful appellant before court, court had conscientiously considered merits of the costs application on *Bradford v Booth* principles. The local authority should have appreciated that when witnesses indicated their unwillingness to attend Crown Court, the original decision was unsustainable.

Chief Constable of Warwick Police v Young [2014] EWHC 4213 (Admin) - dangerous dogs case continued until shortly before trial despite defendant serving voluminous evidence that her dogs were not the ones which had attacked sheep, and repeatedly inviting police to withdraw. Award of costs against police upheld.

The quirk in s 64(1) Magistrates' Courts Act 1980

On appeals brought by complaint to the magistrates where no independent statutory costs awarding provision exists, so including appeals relating to private hire vehicle operator's licences, the court's costs discretion is found in s 64(1) Magistrates' Court Act 1980, which provides:

> *On the hearing of a complaint, a magistrates' court shall have power in its discretion to make such order as to costs—*
>
> *(a) on making the order for which the complaint is made, to be paid by the defendant to the complainant;*
>
> *(b) on dismissing the complaint, to be paid by the complainant to the defendant,*
>
> *as it thinks just and reasonable; but if the complaint is for an order for the variation of an order for the periodic payment of money, or for the enforcement of such an order, the court may, whatever adjudication it makes, order either party to pay the whole or any part of the other's costs.*

It seems plain on its face that this a far more limited discretion than that found in s 181 of the Licensing Act 2003, which empowers the Magistrates Court hearing an appeal under that Act to "make such order as to costs as it thinks fit. The s 64(1) regime only appears to encompass costs following the event.

However, in *Crawley BC v Attenborough*, Scott-Baker L.J. said, obiter, that he saw "no practical distinction" between s 64(1) and s 181 of the Licensing Act 2003.

In *Prasannan v Royal Borough Kensington and Chelsea* [2010] EWHC 319 (Admin) the successful appellant was nonetheless landed with a substantial adverse costs order made under s 181 of the 2003 Act. She appealed by way of case stating, gamely arguing that if there was "no practical distinction" between s 181 and s 64(1) of the 1980 Act as Scott-Baker L J had said in *Crawley*, then there was no power to order her, the successful appellant, to pay the respondent's costs. Perhaps unsurprisingly this argument got pretty short shrift from Belinda Bucknall QC, sitting as a Deputy High Court Judge.

But the issue remains that where s 64(1) governs the scene, the costs order has to fit in to one of the two statutory scenarios. In the recent appeal by Uber London Limited against the refusal by Transport for London to renew its London private hire vehicle operator's licence, the Chief Magistrate allowed Uber's appeal - it was, on one analysis, the successful party and obtained the order for which complaint was made. However, Uber wanted to pay, and TfL wanted to receive, TfL's costs in the agreed sum of £495,000. The Chief Magistrate was persuaded to make this order on the basis (I paraphrase and summarise) that the complaint originally made was for a full five year licence, Uber initially asserting that TfL's decision was wrong, that position being resisted by TfL, whereas what Uber received was a limited "probationary" licence having accepted that TfL's decision was right.

There is no doubt that s 64(1) is unwieldly and overly prescriptive given the modern approach to costs as codified in CPR Part 44. Unless and until it is updated, it will continue to strain lawyers' ingenuity as to how an otherwise perfectly sensible costs order might be made.

Appeal not proceeded with

Section 52(3) of the Courts Act 1971 provides that where a complaint is made "but the complaint is not proceeded with", a Magistrates' Court may make such order as to costs to be paid by the complainant to the defendant as it thinks just and reasonable.

This is plainly - and sensibly - a wider discretion than is found on s 64(1) of the 1980 Act, and indeed, used creatively, might rescue some appeals from the straitjacket of s 64(1). Might it be arguable, for instance, that Uber's initial complaint was "not proceeded with"?

The necessity for the appellate court to give reasons when awarding costs

In *Crawley BC v Attenborough*, Scott-Baker L J indicated that the part of his decision in *R v Stafford Crown Court, ex p. Wilf Gilbert (Staffs) Ltd* [1999] 2 All ER 955 where he said that reasons for costs award need not be given should not now be followed. This accords with the modern approach of openness and transparency.

In *Leeds City Council v Leeds District Magistrates* [2013] EWHC 1346 (Admin), Supperstone J quashed an adverse costs order made against the local authority on the basis that no reasons for the order were given. The decision to allow the appeal "does not begin to provide adequate reasons for the costs award that was subsequently made".

Time for payment

Costs awards are civil debts, and advocates often jump up and tell the magistrates that they cannot give the paying party time to pay, as they would with a fine. However, time to pay is part of the general discretion under the CPR code and it seems odd that a costs order can be made which might be immediately enforceable. In my view there is scope to argue that the discretion of the Magistrate's Court to award costs includes a discretion to timetable the payment of those costs.

Non-party costs orders

The editors of *Paterson's Licensing Acts 2019* suggest [6.21] that the wide discretion afforded to the appellate court in relation to costs includes a discretion to make costs orders against non-parties, akin to that the well-established power the civil court has to do the same.

A non-party costs order may be appropriate where an appeal is brought by an impecunious corporate party to further the interests of the persons behind that company, who, to reference *William Wycherley*, have adopted the position that someone without money has nothing more to fear from a crowd of lawyers than from a crowd of pickpockets.

I understand that Westminster Council is one local authority which has successfully obtained non-party costs orders against those funding appeals.

Recent case-law has established that early warning of a potential non-party costs order to those affected is a fundamental requirement to the subsequent making of such an order: *Sony/ATV Music Publishing LLC v WPMC Ltd* [2018] EWCA Civ 2005. Accordingly, where a local authority respondent is faced with an appeal from an impecunious company and fears not being able to enforce a costs award, then early steps need to be taken establish for whose benefit

the appeal is brought so that they can be put on notice of the possibility of a non-party costs application against them.

An alternative which, so far as I am aware, remains untested is whether the width of the discretion in s 181 of the Licensing Act 2003 permits the Magistrates' Court to require the provision of some sort of security for costs. This would be an interesting argument.

'Participants'

R (Chief Constable of Nottinghamshire) v Nottingham Magistrates Court [2009] EWHC 3182 (Admin) confirmed that the Magistrates' Court has an implied power to allow non-parties to participate in appeals - in that case, the non-party being the police, which was not a respondent to Tesco's appeal.

Such persons are not joined to the proceedings as such, but participate, and - in general - should neither pay nor receive costs. It might be potentially feasible to obtain a non-party costs order against a participant who by its conduct causes the actual parties to waste costs, although I am not personally aware of any examples of this.

Some conclusions

When preparing to sail out of the calm harbour of the "no costs" first instance regime and into the potentially stormy waters of the "costs risk" appellate regime, it is wise to take precautions.

Treating the licensing appeal as if it was litigation subject to the CPR is not a bad start. Not least, if you end up in the High Court on appeal, you will have provided the Magistrates' Court with the right vocabulary and (hopefully) approach. The relevant provisions of the CPR are not complicated and provide a useful checklist that the court can be taken through when (hopefully) contrasting the receiving party's exemplary conduct with the paying party's unhelpful behaviour.

So, when it comes to costs, litigants that conduct themselves in such a manner as would avoid criticism on the CPR 44.2(5) checklist may fare better than those who do not engage in pre-action correspondence, raise duff issues, fight cases with extreme and unnecessary aggression or exaggerate the good points they have.

Attempting to narrow issues or compromise completely in without prejudice communications and meetings is never a bad idea. Remember that unless the communications are expressed to be "without prejudice *save as to costs*" rather than simply "without prejudice" then they cannot be shown to the judge making the costs order without both parties' consent. Rarely is there much point in labelling communications simply "without prejudice". It is good discipline to never mix up open correspondence with without prejudice correspondence. If in doubt, send two letters: the open letter dealing with the open issues and the "without prejudice save as to costs" letter dealing solely with settlement.

Preparing costs applications well in advance, including detailed costs schedules with supporting representations, can pay dividends. It prevents complaint being made by the other side that they are being ambushed, and puts the court in the mind-set that costs is not some irritating loose end, but a substantial issue that needs to be determined.

Local authorities should not assume that *Bradford v Booth* gives them automatic immunity. A licensing authority respondent that makes no attempt to review and assess the merits of an appeal as it progresses does so at its peril.

And often, licensing authorities do not appreciate the full scope of recoverable costs that can be pursued, nor the steps that can be taken when an impecunious appellant threatens a cost loss.

Happy sailing!

Charles Holland
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If you would like to submit an article to be considered for inclusion in a future issue of the Journal or would like to discuss an article you would like to write, please contact us at
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Considering those who may need additional help in the workplace

There are many steps employers must take to ensure that staff or events visitors with disabilities or wellbeing issues are looked after properly, as **Julia Sawyer** explains

As an employer and a person in control of a premises or event the public comes to visit, you have a moral and a legal duty to protect the safety of your employees, to ensure they are not put in a vulnerable situation.

The Health and Safety Executive defines vulnerable workers as those who are at risk of having their workplace entitlements denied, or who lack the capacity or means to secure them.

Those who could come into this definition include:

- Agency / temporary workers
- New and expectant mothers
- Migrant workers
- Disabled people
- Older workers
- Young people
- New staff.

Legal requirements

Children and young people

One of the licensing objectives under the Licensing Act 2003 is "the protection of children from harm", and guidance issued under s 182 of the Licensing Act 2003 requires that children must be protected from "physical, psychological and moral harm". Premises allowing persons under the age of 18 are expected to have systems in place to safeguard children and young people.

Under health and safety law, every employer must ensure, so far as is reasonably practicable, the health and safety of all their employees, irrespective of age. As part of this, there are certain considerations that need to be made for young people – who are defined as:

- A young person is anyone under 18; and
- A child is anyone who has not yet reached the official minimum school leaving age (MSLA). Pupils will reach the MSLA in the school year in which they turn 16.

Under the Management of Health and Safety at Work Regulations 1999, an employer has a responsibility to ensure that young people employed by them are not exposed to risk due to:

- Lack of experience
- Being unaware of existing or potential risks and / or
- Lack of maturity.

New or expectant mothers

Specific laws relating to new and expectant mothers at work are mainly contained in the Management of Health and Safety at Work Regulations 1999 (MHSW). These regulations require that the risk assessment should include any specific risks to new and expectant mothers. These risks can be from any process, working conditions, or physical, biological or chemical agents.

When an employee provides written notification to her employer stating that she is pregnant, or that she has given birth within the past six months or that she is breastfeeding, the employer should immediately consider any risks identified in their workplace risk assessment. If that risk assessment has identified any risks to the health and safety of a new or expectant mother, or that of her baby, and these risks cannot be avoided by taking any necessary preventive and protective measures under other relevant health and safety legislation, then employers must act to remove, reduce or control the risk.

The Workplace (Health, Safety and Welfare) Regulations 1992 require employers to provide suitable rest facilities for workers who are pregnant or breastfeeding. The facilities should be suitably located (eg, near to toilets) and where necessary, employers should provide appropriate facilities for the new or expectant mother to lie down.

Guidance and other considerations

Mental health / stress in the workplace

Mental health / stress are reactions to events or experiences in someone's home life or work life or a combination of both. Common mental health problems can have a single cause outside work, for example bereavement, divorce, postnatal depression, a medical condition or a family history of the problem. But people can have these sorts of problems with no obvious causes.

Mental health training for line managers is essential and the training should include learning the signs of poor mental health and suicide risk. It should also consider the likely impact of suicide on colleagues, public who visit your premises or event and the business. Suicide is a complex issue. Although people with a diagnosed mental health condition are shown to be at higher risk of attempting and completing suicide, many who take their own lives do not have a mental illness but are struggling to cope with a personal event, or a set of problems that appears to have no other solution.

What should be considered?

Risk assessments should be reviewed on a regular basis to assess if any additional controls need to be introduced to consider those with additional needs.

New starters or young people

Assess the new starter's capabilities in terms of:

- Literacy and numeracy levels
- General health
- Relevant work experience
- Physical capability to do the job
- Familiarity with the work being done and the working environment (especially where conditions change rapidly, such as at a festival or on construction sites)
- Any cultural or language issues.

Provide an induction. Plan it carefully, including photos of hazards where possible, and use plain, simple language. Take time to walk around the workplace or site with new workers and show them where the main potential hazards exist (eg, falls, slips and transport).

Communication

Make sure the control measures to protect against risk are up to date and are being properly used and maintained – and communicated to staff. This could include taking steps to:

- Involve employees and health and safety representatives in discussions about the risk and how best to make sure new starters are protected.
- Emphasise the importance of reporting accidents and near misses.
- Make any necessary arrangements for health surveillance.
- If required, make sure suitable personal protective equipment is provided and maintained without cost to the employees.
- Provide relevant information, instruction and training about the risks that new workers may be exposed to and the precautions they will need to take to avoid those risks.
- Provide adequate supervision. Make sure workers know how to raise concerns and supervisors are familiar with the possible problems due to unfamiliarity and inexperience.
- Check workers have understood the information, instruction and training they need to work safely, and are acting on it, especially during the vital first days/weeks at work. Remember to make sure workers know how and with whom they can raise any concerns about their health and safety and that they know about any emergency arrangements or procedures.

Vulnerable people

As a manger or a person in control of an event or premises, you should assess whether there are adequate contingency plans in place to deal with a vulnerable person, such as someone who attends your event for warmth, company or has suicidal thoughts. Consider, is there a nominated person trained to deal with the vulnerable? Do the Operations team members understand and recognise any indicators that would alert them to put in place the contingency plan for dealing with a vulnerable person?

Contingency plans

Emergency procedures and contingency plans should be written and communicated to all the relevant people who would be involved in the implementation of them.

PEEP

A PEEP is a Personal Emergency Evacuation Plan. It is a bespoke "escape plan" for individuals who may not be able to reach a place of safety unaided and quickly in an emergency.

PEEPs may be required for people with:

- Mobility impairments
- Sight impairments

- Hearing impairments
- Cognitive impairments
- Other disabilities.

A temporary PEEP may be required for:

- Short term injuries (eg, broken leg)
- Temporary medical conditions
- Those in the later stages of pregnancy.

The underlying question in deciding whether a PEEP is necessary is “can you evacuate the building unaided, in a prompt manner, during an emergency?” If the answer is “no”, then it is likely that a PEEP is needed.

Conclusion

Employers putting on events or working in the entertainment industry need to recognise that they should apply additional controls to protect those people who may be in a vulnerable position. The needs of vulnerable people should be considered in the planning and design of a workplace when a building or an event first opens and should be re-assessed when policies and procedures are established or someone new to the building / event requires additional controls to maintain their safety.

Those in a managerial position, or specifically nominated, should be trained to recognise signs of potential problems and understand what measures need to be taken to protect those around them.

Adequate contingency plans and good communication are key to ensure an incident is dealt with appropriately in a workplace. Each situation will be different and the effect that it has on the immediate work force and those around them will vary considerably. It takes trained and competent people to manage these incidents.

Julia Sawyer
Director, JS Safety Consultancy

Taxi and private hire vehicle licensing - Steps towards a safer and more robust system

James Button considers the Government's long-awaited thoughts on taxi reform, and finds them singularly lacking

Readers will recall the report of the Ministerial Working Party (now referred to as the Task and Finish Group on Taxi and Private Hire Vehicle Licensing-TFG) detailed in the November *Journal*, and we finally have the response from the Government. Despite an upbeat announcement by Nusrat Ghani, Parliamentary Under Secretary of State for Transport, it seems clear that there is no heartfelt commitment to updating the law in a comprehensive fashion.

This is a half-hearted response to a very sensible and well considered set of proposals and must be regarded as a missed opportunity.

In short, the Government's position is detailed in the summary (chapter 1):

> *Above all other considerations the TFG has put the passenger at the heart of its thinking; we welcome and share this view. Government will take action where needed to ensure a safe and well-functioning sector which meets the needs and expectations of its passengers.*
> . . .
> *The Government accepts the three key measures recommended to achieve a safe service for passengers:*
> - *National Minimum Standards*
> - *National Enforcement Powers; and*
> - *A National Licensing Database.*

These matters are considered further in the accompanying article covering the Consultation on the s 177 Statutory Guidance (see pages 72).

However, as the TFG report made 34 recommendations, it can be seen that a commitment (but only via Guidance at this stage) to fewer than 10% of those is at best a miserly response.

To fully understand the Government's position, it is necessary to restate the Recommendations

Recommendation 1
Notwithstanding the specific recommendations made below, taxi and PHV legislation should be urgently revised to provide a safe, clear and up to date structure that can effectively regulate the two-tier trade as it is now.

Government response
"We agree that the regulation of taxis and private hire vehicles needs reform" (para 2.1); but "In the short term this does not include a full replacement of the law which regulates taxi and private hire." (Para 2.3.)

Comment
This sums up the situation. Despite a call for evidence for the TFG, and a considered report, there is simply not the political will to reform the law governing this vital sector of the economy, and if public safety is not a sufficient driving factor, it is difficult o see what will be.

Recommendation 2
Government should legislate for national minimum standards for taxi and PHV licensing - for drivers, vehicles and operators (see recommendation 6). The national minimum standards that relate to the personal safety of passengers must be set at a level to ensure a high minimum safety standard across every authority in England.

Government must convene a panel of regulators, passenger safety groups and operator representatives to determine the national minimum safety standards. Licensing authorities should, however, be able to set additional higher standards in safety and all other aspects depending on the requirements of the local areas if they wish to do so.
Government response
"The Government agrees that there should be national minimum standards for taxi and PHV licensing, and will take

forward legislation when time allows to enable these." (Para 2.4.)

And, "In the interim, Government will continue to review its statutory and best practice guidance. The development of these, through engagement and consultation, will ultimately shape the content of national minimum standards." (Para 2.6.)

Comment
When will time allow? In the meantime, using Guidance is a poor substitute.

Recommendation 3
Government should urgently update its Best Practice Guidance. To achieve greater consistency in advance of national minimum standards, licensing authorities should only deviate from the recommendations in exceptional circumstances. In this event licensing authorities should publish the rationale for this decision.

Where aspects of licensing are not covered by guidance nor national minimum standards, or where there is a desire to go above and beyond the national minimum standard, licensing authorities should aspire to collaborate with adjoining areas to reduce variations in driver, vehicle and operator requirements. Such action is particularly, but not exclusively, important within city regions.

Government response
"The Government welcomes this recommendation." (Para 2.8.)

And, "the Department is for the first time consulting on statutory guidance to be issued to licensing authorities which details the Department's view of how their functions may be exercised so as to protect children and vulnerable adults from harm." (Para 2.9.)

Comment
This does not address the recommendation, because there is no indication when there will be revised Best Practice Guidance. The s 177 Guidance is very limited in its scope when compared to the Best Practice Guidance

Recommendation 4
In the short-term, large urban areas, notably those that have metro mayors, should emulate the model of licensing which currently exists in London and be combined into one licensing area. In non-metropolitan areas collaboration and joint working between smaller authorities should become the norm.

Government having encouraged such joint working to build capacity and effectiveness, working with the Local Government Association, should review progress in nonmetropolitan areas over the next three years.

Government response
"The Government agrees that collaboration and joint working can be helpful in ensuring efficient operation of taxi and PHV licensing in smaller local authorities. The Government will keep progress in this area under review."

Comment
Unfortunately, "keeping a matter under review" always seem to be a euphemism for kicking it into the long grass.

Recommendation 5
As the law stands, 'plying for hire' is difficult to prove and requires significant enforcement resources. Technological advancement has blurred the distinction between the two trades.

Government should introduce a statutory definition of both 'plying for hire' and 'pre-booked' in order to maintain the two-tier system. This definition should include reviewing the use of technology and vehicle 'clustering' as well as ensuring taxis retain the sole right to be hailed on streets or at ranks.

Government should convene a panel of regulatory experts to explore and draft the d finition.

Government response
"This matter was the subject of specific consideration by the Law Commission in the course of its review. The Commission ultimately concluded that a statutory definition of plying for hire would not be a practical improvement on the current position." (Para 2.11.)

And, "We have no reason to believe that the legal situation has changed since 2014, and thus no reason to believe that a new or reconvened expert panel would reach a different conclusion. As a result, the Government does not intend to take this recommendation forward at this time." (Para 2.12.)

Comment
This definitely seems like a "this is too difficult" response. No-one thinks it would be easy, but it is one of the biggest problems facing the industry, and by extension, public safety.

Recommendation 6
Government should require companies that act as intermediaries between passengers and taxi drivers to

meet the same licensing requirements and obligations as PHV operators, as this may provide additional safety for passengers (eg, though greater traceability).

Government response
"PHV operators, and companies that act as intermediaries for taxi bookings, do perform functions that appear very similar. However, the Government is not convinced that there is a compelling case for the licensing of taxi intermediaries (such as taxi apps or radio circuits)." (Para 2.13.)

And, "An operator is fundamental to the booking of a PHV, and so has a distinct and legally necessary role in the regulatory system. Conversely, when a taxi is requested via an intermediary, that intermediary is doing nothing more than passengers could do themselves - they merely convey the request from the passenger to a taxi driver." (Para 2.14.)

Comment
This is frankly disingenuous. An operator is integral to the private hire regime simply to differentiate private hire from hackney carriages, and as a statutory requirement, but they hold vital and sometimes personal and sensitive information. A booking intermediary for HC's fulfils the same role, and as it is being undertaken on a commercial basis, it is quite different from a passenger making the same booking.

Recommendation 7
Central Government and licensing authorities should 'level the playing field' by mitigating additional costs faced by the trade where a wider social benefit is provided – for example, where a wheelchair accessible and/or zero emission capable vehicle is made available.

Government response
"For zero-emission capable vehicles, the Government provides the plug-in car grant and the plug-in taxi grant." (Para 2.17.) But, "The Government does not propose to introduce further financial incentives for taxis and PHVs based on vehicle type at the current time; however we will keep this under review." (Para 2.19.)

Comment
Unfortunately, this simply does not address the financial realities of purchasing (or leasing) and then running wheelchair accessible vehicles, and as a result disabled passengers will continue to be disadvantaged, which is disgraceful. See above for comments on keeping matters under review.

Recommendation 8
Government should legislate to allow local authorities, where a need is proven through a public interest test, to set a cap on the number of taxi and PHVs they license.

This can help authorities to solve challenges around congestion, air quality and parking and ensure appropriate provision of taxi and private hire services for passengers, while maintaining drivers' working conditions.

Government response
"The Government does not propose to take this recommendation forward. We would instead wish to see local authorities make the most use of existing powers to address air quality and congestion issues." (Para 2.24.)

Comment
This simply places the onus on local authorities. The blunt and unrealistic "significant unmet demand" test for hackney carriage numbers and a very variable emissions test for private hire vehicles. It is as far removed from any concept of national standards as it could be.

Recommendation 9
All licensing authorities should use their existing powers to make it a condition of licensing that drivers cooperate with requests from authorised compliance offi ers in other areas. Where a driver fails to comply with this requirement enforcement action should be taken as if the driver has failed to comply with the same request from an offi er of the issuing authority.

Government response
"We are aware of a number of authorities that already have this requirement as part of their licensing conditions and we would encourage other licensing authorities to do so too." (Para 2.26.)

Comment
That's fine in theory for private hire drivers, but a local authority cannot attach conditions to hackney carriage drivers' licences, and out of district hackney carriages are a significant problem.

Recommendation 10
Legislation should be brought forward to enable authorities to carry out enforcement and compliance checks and take appropriate action against any taxi or PHV in their area that is in breach of national minimum standards (recommendation 2) or the requirement that all taxi and PHV journeys should start and/or end within the area that issued the relevant licences (recommendation 11).

Government response
"The Government agrees that there should be national

enforcement against the national minimum standards that will be introduced in response to recommendation two, and will legislate for this when time allows." (Para 2.27.)

Comment
Again, legislation when time allows . . .

Recommendation 11
Government should legislate that all taxi and PHV journeys should start and/or end within the area for which the driver, vehicle and operator (PHV and taxi – see recommendation 6) are licensed.

Appropriate measures should be in place to allow specialist services such as chauffeur and disability transport services to continue to operate cross border.

Operators should not be restricted from applying for and holding licences with multiple authorities, subject to them meeting both national standards and any additional requirements imposed by the relevant licensing authority.

Government response
"We acknowledge the view that national minimum standards will go some way towards resolving that problem." (Para 2.33.)

"Even with national minimum standards in place, there will still be variations in licensing conditions." (Para 2.34.)

But, "Government therefore agrees with the principle of this recommendation, and will consider further (with a view to legislation) how it might best work in detail." (Para 2.35.)

Comment
It remains to be seen what any proposed legislation may suggest (not to mention when that may be forthcoming), but it is an area of considerable controversy and may prove difficult o frame acceptable proposals.

Recommendation 12
Licensing authorities should ensure that their licensing, administration and enforcement functions are adequately resourced, setting fees at an appropriate level to enable this.

Government response
"The prime reason for regulation of taxis and PHVs is to protect the public and licensing authorities must ensure that this function is sufficiently resourced to do so. We therefore urge licensing authorities to ensure that they have efficient and effective procedures in place to minimise the cost to the trade of establishing a robust and well-resourced licensing body and undertake a review of their licensing fees to recover the permissible costs and no more of providing this." (Para 2.36.)

Comment
This is perhaps the most irritating response in the whole document. As enforcement costs for drivers and operators cannot be recovered via the licence fee, it doesn't matter how efficient and effective the procedures are, a significant cost of the hackney carriage and licensing regime must be funded by council tax payers.

Recommendation 13
Legislation should be introduced by the Government as a matter of urgency to enable Transport for London to regulate the operation of pedicabs in London.

Government response
"The Government fully supports this recommendation" (para 2.37); "The Government has worked with TfL to support the Pedicabs (London) Private Members' Bill brought forward by Paul Scully MP." (Para 2.39)

And, "Should [that] not become law, the Government will put forward its own legislation when time permits to enable TfL to regulate pedicabs." (Para 2.40.)

Comment
Support for a Private Members' Bill is always welcome, but if that does not succeed, we are back to "when time permits".

Recommendation 14
The Department for Transport and Transport for London should work together to enable the issue of Fixed Penalty Notices for both minor taxi and PHV compliance failings. The Department for Transport should introduce legislation to provide all licensing authorities with the same powers.

Government response
"We will engage with licensing authorities to establish if there is significant demand for a power to issue fixed penalty notices outside of London to assist in the enforcement of national minimum standards." (Para 2.43.)

Comment
Surely this should not only be for the (at present mythical) national minimum standards, but for all HC and PH offences.

Recommendation 15
All ridesharing services should explicitly gain the informed consent of passengers at the time of a booking and commencement of a journey.

Government response
"Government supports choice for consumers but this must be an informed choice. . . operators should ensure their systems make it entirely clear to passengers when they are engaging a shared service. Licensing authorities may wish to ensure that their operator licensing conditions make clear that operators must do this." (Para 2.45.)

Comment
… which might work for private hire, but ignores ridesharing in hackney carriages.

Recommendation 16
The Department for Transport must as a matter of urgency press ahead with consultation on a draft of its Statutory Guidance to local licensing authorities. The guidance must be explicit in its expectations of what licensing authorities should be doing to safeguard vulnerable passengers. The effectiveness of the guidance must be monitored in advance of legislation on national minimum standards.

Government response
"The . . . draft statutory guidance . . . has now been published for consultation alongside this response." (Para 3.4.)

Comment
Finally! Section 177 Policing and Crime Act became effective on 31 January 2017. The fact that it has taken more than two years for the Government to even commence consultation on the Statutory Guidance calls in to question how important they consider it to be.

Recommendation 17
In the interests of passenger safety, particularly in the light of events in towns and cities like Rochdale, Oxford, Newcastle and Rotherham, all licensed vehicles must be fitted with CCTV (visual and audio) subject to strict data protection measures.Licensing authorities must use their existing power to mandate this ahead of inclusion in national minimum standards.

To support greater consistency in licensing, potentially reduce costs and assist greater out of area compliance, the Government must set out in guidance the standards and specifications of CCTV systems for use in taxis and PHVs. These must then be introduced on a mandatory basis as part of national minimum standards.

Government response
"The Government's view on the use of CCTV in taxis and private hire vehicles is set out in the consultation on draft statutory guidance which accompanies this response." (Para 3.5.)

Comment
The full proposal is considered in the Draft Statutory Guidance - see the accompanying article for full details (page 72).

Recommendation 18
As Government and local authorities would benefit from a reduction in crime in licensed vehicles both should consider ways in which the costs to small businesses of installing CCTV can be mitigated.

Government response
"The cost of installing a CCTV system is similar to a replacement set of tyres for a vehicle; as such we do not consider subsidising of these additional costs is necessary." (Para 3.10.)

Comment
OK, but tyres are a mandatory requirement, whereas CCTV is not. How many proprietors will consider the safety aspects over the cost?

Recommendation 19
National standards must set requirements to assist the public in distinguishing between taxis, PHVs and unlicensed vehicles. These should require drivers to have on display (e.g. a clearly visible badge or arm-band providing) relevant details to assist the passengers in identifying that they are appropriately licensed eg, photograph of the driver and licence type, ie, immediate hire or pre-booked only.

All PHVs must be required to provide information to passengers including driver photo ID and the vehicle licence number, in advance of a journey. This would enable all passengers to share information with others in advance of their journey. For passengers who cannot receive the relevant information via digital means this information should be available through other means before passengers get into the vehicle.

Government response
"The Government will consider what vehicle and driver identification requirements should be included within national minimum requirements, focussing on supporting safety. Over and above national minimum standards, local considerations (particularly in respect of vehicle licensing conditions) will remain important." (Para 3.14.)

Comment
Again, this is dependent on National Minimum Standards.

Recommendation 20
All drivers must be subject to enhanced DBS and barred lists checks. Licensing authorities should use their existing power to mandate this ahead of inclusion as part of national minimum standards.

All licensing authorities must require drivers to subscribe to the DBS update service and DBS checks should must be carried out at a minimum of every six months. Licensing authorities must use their existing power to mandate this ahead of inclusion as part of national standards.

Government response
"The Government agrees with both parts of this recommendation, and they are included in the statutory guidance which has been issued for consultation alongside this response. In the longer term, they will be considered as part of national minimum standards." (Para 3.15.)

Comment
The full proposal is considered in the Draft Statutory Guidance - see the accompanying article for full details. Again, this is dependant ultimately on National Minimum Standards.

Recommendation 21
Government must issue guidance, as a matter of urgency, that clearly specifies convictions that it considers should be grounds for refusal or revocation of driver licences and the period for which these exclusions should apply. Licensing authorities must align their existing policies to this ahead of inclusion in national minimum standards.

Government response
"The Government agrees with this recommendation, and its view has been included in the statutory guidance which has been issued for consultation alongside this response." (Para 3.18.)

Comment
The full proposal (based firmly on the IoL G*uidelines on Suitability*) is considered in the Draft Statutory Guidance - see the accompanying article for full details.

Recommendation 22
The Quality Assurance Framework and Common Law Police Disclosure Provisions must be reviewed to ensure as much relevant information of conduct as well as crimes, by taxi and PHV drivers (and applicants) is disclosed ensuring that licensing authorities are informed immediately of any relevant incidents.
Government response
"The Quality Assurance Framework (QAF) is the decision-making tool used by the Disclosure Units of police and other law enforcement agencies when considering whether information should be disclosed or not for inclusion in Enhanced Disclosure and Barring Service certificates. This is overseen by the National Police Chiefs' Council (NPCC) as it relates to the statutory police role within the disclosure regime." (Para 3.20.)

"Under Common Law Police Disclosure provisions (CLPD), the police can use their common law powers for the prevention and detection of crime to proactively provide police intelligence or information to a third party (such as a licensing authority) where there is a public protection risk, to allow them to act swiftly to mitigate any danger. It is for Chief Police Offi ers to locally determine the implementation of CLPD provisions." (Para 3.21.)

And, "Government will discuss the provision of information with the NPCC with a view to ensuring that appropriate steps are being taken to provide relevant information to licensing authorities." (Para 3.22.)

Comment
This is a fundamental problem, with plenty of evidence obtained by the IoL that the system is not working, and vital safeguarding information is not being provided by the police, either in a timely fashion or at all. It is to be hoped that the Government's "discussion" with the NPCC takes place rapidly and is immediately productive.

Recommendation 23
All licensing authorities must use the National Anti-Fraud Network (NAFN) register of drivers who have been refused or had revoked taxi or PHV driver licence. All those cases must be recorded, and the database checked for all licence applications and renewals. Licensing authorities must record the reasons for any refusal, suspension or revocation and provide those to other authorities as appropriate. The Government must, as a matter of urgency, bring forward legislation to mandate this alongside a national licensing database (recommendation 24).

Government response
"The Government supports the Private Member's Bill brought by Daniel Zeichner MP that would mandate licensing authorities to use such a database. The Government also welcomes the initiative of the LGA in setting up a voluntary database of drivers who have been refused or revoked licences."(Para 3.24.)

And, "In the longer term, the Government intends that information about drivers who have had licences refused or revoked would be one part of the wider-ranging national

database discussed against the next recommendation." (Para 3.25.)

Comment
As the Government states it will legislate for a national database (see below) this is a welcome development, and the statutory database is eagerly awaited.

Recommendation 24
As a matter of urgency Government must establish a mandatory national database of all licensed taxi and PHV drivers, vehicles and operators, to support stronger enforcement.

Government response
"Government will legislate for the creation of a national taxi and private hire database, as a necessary accompaniment to national enforcement powers." (Para 3.26.)

Comment
Excellent, and no caveat that this will only happen "when time allows". Let us hope it is very soon.

Recommendation 25
Licensing authorities must use their existing powers to require all drivers to undertake safeguarding/child sexual abuse and exploitation awareness training including the positive role that taxi/PHV drivers can play in spotting and reporting signs of abuse and neglect of vulnerable passengers. This requirement must form part of future national minimum standards.

Government response
"The draft statutory guidance which has been issued for consultation alongside this
response includes a recommendation that licensees should be required to undertake safeguarding / child sexual abuse and exploitation awareness training." (Para 3.30.)

And, "In the longer term, the Government intends that this requirement would be included in national minimum standards." (Para 3.31.)

Comment
The full proposal is considered in the Draft Statutory Guidance - see the accompanying article for full details. Again, this is dependant ultimately on National Minimum Standards.

Recommendation 26
All individuals involved in the licensing decision making process (officials and councillors) must be obliged to undertake appropriate training. The content of the training must form part of national minimum standards.

Government response
"The draft statutory guidance which has been published for consultation alongside this response recommends that those charged with determining taxi and PHV licensing matters undertake appropriate training." (Para 3.33.)

And, "In the longer term the Government intends that the requirement for training would be included in national minimum standards." (Para 3.34.)

Comment
The full proposal is considered in the Draft Statutory Guidance - see the accompanying article for full details. Again, this is dependant ultimately on National Minimum Standards.

Recommendation 27
Government must review the assessment process of passenger carrying vehicle (PCV) licensed drivers and/ or consideration of the appropriate boundary between taxis/PHVs and public service vehicles (PSVs).

Government response
"Where PHV operators also hold a PSV operator's licence, PSVs should not be used
to fulfil bookings except with the informed consent of the hirer." (Para 3.37.)

Comment
This is a sensible suggestion, but it does require a great deal of knowledge of the systems on the part of the hirer to ask the correct questions to enable that informed choice to be made.

Recommendation 28
Licensing authorities must require that all drivers are able to communicate in *English* **orally and in writing to a standard that is required to fulfil their duties, *including in emergency and other challenging situations.***

This is also vital, and it is disappointing that it needs to be said. As HC/PHV drivers are both providing a service, and also placed in positions of great responsibility, the ability to communicate readily with passengers and others is essential.

Government response
"The draft statutory guidance which has been issued for consultation alongside this response recommends that licensing authorities require an English assessment (oral and written) for their licensees." (Para 3.40.) And, "In the longer term, Governments intends that this requirement would be included in national minimum standards." (Para 3.41.)

Comment
The full proposal is considered in the Draft Statutory Guidance - see the accompanying article for full details. Again, this is dependant ultimately on National Minimum Standards.

Recommendation 29
All licensing authorities should use their existing powers to require that the taxi and PHV drivers they license undergo disability quality and awareness training. This should be mandated in national minimum standards.

Government response
"The Government supports this recommendation. . . " (Para 4.1); " . . .the Inclusive
Transport Strategy . . . includes a commitment to consult on updated best practice guidance which should better support licensing authorities to use their existing powers." (Para 4.3.)

And, "In the longer term the Government intends that these training requirements will be included in national minimum standards." (Para 4.4.)

Comment
A commitment to consult on revised Best Practice Guidance is not much of a commitment, when the consultation has been mooted since 2015. Again, this is dependant ultimately on National Minimum Standards.

Recommendation 30
Licensing authorities that have low levels of wheelchair accessible vehicles (WAVs) in their taxi and PHV fleet should ascertain if there is unmet demand for these vehicles. In areas with unmet demand licensing authorities should consider how existing powers could be used to address this, including making it mandatory to have a minimum number of their fleet that are WAVs. As a matter of urgency, the Government's Best Practice Guidance should be revised to make appropriate recommendations to support this objective.

Government response
"We will write to all local licensing authorities stressing the importance of supporting an inclusive taxi and PHV fleet." (Para 4.7.)

And, "We will continue to monitor the proportion of WAVs within overall taxi and PHV fleets, . . . and to seek clarification from authorities as to the steps they are taking to assess and respond to the local need for such vehicles." (Para 4.8.)

Comment
Although assessing demand (met or unmet) for WAV may be difficul , it must be possible. This is a response which will do nothing to improve the provision of WAV in areas which currently have very few such vehicles.

Recommendation 31
Licensing authorities which have not already done so should set up lists of wheelchair accessible vehicles (WAVs) in compliance with s 167 of the Equality Act 2010, to ensure that passengers receive the protections which this provides.

Government response
"[The] Government [will] continue to encourage local licensing authorities, which have not already done so, to publish lists of taxis and PHVs designated as wheelchair accessible under Section 167 of the Equality Act 2010, and to inform the Department that they have done so." (Para 4.10.)

Comment
It is difficult to see why this requirement is not mandatory, and this response will do little to increase the numbers of authorities that publish such lists.

Recommendation 32
Licensing authorities should use their existing enforcement powers to take strong action where disability access refusals are reported, to deter future cases. They should also ensure their systems and processes make it as easy as possible to report disability access refusals.

Government response
"The Government agrees that those that refuse to meet their legal obligation under ss 168 and 170 of the Equality Act 2010 should be subject to enforcement action. We have stated in the Inclusive Transport Strategy that licensing authorities should use the powers available to them, and take robust action against those who have discriminated illegally against disabled passengers." (Para 4.13.)

Comment
This is a good response and supports the work already being undertaken by several local authorities.

Recommendation 33
The low pay and exploitation of some, but not all, drivers is a source of concern. Licensing authorities should take into account any evidence of a person or business flouting employment law, and with it the integrity of the National Living Wage, as part of their test of whether that person or business is "fit and proper" to be a PHV or taxi operator.

Government response
" . . . the Government agrees that the decisions of tribunals, and whether an operator concerned is complying with a

ruling in the way the law requires, should reasonably be considered by a licensing authority as part of the 'fit and proper' test for a PHV operator." (Para 5.2.)

Comment

This is a useful response and ties in with the wider approach to the fitness and propriety of operators advocated by the IoL in the Suitability Guidance.

Recommendation 34

Government should urgently review the evidence and case for restricting the number of hours that taxi and PHV drivers can drive, on the same safety grounds that restrict hours for bus and lorry drivers.

Government response

"In the first instance, in order to assess the scale of the issue, the Government will engage informally with sector stakeholders to determine whether it is possible to more accurately assess the hours drivers are working, and whether there is a trend for working more or excessive hours. The Government is mindful not just of road safety, but also of the need to avoid burdensome, yet difficult to enforce, regulation." (Para 5.6.)

Comment

This is at least a hint that the Government is prepared to consider the question of working hours, although how effective the informal engagement may be remains to be seen.

Conclusion

Overall this is a disappointing response. The TFG report was well considered and made sensible recommendations that were, in many cases, readily achievable with minimal legislative alteration. Although the responses to the report and the proposed guidance do take some matters forward, it really does fall short of expectations and will ultimately be filed in the annals of futile attempts to reform hackney carriage and private hire licensing.

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Statutory Guidance - consultation

The Government has finally produced the long-awaited consultation on the Statutory Guidance made under s 177 of the Policing and Crime Act 2017. **James Button** assesses the most important sections

Consultation on the Statutory Guidance made under s 177 of the Policing and Crime Act 2017 takes place until 22 April (although an earlier date of 8 April is mentioned on page 11 of the initial consultation document). The consultation document itself is lengthy, being some 36 pages in length of which 29 comprise the Statutory Guidance, which begins on page seven.

It is explained in Para 1.8 that the Statutory Guidance will replace relevant sections of the Best Practice Guidance which dates from 2010. Unfortunately it does not make clear which sections will be replaced, and this will probably not become clear until consultation takes place on the revised Best Practice Guidance, which is promised "once the final Statutory Guidance has been issued". It is difficult to see any compelling reason why the Statutory Guidance and the Best Practice Guidance cannot be combined into one document, and consultation on that take place at the same time. Multiple documents simply lead to more opportunities for confusion and uncertainty.

Turning to the Guidance itself, it covers 29 topics with two additional annexes. These are considered individually below. The response form (available online at https://www.gov.uk/government/consultations/taxi-and-private-hire-vehicle-licensing-protecting-users and as hard copy) contains 34 questions.

Consideration of the Statutory Guidance

This section makes it clear that the Department for Transport expects every licensing authority to comply with the Guidance, although this carries the usual corollary that ultimately decisions are a matter for each individual local authority. (Paras 2.1 to 2.8.)

Licensing policy

The Department encourages licensing authorities to create a cohesive policy document that brings together all their procedures on taxi and PHV licensing.

This should include but not be limited to policies on convictions, a '*fit and proper' person test, licence conditions and vehicle standards.* (Para 2.9.) And, *"When formulating a taxi and PHV policy, the primary and overriding objective must be to protect the public."* (Para 2.10.)

The remainder of this section explains the justification for this statement, which must be beyond question. (Paras 2.9 to 2.13.)

Fit and proper test

For the first time there is Guidance on the concept of a driver's fitness and propriety with the following suggested question to be asked of any applicant or existing licensee:

> *Without any prejudice, and based on the information before you, would you allow a person for whom you care, regardless of their condition, to travel alone in a vehicle driven by this person at any time of day or night?*

This is reinforced by an explanation that in cases of uncertainty the applicant or licensee should not be given the benefit of the doubt.

This will no doubt assist decision makers and is not dissimilar from the test which is widely used by local authorities, which has been suggested by *Button on Taxis* for the last 20 years. (Paras 2.14 to 2.16.)

Administration of the licensing framework

This section advocates training for councillors involved in taxi licensing decisions, which is to be applauded. It also suggests that decision-making on contentious matters should remain with councillors, rather than being delegated to offi ers. However it does make a strange claim at paragraph 2.21 that:

> *It is rare for the same councillors to be involved in frequent hearings – therefore the councillors involved in the decision making process will have less knowledge of previous decisions and therefore are less likely to be influenced by them. Oversight and scrutiny can be provided in relation to the licensing service generally, which can provide independent and impartial oversight of the way that the functions are being discharged within the authority.*

Experiences with local authorities suggest that in many cases it is actually a very small number of members who regularly sit to determine matters relating to hackney carriage and private hire drivers. (Paras 2.17 to 2.24.)

Whistleblowing

Drawing in particular on occurrences at South Ribble Borough Council, the Guidance requires local authorities to have effective whistleblowing policies, and suitable procedures to enable staff to raise concerns, and for those to be dealt with openly and fairly. (Paras 2.25 to 2.28.)

Implementing changes to licensing policy and requirements

This makes clear that any changes in licensing requirements should lead to a reconsideration of existing licences in the light of the new requirements. (Paras 2.29 and 2.30.)

The Disclosure and Barring Service

This reinforces the very important suggestion that all hackney carriage and private hire drivers should be required to produce an enhanced DBS certificate with a check of the barred lists. It seems all local authorities require an enhanced DBS check for drivers, but many do not currently check the barred lists. When the role of a driver is properly considered, it becomes crystal clear that this is a vital public safety consideration. (Paras 2.31 to 2.37.)

DBS update service

Licensing authorities should make use of the DBS update service and require drivers to consent to allowing the authority to regularly check the DBS database. This section also makes clear what should be entered on a DBS application to ensure a check of the adult and children barred lists:

> *Other Workforce should always be entered at X61 line 1 and Taxi Licensing should be entered at X61 line 2.*

Although this is not new, and many authorities have been undertaking this for some time, it is reassuring that the Guidance now makes it crystal clear that this should be seen as a mandatory requirement. (Paras 2.38 to 2.40.)

Licensee self-reporting

This suggests requiring licensees to notify the licensing authority "within 48 hours of an arrest and release, charge or conviction of any motoring offence,or any offence involving dishonesty, indecency or violence" which would then result in a review of the licence.

This is possible for private hire drivers where a condition can be attached to the licence, and it will also work for holders of dual licences (to drive a hackney carriage as well as a private hire vehicle). However, it cannot work for drivers who solely hold a hackney carriage driver's licence, because conditions cannot be attached to hackney carriage drivers' licences (see *Wathan v Neath Port Talbot CBC* [2002] L.L.R. 749 Admin Crt) and such requirements can only be imposed by byelaws. As the experience of local authorities over the last decade makes it clear that the DfT is not prepared to depart from the model byelaws, this is going to be impossible to implement. (Paras 2.41 and 2.42.)

Referrals to DBS and the police

This is an important update making local authorities aware that in certain circumstances information that they hold can be provided to the DBS. This will tie in with the proposed national database as a significant method of improving dissemination of vital information. (Paras 2.43 to 2.46.)

Overseas convictions

This reinforces the position in relation to overseas convictions and is a useful reminder of the Home Offi e Guidance. (Paras 2.47 and 2.48.)

Conviction policy + Annex A

This builds upon the existing Best Practice Guidance (paragraph 59), and by virtue of Annex A, incorporates much of the "Guidance on Determination" (chapter 4) of the *Guidance on determining the suitability of applicants and licensees in the hackney and private hire trades* published by the Institute of Licensing in association with the LGA, NALEO and LLG. This is to be welcomed, and is a welcome endorsement of that work, but it must be recognised that Annex A does not reproduce those proposals completely. In relation to motoring convictions they have departed from the IoL proposals, and although they retain the same approach to drink-driving and the use of mobile telephones, they make no mention of major or minor motoring offences, hackney carriage and private hire offences and other vehicle-use offences.

They suggest the same criteria should apply to operators (but discounting driving convictions) but no mention is made of the suggestion in the Suitability Guidance that the same criteria should apply to vehicle proprietors.

As a consequence, while Annex A is to be welcomed, and is a major improvement on the 25-year-old Annex D attached to DoT Circular 2/92, it falls short of being a comprehensive model convictions policy, and leaves scope for significant variations between licensing authorities. (Paras 2.49 and 2.50.)

Common law police disclosure

This is one of the big problem areas facing local authorities, with inconsistent and haphazard reporting of matters of concern. There is a great deal of evidence to show that CLPD is not being used to provide the necessary information in a timely fashion to enable local authorities to take steps to adequately protect the public via the hackney carriage and

private hire licensing regimes.

The statement in the draft Guidance, below, is completely unacceptable and does nothing to improve the situation. (Paras 2.51 to 2.53.):

> *The new procedure provides robust safeguarding arrangements while ensuring only relevant information is passed on to employers or regulatory bodies. We would therefore strongly recommend that licensing authorities maintain close links with the police to ensure effective and efficient information sharing procedures and protocols are in place and are being used.*

There is useful information on data sharing and references to other relevant documentation. (Paras 2.54 to 2.61.)

Multi-agency safeguarding hub (MASH)

This section raises awareness of a further source of information and intelligence sharing and states:"The Department recommends all licensing authorities should establish a means to facilitate the objectives of a MASH" (Paras 2.62 to 2.64.)

Complaints against licensees

This endorses the LGA recommendation that local authorities should have a robust system for recording complaints, analysing trends and then considering appropriate action.

It goes further by requiring local authorities to produce Guidance to passengers on making complaints that must be available on their website and displayed in licensed vehicles. It also encourages effective partnership working between licensing authorities and private hire operators to try to get operators to raise concerns with the authority about particular drivers.

It is suggested that this will enable complaints in relation to out-of-area vehicles to be successfully directed to the relevant licensing authority, and also makes reference to CCTV in the vehicles.

It remains to be seen how effective this will be, because it not only requires action on the part of local authorities, but also a great deal of increased awareness on the part of the public. (Paras 2.65 to 2.68.)

Duration of licences

This section states that licences for shorter periods than the three years for drivers and five years for private hire operators, which are the maximum periods for which a licence can be granted, can be granted where "the licensing authority considers that a probationary period is necessary".

It is impossible to see how somebody can be considered fit and proper on a probationary basis. A person is either fit and proper or not, and earlier in the Guidance (paras 2.14 to 2.16) it is stated quite clearly "that an applicant or licensee should not be 'given the benefit of doubt'."

It is suggested that this is incorrect and that probationary licences should never be granted. (Paras 2.69 and 2.70.)

Safeguarding awareness

> *It is the Department's recommendation that licensing authorities provide safeguarding advice and Guidance to the trade and that taxi and PHV drivers are required to undertake safeguarding training.*

This is essential, and is already undertaken and required by many authorities. The endorsement of that approach in this Guidance is welcomed. (Paras 2.71 to 2.73.)

Other forms of exploitation – 'county lines' drug-traffickin

This is a useful, brief explanation of the county lines problem, which in itself becomes an integral part of safeguarding awareness. Again, this is to be welcomed. (Paras 2.74 to 2.78.)

Language proficiency

This suggests (but it could be expressed more forcefully) that satisfactory oral and written English language skills are necessary requirements for hackney carriage and private hire drivers. To that extent it is welcome. (Para 2.79.)

Enforcement

This encourages collaborative working between local authorities, and in particular mutual authorisation of offi ers. It also supports "penalty points schemes" and restates the suggestion that should be a clear simple and well-publicised complaints process. (Paras 2.80 to 2.83.)

Suspension and revocation of driver licences

This is a useful summary of the position relating to action against drivers' licences. In particular it is welcome that emphasis is made that before any decision is made the driver should be given the opportunity to state their case.

The statement "If a period of suspension is imposed, it cannot be extended or changed to revocation at a later date" is welcomed, but should be more forceful and clearly directed to the decisions in *R (on the application of Singh) v Cardiff City Council* [2013] LLR 108 Admin Crt, and Reigate & Banstead Borough Council v Pawlowski [2018] R.T.R. 10 Admin Crt. (Paras 2.84 to 2.89.)

Criminal record checks for PHV operators

This is a useful ancillary section specifically related to private hire operators' suitability, an area which has been unfortunately overlooked by many authorities in the past. Again this builds upon the suggestions made by the IoL in the "suitability guidelines" and is to be welcomed. (Paras 2.90 to 2.95.)

PHV operators - ancillary staff

It is vital that all staff of a private hire operator that have access to customer information are safe and suitable persons, and this section emphasises that, making useful suggestions as to how this can be achieved. (Paras 2.96 to 2.99.)

PHV operators - use of passenger carrying vehicles (PCV) licensed drivers

This section emphasises that a booking for a private hire vehicle must be fulfilled by a private hire vehicle, and not via a PSV. It is to be welcomed. (Para 2.100.)

PHV operators - record-keeping

This suggests the minimum information that should be recorded in a private hire operators booking records. Unfortunately it does not include the time at which the hiring is required. This information will be of vital importance in determining whether or not the journey was conducted lawfully, or whether the driver was guilty of illegally standing or plying for hire. Subject to that addition, this is a useful section. (Paras 2.101 to 2.103.)

In-vehicle visual and audio recordings – CCTV

This section presents a useful overview of the advantages of CCTV in vehicles, and the law and guidelines relating to them. This is a complex area, and there are clear conflicts between the need to protect both public and driver safety, and the privacy perspective.

It is clear that Guidance cannot mandate CCTV with continual audio and video recording, and this Guidance goes as far as it probably can with the law as it currently stands. Legislation requiring this is urgently needed to overcome the legitimate concerns of the surveillance camera Commissioner and the information Commissioner.

It is also important to recognise that although, as the Guidance states, "vehicles may not be exclusively used for business, also serving as a car for personal use" hackney carriages and private hire vehicles are licensed vehicles at all times (see *Yates v Gates* [1970] 2 QB 27 and Benson v Boyce [1997] RTR 226) and should be regarded as business vehicles, rather than private vehicles. Any private use must be subject to those criteria, and that should include any CCTV requirements. (Paras 2.104 to 2.116.)

Stretched limousines

This section usefully makes the point that stretched limousines seating up to eight passengers are part of the private hire regime, and local authorities should take steps to license them, in order to protect the public from unlicensed and therefore unregulated and unauthorised use. (Paras 2.117 2.118.)

Consultation at the local level

This emphasises the need for consultation and is a useful conclusion to the Guidance. (Paras 2.119 and 2.120.)

Annex A
Previous convictions Guidance

This has already been considered above

Annex B
Staying safe: Guidance for passengers

This is a suggestion for Guidance to passengers. Such information is already produced by many local authorities, but this may be a useful encouragement for those who do not do so.

Conclusion

Does this Guidance actually take hackney carriage and private hire licensing forwards? Whilst there are useful suggestions made, and as detailed above, a lot of the document is to be welcomed, the vast majority of this activity is already undertaken by local authorities who regard hackney carriage and private hire licensing as being an important and significant part of their work.

Whilst this may improve standards in authorities that are currently falling short, it is a long way away from the heralded "national standards" that the Government champions in the publicity accompanying this draft Guidance. As the Under Secretary of State herself states, legislation is required to introduce national minimum standards, to enable enforcement and compliance checks to be conducted by any licensing offi er irrespective of where the vehicle and driver have been licensed and take appropriate action, and to create a national database.

If this legislation is not forthcoming in a very short period of time, the public will rightly regard this Guidance is being a second-rate attempt to protect public safety.

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