Journal of Licensing

The Journal of the Institute of Licensing

Number 6 July 2013

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Journal of Licensing

Journal of Licensing ISSN 2048-9110

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This issue shall be cited as **(2013) 6 JoL**.

Foreword

Jon Collins

Chairman, Institute of Licensing

A chill ran down my spine when I read the recent report from the Alcohol Health Alliance entitled *Health First: an evidence-based alcohol strategy for the UK*. Not, this time, because of the dystopian vision of the future it painted – for example, "We need to imagine a society where low or no alcohol consumption is the norm". No, the phrase that made me shudder would probably appear fairly innocuous to the layman. It was, in fact, one of the top ten recommendations in the report, namely that "Licensing legislation should be comprehensively reviewed".

Now, hopefully, two questions are running through your mind. Firstly, has anyone actually asked Society if it wants a no/low alcohol future? And secondly, where have these people been for the last fifteen years?

When I mentioned this proposal at the latest meeting of the National Licensing Forum, there was a collective grimace from those around the table who are veterans of the licensing reform process. That process ran from around the time of New Labour's election in 1997, and took in *Time for Reform*, the White Paper of 2000, the Licensing Act 2003 and subsequent secondary and supplementary legislation ahead of the new licensing regime going live in November 2005. Then, of course, we were faced with a period of review and much amendment (chiefly to strengthen the enforcement elements of the legislation) through to the Coalition taking power in 2010. Practically its first act was to announce a multi-faceted re-balancing of licensing legislation to further strengthen the voice of the resident and the hand of the regulator.

How can it be that health lobbyists, close to the legislative process and advocating an evidence based approach, really think we need a comprehensive review? We are, after all, still digesting the latest phase of this decade-and-a-half-long cycle of reform. The trade and its regulators are still getting to grips with the powers and responsibilities introduced, amended and revised during this period. The use of tools such as closure notices, expedited reviews and cumulative impact policies has been subject to intense debate. And we are yet to see the first shots fired in anger in the multiple local disputes we can expect over the Late Night Levy and Early Morning Alcohol Restriction Orders (EMROs). The levy, of course, was introduced after the abject failure of alcohol disorder zones and on the basis of a "polluter pays" argument that only makes sense if you ignore the billions paid into the Exchequer each year by the alcohol industry.

This version of the EMRO has been revised as part of the Coalition's re-balancing, taking us further and further away from the spirit of the 2003 Act. This Act was prepared by DCMS officials – having begun the process while at the Home Office – with Ministerial licence to strip the system back to its component parts and rebuild it in a form fit for purpose in the 21st century. Nothing was off limits and the guiding philosophy was for a modernising, light touch regime that would facilitate a more relaxed approach to alcohol. This last part was to be achieved by removing the standard terminal hour, which was perceived as encouraging an end of evening binge against the clock.

To be fair to the Alcohol Health Alliance, it was the police who seemed most in favour of removing the terminal hour, the feeling being that staggered closing would remove a peak of disorder. We now have many within the police arguing for the re-introduction of standard closing (through an EMRO). Has the evidence changed or is this one part institutional memory loss and one part pragmatic budgetary considerations? Either way, the late night industry, having witnessed a massive expansion in outlet numbers in the run up to reform in 2005, could see its competitive position not just undermined but fundamentally damaged by this latest development.

Licensing reform will always have unintended consequences. The number of pubs, clubs and bars, supermarkets, convenience stores and off licences and the millions of people consuming alcohol on a regular basis (at home and in trade) means any change triggers a vast social experiment. And that is before we consider the number, range and complexity of our regulatory and enforcement bodies. It would be far better to work with what we have got than to introduce yet more change and uncertainty into the system.

The reality is that licensing works well as it is. Given the importance of the issue and scale of activity, there will always be new anomalies created and new perspectives required and thus an element of on-going maintenance to be performed. But we do not need a fundamental review. It would be an unnecessary distraction, a drain on resources and, if the last 15 years have taught us anything, just lead to another review in 2028.

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Editorial

Leo Charalambides

Editor, Journal of Licensing

The role of public health within local authority licensing is an unresolved debate which has been in sharp focus recently. Under the Licensing Act 2003 health bodies are now included in the ranks of responsible authorities. Central government is encouraging local authorities to make use of data relating to health issues in the development of their statement of licensing policy, special policies and evidence for Early Morning Alcohol Restriction Orders.

Under the Gambling Act 2005 a number of local authorities are closely examining the "Protection of children and other vulnerable persons from being harmed or exploited by gambling" objective so as to explore whether this objective can be used to counter the perceived proliferation of high-street betting shops.

It is perhaps in the sex establishment regime that the promotion of public health could be most easily accommodated yet it is a sadly neglected consideration.

On 5 June 2013 Public Health England (PHE) in its Health Protection Report presented the most recent figures and trends in sexually transmitted infections (STI). It named the London Borough of Lambeth as the highest borough for sexually transmitted diseases.

This demonstrates additional public interest justification for Lambeth's bold and well-informed decision to adopt and apply a broad definition of sexual entertainment venues (SEV) to cover not only lap-dancing and similar entertainments but also venues that operate other adult sexual entertainment. In the case of Lambeth this includes saunas with sex-on-sex facilities, bars and clubs offering "dark-room"entertainment and venues which cater for the various fetish communities.

The basis for this approach is provided in the wide-ranging definition of "relevant entertainment" under the Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 which requires authorisation for <u>any</u> live performance, <u>or any</u> live display of nudity which, ignoring financial gain, is such that it must reasonably be assumed (objectively) to be provided solely or principally for the purpose of sexually stimulating any member of the audience.

This definition of "relevant entertainment" has, however, been generally been narrowly construed and limited to the common-place view of lap dancing and similar activities. The curious consequence of this position is that no-touch lap dancing is heavily conditioned and regulated while venues and entertainment which involve sexual congress are allowed to operate and flourish unchecked and unregulated.

The public interest in respect of ensuring that these venues are fit for purpose, that they operate with proper regard for the entertainers and participants and are suitably located and not used to cover criminal activity is self-evident. They are all concerns that are addressed in the full and proper application of the 1982 Act.

The commendable approach taken by Lambeth highlights a further potentially significant failing. While the majority of local authorities take a rigorous approach to lap dancing and similar entertainment, they demonstrate an equally persistent institutional blind spot in respect of the wider SEV offering in their areas. I know of many local authority areas where strictly controlled lap dancing venues exist almost cheek-to-jowl with other non-lap dancing SEVs. Can it be right to have such close control and supervision of lap dancing venues when, in close proximity, sex-on-sex venues operate with little or no regard to regulatory regimes?

In my mind this not only constitutes a failing by local authorities to administer the sex establishment regime to the full extent of the public interest but also constitutes a grossly unfair and discriminatory implementation and application of the sex establishment regime.

A number of sex-on-sex venues operate under the provision of Special Treatment Licences; these typically provide that premises are not to offer or engage in sexual services or activities. These conditions are honoured more in the breach than in the observance. Typically, saunas and such similar venues provide and include, for example, "rest rooms" wherein rest is far removed from the reality. In 2012 the press reported a number of deaths occurring in gay saunas. Indeed, it was the death of two men at a Lambeth venue in 2012 that prompted the action taken by the local authority there.

While licensing regimes generally may struggle to implement public health considerations within their operation, this is not the case with the sex establishment regime. In light of the findings reported by PHE, the proper use of the sex establishment regime provides an additional tool to counter the reported trends. There is a pressing public health need for local authorities to review the definition and application of SEVs and for the regime to be applied with equal force and attention across the wide spectrum of sexual entertainment.

What is the right regulation for face-to-face fundraising?

Charitable collections pose problems for local authorities and police because of the hotchpotch of legislation governing the third sector. **Dr Toby Ganley** and **Ian MacQuillin** of the Public Fundraising Regulatory Association identify a way forward

There's no polite way to say this: the statutory regulation surrounding face-to-face (F2F) fundraising – the activity performed by street fundraisers who some people disparagingly refer to as chuggers – is a total dog's dinner. All it consists of is bits and pieces of outdated legislation that are no longer fit for purpose, and two attempts at replacing these with new legislation never quite got there.

This unsatisfactory situation has led to a variety of attempts to fill the gap by bluff, or by co-opting legislation designed for controlling other activities. However, we believe the best solution on offer, as recommended by the Government, is the co-regulatory option offered by the Public Fundraising Regulatory Association (PFRA).

The purpose of this article, therefore, is to:

- Set out the various types of charitable collections.
- Outline existing legislation and how this does or does not address regulatory issues (this article concentrates on the legislation in England and Wales).
- Examine the recommendations affecting licensing of charitable collections made by Lord Hodgson in his review of the Charities Act 2006 (CA06).
- Describe how PFRA works with councils through fundraising "site management agreements".
- And explore some of the issues pertaining to charity collections, as we see them, facing local government.

Charitable collections

Charities collect in public in a number of different ways, including:

- Cash on the street or doorstep (usually conducted by volunteers, who are often referred to in the charity sector, with great affection, as tin rattlers).
- Direct Debits (regular giving) on the street or doorstep (chuggers).
- Lottery sales, usually on the doorstep.
- Contact details on the street (called prospecting in the charity sector, this is done so the charity can call the person who has given their contact details to ask them to make a regular donation).
- Clothing collections on the doorstep.

Each of these methods of fundraising has its pros and cons for charities, but the main point to emphasise is that they all work: charities do not conduct fundraising that loses them money. Moreover, each type of fundraising serves a particular niche and is not an alternative to the others – they are complementary.

Having said that, for the past 30 years, there has been a concerted move in the charity sector to shift away from traditional *ad hoc* giving, such as dropping coins in a tin or responding with a fiver to a piece of direct mail, and towards regular monthly giving, first through standing orders and now predominantly through Direct Debits. Having a large number of donors who each give a regular amount of money provides a charity with far more flexibility in terms of budgeting for the future. Regular giving income is predictable income that allows charities to plan their services with confidence. Cash collections, however, are excellent for smaller, often local, charities, that don't have the resources or infrastructure to conduct regular giving appeals, and also if there is an urgent need, such as the current emergency appeal for Syria being co-ordinated by the Disasters Emergency Committee.

There are two broad models for recruiting regular givers. One is to take the *ad hoc* donors a charity already has - for example, those who have participated in events, or gave to the Christmas appeal - and ask them to make a monthly gift via Direct Debit. Direct mail and telephone are good media for this kind of conversion activity. The second model involves recruiting donors straight into regular monthly giving. During the 80s and early 90s, direct mail worked well for this, until costs increased and response rates fell. For a time in the early 90s, it looked as if telephone

fundraising would be the best source of finding new regular givers, until the Telephone Preference Service outlawed cold calls to those who opted not to receive them. And then in 1997, F2F fundraising on the street appeared in the UK (Greenpeace was the first to try it out, in Brighton). This and its sister use of F2F on the doorstep is now one of the most cost-effective ways available to charities to recruit people directly into regular monthly giving (as noted above, charities only use fundraising methods that work for them).

Each of the collections methods we outlined (apart from volunteer tin rattlers, who, unless they turn out to be fraudsters, seem to be beyond reproach) attracts criticism. Some people object that fundraisers are paid and not volunteers. Others object that charities don't make enough from the collections. Some people object to being asked to give in the first place. Strictly, these concerns are outside the scope of this article, although they do sometimes crop up in the deliberations of licensing officers, so we'll return to them towards the end of the article. (Anyone interested in finding more about these controversies should go to our website – www.pfra.org.uk – and click the "Do you want to know more about F2F?" tab.)

For now, though, we will focus on licensing and regulatory issues.

Legislation

For most of the collection types, the question of licensing is straightforward.

Any charitable collection conducted by going door-to-door requires a licence from the council under the House-to-House Collections Act 1939, unless they are working in London, in which case the relevant licensing authorities are the Metropolitan and City police forces. In addition, any charity selling lottery tickets on the doorstep requires a further licence from the Gambling Commission. The situation is slightly complicated by the fact that 44 charities hold national exemption orders issued by the Home Office (these are available to charities that have carried out collections in at least 70 local authority licensing areas for the preceding two years). National exemption orders remove the need for the holders to obtain a licence from a council, but the holder is still under an obligation to inform councils where and when they will be collecting.

This is not a particularly useful regulatory tool – it does not provide very useful powers for councils to determine when and where doorstep fundraising takes place because of very limited grounds for refusal of licenses.

However, it is street collections where the greatest licensing controversy occurs.

As most fundraising managers and licensing officers will know – and virtually no-one outside of these two occupations will care – the bone of legislative contention relating to chuggers is the arcane Police, Factories etc (Miscellaneous Provisions) Act 1916. This act – which was hastily brought into force to prevent fundraising for bogus war charities during the First World War giving the police the authority to issue licenses for charitable collections of money – requires a charity to obtain a licence for charitable collections in public places, which to all intents and purposes means those carried out on the street. Model local regulations are provided in the Charitable Collections Order 1974 (Transitional Provisions), though local authorities are not obliged to introduce such a system of licensing in their area.

The issuing of licences was the responsibility of the police until the Local Government Act 1972 transferred the licensing role to councils (except in London, where licences are still issued by the police).

Charitable cash collections on the public highway require a licence under this Act. Section 5 (the only part still in force) very clearly states a licence is required in order to "collect money or sell articles for the benefit of charitable or other purposes" (s5.1). However, an issue arises when determining whether F2F street fundraising is covered by this Act since Direct Debits are not "money" in law.

PFRA has obtained two separate legal opinions (the first from solicitors Farrer and Co, the second from Nigel Jones QC of Hardwicke) which state that Direct Debits are not "money", but are "promises of money at a later date" – in legal terms, a "*chose in action*" and therefore F2F fundraising for Direct Debits does not require a collection licence under the 1916 Act. The same is true of "prospecting" where only contact details are solicited. However, doorstep collections of Direct Debits require a licence because the House to House Collections Act 1939 gives councils power to issue licences for collections of "money or other property" – three extra words that make all the difference.

The Metropolitan Police (the licensing authority in London) agrees that neither Direct Debits nor prospecting are covered by the 1916 Act and so all F2F fundraising within the Metropolitan Police District is done legally without a licence.

The vast majority of councils agree that Direct Debit street fundraising is not covered by the 1916 Act, but a few maintain that it is. This leads to at least the following permutations with respect to licensing F2F street fundraising:

- 1916 does not apply so the council has no jurisdiction whatsoever – fundraisers can come and go as they please.
- 1916 does not apply so the council works with the PFRA to ensure fundraising is regulated for charities and residents through a site management agreement.
- 1916 does not apply so the council will need to resort to some other legislation to attempt to control street F2F fundraising.
- 1916 does apply and so the council is happy to work with the PFRA to ensure fundraising is done equitably for charities and residents through a site management agreement.
- 1916 does apply and so the council is happy to give licences for Direct Debit fundraising.
- 1916 does apply and the council will not allow Direct Debit fundraising.

There are only a small number of councils that contend that the 1916 Act does apply to street F2F fundraising, and an even smaller number that refuse to allow the activity on those grounds. As we shall explain later, PFRA runs diary allocations programmes for fundraising areas that

we control. However, many councils, such as Chesterfield Borough Council and Kirklees Council run their own diaries, with charities booking their fundraising activity directly with the council, rather than through the PFRA. This arrangement can work well for both councils and charities although councils are legally powerless to prevent teams of fundraisers from working in their area.

There are only a very few councils that maintain the 1916 Act gives them authority to ban F2F street fundraising by refusing to grant licences. Our very strong position is that these councils would be acting outside of the authority granted to them by existing legislation and councils taking this position are swimming against the tide, not just of many of their peers, but of the Office for Civil Society (OCS) and the Cabinet Office.

Councils that have accepted they have no power to act under the 1916 Act have often considered other means to regulate street F2F fundraising, either by trying to enact a specific bylaw, or by turning to street trading legislation. We believe both of these to be dead ends.

As we will shortly discuss, the public collections licensing regime has been one part of a recent independent review into charity legislation chaired by Lord Hodgson of Astley Abbotts, which reported last year. All bylaws require the approval of the relevant secretary of state, in this case the Secretary of State for Communities and Local Government.

While the Government is still considering Lord Hodgson's proposals, it is extremely unlikely that any bylaw that attempted to introduce controls in an area that is still being considered by central government would receive approval from the Secretary of State. We understand that the OCS has written to a number of councils who have proposed such measures to inform them as much.

Even if the current legislation were not under review, bylaws to regulate street fundraising would still not be a profitable route as it is a principle of British law that bylaws cannot overrule legislation. The Government is of the opinion that street F2F fundraisers are excluded from the 1916 Act. The Charities Act 2006 contains a regime, which while never implemented, remains indicative of the will of Parliament, so no bye-law can legally venture into this territory. But we discuss Charities Act 2006 more thoroughly below.

Another route taken sometimes by councils that seemingly prefer to eschew the co-regulation option (see below) is to attempt to use street trading, touting or pedlar legislation; or alternatively attempt to write bylaws based on such legislation – which would in all likelihood be based on Model Bylaw 12 as contained in Model Bylaw Set 8 produced by the Department for Communities and Local Government (the latest version having been published in February 2013).

Model Bylaw 12 refers to "advertising or soliciting custom for a service". However, fundraisers do not solicit custom from members of the public; rather they enable the public to provide a service on behalf of someone else through the charity. While F2F fundraisers have a contract with the charities on whose behalf they are collecting (an employment contract if they are employed directly or a business contract if they work for a third party agency), fundraisers do not solicit custom for financial gain from the public and donors have no equivalent of the commercial contract that results from a sale of a good or service. Fundraising is an ostensibly similar activity to touting or street trading, but at a much deeper level there are significant differences that mean it is neither of these things.

The only time UK legislation has explicitly included fundraising within a definition of street trading was as part of The London Olympic Games and Paralympic Games (Advertising and Trading)(England) Regulations 2011, which lasted only for the period of the games. The fact that fundraising was specifically included in this legislation (along with street entertainers) suggests that fundraising is not included in existing legislation relating to street trading and touting (if it were, the Olympics regulations would not have needed to explicitly include it).

To the best of our knowledge, no council has controlled street fundraising using bylaws based on touting or street trading legislation; the period of the Olympic and Paralympic games being the only time this was done under the force of explicit primary legislation.

Charities Act 2006

It is certainly an anachronistic anomaly that the law of the land gives councils the power to license charity collections of money, but not of Direct Debits. The Government has recognised this to be so and has twice attempted to bring in new legislation that would have introduced a unified collections licensing regime. Part 3 of each Act contained a new public charitable collections regime that would have given councils power to issue licences for Direct Debit fundraising. However, neither Part 3 of the 1992 nor 2006 Act was brought into force and there is now little or no chance that the relevant provisions ever will be.

The Charities Act 2006 would have cleared up the 1916 anomaly and made it clear that Direct Debit fundraising required a licence by including the phrase "money or other property" (s 45(2)), just as the House to House Collections Act 1939 does, and extended this power to London boroughs, removing it from the police. While Part 3 of the Act was eagerly awaited by the charity sector as well as local government, it would not have provided councils with *carte blanche* to control or ban chuggers at their whim.

First, the Act would have introduced the notion of Public Collection Certificates ("PCC") (ss 51-57). A charity would have had to obtain a PCC from the Charity Commission in order to conduct a public charitable collection. Local authorities would not be able to issue a collection permit (ss 58-59) to charities that did not have a PCC.

This would have meant that it is the Charity Commission that is responsible for determining a charity's *bona fides* rather than a local authority, which currently has these powers under the Police, Factories etc Act 1916. Various burdensome and time-consuming tasks such as verifying collectors' IDs, enforcing non-payment of cash collectors, and scrutinising accountants' returns would have been removed from the powers and duties of licensing officers.

The only grounds that a local authority would have been able to take into account when refusing to grant a permit (s 60) would have been that a proposed collection would have caused "undue inconvenience" to the public because there was another collection already planned in the same locality' on the same day, the day before or the day after.

Section 60 would therefore effectively have introduced the 48-hour rule – the maximum interval a licensing authority could place between episodes of collecting activity in any specific locality would be 24 hours. Had this provision been implemented, licensing authorities would, it appears, have been obliged to permit collecting activities at the very least once every 48 hours if those applications had met the other relevant conditions.

PFRA takes the view that the use of the words "undue inconvenience" is key. "Undue" implies there is a level of inconvenience that is "due" – i.e. tolerable and expected on a public highway. It is only when this inconvenience becomes undue that there would have been grounds to consider a refusal for a permit.

The Charities Act 2006 would also have taken certain collections out of the licensing regime. "Short term" and "local" collections would be exempt (s 50) from a requirement to hold a PCC and a local authority permit. And all doorstep fundraising activity would have been largely deregulated. While any charity wanting to engage in house-to-house collections would have had to obtain a Public Collection Certificate from the Charity Commission, they would no longer have needed to apply for a permit from the council (as they currently do under the House-to-House Collections Act 1939). However, they would have had to notify the council of the date, time and place of the collection and provide the council with a copy of the PCC. In effect, Part 3 of Charities Act 2006 would have granted the equivalent of a national exemption order to every charity in the country.

Lord Hodgson's review

In November 2011, the Government asked Lord Hodgson of Astley Abbotts to lead a review of the Charities Act 2006. The terms of reference for the review listed 14 areas that Lord Hodgson wished to consider, including: a public benefit test for the determination of charitable status; incentivising and supporting trustees; thresholds for registration of charities; and charity mergers. Two of the areas he wished to review of particular interest here were the self-regulation of fundraising and the public collections regime.

Lord Hodgson's report, delivered in July 2012, runs to 158 pages, in which he makes 93 recommendations that require action (many of which contain sub-recommendations) and a further 10 recommendations that do not require action, all of which are now subject to consideration and acceptance by the government.

In relation to the public collections, Lord Hodgson recommended that face-to-face fundraising should be licensed (the PFRA, along with the Local Government Association and Association of Town and City Management had proposed this in evidence to his review), but said that local authorities should be "encouraged to rely on self-regulation of these types of collection by the PFRA". Licensing should be developed within a national legal framework allowing for different degrees of local discretion, reducing inconsistencies but allowing for localism, which should include and provide for:

- National guidelines or model regulations – criteria for organisations to apply for a licence.
- Accountability and transparency.
- Balance between different types and scale of collections.
- Frequency and conduct.

Within this national framework, he said that councils should have a "significant degree of freedom" in determining the frequency and extent of different types of collections, but that they "should not be able to ban a particular fundraising method that is accepted nationally".

He called for the abolition of national exemption orders and said the Government should "explore the appetite and options" for licensing all types of house-to-house textile collections to "equalise the position between commercial and charitable collections".

Finally, he said that licensing in London should be transferred from the police to councils "if there is demand for such a change".

The Government's interim response to Lord Hodgson's report, published in December 2012, supported the "recommendation that stronger self-regulation should be the first resort in relation to chuggers, before statutory regulation is considered".

The co-regulation option

The situation regarding licensing chuggers is currently that:

- The Act that allows councils to licence cash collections does not apply to Direct Debit fundraising.
- The unified licensing regime contained in Part 3 of Charities Act 2006 is unlikely ever to be implemented.
- The Government has recommended self-regulation before statutory regulation is considered.

Although we hesitate to recommend our own work too strongly in this article, working in partnership with an organisation such as the PFRA that delivers self-regulation of charitable collections is the "only game in town" unless and until the Government introduces new primary legislation, which will take several years from start to finish.

The PFRA was formed by charities and fundraising agencies in 2000 to address the problems caused by a lack of statutory regulation. In the late 90s, charities found that they were engaged in turf wars with other charities, turning up earlier and earlier to make sure they got the best sites, only to find a different charity had got up even earlier. One of our first goals was to ensure that all charities had an equitable share of fundraising access, and to negotiate that with the consent of the local council, which we do through "site management agreements" (SMAs).

Through these agreements – of which we currently have 59, from major cities such as Manchester and Glasgow, through to market towns such as Hereford and Newton Abbot – we are aiming to balance the duty of charities to

ask the public to support their beneficiaries, with the right of the public not to be put under undue pressure to give – remember, the term "undue pressure" was included in Part 3 of Charities Act 2006.

We make sure our members stick to the terms of SMAs through a programme of spot checks, mystery shopping and co-regulation with our council partners. Breaches of the conditions of a SMA attract penalties points under our penalties and sanctions regime (detailed in our Rule Book).

A typical SMA will:

- Delineate the location in which fundraisers may work. This is usually very specific, containing instructions such as "High Street between Main Road and Bridge St".
- Specify which days of the week fundraisers may attend. The SMA might, for instance, preclude fundraisers from working on market day. Most SMAs allow fundraisers to work three or four days a week.
- Specify how many fundraisers may attend. Depending on the size and layout of the location, the population density, footfall, vibrancy etc (all factors that speak to what level of inconvenience might become "undue"). Most SMAs allow between three and six fundraisers.
- Include various other criteria and stipulations, such as whether a non-fundraising team leader is allowed to be present.

The PFRA then runs a diary according to the terms of the SMA and complies with the Institute of Fundraising's *Code of Fundraising Practice*.

Once a SMA is in place it should minimise the administration for all concerned, providing just one channel for information, as licensing officers or town centre managers only have to deal with one organisation, the PFRA, instead of dealing with each individual charity and fundraising organisation separately.

Should PFRA members breach the terms of a SMA – for instance by straying outside the delineated areas or sending too many fundraisers – PFRA offers a single point of contact for the local authority to rectify this. We can usually ensure SMA breaches are put right within the hour.

Site management agreements are proven to work. Many of our council partners report that standards of conduct increase and complaints fall once an SMA comes into effect. For instance, the town centre manager at Plymouth City Council was receiving around 50 complaints a month which were resulting from the overuse of sites in the city centre. There were two sites that were being used by six fundraisers six days a week. The SMA we negotiated with Plymouth City Council resulted in each site being used only on three non-consecutive, mutually exclusive days. Within a few weeks, complaints to the TCM had all but dried up. A 50 per cent reduction in volume of fundraising had cut complaints by around 96 per cent.

In November 2012, PFRA struck an agreement with the Local Government Association on regulating street fundraising. The agreement – *Making the Pledge* – recommends PFRA's model of self-regulation to LGA's members and sets out what they should expect in a fundraising agreement. We have forged an excellent working partnership with the LGA, so much so that we have taken on a secondee, Lucy Ellender, from the LGA to work with us for a year as policy and outreach officer. We hope that Lucy's excellent work will lead to many more negotiations for SMAs and kickstart some of those discussions with councils that have stalled in the past year or so.

Moving forward

Of course, licensing charitable collections is not just about street chuggers. One of Lord Hodgson's criticisms of the self-regulation of charitable collections (see box) was that it is fragmented and the roles of the respective organisations – the PFRA, Institute of Fundraising (IoF), and the Fundraising Standards Board (FRSB) – were not clear. He suggested the three bodies should work more closely together and clarify their roles and he also recommended establishing a standing committee with core membership of the Charity Commission, IoF and FRSB to drive through his proposed changes to the licensing regime (outlined above in the section on the Hodgson report).

A working group – which also includes organisations with expert knowledge such as the PFRA and Charity Retail Association as well as the Institute of Licensing and the National Association of Licensing and Enforcement Officers – is now working on a public charitable collections framework that could potentially underpin diaries for all public charitable collections (for example, Direct Debits, cash, clothes and lottery sales) in the street or on the doorstep. The group has established a set of principles for a successful public collection framework – which among other things include that it should be cost effective and proportionate, robust and transparent, and sustainable. This work is on-going.

The future challenges for co-regulation of charitable collections do not just lie at the charity sector's door; local government has challenges of its own.

Last November we both attended the Institute of Licensing's National Training Event. This was part and parcel of how we are trying to focus more of our outreach on local authorities and less on charity sector events, as we have done in the past.

We're glad we went, because it seems our agreements were better known and appreciated than we had realised. But we also learned a lot about the issues affecting licensing officers that we don't usually encounter, things such as the Late Night Levy, Early Morning Alcohol Restriction Orders, licensing action plans, and lots more.

At the opening session, Gary Grant, the licensing advocate from Francis Taylor Building, spoke about some of the issues around alcohol licensing. He said the media was driving the debate, leading to knee jerk reactions from Government; but that the role of licensing was to put in place risk-based controls, and not regulate activities out of existence.

That really struck a chord with us as he could have been talking about regulating street fundraising – they are the same issues and arguments that we face. What this suggested to us was that, in principle, regulating street fundraising isn't all that different to many of the other types of activity councils wish to license and regulate.

That revelation has really helped us to shape some of our thinking about how we can work with councils to co-regulate F2F fundraising, and we think what we offer dovetails perfectly with the LGA's "new model for local government".

A key part of this LGA initiative – which will encompass growth, the future of social care, sustainable funding and welfare reform – will be to look at how councils' regulatory services can work with their local business communities to deliver economic growth.

Local regulatory services – licensing, environmental health and trading standards – work with businesses every day and the LGA wants to ensure that these services are "open for business" by building further on the risk-based approach to regulation, for example by visiting only those businesses that are likely to be a problem. Some business see regulation as a barrier to their economic success and LGA hopes the open for business approach will convince business that council regulation is part of the solution rather than part of the problem.

We believe that this approach should resonate with charity regulation. If the New Model for Local Government places a responsibility on councils to facilitate growth in the commercial sector through proportionate regulation, then it should confer the same responsibility to facilitate growth in the third sector through proportionate regulation.

Risk-based regulation is about striking the right balance between protecting residents from at-risk businesses and cutting red tape for businesses that do not pose a risk. This is how we approach site management agreements, which we see as striking a balance between charities' duties to ask for support on behalf of their beneficiaries and the right of the public not to be put under undue pressure to give.

We think the partnership approach of our site management agreements, which we think are not too dissimilar to the action plans developed between licensing authorities and licence holders to redress breaches of the licensing conditions, can be a paradigm example of the open for business approach.

Dr Toby Ganley, *Head of Policy, PFRA*
Ian MacQuillin, *Head of Communications, PFRA*

Self regulation of charitable fundraising is split in the main across two organisations. The Institute of Fundraising (IoF) is the standards setter for all types of fundraising. These standards are contained in an overarching code of practice (and its associated guidance). This sets standards for all mainstream fundraising methods, such as telephone, direct mail, and digital media, as well as all types of public collections.

Complaints by the public about breaches of the standards set by the code of practice are adjudicated by the Fundraising Standards Board (FRSB), which has the authority to recommend changes to the code of practice.

With face-to-face fundraising (chuggers), there is a third strand of self-regulation – the Public Fundraising Regulatory Association (PFRA). As explained in the article, the PFRA works with councils to establish controls on where and when fundraising may take place in their areas through "site management agreements" (SMA).

The PFRA also has an enforcement role. In August 2012 it introduced a set of rules for street fundraisers that were at the time more stringent than the IoF's code (many of these have since been incorporated into the code or associated guidance). Alongside these rules it established a penalties regime. Local authority officers report breaches of their SMA or the rules to the PFRA and are a key cog in the co-regulatory mechanism.

Self-regulation of chuggers therefore follows the separation of powers model of government: the IoF is the legislature, the FRSB is the judiciary, the PFRA is the executive.

Institute of Licensing *Training*

Institute of Licensing

An important element of the Institute is training, and in addition to the National Training Event we organise residential and non-residential training courses throughout the year on different subjects including licensing fees (2012), licensing hearings for all parties (2012/13) and outdoor events (2011/12/13) to provide timely and relevant training opportunities to our members, including basic training aimed at new entrants, and advanced training for established practitioners.

One of the IoL's main member benefits is the low cost good quality training courses that are available to members in each of the 11 regions and on a National level.

National Training Event

Our signature event, the National Training Event (NTE), held each November, was substantially changed for 2011 following feedback from Institute members against a background of a difficult financial climate. The result was an improved and extended programme with more choice for delegates at less cost for our members. In addition, key programmes were repeated within the event programme which enabled delegates more opportunity to tailor the programme to their individual preferences without having to miss other preferred sessions. This successful format was repeated at the 2012 National Training Event, which was a sell-out.

The 2013 NTE will follow a similar format and will be held on 20th - 22nd November in Birmingham. Keep an eye our website for more information and how to book your place. Make sure you don't miss out on this must attend training event of the year.

Training Courses

The Institute continues to increase the number and frequency of training delivered across all our 11 regions. In 2012 for example we delivered over 80 training courses across the country, all of which were available at significantly reduced costs to Institute members.

The Training courses currently available for delivery in any of the 11 regions include:

- How to Inspect Licensed Premises
- Caravan Site Licensing
- PACE & Investigation Courses
- Taxi Licensing
- Street Trading and Pedlars
- Licensing Act 2003
- Gambling Act 2005
- Basic Licensing Principles
- Councillor Training
- Licensing Hearings for All Parties
- Sex Establishment Licensing
- Animal Welfare Licensing
- RIPA Course
- Bespoke training courses to suit your requirements

The IoL can deliver at your location; you can also email **training@instituteoflicensing.org** for a quote on your training requirements. Most IoL training courses can be delivered at your preferred location for the training fee of £1000 plus VAT (including expenses) for a one day course and in many cases delegate numbers are not restricted allowing the training to be opened up to neighbours which in turn can allow for the cost of the course to be fully recovered.

Institute of Licensing

Benefits of membership

Institute of Licensing

As part of the Institute of Licensing's main aims and objectives we strive to increase knowledge and professionalism in licensing. Being a charity we do not operate as a business and we do not seek to make a profit. We aim to provide a service on a cost neutral basis.

We have a Board of non-paid directors consisting of representatives from all of our membership base, council and police officers, lawyers, licensing consultants and the licensed trade. We have 11 regions covering England, Wales and Northern Ireland. We employ a small number of staff and we have a small team of contractors.

Benefits of Membership

As an organisation the IoL are continuing to provide even better service and value to our members. The subscription rate has stayed the same for individual membership for a number of years whilst the services and benefits to members has risen considerably both in terms of what the organisation from the Centre delivers and the Regions deliver.

A small selection of membership benefits are shown below, for full details visit our member benefits pages of our website **www.instituteoflicensing.org**

Discounts for Members

The IoL are not resting on their laurels we are continuing to look at more and more ways to improve the benefits of membership and this year we have teamed up with various organisations that will offer an even greater service to IoL individual or organisational members. Each organisation is offering members a discount of their normal fees/book prices ranging from 10% to 20%, (see specific discount as offered by each company on our website **www.instituteoflicensing.org**). The companies that are offering the discount are all very highly valued for the services/products that they provide but now if you are an IoL member they are even better value.

Journal of Licensing

This publication, the *Journal of Licensing* is published three times a year, and is free of charge to all members. Additional copies can also be ordered, at a small cost. See inside front cover for more details.

Licensing Flashes

We know that licensing is always changing and we know members need to be kept up to date with the changes and latest court decisions. Members will receive an electronic news update, a "Licensing Flash" whenever there is a news story that will be of interest to our members.

Ask a Question

Do you ever get asked a question and don't know the answer or can't remember? Members can post questions and all members get the opportunity to reply. Again, this is a free service for members.

Membership

For more information on membership and how to apply online visit our membership section of our website **www.instituteoflicensing.org** or contact us at **membership@instituteoflicensing.org**

Membership Fees - 1st April 2013 to 31st March 2014

Individual - £70
Associate - £60
(Retired membership 50% of above)

Standard Organisation (1-6 persons)	- £250
Medium Organisation (7-12 persons)	- £360
Large Organisation (13+ persons)	- £500

Law Commission fails to rise to the challenge of taxi law reform

There are some surprising omissions in the Law Commission's views on reforming the law on hackney carriage and private hire services, writes **James Button**, who concludes that an opportunity is being missed

On 9 April the Law Commission published the responses to its *Consultation on Reforming the Law on Hackney Carriage and Private Hire Services* together with an Interim Statement (available at http://lawcommission.justice.gov.uk/areas/taxi-and-private-hire-services.htm). With over 3,000 responses it is impossible to read all of them. No doubt somebody will wade through the whole lot to identify who said what (and my sympathies are with the Law Commission staff who have had to do so).

Although I have not studied all the responses, it is interesting to note that the Department for Transport did not respond but "The Government" did (see http://lawcommission.justice.gov.uk/docs/TPH1370_-_Government_response.pdf). This seven-page response can be contrasted with the 71 page response of the Welsh Government (see http://lawcommission.justice.gov.uk/docs/TPH331_-_Welsh_Government_response.pdf).

Turning to the Interim Statement, this is unusual. The Law Commission does not normally provide any kind of update on its work but it recognises "that many stakeholders are concerned about possible changes". It also emphasises that this is not a further consultation and there is no further opportunity to respond.

Bearing in mind the original consultation document, it has to be said that many of these proposals are not surprising, but there are some departures from the original proposals which may raise some eyebrows.

The anticipated proposals are:

- maintaining the two-tier system;
- London and England and Wales to be included in the same legislation;
- bringing pedicabs and stretched limousines within the legislation;
- national safety standards for private hire vehicles;
- discretionary local additional standards for taxis;
- private hire operators subcontracting across borders;
- private hire operators using vehicles and drivers licensed elsewhere;
- disability training for drivers; and
- tougher powers for licensing officers.

James Button

The surprises are:

- allowing quantity controls for taxis;
- maintaining the current exemption for wedding and funeral cars;
- private hire operator licensing only applying to dispatch functions;
- no licensing for taxi radio circuits;
- a duty for hackney carriages to respond to a hailing in certain circumstances; and
- the challenge to council taxi conditions by means of a simplified judicial review procedure in the County Court.

As an Interim Statement, the document is inevitably short on detail and it will not be until the draft Bill is published that any indication of how these ideas are expected to work in practice will become clear. Accepting that the proposed changes are just that, the following points spring to mind.

Retaining a two-tier system

Maintaining the two-tier approach will inevitably lead to enforcement problems, notwithstanding the proposal to address difficulties that exist in relation to plying and standing for hire by replacing the concept with a modern definition relating to pre-booking. It remains to be seen how effective those proposals may be.

However, the problem of understanding on the part of the public will remain. It is well accepted that few members of the public understand the difference between hackney carriages and private hire vehicles now and it is difficult

to see how that will change in the future, even if hackney carriages are to be called taxis.

The proposal to introduce legislation which will cover the whole of England and Wales (including London) is sensible.

Quantity controls

Given that only 25% of local authorities limit hackney carriage numbers at present, it does seem very surprising that the Law Commission has decided to allow the retention and indeed introduction of quantity controls for hackney carriages.

The proposal that any licences granted under new quantity restrictions will not be transferable will prevent any new markets for taxi licences opening up, but is likely to trigger renewed calls for number limitation to be imposed before new legislation takes effect. Local authorities are already inundated with requests (in many cases demands) from the hackney carriage trade to introduce number limitation where none currently exists, and this will simply increase those demands, with the significant cost implications associated with that approach falling on the local authority.

Who and what would be covered by licensing?

The proposal to include pedicabs and stretched limousines is sensible. It remains to be seen whether it will include horse-drawn vehicles.

There was clearly a lot of opposition to having wedding and funeral cars included but these are also vehicles that carry passengers on a commercial basis and it is difficult to see any real justification for this exemption. If the national standards for private hire vehicles (see below) are low (as many suspect they will be) there is no reason why wedding and funeral cars cannot be included in private hire licensing.

Standard-setting

The proposal for minimum standards for both taxis and private hire vehicles still fails to make the distinction between safety (brakes, steering, etc) and suitability (size, ease of access and egress, etc).

The reference to the Secretary of State and Welsh Ministers suggests that there is still a view that taxi licensing should be devolved to the Welsh Assembly.

Local standards for taxis

As it is made clear that a taxi can undertake pre-booked work outside the district in which it is licensed, local standards may well lead to a continuation of licence shopping. A proprietor could obtain a taxi from a district which does not have higher hackney carriage standards, thereby effectively acquiring a private hire vehicle which also has the ability to undertake taxi work in its home district.

National standards for private hire services

It remains to be seen what this national standard for private hire services actually is. Suspicions are that it will be very low (possibly as low as a standard MOT).

Cross-border

It is difficult to see any argument against operators being able to subcontract across borders (although it remains contentious in many places).

The proposal to allow private hire operators to use vehicles and drivers licensed by any council is problematic. How will the operator and the operator's local authority know that the vehicle and driver's licence (which could have been issued by authorities 100 or more miles away) are valid?

Operators, taxi radio circuits and intermediaries

It is difficult to see the distinction between dispatch functions and taking bookings. Whilst there may be an argument for a "one-man band" operator/proprietor/driver not requiring a licence, the differences between smartphone applications, aggregator websites and other intermediaries may well lead to enforcement difficulties.

From a public safety perspective it is difficult to see why taxi radio circuits should not be licensed if private hire operators have to be.

Equality and accessibility

Whilst compellability for taxis and a duty to stop in certain circumstances are valid and laudable aims, they may well prove very difficult to enforce.

Accessible complaints procedures and driver disability training both seem sensible proposals.

Enforcement

It remains to be seen what the "tougher powers for licensing officers" will be. Impounding vehicles and fixed penalty schemes seem sensible but the ability to stop vehicles may well require significant extra training and resources.

Clarifying the scope of touting would be useful.

Hearings and appeals

In the absence of a proposal to create a specialist licensing tribunal, the current system of magistrates' appeals is satisfactory. It remains to be seen whether a further right of appeal to the Crown Court remains.

The proposal for a "judicial review lite" procedure in the County Court to challenge taxi conditions is interesting, and it remains to be seen how these proposals will be developed.

Conclusion

This seems to be a missed opportunity to provide a root and branch reform of the licensing regime relating to small vehicles used to carry passengers for commercial purposes. As it stands, it is difficult to see how these proposals will remove very many of the current problems facing both authorities and the trade, and as it is ultimately a case of tinkering with the existing system, there may well be a great many unforeseen consequences.

Overall, this is not wholesale reform bringing taxi licensing law into the 21st century. The proposed changes will still be rooted firmly in the 19th century overlaid with 1970s developments. It is in danger of leading to a piecemeal approach which will not address the problems faced by local authorities and the taxi trade, and will not aid the public in their understanding of taxi licensing.

James Button
Principal, James Button

Late Night Levies and EMROs – a raw deal for hoteliers

Hoteliers in tourist areas are right to be concerned that their late-night trade will be unfairly penalised by measures aimed at quelling town centre social disorder, writes **Sandra Graham**

There is a considerable ground swell of unease gathering momentum in my local town from disgruntled hoteliers not only struggling to make a decent living in these economic times but also now facing additional costs following the creation of Business Improvement Districts in the area and, potentially, a Late Night Levy.

A growing awareness of subliminal pressure being brought to bear by local police in support of the introduction of a Late Night Levy means, in all likelihood, they will not escape the grip of such a Levy.

Since the introduction of the concept under the Police Reform and Social Responsibility Act 2011, we have waited with bated breath to see which licensing authorities might be the first to take the plunge into unchartered waters. Not surprisingly, we have, over the ensuing months, seen a handful of cities take the first steps. However, what might be appropriate to city centre areas, where arguably there might be more potential for crime and disorder from locals letting their hair down, may not be so desirous in seaside resorts increasingly reliant on attracting tourism for the local economy. (Figures for 2010 show tourism being worth £424.7million to my local town.)

There is concern that the adoption of a Late Night Levy might send out the same negative message as was feared from an adoption of the notorious Alcohol Disorder Zones. Such public stigma is a highly negative factor in an area where a substantial proportion of the local economy is dependent on tourism, both from the business and leisure sectors, and particularly when the British holiday resort has moved away from the family holiday as the main source of income to short-breaks, conferences and the function/ events trade.

The vibrancy of the local night-time economy plays a large part in attracting tourist business to the town. So it is that we are faced with the dilemma of trying to deal sensibly with the policing of, admittedly, some crime and disorder issues in the town centre, without restricting those who play a large part in the attraction and repeat business of customers to the town, the hoteliers.

Whoever drafted the provisions of the Late Night Levy and Early Morning Alcohol Restriction Orders (EMROs) did not consider this sector of the licensed trade with any detailed thought as to its operation; and this despite tourism being one of the world's fastest growing industries. The more one examines the detail, the more this becomes apparent.

Yet, in my experience, hotels have never been at the forefront of crime and disorder issues. Anyone in the hotel business will tell you that to survive commercially one cannot just rely on overnight guests – the profit comes mainly from ancillary sales, functions, conferences and the like. Any hotel trying to make its commercial mark needs to major on the function and conference trade to keep afloat. In practice, functions, and particularly weddings (which still are a source of good income even in tough economic times) result in many non-resident customers using the bars. Yet to be successful in attracting such functions there is an expectation, nay a requirement, that the bars be open until at least 1 am, if not later.

In order to attract conference business to a town there needs to be accommodation to suit every budget. In practice this means that delegates from various hotels tend to congregate in other hotels for fringe meetings and informal social networking and one of the determining factors as to whether the conference will take place in any particular location seems to be the availability and use of hotel bars until the wee small hours – sometimes as late as 6 am!

The statutory provisions for exemption of hotels from the Late Night Levy (even if the exemption is adopted by the licensing authority) limit the exemption applicable to hotels, guest houses and the like to those which are authorised to supply alcohol during the late night supply period only to persons staying at the premises for consumption on the premises. Whilst this may appear satisfactory at a cursory glance, this very restricted application is even more limited than the "old style" residential licences under the Licensing Act 1964, which at least permitted sales of alcohol to residents and their

bona fide guests. As explained above, many hotels derive much of their business from accommodating visitors who are not staying overnight yet clearly want to enjoy a drink with relatives/friends/business colleagues in the bar, often well beyond midnight. Indeed, the ability to service this demand is imperative to the viability of such businesses.

So let us look at the cost implications for hotels that cannot bring themselves within any defined exemption. The amount of the levy has currently been prescribed nationally and it is not an insubstantial sum. The amounts are set on a scale based upon the non-domestic rateable value (NDRV) of the premises, as with licence fees. Ironically, on this basis, as hotels tend on the whole to be large premises, their NDRV tends to be much higher than many pubs and clubs and hence it is likely that they would be paying proportionately a much higher amount of the levy even though disproportionately they would be less likely to be contributing to any crime and disorder in the area.

In addition, with the many Business Improvement Districts (BIDs) springing up around the country, many hotels are already supporting and funding BID payments out of income, which is no mean feat in these times. Hoteliers are concerned that if a Late Night Levy is introduced this will be yet another cost to bear within their increasingly tightened budgets.

Ah, you might say, aren't there exemptions provided in the legislation for BIDs? True, there is provision to include this as an exemption, at a licensing authority's discretion, but only if the objects of the BID include "relevant purposes", which in a nutshell refers to there being some element of provision for reduction in late night crime and disorder. Having made enquiries in this respect from several operators of BIDs, they seem suitably vague as to their objects on this point!

'Whoever drafted the provisions of the Late Night Levy and EMROs did not consider this sector of the licensed trade with any detailed thought'

Equally, if those in a BID are exempt from the levy, the law of unintended consequences is likely to result in those licensed premises in outlying areas, outside the BID, funding a greater proportion of the levy when the issues of crime and disorder are not in their immediate geographical area but are in the town centre.

If a Late Night Levy is introduced, there will be the ability for a premises licence holder to apply to vary the licence to restrict the terminal hour for sales of alcohol to a time before the late night supply period begins without having to pay a fee. However, if this happens on any major scale (a possibility in some areas in the current economic climate) the resultant lack of facilities within the night-time economy is likely to drive business out of the town to other areas where the provision of such leisure and tourist facilities is not so limited.

EMROs have the ability to be much more targeted than the Late Night Levy in that they need not affect the whole of a licensing authority's area and to that extent may be the preferred option, if indeed either option is appropriate. However, here the exception provided by the legislation for hotels is even more restrictive than that under the Late Night Levy provisions. It is limited to those premises where the supply of alcohol during the late night period is only made to a person staying in the hotel and the consumption of alcohol takes place only in the room in which the person is staying (ie, room service or mini-bar facilities). For any reasonably sized hotel to limit itself in this way would be operational suicide. Small wonder hoteliers feel their position, and the economic benefit from tourism, has not been fully considered when introducing these provisions!

Sandra Graham
Solicitor, Horsey Lightly Fynn

National Training Event 2013 - Birmingham

The IoL's signature annual event, the three day National Training Event (NTE) returns to the Crowne Plaza Hotel in Birmingham this year on 20th - 22nd November. This marks the 10th Anniversary of this three day residential event.

The programme has been designed to give maximum flexibility to delegates and to allow them to tailor the training event to suit individual needs. Speakers will include James Button, Gary Grant, Susanna FitzGerald QC, Philip Kolvin QC, Sarah Clover and many others.

Details will be updated as they are confirmed and delegates are advised to book early to avoid disappointment, last year's event was a sell-out. A full residential place for members is £495 + VAT (price includes £50 'Early Bird' booking discount). More information, a copy of the draft programme and details of the various booking options are available on the website www.instituteoflicensing.org/events.

Course Objectives: To provide a valuable learning and discussion opportunity for licensing practitioner to increase understanding and to promote discussion relating to the intricacies and practical application of the law in the subject areas and the impact of forthcoming changes and recent case law. The training structure is aimed at allowing maximum benefit to be derived by delegates in allowing them to choose the subject areas most relevant to their areas of interest. The three day event will carry a total of 12 hours CPD.

Gambling Commission publishes consolidated codes of practice

Thanks to the Gambling Commission's consolidation of licensing codes, it will no longer be necessary for licensing authorities to decipher and consider the previously separate codes. **Nick Arron** explains the benefits, and also looks at the postcode lottery of gaming visits by local authorities as well as the draft Gambling Bill

Section 24 of the Gambling Act 2005 requires the Commission to issue codes of practice on the manner in which facilities for gambling are provided. The codes of practice are applicable to holders of operating and personal licences or any other person involved in providing facilities for gambling. In particular the Commission is required to publish a Social Responsibility Code.

The codes of practice relevant to operating and personal licenses are published in the Licence Conditions of Codes of Practice (LCCP). The Gambling Commission has also published separate codes of practice on equal chance gaming and gaming machines in clubs and alcohol licensed premises which are applicable to situations where the facilities for gambling are provided by those who do not hold operating or personal licences.

The Gambling Commission has now consolidated all the codes into a single document and point of reference. Naturally there is some duplication with the codes of practice relating to the operating and personal licenses found in the LCCP. In the introduction to the codes, the Commission stresses that the new consolidated document should not be confused with the LCCP.

The consolidated document will help licensing authorities exercising their functions under section 153 of the Act. The section requires licensing authorities, when exercising their functions under Part 8 (Part 8 regulates premises licences), to aim to permit the use of premises for gambling insofar as the authority think it:

(a) in accordance with any relevant code of practice under section 24;
(b) in accordance with any relevant guidance issued by the Commission under section 25;
(c) reasonably consistent with the licensing objectives (subject to paragraphs (a) and (b)); and
(d) in accordance with the statement published by the authority under section 349 (subject to paragraphs (a) to (c)).

Nick Arron

The consolidation of the codes of practice into a single document will assist local authorities by creating a single reference point, for section 153 (1) (a). It will no longer be necessary for licensing authorities to decipher and consider the separate codes. They will not have to consider the LCCP, which as well as the codes of practice issued under section 25, contains the operating and personal licence conditions, imposed under section 75, which are not a consideration under section 153.

The codes contain two types of provisions - Social Responsibility Code Provisions and Ordinary Code Provisions.

Compliance with the Social Responsibility Code Provisions is a condition of operating licenses. Any breach of them by an operator can lead to regulatory action by the Commission and will also expose the operator to the risk of prosecution.

Ordinary Code Provisions do not have the status of operating licence conditions but are admissible in evidence in criminal or civil proceedings and must be taken into account in any case in which a Court or Tribunal think them relevant and by the Commission in the exercise of its functions. The Ordinary Code Provisions generally set out good practice.

Licensing authority statistics 31 March 2012

The Gambling Commission recently published the licensing authorities' statistics from 1 April 2009 to 31 March 2012. The statistics provide a perspective on the size and shape of the gambling industry.

On 31 March 2012 there were 12,462 gambling premises licences active, made up of adult gaming centres, family entertainment centres, betting shops, bingo premises and casinos. The majority are betting premises - 9,128 - followed by adult gaming centres – 2,247. The Commission reports 646 bingo premises but these include high street arcades which now operate under bingo premises licences as well as operations such as Riley's Snooker Club and holiday parks which often hold bingo licences for their entertainment venues. The actual number of traditional bingo halls is lower than the reported number of premises licensed for bingo.

The number of permits in force (for gaming machines in pubs and clubs, gaming in clubs and family entertainment centre gaming machine permits) continues to rise with 39,566 at 31 March 2010, 49,815 at 31 March 2011 and 54,602 at 31 March 2012. However, the numbers issued each year are declining, suggesting that many pubs and clubs now have the entitlements they require.

Reliance on temporary use notices (TUN) remains low with 47 days covered by a TUN in 2011/2012, from 11 temporary use notices issued by 11 local authorities. The number of days covered in 2010/2011 was 50 and 2009/2010 at 45. The low numbers reflect the limited activities permitted under TUNs.

Licensing authorities visited 7,586 premises during 2011/2012 as part of their regulatory responsibility for gambling. This is an increase from 6,765 in 2010/2011. Of the 7,586 visits, the majority were made to premises classed as "other", which are predominantly pubs and clubs where no operating licence exists. The remaining 3,003 visits were made to premises licensed under the Act.

The number of visits made by licensing authorities following complaints to premises licensed under the Gambling Act remains low at 121 from 12,462 premises. In comparison there were 272 visits following complaints to pubs and clubs. The number of test purchasing visits made by licensing authorities in respect of gambling remains low at 206 with 204 in 2010/2011 and 205 in 2009/2010.

For the first time the Commission published the licensing authority data used to compile the statistics. A review of the data highlights that visits by licensing authorities are a postcode lottery. The majority of licensing authorities made few or no visits as part of their regulatory responsibility for gambling in the year to 31 March 2012. Of the 3,987 planned visits to pubs, clubs and other premises by licensing authorities during 2011-12, 600 were by the London Borough of Newham, which made only four other planned visits to licensed premises. In comparison, some licensing authorities demonstrate a more consistent schedule of visits over the years to all gambling premises, such as Birmingham City Council, Castle Point Borough Council, Cornwall Council, Derby City Council, East Lindsey District Council, Eastbourne Borough Council, Hastings Borough Council, the London Borough of Harrow, Nottingham City Council and Sunderland City Council. Outside of these areas, premises will be unlucky to receive a visit from their licensing authority in respect of gambling. The figures do not include visits by the Gambling Commission.

Gambling (Licensing and Advertising) Bill

The pre-legislative scrutiny of the draft Gambling (Licensing and Advertising) Bill by the DCMS Select Committee has been published. The Bill will require overseas gambling operators to obtain a Gambling Commission licence in order to provide services or advertise to British-based consumers.

The Committee reports that the overseas-based remote gambling operators generally opposed the Bill, on the grounds it was unnecessary for consumer protection, might drive consumers to cheaper unlicensed operators and was principally intended to bring overseas operators within the UK's tax regime. Much of the UK-based gambling industry, sports bodies (concerned about match-fixing) and organisations working to combat problem gambling supported the principle of the Bill. Almost all those who gave oral or written evidence raised the issue that the enforcement regime would have to be rigorous in order to provide any of the benefits to consumers that the Government intended should be derived from the legislation.

The Committee supported the principle that gambling should be regulated on a "point of consumption" basis. It noted the concerns raised about taxation of the online industry, finding that the ability to bring all operators serving UK consumers within the tax net is a consequence but not the prime motivation of the draft legislation. And it added that the Treasury, in setting a tax rate for remote gambling, should bear in mind that too high a rate would be liable to drive customers and companies into the unregulated, black market.

The Committee believed the Gambling Commission had at its disposal all the tools it needed for effective enforcement and that the extra income expected from the extension of the licensing regime would produce sufficient funds to pay for the extra work of enforcing that regime, without the need to raise licence fees, although they intended to monitor these areas.

It recommend a change to the Bill to make it clearer that the operators affected are those providing remote gambling services to customers in Great Britain. It also suggested that the Government amends the Bill to address the anomaly that it is illegal for casinos to provide online gambling on their premises. This will be an attractive suggestion to casinos but will be an amendment that other sectors will also wish for.

Nick Arron
Lead Partner, Betting & Gaming, Poppleston Allen

Don't club the clubs

Private Members' Clubs have a long and distinguished history of service to their communities but they are in decline and over-zealous and ill-informed public officials are not helping, says **Stuart Moore**

We went to Woods at the Pell Mell (our old house for clubbing) and there spent till ten at night

These words are from Samuel Pepys' diary, written over 300 years ago, and are considered to be the earliest record we have of what has come to be known as the private members' club.

There were, of course, private meeting places in and around the City of London from even earlier times, most notably coffee houses (which later came to serve alcohol). These were patronised by the well-to-do of the day such as doctors, architects and judges, and were jealously guarded by the professionals who sought a place of quiet reflection and inner sanctum away from the hustle and bustle of everyday life. The only alternative for meeting would have been the far less salubrious beer and gin houses portrayed in Hogarth's famous image of Gin Lane.

It became clear that these private members' clubs were an alternative to the places that were driven purely by profit and alcohol consumption. This was a place where people could play chess or read the daily broadsheets with the minimum of disruption.

What followed on from those humble beginnings were several centuries of notable history relating to the many clubs, societies, associations and institutes that we have come to know and love. Although the legal fundamentals are very much the same, the actual club activities are as varied and as diverse as their names and locations. Cricket clubs, Labour clubs and Royal British Legions are all examples of the types of premises that you will see in any town, city or village throughout the world.

They are easily identified by the vast array of memorabilia that often adorn the entrances and walls ranging from sports trophies to medals and military artefacts as well as pictures and portraits of fondly remembered past members and achievers.

Prior to the introduction of the 2003 Licensing Act, these clubs were known as registered clubs, quite simply because all they had to do was register their interests with the local magistrates who would then issue them with a certificate of registration. The process was very similar to the one used today to obtain a Club Premises Certificate under Part 4 of the Licensing Act 2003.

Basically, the magistrates needed some kind of evidence that the formation of the club was *bona fide* and that the activities were such that the premises would qualify for its certificate as opposed to a justices' on licence. This was done by the production of various documents and importantly the club's rules, which demonstrated two key issues: that the club genuinely engaged in qualifying activities; and that it operated in accordance with the principle of good faith (*cf.* sections 61 and 63, LA 2003 respectively). As long as the magistrates were satisfied, the certificate would be granted for between one and ten years.

These club rules themselves did not need to be a blow by blow account of what was taking place on a daily basis but they did have to show the basic structure of the association and address issues such as the name of the club, the objects and purpose, the election and admission of members, the suspension and expulsion of members and of course, dissolution.

Over the years, various umbrella organisations, not least the Working Men's Club and Institute Union (CIU), drew up a standard set of rules that clubs could adopt, which would include all of the relevant provisions required to satisfy the courts. These became known as "model rules".

This was important to convince the magistrates, because the granting of such a certificate allowed the club to benefit from various exemptions in relation to business rates, VAT and Corporation tax.

It was later in the 19th and 20th century that registered clubs really came into their own and their activities were expanded to cater for the working classes who were fast becoming their champions. The growth of the private members' club as we know it today was well under way and many employers were also providing club premises for their workforce. This had a positive impact on morale as employees of the company could serve on the committee and have a direct say in how the club operated and managed its affairs.

This development also presented opportunities for employees to integrate and socialise with their colleagues - very much resembling the concept of a big society, which

the Government recently tried to sell us - a society where self help and mutual support becomes a way of life. As you can see, this is by no means a new concept. Such societies have operated right under our noses for hundreds of years.

Before the period of club growth, live entertainment was something that was restricted to the middle and upper classes. Live music and dance was confined to the music halls, which were prohibitive to the working classes both in cost and culture. Private members' clubs offered an alternative and started to provide their own entertainment by allowing members to entertain themselves on what became known as open mike nights as well as staging paid live acts. This paved the way for TV producers to replicate this culture in the famous "Wheeltappers and Shunters" and more recently the popular "Phoenix Nights" series.

In turn, these provided a springboard for many of today's famous entertainers from Tom Jones to Robbie Williams, who honed their skills on the stage of their local working mens' club.

The clubs would also provide an array of sporting facilities such as bowls, snooker, darts, cribbage and skittles, to name but a few. This would encourage interaction with other nearby clubs through the formation of leagues and cup competitions. Such activities did much to ensure community cohesion and healthy rivalry. Long term friendships were cemented and many a romance flourished (yes, I am speaking from personal experience!).

Their popularity was such that people would queue, sometime for hours before the club opened, in order to get "their seat", which would be claimed by a strategically placed coat, bingo pen or half pint glass. That would be enough to mark your territory for the evening and woe betide anyone who dared to move it.

The clubs themselves continued to evolve and move away from being just a gathering place towards a general activity centre. They started to take themselves seriously and acknowledge their status within the local community.

Because of the level of support and the business model that evolved, clubs started to protect their interests by becoming incorporated under the likes of the Friendly Society's Act and the Industrial and Provident Society's Act as well as being limited under the Company's Act.

But it wasn't just the grown ups who reaped the benefits, clubs would have pantos and Christmas parties for members' children (in some cases this might be the only Christmas present some of them would get). Coach outings and sports days would also form part of the annual events calendar. Welfare became a priority and clubs would have a separate fund to assist the less fortunate members and senior citizens by making sure that they were not excluded because of financial hardship.

The Royal British Legion is a classic example and regularly provides rehabilitation and convalescence for its members and ex-service personnel at very little and often no cost to those who need it. It's all provided for from the members' annual subscriptions and the various fund raising activities.

Unfortunately, today though, we are witnessing the demise of clubs, thanks to the hard-hitting recession and a general shortage of money. Government statistics for 2010 to 2012 show that the number of private members' clubs in the UK went from 17,000 to 15,900 - a 6% reduction, and the decline is continuing.

Unfortunately, there is very little legal or financial help available to the un-incorporated club, nor is there formal business training for those who are charged with the management of the club. These two facts alone make a lethal cocktail for club committees and are seeing many clubs slide down the greasy pole of bankruptcy.

I have also witnessed a worrying trend that developed at the introduction of the 2003 Act, whereby local authorities and police officers were trying to convince clubs that it would be to their benefit to exchange their club premises certifiacte for a premises licence. Quite often this advice was given without any understanding of the incorporation or constitution of the club or the detrimental impact that such a transition could have on the future of the club in question.

I have heard stories of club officers being carpeted by the police and local authority for alleged breaches of the Licensing Act which were nothing to do with the 2003 Act. I have also seen Trojan Horse-style visits and absurd conditions being suggested or forced on clubs to circumvent the enforcement protocols attached to their club premises certificate.

Often clubs do not have access to any legal support, and the cost of obtaining legal advice is prohibitive, so any suggestions put forward by the authorities are accepted without question.

Many of today's clubs are hanging on by a financial thread. Over-zealous enforcement or the slightest nudge or ill–thought-out intervention could see them go to the wall. All this will do though, as we so often see, is open the gates for the local Tom, Dick or Harry to buy the premises for a knock down price, get a premises licence and open it up as a late night, vertical drinking venue.

That's when you will get the drunkenness, disorder, noise nuisance, under- age sales and the other issues that you do not normally associate with a club premises. All this does is keep the overstretched and under-funded authorities at breaking point.

I am not suggesting for one minute that we should turn a blind eye to clubs that are non-compliant. I fully understand that club premises, like any other licensed premises, have a duty to adhere to the law and they are bound to comply with any conditions that they may have.

All advice, help or guidance will always be welcomed. In my experience, half an hour with the committee will nearly always result in an immediate improvement and compliance, which will then free up the authority to focus on the real culprits in the business.

Private members' clubs are still very much part of our heritage and are still jealously guarded by those unpaid volunteers who run them. It is a rapidly changing world and many clubs do not have the finance or skills to suitably adapt to those changes.

Let's not club them into submission.

Stuart Moore
North Liverpool Police Licensing

Opinion

Section 53C and interim suspensions

The High Court has refused permission to bring a judicial review of a decision by a licensing authority (Tower Hamlets) made on the section 53C "full" review of a premises licence.[1] The impugned decision was that the interim step of suspension should be continued pending appeal to the Magistrates' Court against the revocation of the licence. The single Judge said: "There is no obvious error in the decision."

It is instructive to set out the decision in full:

The Licensing Sub-Committee are of the view that serious crime and serious disorder would continue to occur at the premises and therefore it is appropriate and proportionate to continue with the interim step of suspending the premises licence with immediate effect, in that the interim step of suspension will continue to have effect during the 21 day period allowed for lodging an appeal and the interim step of suspension will continue until this matter is heard on appeal in the Magistrates' Court.

As has been commented extensively elsewhere, it would be an odd thing if (as seems to have been decided in the case of *Oates*) there were a blanket rule to the effect that interim steps fall away when the *licensing authority* determines the "full" review under section 53C. Section 53B(1) provides that the interim steps are "pending a determination of the review applied for". Those words surely mean pending "final" determination of the review, whether by the Magistrates' Court on appeal, or (if the review is remitted to them) by the licensing authority itself.

The purpose of emergency (summary) interim measures to control or prevent licensable activities taking place at premises associated with serious crime and disorder would seem to be defeated if (as was the case in Tower Hamlets) the review decision is to revoke the licence, and the licensing authority is of the view that the serious crime and disorder would otherwise continue; yet notwithstanding the blatant undermining of the crime and disorder licensing objective, the licence were automatically to spring back into life as soon as the licensing authority gives its decision on the review – and spring back for 21 days even if the licensee does not appeal, and has no intention of doing so!

One may have considerable sympathy with the single Judge's observation, therefore, that on the facts of the application before him, there was "no obvious error" in Tower Hamlet's decision that the interim step of suspension should continue pending determination of the appeal.

The same consequence might have been achieved, however, by a more legally water-tight route. The difficulty I have is in identifying the source of the licensing committee's authority to rule that interim steps continue in force, however sensible or desirable such a ruling might be. If they have such a power, it would have to be found in section 53C. The section gives them no such express authority; and it is surely impossible to infer the power from a section which does provide, expressly, that a decision under it does *not* come into force until the end of the period given for appealing against the decision, or if the decision is appealed against, the time the appeal is disposed of.

The circularity is all too obvious: the power to order that interim steps continue in force pending appeal, if it existed, would be subject to section 53C(11) which provides that any exercise of such a power would be of no effect pending appeal.

The simple reality is that there are cases in which the continuance of interim steps pending appeal operates unfairly, even to the point where no party wishes them to do so; and there are other cases in which it would fly in the face of the licensing objectives if the interim steps did *not* continue in force pending appeal. The existing law is in dire need of amendment, so as to give licensing authorities a discretionary power to do the right thing on a case-by-case basis.

I have no doubt, and have written so previously[2] that the interim steps ordered on a section 53B hearing remain in force, by operation of law, pending a final determination in the appeal process. That interpretation would produce the consequence that Tower Hamlets (and, it would seem, the single judge) thought necessary in the case before them, without the need to find and exercise a discretionary power that Parliament has not given to licensing authorities. Having said that, I think it is eminently desirable for licensing authorities to give an indication of how they would have exercised such a discretion, if it were theirs to exercise. That way, it might at last penetrate the cranium of the Home Office that the law is in need of amendment.

Equally, it is high time that this issue reached the High Court for a conclusive ruling, and I hope that one day soon one of these case will do so. But the essentially intuitive response of the single Judge in the Tower Hamlets application is perhaps an early warning sign of what that ruling might be.

Gerald Gouriet QC
Barrister, Francis Taylor Building

1 *R (o/a London Borough of Tower Hamlets) v Commissioner of the Metropolis CO/3009/2012* (Unreported).

2 Gerald Gouriet QC, Reviewing Licensed Premises, 31 January 2012, SJ 156/4, page 21.

City of London's 'Code of Practice' makes perfect?

A new scheme for promoting good practice amongst licensees, blocking betting shop applications, and the future of licensing in the West End of London – **Richard Brown's** latest subjects for appraisal

Richard Brown

Amidst the welter of "will they/won't they" rumours as to which local authorities are planning or thinking about introducing the Late Night Levy or an EMRO, City of London (CoL) – the municipal body for the famous financial centre – has come up with a novel dual approach to ensuring that the licensing objectives are promoted: its recently published Code of Practice for Licensed Premises and Traffic Light Scheme for Licensed Premises.[1]

The Code seeks to provide applicants and licensees with guidance and good practice, and also sets out what is expected by way of pro-active commitment from those self same applicants/licensees in adopting the Code as a way of preventing problems at their premises. The Traffic Light scheme is a bit like a penalty point scheme such as is used in some street-trading licensing regimes, where crossing the defined threshold is likely to lead to action from the licensing authority.

The Code begins by setting out its aims, and explaining how the Code will be used. Although it has repeated references to what the authority "expects", the Code is also clear that it constitutes only one way, albeit a key way, of promoting the licensing objectives, that not every risk it has identified will be relevant to every premises, and that the Code does not restrict an applicant/licence holder from promoting the licensing objectives through alternative means. Furthermore, applicants are expected to "have regard" to it rather than be compelled to adopt it root and branch. It is probably important that these qualifications were stated, to avoid vigilant lawyers scrutinising the scheme with the Code in one hand while brandishing Mr Justice Richards' decision in *Canterbury City Council* in the other.[2]

The aim of the scheme is to identify problems or concerns at an early stage, at which point advice will be offered to licensees. Appropriate measures from the Code can then be agreed if the problems are not resolved. The hope is that formal enforcement action by way of prosecution or review can be avoided. The Code goes on to identify a number of risks associated with each licensing objective (for example, sale of alcohol outside permitted hours, or noise and nuisance from customers arriving and leaving the premises), and a series of good practice measures associated with the identified risk.

Although the CoL makes clear to licensees that the Code is not statutory, consistency with the section 182 Guidance and the CoL's own Statement of Licensing Policy is, of course, important to give the scheme a firm footing. In view of the revised October 2012 section 182 Guidance, CoL amended its Statement of Licensing Policy to incorporate the provision of the Code (as per para 13.3 of the Guidance). The Guidance certainly envisages such a scheme.[3] Under the heading "Enforcement" is a positive recommendation from the Government that licensing authorities "should establish and set out joint-enforcement protocols with the local police and the other authorities and describe them in their statement of policy." The City of London Police's pun-tastically titled strategy document "Last Orders: Calling time on the City's Violent Crime" is an example of the sort of document which may have contributed to the formulation of the Code. The Code and Traffic light scheme are effectively a "joint-enforcement protocol", in drawing together the expectations of the licensing authority and its responsible authority partners.

The Traffic Light scheme operates in conjunction with the Code, and is intended to form the basis of a "simple but effective monitoring tool" where points are "awarded" in accordance with a sliding scale based on an analysis of incidents recorded by the licensing authority. One to five points can be awarded depending on the severity of the incident. All premises begin in the Green Zone, and will

1 http://www.cityoflondon.gov.uk/business/licensing/alcohol-and-entertainment/Pages/Licensing-policy.aspx.

2 *R (British Beer and Pub Association and Ors) v Canterbury City Council* [2005] EWHC 1318 (Admin) – where the City Council was held to have "no power at all to lay down the contents of an application" (para 85).

3 Amended Guidance issued under s182 Licensing Act 2003, October 2012 – paras 13.16-13.17.

be promoted (or relegated?) to the Red Zone should the premises be assigned between six and nine points under any one licensing objective, or 11 to 19 points across all four licensing objectives. The threshold for movement into the Red Zone, in which premises are seen as undermining the licensing objectives and require immediate action from the management, is ten or more points across any one licensing objective, or 20 or more points across all four licensing objectives. Importantly, complaints about premises must be substantiated, so the simple fact that a complaint has been made by a resident will not in itself lead to the awarding of a point. Importantly, the scheme also awards credit points for any good practice measures. Penalty points will be removed 12 months after accrual. If there is a *bona fide* change of ownership and management, the slate is wiped clean.

The system could prove a valuable aid to residents seeking to resolve problems with licensed premises. The points range under the public nuisance objective is one point for the likes of obstruction of the public highway (evidenced), two points for substantiated complaints about noise from customers entering/leaving premises or using an external area, and five points for breach of a Noise Abatement notice. However, many concerns of residents about noise nuisance are by their nature short lived. With the best will in the world, noise is notoriously difficult to photograph! Unless a council enforcement officer happens to be passing by, nuisance from, for example, anti-social behaviour from customers leaving a premises is likely to have disappeared by the time they arrive on the scene. Of course, an inference could be drawn from a photograph of a crowd of people under a residents bedroom late at night but whether that would be sufficient to constitute a "substantiated" complaint is debatable.

Concerns have been raised by the trade as to the appropriateness of what it sees as potentially another layer of regulation (notwithstanding the Code's stated aim of reducing the need for formal enforcement), and that it will be another levy-esque "blanket approach" rather than a premises-specific approach. This is consistent with the section 182 Guidance, which is concerned to ensure that "resources are used efficiently and for example, are more effectively concentrated on problem premises."[4] However, the thrust of the Code and traffic light scheme appears to be to provide a co-ordinated way of flagging up these problem premises across a range of responsible authorities. Time will tell if the Code works in practice for the licensing authority, responsible authorities, licensees and residents.

'And then there is gambling: the cheapest of all luxuries.' George Orwell, *The Road to Wigan Pier*

My previous article[5] examined the ability of residents to engage with the gambling licensing regime, particularly in the context of extended hours and "primary gambling activity", and concerns about B2 gaming machines. There has been a number of high profile refusals of betting shop licences recently, including one in Newham based specifically on the issue of primary gambling activity. London Borough of Hillingdon has also refused an application recently, although not on the basis of primary gambling activity.

The Newham refusal was reported in the media as an attempt "to block the spread of betting shops in poorer areas".[6] In fact, the Newham decision itself did not refer to blocking the spread of betting shops in poorer areas (although saturation was raised as a concern). Certainly this is the thrust of some objections to the perceived spread of betting shops on the High Street, often linked in with pawn shops and pay-day lenders. It is a vexed issue and one with which the trade is understandably not slow to dispute. The application occasioned objections from local councillors and the licensing authority, but no local residents, and upon consideration by the council's sub-committee it was determined to refuse the new licence on the basis that "the primary gambling activity of the premises will not be betting".[7] The application was also seen as not being "reasonably consistent"[8] with the licensing objectives.

Of course this is by no means the first time that a betting shop application has been turned down, sometimes as a result of considerable public opposition, but the issue of the extent to which the section 153 "aim to permit" restricts licensing authorities' ability to refuse applications, particularly in the context of primary gambling activity, has yet to be tested at an actual appeal hearing in the Magistrates' Court, let alone the higher courts. The progress of the Newham appeal (due to be heard in June) and any future judicial pronouncement by the High Court is awaited keenly by many.

The future of the West End

Licensing features in a major new report into the future of the West End of London which has recently been published.[9] The specific findings with regards to licensing included a proposed rebalancing of the traditional definition of the night-time economy – 6pm to 6am - to take into account the wide variety of different uses which could be included under that time period; principally, pubs bars and nightclub (broadly, alcohol-led premises), and restaurants, theatres and live music premises (broadly, not alcohol-led). It also suggested taking into account the existence of a "late evening" economy and a "night time" economy – a fact which the report acknowledges is implicit in the existence of "core hours" in Westminster and "framework hours" in Camden, but that should be made clearer in the body of the policies.

The main "headline" recommendation picked up by the general media was the suggestion that the London Underground should run later, but the recommendations regarding the Late Night Levy – that it is reconsidered by the Government with the idea that it becomes more flexible and less of a blanket-approach, along the lines of the "polluter pays" principle - is also worthy of comment. The report suggests that a redesigned levy could be applied to a limited area, and could exempt certain types of premises. The impact of the recommendations will be awaited by businesses and residents alike.

Richard Brown

Solicitor, Licensing Advice Project, Westminster CAB

4 Amended Guidance issued under s182 Licensing Act 2003, October 2012 – para 13.17.

5 (2013) 5 JoL 19 – 21.

6 http://www.guardian.co.uk/uk/2013/mar/01/councils-try-block-betting-shops.

7 http://mgov.newham.gov.uk/mgAi.aspx?ID=44116.

8 s153(1)(c) Gambling Act 2005.

9 http://www.westendcommission.com/Report.html

Institute of Licensing News

A big welcome to Issue 6 of the *Journal of Licensing* and our IoL news update.

A busy time as ever, with many interesting developments in the licensing world, and more to come. At the time of writing, we are still awaiting the outcome of the Hemming case (licensing fees) and the Aylesbury Vale case (adoption procedures), both of which will have significant implications for licensing practitioners.

Sue Nelson
Executive Officer, IoL

Membership 2013/2014

Many thanks to all those who have already renewed their membership. Our members are our most important asset and we will continue to strive to improve our systems and services to give you the best we can. Your suggestions on how we can improve membership benefits and services are always welcome and can be emailed to membership@instituteoflicensing.org.

Jim Hunter
Training & Qualification Officer, IoL

The period 2012/2013 saw our highest membership levels so far, and we continue to welcome new organisations and individuals joining throughout the year.

We are pleased to be able to offer a number of special discounts and offers to members, and details can be found on the website: http://www.instituteoflicensing.org/member_benefits.html.

Many of you have opted to sign up to our new direct debit scheme for membership subscriptions and this can be done at any time. Just email accounts@instituteoflicensing.org for more information.

Natasha Mounce
Co-ordinator, IoL

Training and Events

Professional Licensing Practitioners Qualification

The IoL's programme of training and events is as busy as ever, and we were delighted to reintroduce our Professional Licensing Practitioners Qualification last May. This was a four day course held at the Menzies Hotel in Swindon and was quickly sold out, with a waiting list for future courses as a result! The course was CPD accredited, with an exam at the end of each day. We hope to run this course at least annually.

National Training Event 2013

The IoL's signature event, the three day National Training Event (NTE), returns to the Crowne Plaza Hotel in Birmingham this year (20 - 22 November).

This marks the 10th anniversary of this three day residential event, which started life as the LGLF Annual Conference in 2003.

Although modified over the years to suit the changing needs of our members, the event stays true to its original aspirations in providing an unbeatable training event involving three days of first class training by leading licensing experts from across England, Wales, Scotland and Northern Ireland.

We are so pleased each year to welcome long standing and new members (and non-members) to the event. Each event is assessed by using feedback from delegates to ensure that we keep the event on track and provide what members and delegates alike have now come to expect from "the licensing training event of the year".

The 2012 NTE was our most successful so far with 200-plus in attendance over a packed three days. The event is unrivalled in bringing together so many licensing professionals from different areas (both geographic and specialist) to discuss a huge range of licensing issues, local initiatives and forthcoming changes.

Don't forget to book your place at this event in good time to avoid disappointment!

The Regions

Our regional officers continue their hard work on our behalf and a big thank you to all of them who are doing this work on a voluntary basis alongside their full time jobs. The IoL simply could not function at the level it does without their hard work and dedication, and we are always grateful to them.

The regional meetings are an essential part of the IoL's operations and provide a local focus and networking opportunity for regional members, enabling them to hear from key speakers, network with other regional members and discuss local and national issues.

Awards

The Jeremy Allen Award 2013

We are delighted to continue the Jeremy Allen Award, now in its third year, in partnership with Poppleston Allen Solicitors.

This award is open to anyone working in licensing and related fields and seeks to recognise and reward exceptional practitioners. Crucially, the award is by third party nomination, which in itself is a tribute to the nominee in that they have been put forward by colleagues in recognition and out of respect for their professionalism and achievements.

Nominations for the 2013 award are invited by no later than **15 September 2013.** The criteria are shown below and we look forward to receiving nominations from you. Please email nominations to awards@instituteoflicensing.org and confirm that the nominee has agreed to be put forward.

Award Criteria

The award is a tribute to excellence in licensing and will be allocated on the basis of practitioners who have made a notable difference by consistently going the extra mile. This might include:

a) Local authority practitioners positively and consistently assisting applicants by going through their licence applications with them and offering pragmatic assistance / giving advice.
b) Practitioners instigating mediation between industry applicants, local authorities, responsible authorities and / or local residents to discuss areas of concern / to enhance mutual understanding between parties.
c) Practitioners instigating or contributing to local initiatives relevant to licensing and /or the night time economy. This could include for example local pubwatch groups, BIDS, Purple Flag initiatives etc.
d) Practitioners using licensing to make a difference.
e) Regulators providing guidance to local residents and / or licensees.
f) Practitioners' involvement with national initiatives, engagement with Government departments / national bodies, policy forums etc.
g) Practitioners' provision of local training / information sharing.
h) Private practitioners working with regulators to make a difference in licensing.
i) Responsible authorities taking a stepped approach to achieving compliance and working with industry practitioners to avoid the need for formal enforcement.
j) Regulators making regular informal visits to licensed premises to engage with industry operators, to provide information and advice in complying with legal licensing requirements.
k) Regulators undertaking work experience initiatives to gain a more in depth understanding of industry issues, or industry practitioners undertaking work experience initiatives to gain a more in depth understanding of regulatory issues.
l) Practitioners embracing and developing training initiatives / qualifications.
m) Elected councillors promoting change within local authorities / industry areas, and/or showing real interest and getting involved in the licensing world.

Presenting the award last year, Lisa Sharkey, partner at Poppleston Allen, said: "The award seeks to recognise individuals for whom licensing is a vocation, their night and day, just as it was for Jeremy.

Everyone nominated for consideration of this award should feel very proud that others have recognised their commitment and dedication."

Fellow and Companion Nominations

Last year we were proud to present Companionship for James Button and Fellowship for Roy Light and Ian Webster. These are our highest categories of membership, considered on nomination against a high criteria and intended to award exceptional and outstanding achievements in licensing.

Fellowship will be 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:

a) Is a member of the Institute or meets the criteria for membership; and
b) 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:
   - Recognised published work.
   - Research leading to changes in the licensing field or as part of recognised published work.
   - Exceptional teaching or educational development.
   - Legislative drafting.
   - Pioneering or taking a leading role in licensing initiatives or developments leading to significant changes or having a significant impact.

It is stressed that Fellowship is intended for individuals who have made exceptional contributions to licensing.

Nominations are welcomed at any time and should be emailed to awards@instituteoflicensing.org.

All awards are presented at the Gala Dinner during the IoL's National Training Event, at the Birmingham Crowne Plaza on the evening of Thursday 21 November.

Consultations

Law Commission – Interim statement re Taxi Consultation (published April 2013)

Following receipt of over 3,000 responses to its consultation on the proposed reform of taxi and private hire licensing laws, the Law Commission took the unusual step of publishing an interim statement in April 2013 in advance of its final report which is expected towards the end of the year.

The interim statement, published in recognition of the level of interest in this consultation, set out the key findings from the consultation which included:

- Retention of two-tier licensing regime with taxis and private hires remaining distinct and separately licensed.
- Limitation policies to remain within the discretion of licensing authorities, with thought given on how to prevent transfer of licences (exceptions for areas with existing limitation policies) to remove the commercial value of licences.
- Pedicabs and stretch limos to be brought clearly within the scope of licensing.
- Retention of exemption for wedding and funeral cars.
- Provision of national safety standards for both taxis and private hire vehicles (set by Secretary of State / Welsh Ministers).
- Local authority discretion to set local standards for taxis (but not for private hire).
- Operators able to use drivers and vehicles from outside their own area and to invite/accept bookings within that same licensing area (could only pick up a passenger with a pre-booking in all cases).
- Tighter definition for private hire operators to cover dispatch functions only.
- Clarifying "compellability" to tackle the problem of drivers failing to stop for disabled passengers.
- All drivers to undergo disability awareness training.
- Tougher enforcement powers for licensing officers (such powers to be equally valid for out of area vehicle enforcement).
- Appeals to magistrates with simplified judicial review process to county court to enable easier challenge to local taxi conditions.

Frances Patterson QC, the Law Commissioner leading the project, said: "The legal framework governing the taxi and private hire trades is complex and inconsistent. The purpose of our review is to improve and simplify it, and ensure it is fit for purpose.

"We listened to a great many people during our consultation – drivers, operators, licensing authorities and passengers. They confirmed what we have always believed, that the two-tier system distinguishing taxis and mini-cabs should stay. And they convinced us that the trade and its passengers will benefit if licensing authorities continue to have the power to limit taxi numbers."

The IoL had submitted two responses, the first outlining the views received from IoL members, the second a separate response agreed by the IoL's Taxi Consultation Panel. Neither response strongly supported either the two- tier retention or limitation policies, and both encouraged a radical approach to providing new law which fits the current day and age, but could also be future-proofed as much as possible. It remains to be seen what will eventually happen in terms of new law for taxis, but it is unlikely, to say the least, that we are looking at wholesale reform.

Home Office Alcohol Strategy Consultation (Closed 6 February 2013)

In the last issue we reported on the IoL's responses to the Home Office Alcohol Strategy consultation, which ended in February. We have yet to hear the results of the consultation or any likely outcomes in relation to the five key areas, although there has been a fair amount of speculation in relation to minimum pricing and that element appears to be shelved for the time being at least.

The five key areas were:

1. A ban on multi-buy promotions in shops and off-licences to reduce excessive alcohol consumption.
2. A review of the mandatory licensing conditions, to ensure that they are sufficiently targeting problems such as irresponsible promotions in pubs and clubs.
3. Health as a new alcohol licensing objective for cumulative impacts so that licensing authorities can consider alcohol-related health harms when managing the problems relating to the number of premises in their area.
4. Cutting red tape for responsible businesses to reduce the burden of regulation while maintaining the integrity of the licensing system.
5. Minimum unit pricing, ensuring for the first time that alcohol can only be sold at a sensible and appropriate price.

Scottish Government Consultation on Further Options for Alcohol Licensing (Closed 21 March 2013)

On 19 December 2012 the Scottish Government announced its consultation on proposals intended to address the concerns raised by a wide variety of stakeholders, including:

1. Further criminalising the supply of alcohol to under 18s - extend existing criminal law to cover the supply of alcohol to under-18s in a public place.
2. Restrictions where disorder is likely to occur – police powers.
3. Restrictions where disorder is likely to occur – licensing board powers.
4. Enable licensing boards to apply new local licensing conditions to all existing licensed premises without the need to update individual licences.
5. Reintroduction of the "Fit and Proper" test – licensing boards are currently limited to considering relevant convictions notified by the chief constable when determining whether someone should be granted a personal licence.
6. Place a statutory duty on licensing boards to promote the licensing objectives.

7. Place a statutory duty on licensing boards to report annually on how the board fulfilled its duty to promote each of the licensing objectives.
8. Place a statutory duty on licensing boards to gather and assess information on each of the five licensing objectives in the 2005 Act in the preparation of their statement of licensing policy.
9. Extend the period that a statement of licensing policy is in force to five years and introduce a statutory ouster limiting appeals against an adopted licensing policy statement outside its introductory period.
10. Consideration of English Language ability.

In our response, the IoL said: "Where possible the licensing regime should be simplified both for industry operators and regulators. We see no reason why non contentious matters cannot be delegated to clerks at all times rather than just during the post election period.

"Timescales and hearing procedures would be beneficial to bring consistency to the regime, and to give industry practitioners a realistic expectation of procedure.

"There is also support for a further objective to bring balance to the regime. Proposals in Northern Ireland refer to a sixth licensing objective which is 'fair treatment of stakeholders'. Something along these lines and a general focus on licensing for the public good, allowing responsible operators the freedom and confidence to contribute to local communities and their economies while preserving the means for regulators to deal effectively with problems and giving local residents a voice to be heard, will bring long term benefit to all parties."

BRDO – Amending the Regulators Compliance Code (closed 3 May)

This consultation sought views on a new, shorter version of the previous Regulators Compliance Code renamed under proposals as the Regulators Code. This is the statutory code of practice that governs approaches to enforcement by non-economic regulators (and includes regulatory functions exercised by local authorities in Wales, Scotland and Northern Ireland). It is intended to assist regulators in carrying out their regulatory duties while at the same time providing businesses with information about what to expect from regulators.

The consultation followed a review of the existing Regulators Compliance Code which found:

- Regulators have broadly adopted the principles of the code and have reflected the code in their policies.
- There is very low visibility and understanding of the code amongst businesses and some front line regulatory officers.
- There is evidence of variation in the accessibility and transparency of enforcement policies.
- The code could be clearer in its requirements and expectations of regulators.
- The code has unfulfilled potential in holding regulators to account for their activities.
- The consultation therefore proposes to simplify the content, make it more accessible to businesses, require regulators to publish clear and detailed service standards and enable regulators to be held to account for their actions.

The draft Regulators Code is set out in five sections, which are summarised below in italics:

1. Regulators should carry out their activities in a way that helps businesses and regulated bodies to comply and grow.
   This section looks at policy and procedures being reviewed or designed in ways that support or enable economic growth by considering ways to reduce business cost, assist in designing cost effective solutions and secure wider economic benefits to society, as well as considering the impact of their (regulatory) approaches on economic growth.
2. Regulators should provide simple and straightforward ways to communicate with those they regulate, and resolve disputes.
   This section includes requirements to have clear, open and early dialogue with businesses, allowing them to contribute to the development of policy and service standards, providing clear information about appeals processes and publishing information about complaints, measuring customer satisfaction levels and publishing information on fees and charges (including the background).
3. Regulators should base their regulatory activities on risk, including the use of alternatives to enforcement.
   This section is about taking a risk based approach to compliance activities, choosing the most appropriate form of intervention and considering all available options including non regulatory approaches to achieving compliance. The section requires regulators to demonstrate their understanding of the sectors they regulate, recognise efforts to comply and evaluate the effectiveness of their chosen interventions. This includes publishing details of compliance approach so that businesses have a clear idea of what to expect.
4. Regulators should share information about compliance and risk.
   This section is about sharing information to reduce the number of requests for potentially the same information, and using information to help target resources and minimise duplication.
5. Regulators should provide advice and guidance to help businesses and other regulated bodies meet their responsibilities to comply with the law.
   This section includes the need to ensure that advice and guidance is easily accessible and readily available, focused on assisting businesses in understanding requirements and ensuring that advice does not impose unnecessary burdens. Guidance should be published and stakeholders consulted during development of such guidance. The section also advocates the need for regulators to liaise between each other to resolve any disagreements in relation to advice provided.

In summary, the revised code is intended to focus on the need for regulators to work in partnership with businesses to achieve compliance and where necessary to enforce requirements, that a stepped approach be taken. It is all very much in line with good working practices, which we believe are the norm in most cases.

Responses received from IoL members showed little concern although the point was made that there is a need to avoid increasing the regulatory burden on regulators as well as businesses.

The IoL sits on various BRDO focus groups looking at regulatory activities and how to improve them, and the Regulators Code has been discussed during these meetings. From those discussions, we can say that it is likely that templates will be provided for some of the forthcoming requirements including the publication of service standards etc.

Inclusion

The IoL is always grateful for contributions from members, and there are a number of ways in which members can get more involved:

Regionally – through volunteering to serve on the region or assist the regional committee in relation to events, communications etc.

News and information – in particular we are always keen to hear about news in licensing so that we can report on happenings, initiatives, case outcomes etc. Please keep us informed by emailing news@instituteoflicensing.org and making sure you have us on your press release distribution lists.

Journal articles – if you have an idea for an article let us know – email journal@instituteoflicensing.org.

Training ideas – let us know what training you want and think others would like to see – email training@ instituteoflicensing.org.

Committees and Consultation Panels – if you are interested in working with our committees or sitting on a consultation panel, email sue@instituteoflicensing.org.

Any other suggestions – if you have an idea on how we can improve services for IoL members or enhance the role of the IoL and in doing so increase potential membership email membership@instituteoflicensing.org.

IoL Training & Events Calendar

July 2013

3 *Practical Riding Establishment Course* - Taunton

16 *Caravan Site Licensing Course* - Bournemouth

August 2013

16 East Midlands Regional Meeting

September 2013

11 North West Regional Meeting

12 London Regional Meeting

18 North East Regional Meeting

23 London Region - Training Day

24-27 *Professional Licensing Practitioners Qualification*

October 2013

2 *RIPA Course* - Preston

3 *RIPA Course* - Burton upon Trent

7 *Caravan Site Licensing Course* - Newton Abbot

November 2013

20-22 ***National Training Event*** - Birmingham

December 2013

4 North East Regional Meeting

5 London Regional Meeting

6 East Midlands Regional Meeting

11 North West Regional Meeting

Fee setting post-*Hemming*

In the context of licensing and local authority administration, the consequences of the decision in *Hemming* cannot be under-estimated, writes **Leo Charalambides**

Like no other recent case, the High Court decision in *Hemming (t/a Simply Pleasure Ltd & Ors v Westminster City Council* [2012] EWHC 1260 (Admin) and [2012] EWHC 1582 (Admin)[1] has caused considerable concern across the licensing community. Mr Justice Keith expressly recognised that his decision would have "wider ramifications than the narrow interests of the parties to the litigation, and I therefore approach the issue with a keen sense of its importance".[2] The learned judge's construction (with which the Court of Appeal agreed – see below) of Directive 2006/123/EC on Services in the Internal Market ("the EUSD") and the Provision of Services Regulations 2009 (SI 2999/2009)("the 2009 Regulations") will inevitably have very wide and serious implications for other regulatory authorisation regimes within the United Kingdom.[3]

The facts of *Hemming* are well known; this was a challenge to the annual licence fee for sex establishments in Westminster. In particular the court was asked to consider: (i) whether the local authority was obliged to adjust what would otherwise have been an appropriate fee for 2011/12 to reflect any previous surplus or deficit; and (ii) whether the costs of enforcing the licensing system could be reflected in the licence fee.

The former ground of challenge required an assessment of the scope, extent and implications of the EUSD and the 2009 Regulations. The relevant portion of the High Court judgment concludes:

(33). There is no doubt that before 2009 the Council was permitted to reflect the costs of enforcing the licensing system in the fees which it charged. As Roch J said in King[4] at p 710, albeit in the context of licences for street traders:

"[Local authorities] may take into account the costs which they will incur in operating the street trading scheme, including the prosecution of those who trade in the streets without licences.*" (Emphasis supplied)*

Similarly, in Hutton,[5] Forbes J noted at p 517 that it was not disputed that the Council could calculate the licence fee for sex establishments, "not only [by reference to the cost of] processing licensing applications, but also [by reference to the cost of] inspecting premises after the grant of licences and ... [the] vigilant policing of establishments within the city in order to detect and prosecute those who operated sex establishments without licences".

On 24 May, 2013 the Court of Appeal gave its anxiously anticipated judgment in the case (see [2013] EWCA Civ 591). In its decision the Court of Appeal adopted and upheld the reasoning of the High Court. At paragraph [67] Beatson LJ states:

The judge is clearly correct in stating that the language of Regulation 18(4), particularly when read with the definition of "authorisation procedures" in Regulation 4, points strongly to a construction that only permits the costs of administering the application to be reflected in the fee.

The decision has immediate implications in respect of: (i) the application of the EUSD to other regulatory authorisation schemes administered by local authorities; (ii) the principles and practical approach in respect of setting fees for authorisation and other administrative costs; (iii) the proposed fee setting provisions contained in sections 197A and 197B of the Licensing Act 2003; and (iv) the proposed Late Night Levy set out in the Police Reform and Social Responsibility Act 2011. Each of these will be considered in turn.

Application of the EUSD

Firstly, it will be for the local authority to determine whether the EUSD applies. Article 2(2) of the EUSD sets out a number of significant exclusions for the purposes of local authority administration. These include transport services which include *inter alia* urban transport and taxis;[6]

1 See Case Digest (2012) 3 JoL 48; also P Kolvin QC, *Simply Pleasure and the determination of licence fees*, (2012) 4 JoL 10 – 11.
2 *Hemming* [2012] EWHC 1260 (Admin), para 33.
3 *Hemming* [2013] EWCA Civ 591, para 7.
4 *R v Manchester City Council ex parte King* (1991) 89 LGR 696.
5 *R v Westminster City Council ex parte Hutton*, was one of a number of cases tried together and reported collectively as *R v Birmingham City Council ex parte Quietlynn Ltd and Ors* (1985) 83 LGR 461.
6 EUSD, Article 2(2)(d) and Recital (21).

audiovisual service including cinematographic services;[7] and gambling activities.[8] The effect of these exclusions is, that for example, in the context of sex establishment licensing pursuant to Schedule 3 of the Local Government (Miscellaneous) Provision Act 1982, the EUSD applies in so far as sex shops and sexual entertainment venues is concerned but not for sex cinemas. Equally, under the Licensing Act 2003 the exhibition of film is excluded from the scope of the EUSD but not the remaining descriptions of regulated entertainment.

Fees for authorisations and other administrative fees

Secondly, particular care needs to given to the distinction between the fee for "administrative procedures for granting authorisations, licences, approvals or concessions" (Recital 39) and "other administrative fees" (Recital 49).

In the Court of Appeal Beaston LJ took care to highlight that "authorisation schemes" and "authorisation procedures" are critical concepts and terms of the EUSD and the Regulations (para 21). These terms require careful consideration as the regime of the EUSD and the 2009 Regulations apply not only to schemes requiring authorisation in order to have "access to" a service activity, but also to schemes that require authorisation "to exercise" that service activity (see para 106).

Turning to the distinction between authorisation fees and other administrative fees the learned judge states:

*[70] ... What must be remembered is that Regulation 18(4) is concerned with charges which applicants may incur under an **"authorisation scheme"** (my emphasis). The charges must be proportionate to and not exceed the cost of the procedures and formalities under the "authorisation scheme". An "authorisation scheme" is one which requires a service provider to obtain the authority of the competent authority to have access to or to exercise a service activity. It is difficult to see how even a strained interpretation enables the "cost of authorisation procedures and formalities" to include the cost of prosecuting unlicensed operatives who have not applied for authorisation.*

[71] ... ... Moreover, the wording of Articles 13(3) and (4) suggest (albeit obliquely) that the "authorisation procedure" ends when a person gets authorisation because they respectively provide for a fixed period for processing applications, after the end of which, absent a response authorisation is deemed to have been granted.

In respect of Recital (49) and "other administrative fees" the Court of Appeal notes, at para 109, that "it is necessary and important for the 'other administrative fees' to be authorised and not themselves to fall within the Service Directive as fees for authorisation."

The provisions in respect of sex establishments pursuant to Schedule 3 of the 1982 Act do not helpfully demonstrate this distinction. The distinction may be classified as one concerned, on the one hand, with the costs of issue and administration (the authorisation fee) and, on the other, the cost of control and supervision (other administrative fees).

To those familiar with taxi licensing these are familiar concepts. The Local Government (Miscellaneous Provisions) Act 1976, s 53(2), states:

*Notwithstanding the provisions of the Act of 1847 [Town Police Clauses Act 1847], a district council my demand and recover for the grant to any person of a licence to drive a hackney carriage, or a private hire vehicle, as the case may be, **such fee as they consider reasonable with a view to recovering the costs of issue and administration** and may remit the whole or part of the fee in respect of a private hire vehicle in any case in which they think it appropriate to do so.*

Section 53(2) can be contrasted with s 70(1)(c) which states:

Subject to the provisions of subsection (2) of this section, a district council may charge such fees for the grant of vehicle and operators' licences as may be resolved by them from time to time ad as may be sufficient in the aggregate to cover in whole or in part - ...

*(c) any reasonable administrative or other costs in connection with the forgoing and with the **control and supervision** of hackney carriages and private hire vehicles.*

In contrast to Schedule 3 (Sex Establishments), Schedule 4 (Street Trading) of the 1982 Act provides very detailed provisions about the authorisation fee along with additional provision for the recovery of such reasonable charges as the local authority determines for the collection of refuse, the cleansing of streets and others services rendered by the local authority to the holder of a street trading licence or consent (see LG(MP)A 1982, Sch 4, para 9(6)). Similar provisions are contained in the City of London (Various Powers) Act 1987 wherein section 10 provides for an authorisation fee while section 12 makes provision for the recovery of charges to licensed street traders (other administrative fees). Also, the London Local Authorities Act 1990 (as amended) wherein section 32 makes detailed provision for fees and charges.

EUSD compatible fees for applicable authorisation schemes

Having determined that the EUSD applies to a relevant regulatory authorisation scheme administered by a local authority the fee can **not** exceed the cost of the authorisation procedures, that is the cost of administering the application.[9] These costs include: the administrative costs; the cost of vetting the applicant; and the costs of investigating their compliance with the terms of their licence in the case of applications for renewal.[10]

7 EUSD, Article 2(2)(g) and Recital (24).
8 EUSD, Article 2(2)(h) and Recital (25).

9 *Hemming* [2013] EWCA Civ 591, para 67
10 *Hemming* [2012] EWHC 1260 (Admin), para 41; *Hemming* [2013] EWCA Civ 591, paras 46, 67 and also 102 which states: 'I agree with the judge that the cost of compliance monitoring and enforcement against an applicant who is given a licence can fall within the costs of "authorisation procedures".'

Fee setting general principles

The following general principles may be stated:

[1] There must be a proper determination of the authorisation fee (see *Hemming* [2012] EWHC 1260 (Admin) and [2013] EWCA Civ 591).

[2] A clear understanding of the policy and objects of the regime in question is required. It follows that the relevant considerations for vetting an applicant for a street trading licence will be different to those required for a sex establishment (see *R v Manchester City Council ex parte King* (1991) 89 LGR 696; also *R (on the application of Davis & Atkin) v Crawley Borough Council* [2001] EWHC 854 (Admin)). Particular attention needs to be had to those statutory provisions where a power is given to the local authority for the determination of an authorisation fee and other administrative fees.

[3] Applicability of the EUSD (see *Hemming* [2012] EWHC 1260 (Admin) and [2013] EWCA Civ 591).

[4] The setting of the authorisation fee is unlikely to require prior consultation and is a matter for the local authority. However, the requirements of a specific regime may require consultation after the authorisation fee (or other administrative fee) has been determined by the local authority (see *King* (1991) 89 LGR 696; also *R v Birmingham City Council ex parte Dredger* (1993) 91 L.G.R. 532 QBD).

[5] Challenges to the reasonableness and proportionality of the determination of the authorisation fee will be subject to established public law principles (see *R v Stoke-on-Trent City Council ex parte Sheptonhurst Ltd & Quietlynn Ltd* (1985) 83 L.G.R. 461; also *Dredger* (1993) 91 L.G.R. 532 QBD).

[6] Non-fiscal. The licensing authority is not entitled to make a profit. In *King* (1991) 89 LGR 696 it was held that the rationale for this position is that the policy and object of the street trading regime (Sch 4 of the Local Government (Miscellaneous Provisions) Act 1982) was to serve the public interest; the 1982 Act was not a fiscal measure.

[7] Different fee levels for different types of application. A licensing authority is entitled to set either the same or different fee levels for different types of applications: ie, grant, renewal, variation, alteration or transfer. In *R v Greater London Council, ex parte Rank Organisation* [1982] LS Gaz R 643 it was held that the GLC was entitled to levy the same fee for the renewal of a licence for music and dance as for the grant of a new licence. Glidewell J rejected the submission that the work done on a renewal application was much less; the judge accepted that the work would not be less in some cases. The judge held that it was a matter within the authority's discretion whether or not the same fee or a different fee was levied.

[8] Different fee levels for different types of authorisation or licensable activity are also permissible. In *King* (1991) 89 LGR 696, Nolan J states: (at 712):

... the powers conferred upon the council by Schedule 4 must be understood and exercised in accordance with the policy and objects of the Act. So far as Schedule 4 is concerned, the policy and object of the Act is to control street trading. The power of the council to grant licences and consents is coupled with a duty to ensure that street trading is conducted and the highway is used in a manner which serves the public interest. The Act is not a fiscal measure. The purpose of paragraph 9(1) is to enable the council to charge a reasonable fee for the service which they render in granting or renewing licenses and consent. ***Paragraph 9(2) enables the council to charge different fees to different traders, depending upon the type of goods which they sell and the place where they sell them, with a view to ensuring so far as possible that the public are supplied with the right goods at the right price.*** *But the level of fees overall must relate to the cost to the council of operating the street trading scheme.'*

[9] Different fee levels for different types of applicant. Academic commentary has suggested that: 'It should also be within the authority's discretion to charge different fees as between the applicants themselves for the grant of a licence, even where the application is for the same type of licence'.[11] This is not a controversial opinion; application fees under the Licensing Act 2003 are currently determined centrally on the basis of the rateable value of the premises with an uplift based on large capacity venues (see: Licensing Act 2003 (Fees) Regulations 2005). Care needs to be had that any differentiation does not offend the non-discriminatory principle set out in Article 10(2)(a) of the EUSD or other equalities legislation.

[10] Recovery of deficit. In *R v Westminster City Council, ex parte Hutton* (1985) 83 L.G.R 461 it was held that where the fee income generated in one year fails to meet the costs of administering the licensing system it is open to the local authority to make a proportionate increase in the licence fee for the following year so as to recoup the cost of the shortfall (*Hutton* at p 518). This longstanding principle was confirmed in *Hemming* [2012] EWHC 1260 (Admin) and [2013] EWCA Civ 591.

[11] Accounting for surplus. In *Hemming* [2012] EWHC 1260 (Admin) and [2013] EWCA Civ 591 the court was asked to determine whether surpluses as well as deficits are to be carried forward. The logic of *Hutton* is that they should. If the council is entitled to bring forward deficits, why should it not give credits for surpluses? Mr. Justice Keith agreed. He stated (para 26): "If a local authority were to be treated as acting lawfully if it failed to carry forward a surplus from one year to the next, the making of profits would become legitimised."

[12] Rough and ready calculations. In *Hemming* [2012] EWHC 1260 (Admin) and [2013] EWCA Civ 591 the court did not require pin-point precision year on year, stating: "...it does not have to adjust the licence fee *every* year to reflect any previous deficit or surplus, so long as it 'all comes out in the wash' eventually. And the adjustment does not have to be precise: a rough and ready calculation which is broadly correct will do".[12] This advice is seemingly adopted by the Court of Appeal.

[13] Anticipated costs. The cases of *King* (1991) 89 LGR 696 and *Hemming* [2012] EWHC 1260 (Admin) and [2013] EWCA Civ 591, being in part concerned with reasonable

11 Colin Manchester, Entertainment Licensing Law And Practice Second Edition, Butterworths 1999, p 50, para 4.03.

12 *Hemming* [2012] EWHC 1260 (Admin), para 27.

assessment and consequent surplus, demonstrate that the fee level may be fixed by reference to anticipated costs of administering the authorisation scheme.

[14] Over-estimation. In *King* (1991) 89 LGR 696 the court stated that "if the fee levied in the event exceed the cost of operating the scheme, the original decision will remain valid provided it can be said that the district council reasonably considered such fees would be required to meet the total cost of operating the scheme".

[15] Comparative fees and local consistency. In *R (on the application of Davies & Atkin) v Crawley Borough Council* [2001] EWHC Admin 854, there "was reference to other street trading schemes in Crawley. The High Street and the Michaelmas Fairs were referred to. The fees charged for these short, mainly charitable events, equated to £4,380 pa. A better comparison, it was suggested, was the trading fee for market stalls. They equated to £8,750 for a 50 week year (although in fact only working for two days a week). Finally, it is said [in the report to committee]: "Based on the current number of traders, additional income in the range of £60,000 per annum will be generated assuming a fee base of £5,000 is acceptable. It is believed that this will be more than sufficient to cover the Council's additional costs in monitoring, enforcement and administration. This will need to be reviewed in the first year of operation, when the workload and resources required to manage the scheme can be assessed" (para 78).

On its facts, the local authority determined that the new fee would be reviewed in the next year, that it could be paid by instalments, and that there was a discretionary hardship allowance (that the fee might be reduced on the production of appropriate accounts). The fee was held to be reasonable and not set in stone (see paras 118 – 121).

In my view, the value of the comparative exercise contributed to the consistency of the decision making process within Crawley. The comparative exercise was not conducted for the purpose of generating revenue (market-forces) but for consistency in local decision making and administration.[13]

Licensing Act 2003: Application Fees & the Late Night Levy

In the context of the Licensing Act 2003 and the Late Night Levy, the importance of the decision in *Hemming* cannot be under-estimated. The implications of the High Court decision have already been widely discussed. I have previously expressed the view that the Late Night Levy constitutes an authorisation scheme as defined by the EUSD and that the practical application of the decision in *Hemming* undermines the *raison d'etre* of the proposals.[14] In the Court of Appeal Beatson LJ notes, at para 96, that:

As to the fees and the late night levy under sections 121 and 125 – 139 of the Police Reform and Social Responsibility Act 2011, during the hearing Mr Kolvin suggested that the new sections 197A and 197B of the Licensing Act 2003 fell foul of the Services Directive to the extent that the charges are application fees. On his post-hearing submissions he stated that the late night levy to be used for local measures to reduce crime and disorder is, under sections 125 – 139 of the 2011 Act treated by the Treasury as a tax rather than an application fee. He accepted that, because the Service Directive does not apply to taxation measures, the State is free to impose such levies.

In response the Court of Appeal graciously stated, at para 97, that "the submissions made about these other areas, while informative, are insufficiently detailed to enable anything more than an impression to be gained of how, if at all, the Services Directive and the 2009 Regulations might apply to them and its impact on monitoring and enforcement".

It would seem that the future battle lines have been drawn.

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13 For an alternative reading of this case see *Button on Taxis*, 3rd Edn., para 4.6.)

14 See Leo Charalambides, *Time at the Bar?* 20 November 2012 SJ 156/44 p21.

National Training Event 2013 - Birmingham

The IoL's signature annual event, the three day National Training Event (NTE) returns to the Crowne Plaza Hotel in Birmingham this year on 20th - 22nd November. This marks the 10th Anniversary of this three day residential event.

The programme has been designed to give maximum flexibility to delegates and to allow them to tailor the training event to suit individual needs. Speakers will include James Button, Gary Grant, Susanna FitzGerald QC, Philip Kolvin QC, Sarah Clover and many others.

Details will be updated as they are confirmed and delegates are advised to book early to avoid disappointment, last year's event was a sell-out. A full residential place for members is £495 + VAT (price includes £50 'Early Bird' booking discount). More information, a copy of the draft programme and details of the various booking options are available on the website www.instituteoflicensing.org/events.

Course Objectives

To provide a valuable learning and discussion opportunity for licensing practitioner to increase understanding and to promote discussion relating to the intricacies and practical application of the law in the subject areas and the impact of forthcoming changes and recent case law. The training structure is aimed at allowing maximum benefit to be derived by delegates in allowing them to choose the subject areas most relevant to their areas of interest. The three day event will carry a total of 12 hours CPD.

Working safely with performing animals

When is a "performing animal" performing? And what safety aspects should be considered for the welfare of the animal, for the employees working with the animals and for the members of the public who come to watch them? Julia Sawyer examines the legal guidelines

The main legal requirements covering performing animals are contained in:

The Health and Safety at Work, etc. Act 1974
The Act places general duties on employers to their employees and protects others who may be affected by the work activity.

The Management of Health and Safety at Work Regulations 1999
The Regulations require that a risk assessment is carried out of the work activity to identify any significant risks and that appropriate control measures are put in place to reduce the risk.

Control of Substances Hazardous to Health 2002
The Statutory Instrument requires that an assessment be carried out of the risk to health from the work activity and stipulates the controls that need to be implemented to protect the health of those working with or who are near to animals. Substances may include saliva, urine, and fecal material. Veterinary products may have a Workplace Exposure Limit (WEL).

The Performing Animals (Regulation) Act 1925 (later referred to as 'the Act')
The Act regulates the exhibition and training of animals to protect the welfare of the animals. (See JoL1 page 28 for detail about this Act.)

Guidelines for the Welfare of Performing Animals 2012

RSPCA Performing Animals Advisory Service

Working with animals in entertainment 08/11 HSE

The term 'performing animal'

There is no definition of "performing animals" in the 1925 Act, which states: "No person shall exhibit or train any performing animal unless he is registered in accordance with this Act."

"Animal" is defined as "not including invertebrates"; "exhibit" is defined as "exhibit at any entertainment to which the public are admitted, whether on payment of money or otherwise"; and the expression "train" means train for the purpose of any such exhibition.

Local authorities differ in the way they define "performing animals". Some take the view that any animal, if taken on the stage or part of a performance in any way, is defined as a "performing animal". Others take a more relaxed view

Julia Sawyer

in which if an animal sits on someone's lap the whole performance, they are not performing; or if a dog is walked on stage with a lead, this is normal behavior and not considered performing and therefore does not fall under the definition.

The Guidance on this term, however, is very clear in that it states a production means every kind of performance, event and show involving animals with the exception of: "fly on the wall" documentaries where an animal is followed while performing its natural behaviour in its usual environment; agricultural shows/sporting events/military and or police activities; and anything done lawfully under the Animal (Scientific) Procedures Act 1986.

The Guidance goes on to state: "'Examples of when these Guidelines should be used include:

- Film or television drama.
- Advertisements.
- Television chat shows.
- Children's television shows.
- Theatre.
- Webcasts and multi media.
- Live events and displays (eg, in a zoo, wildlife or falconry park and art installations).
- Music videos.
- Still photography.
- Corporate training and marketing videos.
- The off-set use of animals to attract the attention of on-set animals.

"The Guidelines should be used even if the use of the animal is minimal and straightforward. They can be applied

to amateur productions as well as commercial ones (eg, amateur dramatics, magic shows and displays or school performances)."

Safety considerations

Hazards

Animals can cause ill health or injury by bites, scratches, secretions, stings, kicking or crushing; by infection or infestation from micro-organisms or carried parasites; or in some cases by allergic reaction.

Some people have phobias about particular kinds of animals (snakes, spiders, etc), which may cause them to react in extreme ways.

Veterinary products can be hazardous to human health and these should be handled and used by those competent to do so. Hazards may also arise from hay or straw used in connection with an animal, eg, fire, soiled materials, dust, allergies, etc.

The following should be considered on a risk assessment and should also be used to consider if the animal is "performing" according to the Act:

- Why the animal is present and what it is planned to do.
- Where the animal is to be kept between appearances.
- What harm the animal could cause.
- What and how much contact there will be with the animal.
- By what route can any micro-organisms be transmitted to humans, eg, by hand to mouth contact, bites, scratches, secretions, or via the air.
- All animals should be regarded as likely sources of infection or infestation.
- Certain breeds of animals can cause infections that may threaten pregnancy.
- How you may influence the animals' behavior.
- Consider who is exposed to the harm.
- What other animals may be present.
- Consider all reasonably foreseeable behavior, eg, reaction to special effects.
- Consider untreated hay or straw used for animals within the fire risk assessment as certain fire proofing materials can be toxic to animals.

Control measures

The risks from animals should, so far as is reasonably practicable, be eliminated or minimised. In most cases expert advice will be needed about specific control measures in relation to a performance, but measures that should be considered include:

- Completing and following animal welfare risk assessments (provision of food and water, suitable environment, animal healthcare, protection from fear and distress, opportunity to express most normal behaviours).
- Registering people under the Act for a specific animal.
- Telling people in advance if animals are to be present.
- Ensuring the performing animal is obtained from competent person.
- Briefing properly everyone involved with, or working close to, performing animals about the risks, control measures and emergency procedures.
- Ensuring an appropriate number of people are present to manage the performing animal.
- Being aware that animal behavior can be influenced by adverse conditions and sudden unexpected stimuli such as lights or noise from special effects. Advice should be sought about this in the early stages of planning and the animal handler should be kept fully informed.
- Minimising the length of time animals are required on set.
- Handling animals no more than is necessary and always with personal hygiene in mind.
- Wearing appropriate personal protective equipment and providing adequate welfare facilities.
- Providing appropriate first aid. Consideration should be given to the need for specific antidotes, such as anti venom, as required.

Registrations under the Act

There is no set national fee for a performing animal's registration and the cost varies across the country from £66.50 up to £150.00. Some local authorities do not even have it listed in their fees and charges. This may be due to the fact that there are very few cases of poorly treated performing animals. We are "a nation of animal lovers" and thanks to the legislation and guidance in place, observed incidents of animal neglect are usually quickly reported.

Detailed in the table below are some incidents involving animals where controls, if they existed, broke down.

Julia Sawyer
Director, JS Safety Consultancy Ltd

Date	Location	Incident	Source
Oct 2012	Cantref Adventure Farm Brecon	Two children contracted Ecoli 0157	www.wales.nhs.uk
Aug/Sept 2009	Godstone Farm Surrey	Up to 90 people affected by Ecoli 0157	Health Protection Agency Nov 2011
Nov 2005	Portugal	Tiger tore off part of worker's arm	The Times 12/11/05
July 2005	Ireland	Monkey bit and scratched visitor	www.greenconsumerguide.com, 28/07/05
July 2005	Czech Republic	Elephant fell in to crowd injuring visitor	The Times 09/07/05
January 2005	USA	Elephant trampled worker to death	CBS News, 01/02/2005

Institute of Licensing *Books*

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Sex Licensing

Philip Kolvin QC

Published 2010 Price £15+P&P

ISBN: 978-0-9555392-2-0

For the first time, England and Wales have a national licensing scheme for the entire range of sex establishments. In Sex Licensing, Kolvin deals with the law, procedures and philosophy of the legislation, and places it in its historical and political context.

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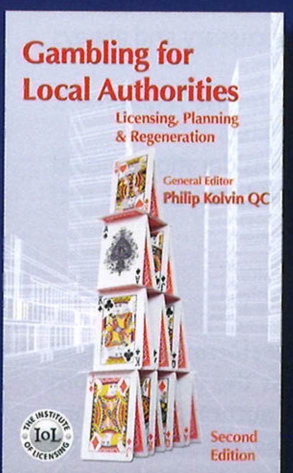

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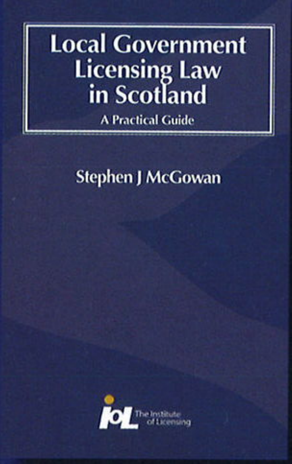

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Human rights and licensing

Human rights jurisprudence and its bearing on licensing decisions is often unclear, and at times councils wrongly invoke human rights arguments, writes **James Button**. A definitive ruling, he says, is overdue

What is the impact of the Human Rights Act on licensing decisions? Is a licence possession for the purposes of the Act? Does removal of a licence impact on a person's private and family life? These are questions that are regularly asked in relation to licensing, and as a result of confused case law there is continuing uncertainty over the relationship between the Human Rights Act and licensing.

As is well known, the Human Rights Act 1998 ("the 1998 Act") incorporates into English law many of the provisions of the European Convention on Human Rights and Fundamental Freedoms. The consequence is that a local authority is a public body for the purposes of the Act and by virtue of section 6(1):

"It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

In relation to licensing, the Convention rights that are most likely to be raised are Article 6 (Right to a Fair Trial), Article 8 (Right to Respect for Private and Family Life) and Article 1, Protocol 1 (Protection of property) ("A1P1").

It is therefore necessary for a local authority when considering a licensing matter (under any of the licensing regimes for which it has responsibility) to consider whether any Convention rights are engaged and if they are, whether its actions are compatible.

It is also important to understand the process of considering the impact on a person's rights if those rights are engaged.

Article 6 - Right to a Fair Trial

In relation to the right to a fair trial under Article 6, generally speaking the lack of independence and impartiality on the part of the Council (which is not only the regulator but also the policy setter and determinator of applications) is not fatal as there is a right of appeal to an independent and impartial tribunal (usually the magistrates' court, but occasionally direct to the Crown Court). This was the decision of the European Court of Human Rights ("ECHR") in *Albert and Le Compte* v *Belgium* (1983) 5 EHRR 533.

Where there is no right of appeal, the availability of judicial review (however unlikely this may be in practical terms) is sufficient, as was decided by the ECHR in *Bryan v United Kingdom* (1995) 21 EHRR 342 and domestically by the House of Lords in *R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 W.L.R. 1389.

Accordingly, it seems unlikely that there will be human rights challenges to the process of local authority licensing decision-making, although the process can be, and regularly is, challenged on *Wednesbury* principles.

Article 1, Protocol 1 – Protection of Property

In relation to the protection of property, the question is much more involved.

There are two types of licences that local authorities grant: those that can be transferred to another party (often at a premium); and those which are personal and therefore have no transfer value.

Examples of the first category include premises licences under the Licensing Act 2003 ("the 2003 Act") and hackney carriage proprietors' licences under the Town Police Clauses Act 1847 ("the 1847 Act") and the Local Government (Miscellaneous Provisions) Act 1976 ("the 1976 Act").

Examples of the second category include personal licences under the 2003 Act and Hackney carriage and private hire drivers' licences under the 1847 Act and the 1976 Act.

It does appear that there is a distinction between these two types of licences in relation to the 1998 Act.

Unfortunately, there is no single English authority on the point, with a variety of cases arriving at different conclusions. The matter is then compounded by the varying approaches taken by the ECHR (and on occasions The European Commission on Human Rights which prior

to 1998 produced reasoned opinions which would be then confirmed by the Committee of Ministers).

In *R (app Nicholds) v Security Industry Authority* [2007] 1WLR 2067 the case concerned registration as an SIA registered door supervisor. The High Court reviewed the law up to then and Kenneth Parker QC (sitting as a Deputy High Court Judge) concluded reluctantly (at paragraph 83) that a personal licence which has no separate value and was not marketable was a possession for the purposes of A1P1.

This was based on the authorities of *Tre Traktörer Aktiebolag v Sweden* (1989) 13 E.H.R.R. 309 (a decision of the ECHR), the High Court cases of *R (Quark Fishing Ltd) v Secretary Of State for Foreign & Commonwealth Affairs* [2003] EWHC 1743 (Admin), *R (app Malik) v Waltham Forest Primary Care Trust* [2006] EWHC 487 (Admin), and the Court of Appeal in *Crompton v Department of Transport North Western Area* [2003] EWCA Civ 64.

The three English cases all relied upon the decision in *Tre Traktörer Aktiebolag* that a licence was a possession. It is worth noting that in *Nicolds* the judge was dubious as to whether *Tre Traktörer Aktiebolag* really did come to that conclusion (see paragraph 79).

Since then, the case law has developed. *Malik* was considered by the Court of Appeal in 2007 (*R (app Malik) v Waltham Forest Primary Care Trust* [2007] 1 W.L.R. 2092) and was referred to in the High Court in *Cherwell DC v Anwar* [2012] R.T.R. 15.

Malik concerned a removal from the medical performers list. This removal prevented Dr Malik from practising as a GP for the NHS. It was found by the High Court that the removal was unlawful (due to procedural irregularities) and the High Court further held that it amounted to an interference with possessions contrary to A1P1. The question for the Court of Appeal in *Malik* was whether the right to practice as a GP did amount to a possession. The Court of Appeal found that it did not as it was a personal right and any goodwill in the practice could not be sold by virtue of a statutory bar contained within the NHS legislation.

In *Cherwell* (which concerned non-renewal of a hackney carriage and private hire combined driver's licence) there was agreement between the parties that a hackney carriage and a private hire driver's licence was not a possession for the purposes of A1P1. Although this was an agreed position, the judge (His Honour Judge Bidder QC sitting as a Deputy High Court Judge) had considered the point before agreement was made and concluded that the decision in *Crompton v Department of Transport North Western Area* was distinguishable.

He preferred the conclusion of the Court of Appeal in *Malik* which regarded the decision on the point in *Crompton* as having been made *per incurium*. He said (at paragraphs 14 to 16):

"14. At this stage of my judgment I should deal, briefly, with the issue of whether this licence constitutes a 'possession' within the meaning of that term in Article 1 of the First Protocol of the European Convention of Human Rights. Counsel before me were agreed that it did not. I agree with their concession. While the contention that the licences in this case were 'possessions' might appear to be supported by the Court of Appeal decision in *Crompton v Department of Transport North-Western Area [2003] EWCA Civ 64*, that the licence in that case was a 'possession' was assumed by the court without argument.

"15. Before Counsel's agreement I had concluded that the later decision of the Court of Appeal in *Waltham Forest NHS Primary Care Trust and Secretary of State for Health v Malik [2007] EWCA Civ 265* does appear to be indistinguishable from this case. Here, as in *Malik*, there is no evidence that the refusal to renew the licence would affect any 'goodwill' of Mr Anwar's business, nor that it would diminish any of the other assets of the business. The licence itself is not marketable, nor does it bear any premium. It is not bought at a market value. *Crompton* is cited in *Malik* and the court in *Malik* appears to have regarded it as a decision made *per incuriam.* That is, I consider I am bound by *Malik,* and indeed that decision appears to me to be completely consistent with a not always easily interpretable line of European authorities.

"16. I therefore conclude that the licences in this case do not comprise 'possessions' within the meaning of article 1."

In 2012 *Malik* was considered by the ECHR which upheld the decision of the Court of Appeal. In arriving at its decision the court considered the case law to date (at paragraphs 88 to 93) and concluded as follows (at paragraph 96):

"96. In view of its review of the case-law, the Court does not consider that the applicant's inclusion in the Performers List in England constituted a 'possession' for the purposes of Article 1 of Protocol No. 1. In order for that Article to apply, it must be established that there was an underlying professional practice of a certain worth that had, in many respects, the nature of a private right and thus constituted an asset and therefore a 'possession' within the meaning of the first sentence of Article 1 (see paragraph 89 above)."

It is clear that a large part of the reasoning for this conclusion was that the professional practice that Malik built up was not capable of being sold with any premium for goodwill. Accordingly the inclusion on the list of practitioners was akin to a personal licence.

On the basis of the decision in *Malik* by the ECHR it would appear that a personal licence is not a possession, as it cannot be sold and cannot generate goodwill.

This might appear to contrast with the decision in *Gudmundson v Iceland* (1996) 21 EHRR CD 89 which actually concerned a taxi driver's licence. However, firstly, it is a decision of the European Commission on Human Rights, rather than the ECHR, although such judgments are still important. Secondly, and perhaps more importantly, it is a decision which does not necessarily seem to apply to the law relating to taxi drivers (or other personal licensees) in England and Wales. In *Gudmundson* the court said this:

"As regards the question as to whether a licence to conduct certain economic activities could give the licence-holder a right which is protected under Article 1 of Protocol No. 1 (P1-1), the Commission considers that the answer will depend *inter alia* on the question whether the licence can

be considered to create for the licence-holder a reasonable and legitimate expectation as to the lasting nature of the licence and as to the possibility to continue to draw benefits from the exercise of the licensed activity. Furthermore, the Commission notes that a licence is frequently granted on certain conditions and that the licence may be withdrawn if such conditions are no longer fulfilled. In other cases, the law itself specifies certain situations in which the licence may be withdrawn.

"It follows, in the Commission's opinion, that a licence-holder cannot be considered to have a reasonable and legitimate expectation to continue his activities, if the conditions attached to the licence are no longer fulfilled or if the licence is withdrawn in accordance with the provisions of the law which were in force when the licence was issued (cf. No. 10426/83, Dec. 5.12.84, D.R. 40 p. 234)."

It can be seen, therefore, that as a taxi driver's licence can be withdrawn in accordance with the provisions of the law (e.g. suspended, revoked or refused to be renewed for one of the grounds contained in section 61 of the Local Government (Miscellaneous Provisions) Act 1976) this decision does not seem to apply to a driver's licence or a personal licence in England and Wales.

This then reveals a stark contrast with a licence which can be transferred and which can generate goodwill. Licences that fall into this category do appear to be possessions following the reasoning in the case law above.

It can therefore be seen that if a local authority is considering action against a personal licence, there is no need to consider the impact of A1P1.

However, and again, from the above analysis, in relation to a goodwill generating, transferable licence, A1P1 will come into play and the authority will then have to be able to demonstrate that its decision did not unjustifiably infringe the human rights of the licensee.

It is important to be clear on decision-making where there is an infringement of human rights. The decision of the House of Lords in *R (On the Application of Begum (By Her Litigation Friend, Rahman)) v Headteacher, Governors of Denbigh High School* [2006] 2 W.L.R. 719 made it clear that the question is whether a person's rights have been infringed, rather than the process by which the decision was made. It is a different approach from that undertaken on a judicial review of a local authority decision, and will depend on the facts of the case much more than the methodology.

From a licensing perspective, this approach was followed and endorsed by the House of Lords in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 W.L.R. 1420.

Article 8 – Private and Family Life

There remains the outstanding question of the impact of Article 8.

Under English case law, the position seems clear. The purpose behind the licensing regime is the legitimate aim and accordingly a licence can be removed without consideration of the impact on a person's family (except in exceptional circumstances). This was the decision of the High Court in *Leeds City Council v Hussain* [2003] R.T.R. 13; which was followed by the decision in *Cherwell DC v Anwar* [2012] R.T.R. 15.

The ECHR has made it clear that there is no right to employment or work protected by the convention but there have been occasional cases where the ECHR has intervened in relation to employment issues and Article 8. In *Sidabras v Lithuania* (2006) 42 E.H.R.R. 6 the court held that a long term prohibition on work for the state was an infringement of Article 8, although whether this would apply to a licensing issue is less clear.

A refusal to grant a personal licence by one council does not automatically mean that other councils will take the same view, even where there are national criteria (as in personal licences under the 2003 Act). In every instance, the local authority must consider each case on its merits and it therefore has a discretion as to whether or not to grant the licence.

Conclusions

Human rights jurisprudence is complex and often contradictory. It does have a valid place in licensing decision-making, but only in relation to transferable, goodwill- generating licences. It is important that all parties to licensing decisions appreciate this. The local authority places itself at risk if it takes human rights considerations into account wrongly.

That is not to say that human rights arguments will not continue to be made in front of council committees and the courts. There is little doubt that decisions will continue to vary widely because of the significant differences in approach in some of the cases from both the domestic courts and the ECHR.

Notwithstanding the above conclusions, it is hoped that at some point there will be a clear and definitive ruling on the status of licences under the Human Rights Act, and the role of private and family life in relation to the loss of such a licence which in most cases will inevitably lead to a loss of income.

James Button
Principal, James Button

PASS steps up the battle for full acceptance

The national Proof of Age Standards Scheme (PASS) is now a decade old but some door supervisors still refuse to accept its validity and are turning away legitimate customers. To get round this problem, a new campaign has been launched, as PASS's Kate Winstanley explains

As most *Journal* readers will know, the Proof of Age Standards Scheme (PASS) is the UK's national guarantee scheme for Proof of Age cards. PASS does not itself issue cards but regulates and accredits schemes, which must submit to periodic audit carried out by trading standards officers in order to receive a licence to apply the PASS hologram to their cards.

By and large, the scheme works well. Over five million PASS cards have been issued since it began in 2003 and PASS has the full backing of the Home Office, Trading Standards Institute (TSI), Association of Chief Police Officers (ACPO) and the Security Industry Authority (SIA) as well as most major operators and the Scottish authorities.

However, there is evidence that cards are still being refused by some door supervisors in the late-night sector. To tackle this remaining obstacle, PASS is launching a major campaign called "Make PASS the Standard". Aimed at late-night venues that employ door supervisors, "Make PASS the Standard" highlights the fact that PASS is the "preferred" form of proof of age, with its main focus on ensuring door supervisors are directed and trained to accept PASS cards.

Background and origins

The brainchild of a Government/trade taskforce to solve the problem of fake ID, PASS was set up in 2003. Card issuers that applied for and received PASS accreditation, following independent audits provided for PASS by the Trading Standards Institute, would be licensed by PASS to embed the PASS hologram in their cards. The unique and distinctive PASS hologram shows retailers, at a glance, that the card is a genuine proof of age card, unlike the many fake or novelty cards, which then as now, can easily be purchased over the internet.

The rigour of the application process means that the risk of cards being issued with false data is minimal. Trademark registration of the PASS hologram makes its forgery a criminal offence and regular checks are made on internet sites selling novelty cards to ensure that cards purporting to be PASS cards are not on offer.

Fake ID still abounds, and if anything the cards on offer are more convincing than ever. Fake lookalike driving licences, so called "provisional motorcycle permits" and "national identity cards" can be bought for as little as £10, with an additional £5 getting an upgraded holographic overlay. To date, the PASS hologram has neither been forged nor used on novelty or fake ID.

There are currently five national PASS-accredited card issuers. The Young Scot National Entitlement Card (Young Scot) issues free cards (paid for by the Scottish Government) to all young people aged 12-26 across Scotland. CitizenCard is the largest commercial PASS accredited scheme in the UK and along with ValidateUK was one of the first schemes to gain PASS accreditation. Newer providers are the Age Entitlement Card and ONEID4U. All the commercial schemes offer cards for around £15.

As well as the national providers there are currently ten PASS accredited local issuers, usually local authorities. The number of locally issued PASS card providers has dwindled recently, mainly thanks to local authority budget cuts. Many are multi-function cards – acting both as proof of age and as a means of obtaining discounted travel or access to leisure centres. Some are primarily issued to schoolchildren and are therefore not intended as proof of age for alcohol/ tobacco.

Benefits of PASS to retailers

The Home Office states that accepting a PASS hologrammed card which carries the bearer's image and acceptable date of birth *is* due diligence. To our knowledge, no one has ever been prosecuted for accepting a PASS card. The belief that insisting on passports and driving licences offers better protection from a legal perspective is simply wrong. And whereas there are no fake PASS cards, there are a great many fake driving licences in circulation.

Another myth is that doorstaff risk their licence if they admit a person who is below 18, having been presented with a PASS-hologrammed card indicating they are over 18. Of course, in general, no offence is committed in such a case unless there is a specific licence condition, but no

SIA badge holder has ever been deprived of their badge in these circumstances.

A surprisingly large proportion of young adults do not possess either a passport or driving licence. The exact number of young adults who possess neither is currently unknown though is thought to be considerably more than a third of 18-19 year olds. Retailers – or more likely door supervisors – who refuse to accept PASS cards are not only discriminating against a large chunk of the young adult population but are also needlessly turning away legitimate custom, and alienating them (and their friends) for many years to come. This is nonsensical from a business perspective.

Benefits of PASS to young people

PASS cards offer a convenient and cost effective means for young people to prove their age without the need to carry around valuable documents such as passports or driving licences. If lost or stolen, such documents are expensive to replace (£79 to replace a passport, £20 for a driving licence).

Recent ONS figures reveal that only 31% of 17-20 year-olds hold a UK driving licence. So almost 70% of 18 and 19-year olds, those most likely to be challenged, will need some other means of proving their age. Unless they are prepared to carry their passport, which is cumbersome, expensive to replace and contrary to police and Government advice, they need PASS cards to prove their age.

The scale and nature of PASS card refusals

Reports of refusals of PASS cards are, sadly, a common occurrence and hundreds of young adults are regularly turned away from clubs and bars. This is frustrating for those young people who have done what we ask of them and bought a Government and police endorsed proof of age card, and is also resulting in lost business for those pubs/clubs which are turning away legitimate customers at the door. It causes distress, deprives those concerned of their rights, often places those turned away at risk, and sometimes leads to entirely unnecessary confrontation and even occasionally disorder. All of these consequences attract critical attention to the trade.

Whereas acceptance rates in supermarkets and the off trade are generally high (up to 98%), acceptance is far lower in the on trade – generally around 55% – with door supervisors being the main culprits. Of the reported refusals of PASS cards, 85% occurred in clubs, bars and pubs, and 80% of these refusals were by door supervisors.

Recent research by PASS into perceptions of PASS among door supervisors indicates that many believe that PASS cards are easy to fake (70%) while 52% assert that PASS procedures are lax. Many did not recognise PASS as "legal" proof of age and were afraid of losing their licences and/or their jobs if they got it wrong and an under 18 was admitted (56%). A lack of proper training on PASS and/or clear direction from their employer and from police were both identified as key determinants of non acceptance of PASS cards.

PASS "mythbuster"

PASS has compiled a "mythbuster" to help dispel some of the common urban myths about PASS held particularly by door supervisors. A full version can be found on the PASS website www.pass-scheme.org.uk:

1. **"There are lots of fake PASS cards."**
   To date, there is no evidence that the PASS hologram has been forged and/or used on novelty ID. Any evidence of forgery of the PASS hologram will be vigorously pursued by the PASS Board and the relevant authorities with a view to prosecution.
2. **"PASS card applications are not properly checked."**
   The application process is audited by trading standards officers. The system is tough, and the authorities back it. The proposition is false.
3. **"Passports and driving licences are more reliable than PASS cards."**
   The audit system combined with the absence of forged PASS cards makes PASS cards as reliable if not more so than passports and driving licences. ACPO and the Home Office advise against the practice of carrying passports because of the inconvenience and expense to replace and the security risk if they fall into the wrong hands. The proposition is false.
4. **"It's difficult to tell a PASS card because they all have different designs."**
   The key to recognising a PASS card is the distinctive PASS hologram. The hologram is the hallmark and it's always identical. Furthermore, to aid immediate and confident recognition, most PASS cards now follow a standard template design with the hologram in the centre right of the card. Novelty or fake cards do not carry the PASS hologram.
   However, recent research by PASS clearly indicates that door supervisors can reliably discriminate between the genuine and the false. Recognition is not problematic; the issue is acceptance.

"Make PASS the Standard" campaign

The campaign to "Make PASS the Standard" aims to establish PASS as the preferred form of proof of age. Late-night operators of bars, clubs and pubs are being encouraged to sign up to a "commitment to action" package to ensure that all staff and door supervisors are trained to recognise the PASS hologram and clearly directed to accept PASS cards.

The list of signed up operators to "Make PASS the Standard" is growing steadily, with most key operators already on board. PASS is working also with key trade associations, ACPO, Home Office, SIA and training providers to bed in the campaign.

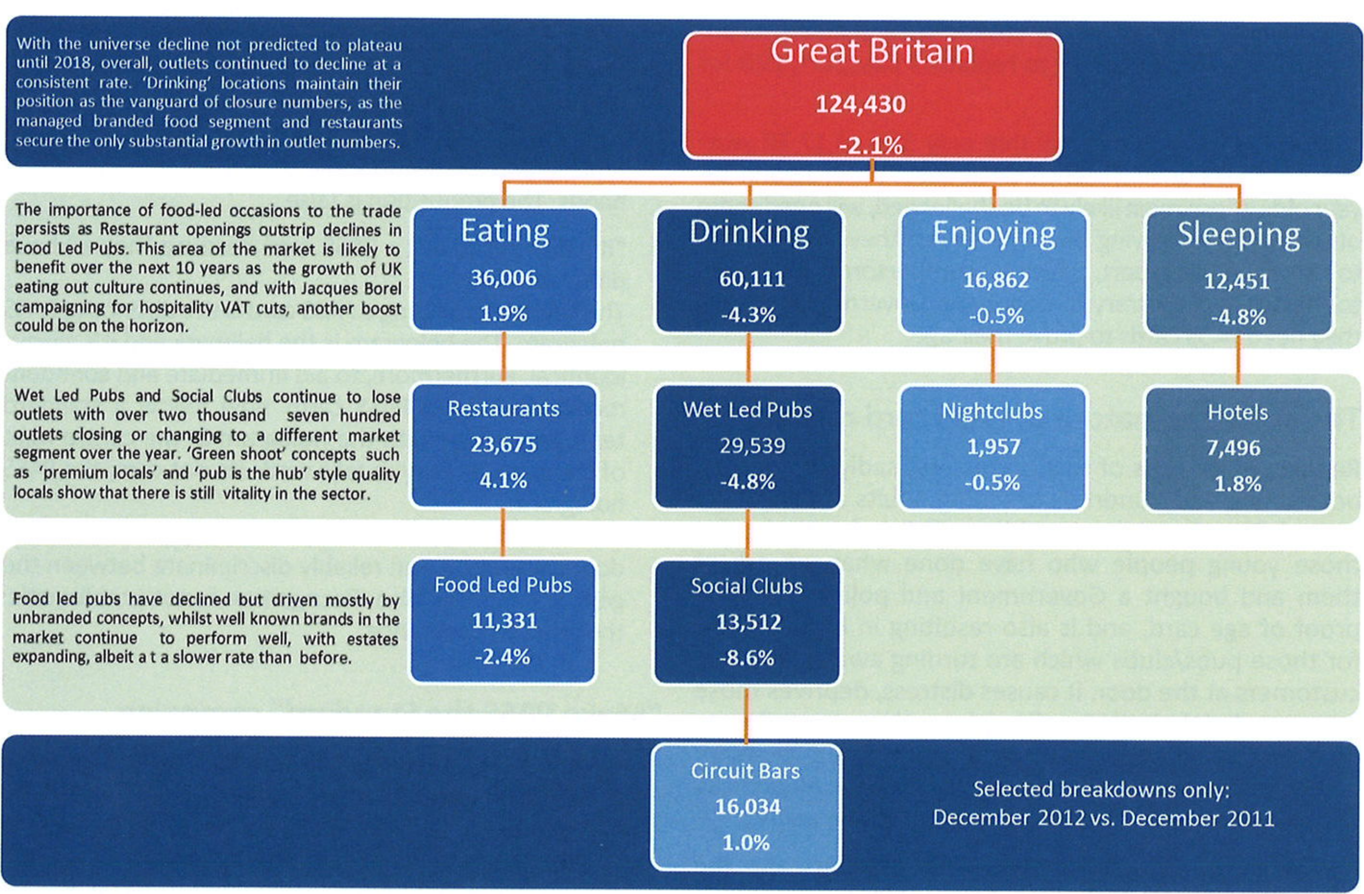
All those involved in the licensing, management and oversight of the on trade, and especially in the late-night economy, are urged actively and publicly to support the campaign. The PASS system works, it is rigorously managed and scrutinised, and almost all audiences have grasped it! Universal acceptance is the goal.

Kate Winstanley
PASS Director/Administrator

Duty change sparks hope for pubs

The GB licensed trade has faced many issues over the last five years which have made running profitable licensed outlets increasingly difficult. Shifting regulation, tough economic conditions and changing consumer tastes have contributed to a significant and continuing decrease in outlet numbers. **Stuart Capel** discusses these factors in the latest statistical snapshot from CGA

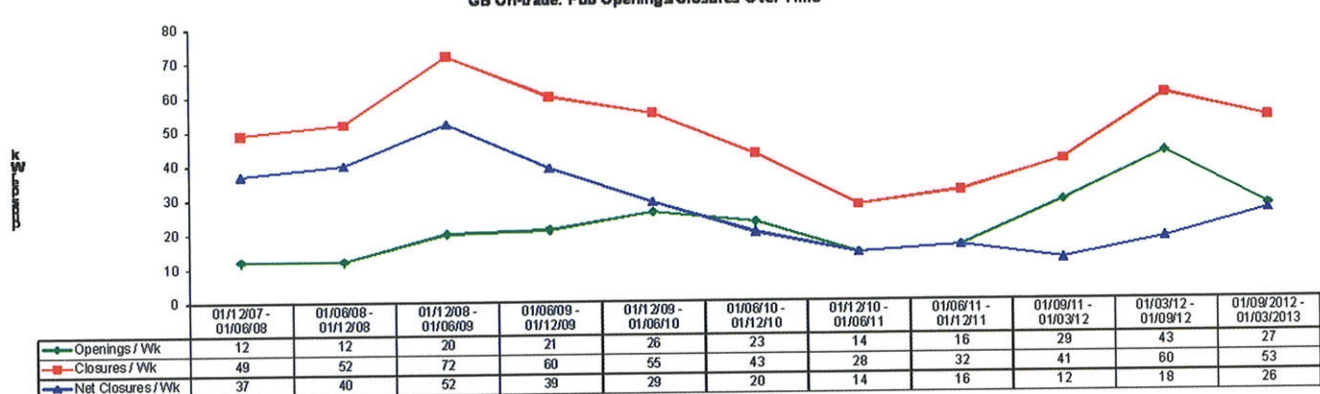
GB On-Trade Universe



The pub, and indeed beer industry as a whole, has received great news in the latest budget – with the long debated scrapping of the beer duty escalator. Unfortunately the latest CGA statistics published via The CGA-CAMRA pub Tracker suggest that this long awaited decision has come too late for many pub owners. Across the 6 months ending March 2013, Pubs have been closing at a net rate of 26 per week, up on the previous six months, for the second time in a row. There is no doubt that difficult trading conditions continue for the pub market, and the impact of the beer duty escalator is likely to be apparent for the time being at least. The continuing duty escalation on remaining drinks will also increase pressure on licensees.

The increased rate of closure will have been impacted by pubs that have held out with hopes that the Christmas period may boost trading to a level of profitability sufficient to carry them through the difficult early months of the year. This may have been the point where many businesses take the decision to cease trading, especially with the cold weather affecting trade. The high street and managed pubs, particularly branded food and café/wine bars, continue to increase in number, as branded concepts leverage their reputation with a strong consumer base that leans toward concepts they trust. The reassurance of a standard offering provides many with a reason to 'stick with what they know' in a bid to maximise return on leisure spend.

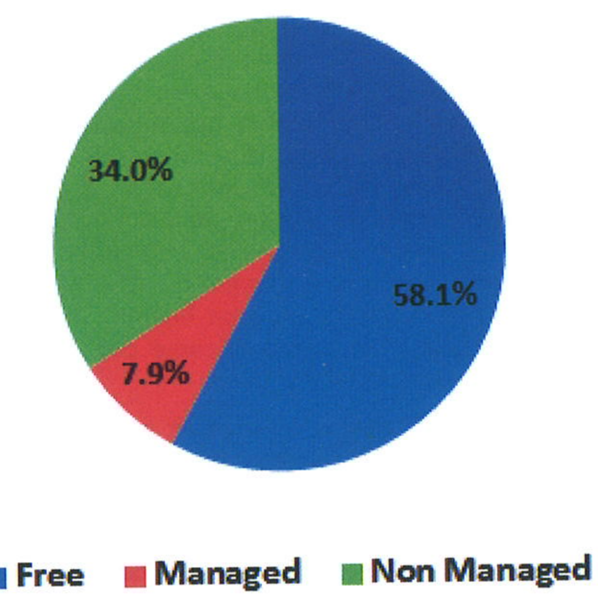
The split between tenure of pub closures is a hotly debated subject – with many arguing that non-managed pubs, being predominantly tied leases, are being treated unfairly causing a higher proportion of closures to be non



	01/12/07 - 01/06/08	01/06/08 - 01/12/08	01/12/08 - 01/06/09	01/06/09 - 01/12/09	01/12/09 - 01/06/10	01/06/10 - 01/12/10	01/12/10 - 01/06/11	01/06/11 - 01/12/11	01/09/11 - 01/03/12	01/03/12 - 01/09/12	01/09/2012 - 01/03/2013
Openings / Wk	12	12	20	21	26	23	14	16	29	43	27
Closures / Wk	49	52	72	60	55	43	28	32	41	60	53
Net Closures / Wk	37	40	52	39	29	20	14	16	12	18	26

– managed. Indeed the closure rate sometimes is higher in non-managed than free trade pubs, but as a proportion of actual closures (the red series in figure 1); free trade pubs are seeing a higher share. The offsetting factor is that the free trade is also seeing many new openings (the green series from figure 1).

The significant polarisation between community wet led and café wine bars continues with the former representing a large proportion of free trade pubs, and the latter representing many managed concepts from smaller multiple retailers that are emerging with a focus on multi-purpose and food led concepts. CGA forecasting analysis predicts contraction in the number of outlets at GB level, with the size of the on trade declining up until 2018. Outlet types experiencing a decline in their customer base face a particular challenge as new customers are needed in order to fill the void. Nightclubs, sports & social clubs and guest houses are all areas facing significant pressure from new offers providing an alternative option to consumers. These come in the form of latenight / dual purpose bars, premium locals and budget hotel chains, all stepping up to meet the needs of a changing and increasingly fickle customer base in search of value and quality.



Definitions

Circuit Bars (High Street) – primarily branded bars with broad value led food and drink offers. But as a broader categorisation, also includes café and wine bars with a higher end offer, often with music and later opening hours. Differentiation can be made between those in high street, town and city centre locations, and those in more affluent suburban centres (such as Didsbury, Manchester and Chapel Allerton, Leeds).

Pre Loading – increasingly common behaviour amongst primarily younger drinkers, who will drink at home prior to going out. This will often result in drinkers starting their evening out at a later time then previously.

Post Loading – a newer phenomenon, where drinkers will continue to consume alcohol at home in a social situation after they return from a night out.

Weekend Millionaires – the propensity of (especially) younger drinkers to concentrate on one "big night out" a week where they are prepared to spend additional money to enjoy a more premium experience (in terms of surroundings, drinks and entertainment).

Premium Spirits – linked to the above, there has been an increasing trend over the last few years towards the purchase of high quality and priced spirits products (initially Vodka but also spreading to Gin and Rum). Typical products in this category would include Hendricks Gin and Grey Goose Vodka.

High End Venues – this classifies outlets that cater and provide for an affluent style or mainstream crowd. They will offer more opulent surroundings and a predominantly premium, broad ranging drink and food offer.

Café/Wine Bars – often higher end and independent venues, these are differentiated from standard circuit bars by their food and drink offer/pricing policy. Often these are more style-led venues but can also include some more premium small brands.

Wet-Led Pubs – pubs that have a high percentage of drinks sales, as opposed to food sales. Usually will also encapsulate community locals.

Opinion

Mediation in licensing: "Take care of the sense and the sounds will take care of themselves"

Lewis Caroll

I had a case the other day; I wonder if anyone else has ever had a case like it. There was this neighbour, who had lived next door to a pub for twenty years, and the pub had been there for two hundred years. They had rubbed along side by side, until one day, the pub started doing things differently, and it got more successful. The sound of success was pretty noisy and suddenly, the neighbour liked living next door to a pub less than he ever had before. He started complaining about it. The licensee got impatient. The neighbour started recording and filming the goings-on. The pub-goers got confrontational. It all got a bit heated. The locals drew battle lines. The petitions came out. Someone mentioned the word "Review".

Sound familiar? I know – I made it up. But it could be any one of a hundred cases. It has to be in the Top Three Most Common Licensing Scenarios (watch this space in future for the other two).

The scenario develops in one of two well-worn but diametrically opposed ways. In the first way, the neighbour mounts a grim campaign with the council departments, and occasionally the police. They see him coming and hide. No-one is available to return the calls, and the out-of hours service is temporarily suspended. There is much eye-rolling. No-one would want to live next to this neighbour, and a wave of sympathy rolls towards the licensee who is, after all, just trying to earn a living; and keeping people in jobs along the way.

In the second scenario, the same neighbour succeeds in bending the ear of someone with influence. He or she totally gets it. A noise becomes an outrage. The officer pays visits to deliver the diary log sheets in person, and provides tutorials in how to fill them out. No-one would want to live next to this pub, and a wave of hostility rolls towards the licensee, who is, after all, just out to make a profit and ruin people's lives with a callous disregard along the way.

What is the difference? Often it seems that there is no objective distinction, and it is entirely dependent upon the personalities involved. This amounts to a postcode lottery of entrenched opinions, personal prejudices, individual sensitivities, and the ability, or inability, to engage the sympathies of the right people. These cases are of the most intractable kind, and among the most likely to end up in appeal, with highly arguable points on both sides. The final outcome is uncertain, but likely to be expensive, and unlikely to be of lasting satisfaction to all parties. In fact, the greater likelihood is that, after a time, it will all blow up again.

What is to be done?

In 2006, at the dawn of the new licensing era, LACORS issued guidance intended to assist local authorities in their new and challenging powers. Executive Director of LACORS, Derek Allen commented: "We advise all affected licensing authorities to mediate as far as possible when a local licence review application is received to avoid the need for a review... " Yet it is rare to find an authority that ever followed this guidance, and rarer still to find one that still does.

And yet, alongside the anger management classes, cognitive behavioural therapy and neuro-linguistic programming that is always so blatantly obviously needed by almost all concerned in these situations, mediation is crying out as an ideal tool in the tool-kit. Those who want it least need it most. There is nothing not to like about it. It is cheap, flexible, and most importantly, it works. And even in cases which do not settle, the outcome is almost always changed from what it would have been without the mediated intervention.

There are several reasons why. This is a highly emotional arena, and people are driven by their anger, fear, prejudices, historical experiences and more. And that is just the professionals. The lay parties are usually down to bare animal instinct by this time. Mediation draws all of that like poison from a snake bite. Without getting too crystals and kaftans about it, people long to be heard. Many see a review hearing, or even a Court appeal as an opportunity to have someone "in charge" listen to them, and validate their experience. Sometimes, this is more important than the final outcome, which, to their surprise, they suddenly find they can live with, now that it is "over". The fight has gone.

If this stage can be reached during the mediation process, before the fighting has even begun, then the subsequent proceedings behave very differently. The emotion has been purged and the parties cannot summon it a second time. It is not a one-size-fits-all, but then, neither is mediation. It is what the parties want it to be. And an outcome that all parties can sign up to is worth taking some trouble for. It is usually not the noise that is really the problem. The process of discovering that cures more than the grounds for review.

Sarah Clover
Kings Chambers

Case Digest

ALCOHOL AND ENTERTAINMENT

Administrative Court (Case Stated & Judicial Review)

Lang J

Licence revoked. Subsequent decision to refuse transfer to freeholder which had let the basement premises to a company, to be used as a club. Magistrates' Court dismissed both appeals and refused to State a Case for the High Court. Application for judicial review also pursued.

Estates & Agency Holdings Ltd v Westminster City Council

Queen's Bench Division (Administrative Court) (unreported)

Decision: 18 September 2012

Facts: Estates & Agency was the freehold owner of a building and let the basement to a company, which used it as a club. Following the revocation of the premises licence held by its tenant the freeholder sought the transfer of the premises licence. The Local Authority's Licensing Committee refused. Magistrates' Court dismissed Estates & Agency's appeal against that refusal. The freeholder asked that the magistrates' court to state a case. The District Judge responded that the application was frivolous as it did not pose any questions for the High Court to resolve. The case finally stated was brief and incorporated the written reasons for its decision. Estates & Agency applied under the Senior Courts Act 1981 s.28A(2) for the case to be sent back for amendment and also, out of time, for permission to apply for judicial review of the Magistrates' Court's decision. That application was made on the basis that it contained errors of law.

Point of dispute: (1) Case Stated: was it lawful for the licensing authority to: refuse to transfer the licence on the ground that an appeal against revocation may be successful; to find that to grant the transfer of a licence to the applicant, on any terms, would undermine the licensing objective of the prevention of crime and that the proposed transferee took no effective action to promote the licensing objectives generally, and the prevention of crime and disorder in particular. (2) Judicial Review: whether the High Court should exercise its jurisdiction (under section 28A(2) of the Senior Courts Act 1981) to order that the case be sent back for amendment; or (in the alternative) whether it had a sufficient basis to decide the appeal without remitting the case for amendment.

Held: As regards the judicial review, there was no good reason for the freeholder's application for permission being made out of time. The company had received the reasons for the Magistrates' Court's decision and was aware upon receipt of the issues that it raised. It was not a proper use of judicial review, which was to be a last resort when other remedies had been exhausted. Although in some cases judicial review would be appropriate if a case stated could not deal with all of the points raised, that was not the case here. A case stated was sufficient to dispose of the matter. Given the deficient nature of the case stated, it would be remitted to the magistrates' court for amendment.

Costs: Unreported.

ALCOHOL AND ENTERTAINMENT

Administrative Court (Case Stated)

Hickinbottom J

Licensee applied to vary its licence - representations from responsible authorities and interested parties – proposal by applicant to modify proposal – on the facts, held not to be a formal amendment of application and therefore not necessary to start the variation process again.

Matthew Taylor v (1) Manchester City Council (2) TCG Bars Ltd

[2012] EWHC 3467 (Admin)

Decision: 7 December 2012

Facts: Existing premises owned by TGC Bars comprised a ground floor and basement. One external door at the front gave access to the basement only (the V2 doorway), as did one door at the back (the Richmond Street doorway). TGC made an application under the Licensing Act 2003 s.34 to vary its licence. Application sought to extend hours, carry out internal works, create two separate venues and provide a new and independent means of access to the proposed new basement club by way of an external doorway on Richmond Street. Following advertising of the application, representations were received, including from Mr Taylor. TCG wrote to the local authority, withdrawing its application to extend its hours and removing the application for a new entrance on Richmond Street. An amended plan showed the V2 doorway on Canal Street marked "Entrance to Basement Bar". The local authority granted the application with further conditions on the licence. Following T's appeal, the Magistrates' Court held that the Local Authority had not acted unlawfully in accepting the amendment of the application after the period for consultation had expired.

Point of dispute: When and to what extent an application to vary a licence could be amended. In what circumstances did an amendment require an applicant to restart the variation process.

Held: The licensing scheme under the Act contained no express power enabling an applicant to amend an application to vary and the regulatory scheme did not allow any amendment to such an application once it had been made. However, a Licensing Authority exercised an administrative function given to it by Parliament. Since a Licensing Authority was essentially concerned with the public interest it was the potential impact upon the public interest alone which triggered any decision-making process. Given those powers of a Licensing Authority, it was open to an applicant, in the face of relevant representations received from responsible authorities or interested parties, to indicate that it did not wish to pursue part of an application and/or that it was willing to agree to a modification to the licence conditions to cater for the concerns expressed. Whilst that might be expressed, as in the instant case, as an "amendment" to the application to vary, it did not amount to formal amendment of the application. It was appropriate for it to liaise with the applicant and responsible authorities or interested parties to see whether a compromise could be reached. If a third party

objected to the terms of the variation, it could appeal to the Magistrates' Court, challenge it by way of judicial review or seek a review of the licence under s.51. The local authority was entitled, in considering the application which had been made, to take into account the changed wishes and intentions of the applicant. In the face of opposition to the extension of hours and public access by the Richmond Street doorway, it was entitled to conclude that it should properly reject those parts of the application. Further, the applicant did not need a variation in its licence to enable it lawfully to use the V2 doorway for public access to the basement. The original licence allowed the doorway to be used for public access to the premises and, after the amendment letter had been sent, the only variation proposed related to the internal structure and layout, in respect of which no representations had been made. The District Judge had been correct in ruling that it had been lawful for the Licensing Authority to proceed to determine the application to vary as it did, notwithstanding the change of scheme as to public access from a different doorway. The result was not outwith the scope of the existing licence and application to vary as seen together.

Costs: Awarded to the Licensing Authority.

ALCOHOL AND ENTERTAINMENT

Administrative Court (Case Stated)

Mr CMG Ockelton sitting as a Deputy High Court Judge

Licensing Authority failed to give adequate reasons for its decision - Magistrates' Court required in its own reasons to state what weight, if any, it had attached to that decision - court wrong in law to hold the decision below 'reasonable' when test for the imposition of sanctions was whether steps considered 'necessary' - decision to award costs to the respondent was unreasonable.

Little France Ltd v Ealing London Borough Council

QBD (Admin) (CMG Ockelton) unreported; Lawtel Document No. AC9401280

Decision: 15 February 2013

Facts: There had been a firearms incident near the bar/nightclub. Police applied for an expedited review of the premises licence. Interim steps were imposed pending a full review. At the full review the Licensing Authority decided to impose further restrictions and in particular a new earlier terminal hour of 02.00. Licensing Authority declined to offer reasons. The licensee appealed to the Magistrates' Court, challenging the curtailment of the new terminal hour. Magistrates' court held that the decision of the Licensing Authority had been correct, proportionate and reasonable; there was a catalogue of reported incidents and the nightclub was in a mixed commercial and residential area. The Appellant appealed by way of case stated against a decision of the Magistrates' Court dismissing its appeal against the decision of the Licensing Authority imposing restrictions and conditions on the premises licence for its nightclub. The questions in the case stated for the opinion of the High Court were whether (i) where the Licensing Authority had failed to give any or any adequate reasons for its decision, the Magistrates' Court was required in its own reasons to state what weight, if any, it had attached to that decision in determining the appeal; (ii) where the Appellant called no evidence, but sought through submissions to place a different interpretation on the Respondent's evidence, the Magistrates' Court was obliged to give specific reasons for preferring that evidence; (iii) in determining the appeal, the Magistrates' Court was wrong in law to hold that the decision below to reduce the licensing hours had been reasonable when the test for the imposition of sanctions in such cases was whether such steps were considered necessary for the promotion of the licensing objectives; (iv) the decision to award costs to the Respondent was unreasonable.

Point of dispute: Whether Magistrates' were entitled to attach any weight to the LA's decision and similarly, award costs against the Appellant, in the absence of proper reasons.

Held: (1) Whilst there was no obligation on a Magistrates' Court to state what weight it had given to the decision below, the appeal to the Magistrates' Court did involve a re-hearing on fresh evidence. In all cases the Magistrates' Court should pay careful attention to the reasons given by the Licensing Authority for arriving at the decision under appeal. The weight which the Magistrates' Court ultimately attached to those reasons was a matter for its judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal. A wholly unreasoned decision might possibly be correct, but the Magistrates' Court on appeal could not simply endorse such a decision; it had to give reasons of its own. (2) The answer to the second question was, in general, no. The obligation of the appeal court was to consider all the relevant evidence. The onus lay on the appellant to show that the decision below was wrong and himself call evidence if the facts were disputed. (3) The answer to the third question was, in general, no. The use of "reasonable" was not criticised. However, the only material challenge was to the restriction of hours and the Magistrates' Court decision failed to show how that restriction was 'necessary' (the statutory test at the time). (4) The decision of the Magistrates' Court on costs was unreasonable because it took no account of the appellant's entitlement to a reasoned decision. (5) Questions 1, 3 and 4 having been answered in favour of the appellant, the decision below would be varied so as to allow the appeal and remit the matter to the Licensing Authority.

Costs: Awarded to the Appellant.

TAXIS

Administrative Court (Judicial Review)

Singh J

Licensing Authority adopted policy of determining licence review applications by reference to a points system – system declared unlawful - called for the automatic revocation of a licence if 10 points had been accumulated in a three-year period, leaving on its face, no room for judgment or discretion, both of which were required under the 1976 Act.

R (on the application of Singh) v Cardiff City Council

[2012] EWHC 1852 (Admin)

Decision: 23 May 2012

Facts: On 14th September 1988, the relevant Committee of the City Council resolved to adopt a penalty point scheme. The Committee reserved right to revoke drivers' licences if offences were severe and to have a penalty point range up to 10 was not necessary. In the case of Mr Singh the senior licensing officer of the defendant Council sent a report which noted that the Public Protection Committee had resolved to impose six penalty points against him as a result of the three motoring convictions he had disclosed. Further the accumulation of 10 or more penalty points in any 3 year period would result in the automatic revocation of his licence. An incident took place as a result of which the Public Protection Committee resolved to impose four penalty points on Mr Singh. His licence was revoked. In the case of Mr Morrissey the Committee had resolved, as he failed to attend the meeting of 5th July 2011, to suspend his Hackney Carriage/Private Hire driver's licence. His licence was suspended on the grounds set out in section 61(1) of the 1976 Act until he attended a future

meeting of the Committee to answer the report made against him. The issues were (i) whether each driver had an adequate alternative remedy, namely an appeal to the Magistrates' Court under the Local Government (Miscellaneous Provisions) Act 1976 s.61(3); (ii) whether the licensing authority's penalty points system was lawful; (iii) whether, in M's case, C had been entitled to suspend his licence on an interim basis before revoking it.

Point of dispute: main ground of challenge on behalf of the Claimants was that the penalty scheme in itself was *ultra vires* and unlawful – the policy in force at the material time called for "automatic" revocation on the accumulation of 10 penalty points. Accordingly it was submitted this was not a proper exercise of discretion as required by section 61 of the 1976 Act – the policy was rigid and inflexible and the penalty points system inherently irrational. Relevant considerations could not be considered.

Held: The applications would be granted. (1) Where there was an appeal available, as there was here, to a Magistrates' Court and thereafter to the Crown Court, and that appeal was by way of a rehearing, there would usually be very good reason to refuse to entertain a claim for judicial review. However, S and M wished to challenge the lawfulness of a policy adopted by a local authority and the appropriate forum for doing so was the Administrative Court. (2) There was nothing wrong in principle with a staged process by which the cumulative effect of incidents of misconduct might lead to the conclusion that in the judgment of the Local Authority a person was not a proper person to continue to enjoy the relevant licence. However, the policy adopted by C was unlawful as it called for the automatic revocation of a licence if 10 points had been accumulated in a three-year period. That, on its face left no room for judgment or discretion, both of which were required under s.61 of the 1976 Act and meant that there would be no consideration of the underlying facts which lay behind the earlier imposition of points which a driver might have. Further, the policy did not recognise that s.61 provided for the suspension, and not just the revocation, of a licence. (3) Section 61 provided for a power of final suspension as an alternative to a power of final revocation; there was no power of interim suspension.

Costs: Reserved.

TAXIS

Administrative Court (Case Stated)

Hickinbottom J

Licensing Authority entitled to impose conditions on the grant of a Private Hire operator licence to a minicab company, including that the company should use a different telephone number to that used by its existing minicab business which functioned under a licence granted by a different licensing authority. Conditions had been imposed with the legitimate aim of ensuring that the Licensing Authority had better control, vigilance and enforcement over private hire operators in its area.

Blue Line Taxis (Newcastle) Ltd v Newcastle-Upon-Tyne City Council

[2012] EWHC 2599 (Admin)

Decision: 27 September 2012

Facts: BLT operated under a licence granted by another Local Authority. It created a new business in Newcastle and applied to the Respondent Local Authority for a further licence. The Local Authority granted the licence subject to conditions, including that the company maintain an independent operation in Newcastle by installing a dedicated telephone line with its own unique telephone number and that telephone number had to be exclusive to that licence. BLT did not advertise the new telephone number. The Local Authority revoked the licence on the grounds that when customers dialled its original number they were connected to either office, so that (they held) the company had not complied with the conditions. The revocation was overturned on appeal, but the court found that the local authority had acted within its powers when imposing the conditions. The questions for the Administrative Court were whether (i) on a proper construction of the conditions, BLT's Newcastle operation was required to have a single, unique telephone number; (ii) imposing the conditions was "reasonably necessary" under the Local Government (Miscellaneous Provisions) Act 1976 s.55(3); (iii) B was in breach of the conditions.

Point of dispute: whether (i) on a proper construction of the conditions, B's Newcastle operation was required to have a single, unique telephone number; (ii) imposing the conditions was "reasonably necessary" under the Local Government (Miscellaneous Provisions) Act 1976 s.55(3); (iii) B was in breach of the conditions.

Held: The appeal would be dismissed. (1) Construing the conditions required looking at them as a whole. Since there was ambiguity, it was permissible to consider the background context. There was no doubt that B intended to run both businesses using its original telephone number. The Local Authority had made it clear that that was not acceptable to it as the licensing authority. The District Judge was entitled to find that B could have been under no illusion as to the purpose and meaning of the conditions and was correct to hold that, on a proper construction of the conditions, the Newcastle operation was required to have a single, unique telephone number. (2) The District Judge was entitled to find that the conditions pursued a legitimate aim because people placed faith in the Local Authority's licensing system and it was a legitimate aim of a Licensing Authority to have better local vigilance, control and enforcement over Private Hire licence operators and to impose conditions to obtain such control. The conditions imposed reduced the risk of the regulatory system being breached by a telephone call answered in the Newcastle office being responded to by a driver from B's other office. Any restriction on its trade was for a legitimate purpose and was justified as being proportionate to that aim. Imposing the conditions was reasonably necessary under s.55(3). (3) On a true construction of the conditions, B was in breach of them.

Costs: Unreported.

GAMBLING

Administrative Court (Judicial Review)

Stanley Burnton LJ, Kenneth Parker J

When granting licences to conduct a Health Lottery, the Gambling Commission had correctly construed the Gambling Act 2005 s.98 and s.19. There had been undue delay by the claimant company, which ran the National Lottery, in applying for judicial review of the Commission's refusal to review the grant of licences to an external lottery manager and to community interest companies to conduct a Health Lottery.

R (on the application of Camelot UK Lotteries Ltd) (Claimant) v Gambling Commission (Defendant) & Health Lottery Elm Ltd & 51 Ors (Interested Parties) & People's Health Trust (Intervener)

[2012] EWHC 2391 (Admin)

Decision: 22 August 2012

Facts: In February 2011 Health Lottery Elm Ltd (T) announced the launch of the Health Lottery stating that it would incorporate Community Interest Companies (CICs). Each week at least one CIC would promote the scheme with additional CICs joining as more tickets were sold in order to prevent any CIC from exceeding the £4 million threshold for a single lottery under the Gambling Act 2005 s.99. The CICs outsourced the management and day-to-day conduct of their lotteries to T for agreed fees. Each CIC also agreed to donate 20.34 per cent of the lottery proceeds to a registered health charity. The Health Lottery was formally launched seven

months later. Camelot (C) asked the commission to consider the legality of the Health Lottery. C issued proceedings in 2012. The commission contended that permission to apply for judicial review should be refused as C had not filed its claim promptly and had not advanced any compelling grounds for its delay.

Point of dispute: The company contended that the purpose for which the CICs had been established was to generate profits for T and that none of the CICs were operated for a non-commercial purpose within the meaning of s.19. C also alleged that the Health Lottery was one single lottery and therefore in breach of the Act. The Commission contended that the lottery schemes were legal and complied with the Act and refused an application to review the scheme.

Held: (1) The relevant facts about the Health Lottery were available and known to C in February 2011. Whilst judicial review proceedings should not be instituted precipitately, there was considerable and undue delay on the part of C in bringing the proceedings. C's contentions as to the effect of s.98 and s.19 went to the legality of the Health Lottery and should have been asserted to the Commission shortly after the announcement. If at that stage the Commission did not accept that the scheme was unlawful, that should immediately have been the subject of legal proceedings. (2) The Commission had correctly construed s.98 and s.19. Section 19 focussed on the non-commercial society and not on those who were contracted by it to provide services of any kind. Accordingly, it could pay its officers and employees, and their private gain was not a private gain for the purposes of s.19(1). It was clear that the Act did not require an external lottery manager to be non-profit making and it followed that the fact that such manager would make profits that would involve private gain on the part of its shareholders, officers or staff did not of itself result in an infringement of s.19(1) on the part of a non-commercial society that contracted with it. Parliament had enacted a control on the profits of an external lottery manager under s.254. If a non-commercial society paid an external manager an excessive sum in respect of the manager's services it would contravene s.260. Even if the Health Lottery scheme was initially proposed with a view in part for private gain on the part of T, provided the charges for its services were reasonable, the CICs were not ineligible for the grant of operating lottery licences. Equally, the fact that T might profit was not a bar to the CICs retaining their licences (paras 68, 70-71). (3) Whilst the CICs were under common control, they were separate legal entities. The fact they had common directors did not of itself justify their being treated as if they were a single corporate entity. Unless the sales of lottery tickets in any week exceeded the sum specified by T and the CICs, each week's lottery was a separate lottery and if each week's lottery was that of a different CIC there was no legal basis for aggregating the proceeds of each of them. The fact that all of the CICs employed T did not of itself allow their separate proceeds to be amalgamated for the purpose of ascertaining whether there had been a breach of the £10 million limitation in annual proceeds imposed by s.99(3).

Costs: Unreported.

GAMBLING

QBD, Administrative Court (statutory appeal)

Lloyd Jones J

First Respondent Local Authority granted casino licence to Second Respondent in respect of premises for which bingo licence also existed – Appellant sought review of casino licence – Local Authority took no action on review – Appellant appealed and challenged issue of licence – Whether circumstances surrounding issue of licence should have been taken into account by council on review application – Gambling Act 2005, ss 152(1)(b), 209.

Clockfair Ltd v (1) Sandwell Metropolitan Borough Council (2) Grosvenor Casinos Ltd

[2012] EWHC 1857 (Admin)

Decision: 9 July 2012

Facts: The facts were involved: the Second Respondent operated a bingo hall known as Mecca Bingo at the premises, first under a bingo gaming licence pursuant to the Gaming Act 1968 and then following the coming into force of the Gambling Act 2005, under a bingo premises licence. In 2004 the Second Respondent applied for a gaming licence so as to permit the premises to be used as a casino. That application was made under the Gaming Act 1968 and was granted by the Warley Justices on 9th June 2005. The casino licence was renewed in 2006 and again in 2007. Upon the transition from the Gaming Act 1968 to the Gambling Act 2005, the Second Respondent applied to the First Respondent to convert the bingo licence and the casino licence into licences under the Gambling Act 2005, pursuant to the Gambling Act 2005 (Commencement No. 6 and Transitional Provisions) Order 2006 ("the Order"). In February 2008 both licences were converted into licences under the 2005 Act. The First Respondent issued first a bingo licence and subsequently a casino licence in respect of the same premises.

On 11th November 2010 the Appellant applied to the licensing authority to review and revoke the casino premises licence on the following grounds:

(1) that the licensee has not used the licence since it was first granted on 7th June 2005; and

(2) that the continued existence of the licence is legally incompatible with the bingo licence that exists in respect of part of the same premises."

On 13th December 2010 the Second Respondent applied to the licensing authority effectively to transfer it to different premises. The Appellant opposed the transfer of the licence *inter alia* on the grounds that it should never have been issued in the first place. On 16th December 2010 the Second Respondent filed written representations in which it stated that the issue of the casino premises licence had been *ultra vires* and should be considered void *ab initio* but submitted that the grant (as opposed to the issue) of the licence was not void *ab initio*. On 7th January 2011 the Appellant filed written representations in relation to the application to transfer in which the Appellant submitted that the issue of the licence had been unlawful. On 27th April 2011 the Second Respondent filed further written representations. It now maintained that the licence had been lawfully issued and retained legal effect in the absence of any timely challenge by way of judicial review. On 3rd May 2011 the First Respondent's legal advisor wrote to the parties stating that section 152(1)(b) of the Act conferred a discretion as to whether or not to issue a premises licence where another premises licence already existed and that this was over-ridden by an obligation under section 164 to issue a licence. Accordingly the casino licence was validly issued. On 4th May 2011 the Appellant filed further written submissions taking issue with that advice and maintaining that section 152(1)(b) clearly prohibited the issue of a second premises licence in respect of the same premises. Two licensing panels met on 12th May 2011 to consider the Appellant's application for review and the Second Respondent's application for variation, respectively. The first panel met in the morning to hear the review application and granted the application to review and proceeded to review the licence. On the review it decided to take no action. This left the licence extant and able to be transferred. The second panel, decided to grant the Second Respondent's variation application to transfer the casino licence to another premises.

The Appellant appealed against these decisions to the Warley Magistrates' Court where the appeals were dismissed the appeals by the District Judge who held:

"(1) Contrary to the submission of the First Respondent the words "may not" in section 152(1)(b) cannot be construed as meaning "may".

(2) The First Respondent in issuing the casino licence correctly applied the transitional provisions in the Order. In this regard the District Judge concluded that section 152(1)(b) and section 164(1)(b) were irreconcilable. He could not find any support for the view that the transitional guarantees were in any way subservient to the provisions in section 152(1)(b).

(3) If the licensing authority were to conclude that the casino licence had been unlawfully issued, they would feel bound to revoke it. Therefore, this was in substance an impermissible collateral challenge. The Licensing Authority was not required to have regard to these matters and had no option but to proceed on the basis that the licence was correctly granted and issued.

Point of dispute: Was it permitted under the Gambling Act 2005 s.152(1)(b) for a Local Authority to issue concurrent bingo and casino licences in the same premises where those licences had originally been issued under the Gaming Act 1968 and had been converted into licences under the 2005 Act.

Held: The Appeal would be allowed. (1) The words "may not be issued" in s.152(1)(b) were clearly prohibitive and prevented the issue of more than one licence in respect of the same premises, subject to the statutory exceptions. There was no provision modifying the application of s.152(1)(b) in the case of converted licences. If that had been the intention, a provision corresponding to s.166(4)(d) or s.166(4)(e) of the 2005 Act could have achieved that result. Accordingly, the Local Authority should not have issued a second concurrent licence in relation to the premises. (2) The principle of legal certainty required that collateral challenges to public law decisions after the expiry of the permitted time for judicial review should not normally be permitted. Although in the instant case the second licence had not been challenged by judicial review, and therefore remained valid, the principle prohibiting collateral challenge did not preclude the local authority from considering the provenance of the licence or the fact that its issue was in contravention of s.152(1)(b). Those were matters which were clearly relevant to the Local Authority's review of the casino licence and should have been taken into account; that conclusion was reinforced by s.201(5)(c) of the 2005 Act which expressly required a Licensing Authority to have regard to the grounds specified in the application for review. It was clear that both the Local Authority and the District Judge had failed to take account of that relevant consideration. Accordingly, the matter was remitted for reconsideration by the local authority.

Costs: Unreported.

SEX ESTABLISHMENTS

Administrative Court (Judicial Review)

Sales J

Lap dancing club - planning and licensing regimes separate and distinct - licensing committee considering an application for licence to run a sexual entertainment venue not obliged to take into account views expressed by the local authority's planning officers and committee during consideration of an application for a change the use of the premises in question.

R (on the application of KVP ENT LTD) v South Bucks District Council

[2013] EWHC 926 (Admin)

Decision: 14 March 2013

Facts: The Planning Committee of the Council decided on 23 November 2011 to grant planning permission for a change of use of the premises from a public house and restaurant to a lap and pole dancing club. That decision was taken by reference to relevant planning law and policies and in light of a report from the Council's planning officers. Five days later a decision to refuse to grant the SEV licence was taken by the Licensing Sub-Committee of the Council after a hearing attended by representatives of KVP and objectors. KVP complained about the adequacy of the reasons in the decision notice of 28 November 2011. In light of that complaint the Council undertook to go back to the Sub-Committee to ask it to explain its reasons more fully. The Sub-Committee reconvened and produced what it described as "Amplified Reasons for Refusal", dated 8 February 2012 (i.e. some two weeks after the complaint from KVP). Despite the giving of these further reasons by the Council, KVP remained dissatisfied and launched a claim for judicial review.

Point of dispute: Inconsistency between the decision of the Planning Committee to grant planning permission and the decision of the Licensing Sub-Committee to refuse an SEV licence for the premises to be used as a lap and pole dancing nightclub.

Held: Application refused. (1) The licensing sub-committee had considered the relevant questions and reached a decision that was legitimately open to it. While there was an overlap between the objectives of the licensing and planning regimes, the SEV licensing regime was a separate regime with a different focus. Planning controls were concerned with the wider impact of a proposed change of use rather than the individual operation of premises. The licensing regime focused more on the specific ways in which premises were operated, and the impact of such operation. Where a case fell to be considered under both regimes, there had to be a distinct and separate consideration of the matters arising. The Policing and Crime Act 2009 had moved SEV licensing from the regime under the Licensing Act 2003 to that under the 1982 Act. That move was intended to widen the grounds on which local authorities could consider and refuse applications for SEV licences. Licensing committees were not bound by the decisions of, or the views expressed by, the local authority's planning officers or planning committee. An important aspect of the planning report was the comparison between the proposed change of use and the planning history of the premises. There was no necessary correlation between the consideration to be given to an application for planning permission and the question to be asked under Sch.3 para.12(3)(d)(i) of the 1982 Act. Moreover, in answering that question, the licensing sub-committee had not confused the character of the locality and the use to which the premises were to be put. The character of the relevant locality was a concept calling for a compendious and general evaluative judgment by the licensing authority, having regard to a range of factors including the use to which properties in the locality were put. Thus, the licensing sub-committee had not been obliged to have regard to the planning report or to take any greater account of the decision to grant planning permission than it had. It had known that planning permission had been granted, but it was entitled to form its own independent judgment based on the representations and evidence specific to the determination of the Sch.3 para.12(3)(d)(i) question. (2) There was no manifest inconsistency between the planning and SEV decisions. They had been made by distinct committees operating under distinct legal regimes and each decision was lawfully available to the committee making it. (3) The Local Authority was clearly entitled to rely on the amplified reasons put forward by the licensing sub-committee. Those reasons were not inconsistent with the reasons originally given. In the absence of any party making representations to suggest that the planning report was a relevant matter that ought to be taken into account, the licensing sub-committee did not have to assume that it was.

Costs: Awarded to licensing authority.

Court of Appeal (Judicial Review)

The Master of the Rolls, Black LJ and Beatson LJ

Fees imposed on licence renewal – whether council could include costs of enforcement within licence fee – enforcement against licensed and unlicensed premises - proper mechanism for calculating the extent of unjust enrichment – costs awards under CPR 36.14(3)

The Queen on the application of Timothy Martin Hemming (trading as Simply Pleasure Ltd) & Ors v Westminster City Council

[2013] EWCA Civ 591

Decision: 24 May 2013

Facts: The annual licence fee for sex establishments in Westminster was determined by the Licensing Sub-Committee of the Council in September 2004 at £29,102.00 with effect from 1 October 2004. That fee was demanded of the claimants in every year thereafter until 31 January 2012. The fees were not re-determined by the Sub-Committee but were reviewed each by an officer who made an adjustment to the fee to take account of any deficit or surplus in the previous year. The licence fee was comprised of two elements, £26,435 was attributable to "monitoring and enforcement against both licensed and unlicensed operators" and £2667 to "the administration of the application". Keith J at first instance found that the costs of *enforcing* the licensing regime cannot be recovered as part of an application fee pursuant to The Services Directive 2006/123/EC. The order provided for the Council to determine a proper fee and for the Council to make restitution to the Claimant for "the excess".

Point of dispute: On a proper construction of The Services Directive and the Provision of Services Regulations 2009, could the Council include the costs of enforcing the licensing system within the licence fee; should a reference be made to the CJEU on the correct interpretation of "authorisation process"; should the proper basis for restitution of any "excess" include adjustments to reflect any previous surplus or deficit; was it unjust to apply CPR 36.14(3) in the circumstances.

Held: Keith J had been correct in finding that the language of the Directive and Regulations pointed towards a construction of "authorisation process" which only permits the costs of administering the application to be reflected in the fee. As a matter of logic, language and with consideration of ECJ and CJEU jurisprudence, neither the cost of an "authorisation process" nor "authorisation procedures and formalities" can properly be read to include the cost of prosecuting unlicensed operatives who had not applied for a licence. In this respect Keith J properly considered a purposive approach, with the purpose behind the Directive being to remove barriers to entry into the internal market. There were good pragmatic reasons for not making a reference to the CJEU. There is a distinction to be drawn between the cost of enforcement against unlicensed operators and the costs of monitoring compliance and enforcement in respect of licensed operators, the latter may properly fall within the costs of the "authorisation procedures". The appeal succeeded in part, in relation to the basis upon which restitution is to be made. In calculating the sum to be repaid to the Claimant, the Council must first determine the extent to which the Council was unjustly enriched at the expense of the Claimants. The Council is not required to make full restitution of the entire sum of all licence fees paid but is instead entitled to first come to a determination of a proper fee for the years where a licence fee fell due and then make restitution to the Claimant of the excess. In respect of fees falling due prior to the coming into force of the Regulations in December 2009, the Council was entitled to charge a fee which included the cost of enforcement against licensed and unlicensed operators. However, after December 2009 the Council was no longer entitled to reflect the cost of enforcement against unlicensed operators in the fee but was entitled to continue to charge for the two elements of (1) the costs of processing the application itself and (2) the costs of monitoring compliance by licence-holders. The council could take account of all surpluses and deficits in the previous years together and the accounting process does not therefore have to be completed for each of the years when calculating restitution up to 31 January 2010 (when the Regulations took effect). Thereafter, the Council could continue to roll deficits and surpluses forward in respect of the two elements of the fee it was able to charge after December 2009 when determining its licence fee each year and the calculation of the extent of the unjust enrichment should take account of this. The appeal in relation to Part 36 of the CPR failed. The Judge did not misdirect himself when considering the issue of costs by failing to disapply Part 36 in relation to a test case about a new legal regime and an unsuccessful public law defendant who rejected a Part 36 offer, although some judges may have done so.

Costs Unreported.

STREET TRADING

Administrative Court (Case Stated)

Mitting J

A person who travelled by car with goods to a town or city to offer those goods for sale was not acting as a pedlar under the Pedlars Act 1871 s.3 since the Act defined a pedlar as a person who both travelled and traded on foot.

Jones v Bath & North East Somerset Council

[2012] EWHC 1361 (Admin)

Decision: 4 May 2012

Facts: J had arrived in the Respondent Local Authority area having driven there by car with a quantity of umbrellas for sale. He had sold umbrellas from a place on which he stood on two successive days, and that he had stood in the same place for a period of 55 minutes on the first day and then for a period of 17 minutes on the second day. J, who held a valid pedlar's certificate, maintained that he had been acting as a pedlar under the Pedlars Act 1871 s.3; therefore the statutory exception under Sch.4 para.1(2) of the 1982 Act applied. The Magistrates' Court rejected the assertion that J was acting as a pedlar and convicted him.

Point of dispute: Was the Magistrates' Court correct to decide that J was not acting as a pedlar.

Held: The Appeal would be dismissed. The burden of establishing the statutory exception that a person was acting as a pedlar lay on the Defendant. The definition of "pedlar" in s.3 of the 1871 Act required a pedlar to have travelled on foot. In modern times, a horse had been replaced with a motor vehicle. As a matter of construction, the statute was to be read so that the reference to "horse" in the 1871 Act was replaced by "motor van" or "car". Therefore, a person who drove with his goods in his car to a town or city to offer them for sale was not acting as a pedlar, as he had not travelled on foot. The requirement that a pedlar conduct his activities on foot applied to both travel and trade.

Costs: No order.

STREET TRADING

Queen's Bench Division

Sweeney J

Balance of convenience made it appropriate to grant a local authority prohibitory injunctions (CPR r.25.1(1)(a)) preventing two ice cream vendors from unlawfully street trading from ice cream vans. The local authority also entitled to its costs.

The Mayor and Burgesses of the London Borough of Lambeth v Elma Sanli

The Mayor and Burgesses of the London Borough of Lambeth v Ndue Meli

[2012] EWHC 1623 (QB)

Decision: 14 June 2012

Facts: Lambeth alleged that the Defendant in each case had persisted in unlawful trading from ice cream vans despite knowing that it was unlawful to do so and despite successful prosecutions. The injunctions were sought, it was said, because the Defendants' unlawful operations would continue unless and until effectively restrained by the law, and that nothing short of an injunction would be effective in restraining them. Thus it was asserted that the applications for interim prohibitory injunctions were made in order to uphold the law, and to respond to the concerns of local people and organisations.

Point of dispute: Extent of proposed injunctions: i) "Licensees" of the Defendants; ii) "Associates" of the Defendants; iii) The exclusion of particular vehicles from the Prohibited Area "save for streets to be specified for reasonable access purposes".

Held: The application would be granted. (1) There was a serious question to be tried in each case. Damages not an appropriate remedy. Balance of convenience favoured the granting of the injunctions under CPR r.25.1(1)(a). (2) The evidence showed that X had habitually flouted the law and there was a need for urgent action. Offer to discuss undertakings was at a late stage and too late to make any costs savings.

Costs: Awarded to local authority.

CARAVAN LICENSING

Divisional Court (Case Stated)

Gross LJ, Singh J

A Local Authority could not rely on its own ultra vires act, namely wrongly issuing a caravan site licence, to found a prosecution of the landowner for not having a valid licence.

(1) Michael Mark Anthony White (2) Michael Thomas White v South Derbyshire District Council

[2012] EWHC 3495 (Admin)

Decision: 8 November 2012

Facts: The relevant land had been used as a caravan site for many years. The previous owner was granted a caravan site licence by the respondent in 2001, subject to conditions based upon Government model standards. Since 2007 the Appellants have been the freehold owners of land at the site. The site licence was transferred to the appellants in 2008. It was common ground between the parties that, at the time of the original grant of the licence in 2001, the land did not have an express grant of planning permission pursuant to the provisions of the Town and Country Planning Act 1990 but also that, if an application had been made for a certificate of lawful use and development, it would have been granted, since the land had been used as a caravan site for at least ten years. In 2009 a certificate of lawful use and development in respect of the land was granted to the appellants. Following an appeal against conviction, the Judge set out his findings as follows:

(1) The agreed evidence demonstrates that, at the time the licence was granted, there did not exist a permission to grant due to the repeal of the established user provisions;

(2) That on a proper construction of the statute, a licence could only have been granted if, at the time, there had been in place a permission;

(3) That, given it is agreed evidence that there was in fact no permission in place at the relevant time, there could not be a valid grant;

(4) Accordingly, if that is the case, then the licence transferred in 2007 is also invalid;

(5) Therefore, on 4 June 2010, both defendants were operators of the site without a valid licence.

Point of dispute: Whether the Local Authority could succeed in a prosecution such as the present in circumstances where it sought to rely on the unlawfulness of its own act, in granting the licence in 2001, in order to found that prosecution.

Held: The appeal would be allowed. (1) An *ultra vires* act was generally a nullity but the doctrine of nullity was relative rather than absolute and the act could be valid for some purposes, in particular where that was necessary to protect innocent third parties. (2) The Local Authority had not been able to produce any case in which a Local Authority which had been able to rely on the unlawfulness of its own act to found a prosecution. (3) The site licence was not clearly invalid on its face. (4) A criminal prosecution could not be said to have been necessary to regularise the legal position. Judicial review was available in principle even if any application would have to be made out of time so that W's conviction was quashed. (5) If a transferable licence was a possession for the purposes of Protocol 1 art.1 to the Convention, it could not be said that the failure to grant a licence in the situation where W was entitled to apply for one could be described as an interference. (6) The answer to the questions stated in the case was that whilst there had been no power to grant the licence, it was not invalid on its face. W's human rights were not engaged and/or not infringed.

Costs: Previous order as to costs in the Court below quashed. Replaced with an order that the appellants should get 50 per cent of their costs below from central funds. With regard to the appeal to the High Court, the Appellants were entitled to 100 per cent of those costs, to be taxed if not agreed.

Jeremy Phillips
Barrister, Francis Taylor Building

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Institute of Licensing

Professional Licensing Practitio

Introduction

The IoL re-introduced their qualification for licensing practitioners back in May. The first course was successfully delivered over four days in the 4* Menzies Hotel in Swindon and was fully booked.

As a result we have set up another PLPQ course this year which will commence on Tuesday 24th September and finish on Friday 27th September 2013.

Each of the four days will finish with an exam to give delegates the option of sitting an exam in the subjects related to their current area of work or the delegates can just attend the training on each of the four days.

Delegates sitting and passing the exam on all four days will be awarded the IoL accredited Professional Licensing Practitioners Qualification. In addition those delegates sitting and passing the exams on less than all four days will be awarded the Licensing Practitioners Qualification related to the specific subject area(s) passed.

You will see from the fee options below, that delegates can attend as a day delegate on a single day to all four days or as a residential delegate staying in the hotel on single days or multiple days.

CPD

The Professional Licensing Practitioners Qualification course will be accredited CPD and will accrue 4.5 hours CPD daily. The IoL is registered with the Solicitors Regulation Authority for CPD (CPD Ref: LGLF/CPC).

Course Objectives

To advance or refresh the knowledge, understanding and practical expertise of delegates attending the courses in relation to the licensing topics covered on each of the four days.

The Training

The training will focus on the practical issues that licensing practitioner will need to be aware of when dealing with the licensing areas covered during the course, see below.

The training is ideally suited to someone new to licensing, or an experienced licensing practitioner who would like to increase or refresh their knowledge and expertise in any of the subject matters.

The training would be suitable for Council and Police Licensing Officers, Councillors, Lawyers who advise licensing committees, managers of a licensing function and committee services officers.

The Programme

Day 1: 24th September 2013

Licensing Act 2003 – Trainer Jim Hunter, IoL Training and Qualifications Officer

Day 2: 25th September 2013

Gambling Act 2005 & Sex Establishments – Trainer David Lucas, Fraser Brown Solicitors

Day 3: 26th September 2013

Taxis – Trainer James Button, James Button & Co assisted by Jim Hunter

Day 4: 27th September 2013

Street Trading, Scrap Metal Dealers & Motor Vehicle Salvage Operators – Trainer Jim Hunter

ers Qualification– September 2013

Course Fees

There are a number of options as you can book for the duration of the course or selected different days/nights depending on the topics you wish to cover from the list above.

Non Residential Rates

IoL Member - Non Residential All 4 days - £400 + VAT
IoL Member - Non Residential Day Delegate - £125 + VAT per day

Non-member - Non Residential All 4 days - £475 + VAT
Non-member - Non Residential Day Delegate - £150 + VAT per day

Non Residential rates include the cost of the training and refreshments throughout the day.

Residential Rates (with Hotel Accommodation)

IoL Member - Residential 3 nights & 4 days - £595 + VAT
IoL Member - Residential 4 nights & 3 days - £630 + VAT
IoL Member - Residential 4 nights & 4 days - £660 + VAT

IoL Member - Residential 1 night & 1 day - £195 + VAT
IoL Member - Residential 1 night & 2 days - £295 + VAT
IoL Member - Residential 2 nights & 2 days - £395 + VAT
IoL Member - Residential 2 nights & 3 days - £495 + VAT
IoL Member - Residential 3 nights & 3 days - £550 + VAT

Non-member - Residential 3 nights & 4 days - £620 + VAT
Non-member - Residential 4 nights & 3 days - £655 + VAT
Non-member - Residential 4 nights & 4 days - £685 + VAT

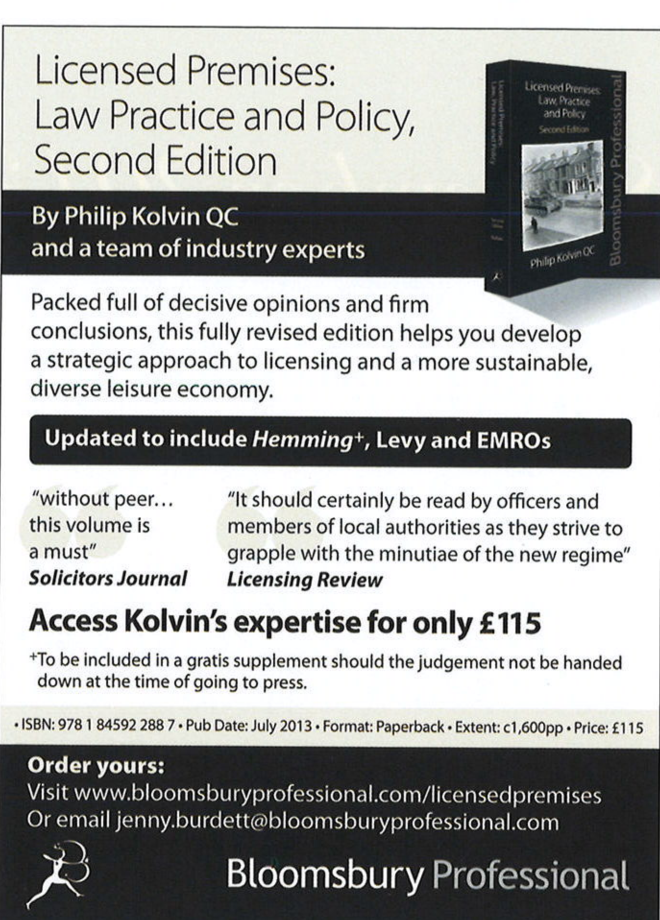
Non-member - Residential 1 night & 1 day - £220 + VAT
Non-member - Residential 1 night & 2 days - £320 + VAT
Non-member - Residential 2 nights & 2 days - £420 + VAT
Non-member - Residential 2 nights & 3 days - £520 + VAT
Non-member - Residential 3 nights & 3 days - £575 + VAT

Residential rates include the cost of the training, accommodation and all meals except for delegates wishing to stay the night before the training starts on Monday 23rd September which does not include an evening meal.

More Information

For all event enquiries please contact us via events@instituteoflicensing.org

Book early to avoid disappointment as places are limited for this course. For more information and to book your place go to the events pages of the IoL website http://www.instituteoflicensing.org/events.html



(formerly 2-3 Gray's Inn Square)

Licensing Experts in:

Sex, Alcohol, Gambling and Taxi Law

Address:	2-3 Gray's Inn Square London WC1R 5JH
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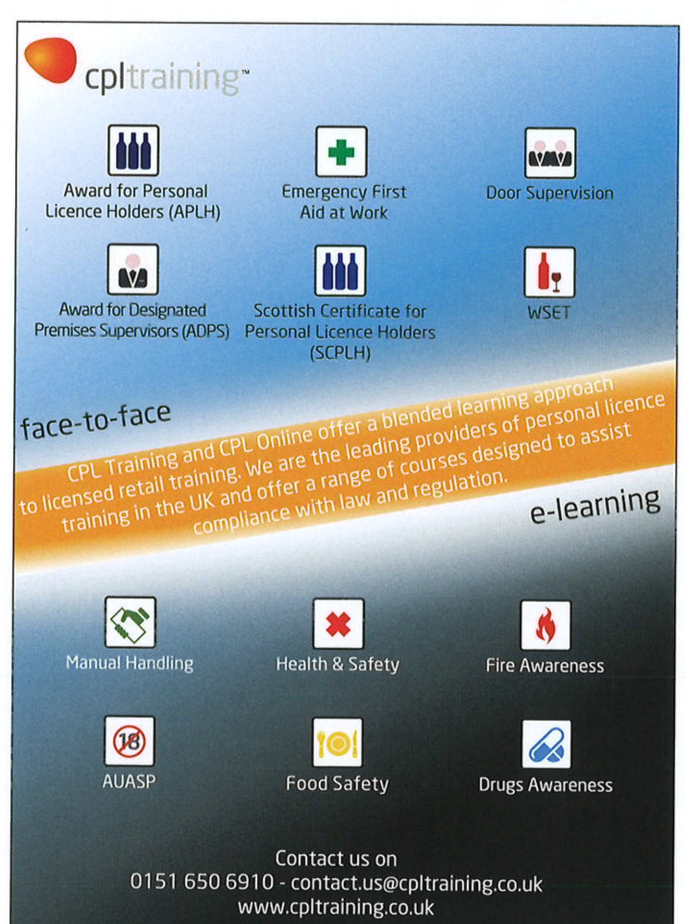
Tel:	020 7242 4986
Fax:	020 7405 1166
Email:	cornerstone@cornerstonebarristers.com
Website:	www.cornerstonebarristers.com



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For more information and to book your space contact Natasha via journal@instituteoflicensing.org

DEANS COURT CHAMBERS

Deans Court Chambers are pleased to announce its membership of the Institute of Licensing as part of our continued commitment to excellence in licensing work.

Deans Court has been involved in representation in licensing work for over 20 years, working for private clients, local authorities and the police in relation to all aspects of licensing work, including alcohol, gaming and private hire vehicle licensing. **Deans Court Chambers** Licensing Team provides representation at all levels across the circuits.

The members of our Licensing Team are:-

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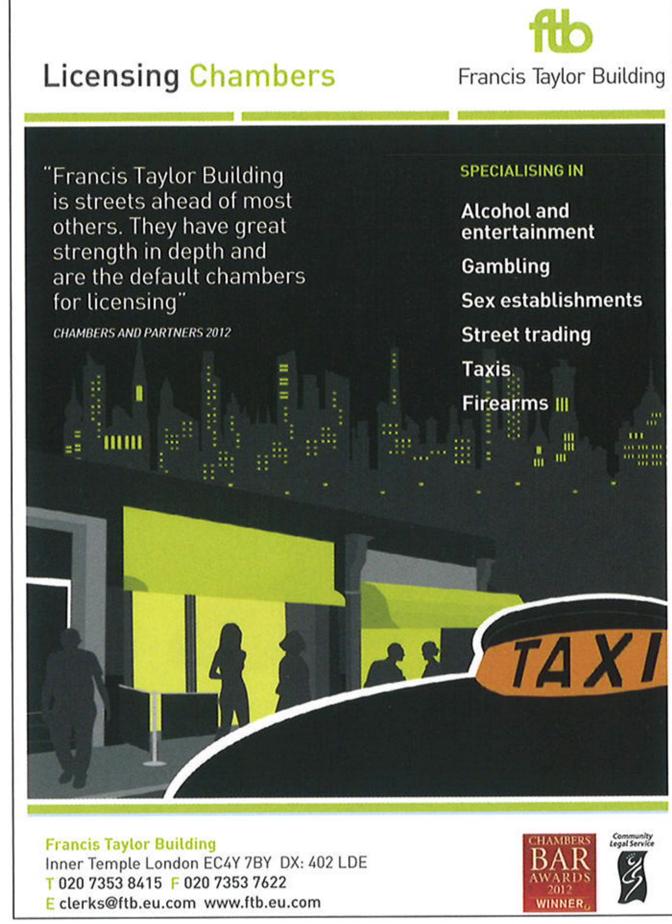
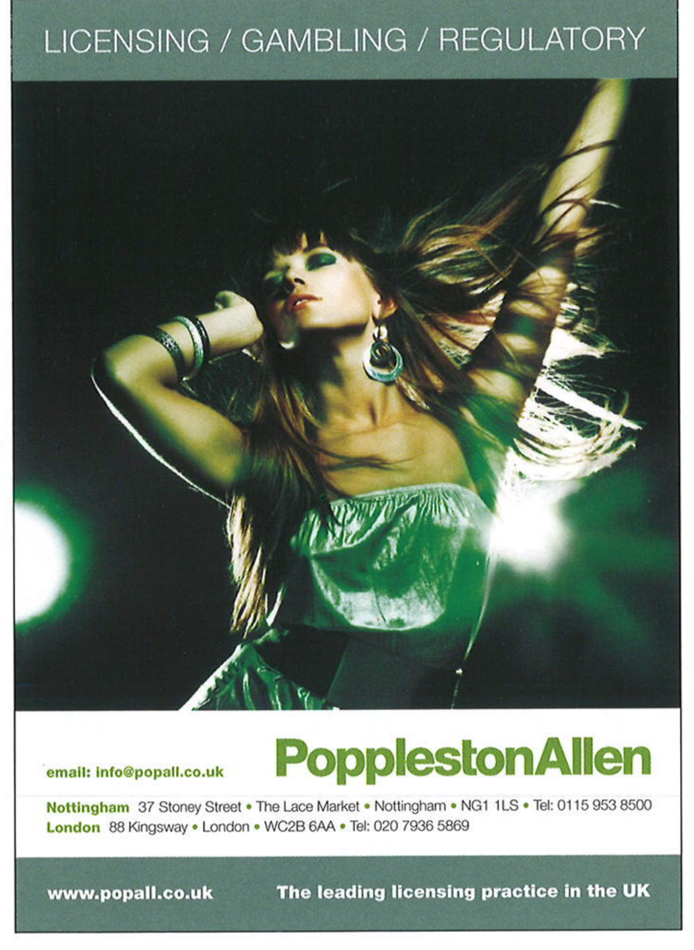
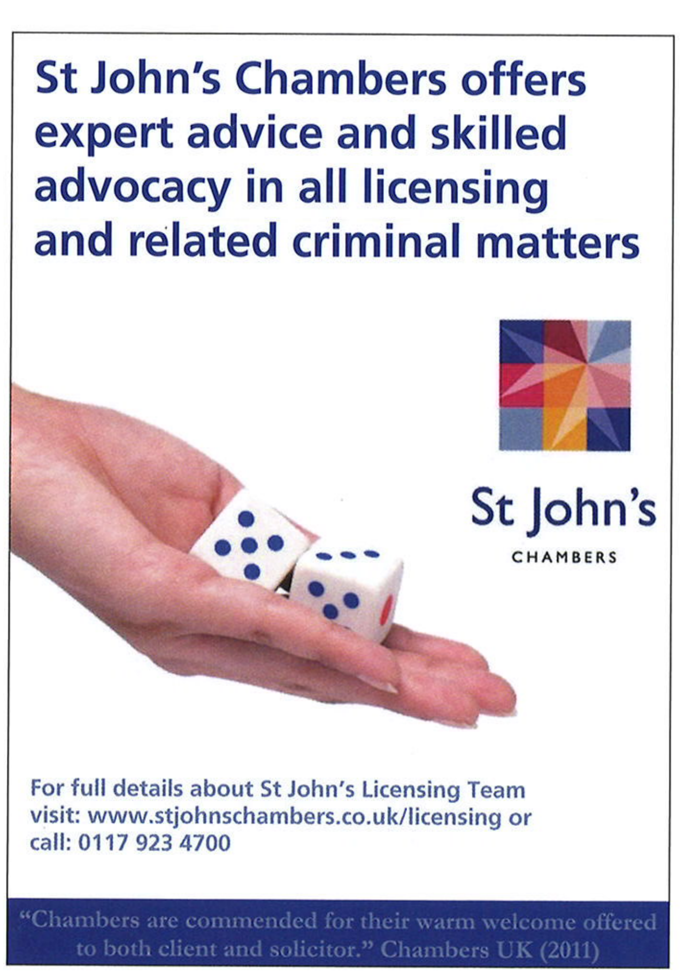
For more information on **Deans Court Chambers** Licensing Team please visit our website www.deanscourt.co.uk or contact Peter Kelly, Senior Criminal Clerk on 0161 214 6011 or pkelly@deanscourt.co.uk







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- Individual/Companion/Fellow – £70.00
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- Standard Organisational Member, for between 1 and 6 named contacts – £250.00
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Apply Online – visit our website - www.instituteoflicensing.org

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