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Daniel Davies, MIoL
Chairman, Institute of Licensing

As I sit down to write this foreword, *National Licensing Week* is in full swing. Running from 13-17 June, it is seen by the IoL as a chance to raise awareness across the country of the underlying message that "licensing is everywhere". The daily themes demonstrate how licensing effects our everyday lives in ways members of the general public may not expect. The themes are:

- Monday – "Positive Partnerships", the cornerstone of effective regulation;
- Tuesday – "Tourism and Leisure", a multi-billion pound and rightly lauded sector of the economy;
- Wednesday – "Home and Family", the down-time we all cherish;
- Thursday – "Night Time", relaxation, celebration, and, sometimes, commiseration; and
- Friday – "Licensing and Business", bookending the week with the dynamic with which we all interrelate each day of our working lives.

The ubiquity of licensing is easy to take for granted or pass over, and it is necessary sometimes to take a step back and look at the big picture not just in these isles but further afield. We are all connected. Nowhere in these pages have we been assisted with this as much as in the lead article for this edition, which is a speech given by our Patron, Philip Kolvin QC, to the Sociable City Summit event in Washington DC recently. I urge you all to digest the content. The speech addresses wider themes but the importance of licensing as a driver and regulator of building and fostering communities is clear.

I wrote in my foreword to the previous edition that there were "reasons for optimism". Since then, the direction of travel has continued cautiously upwards albeit not without significant challenges on the horizon for operators with a cost of living crisis in danger of enveloping us.

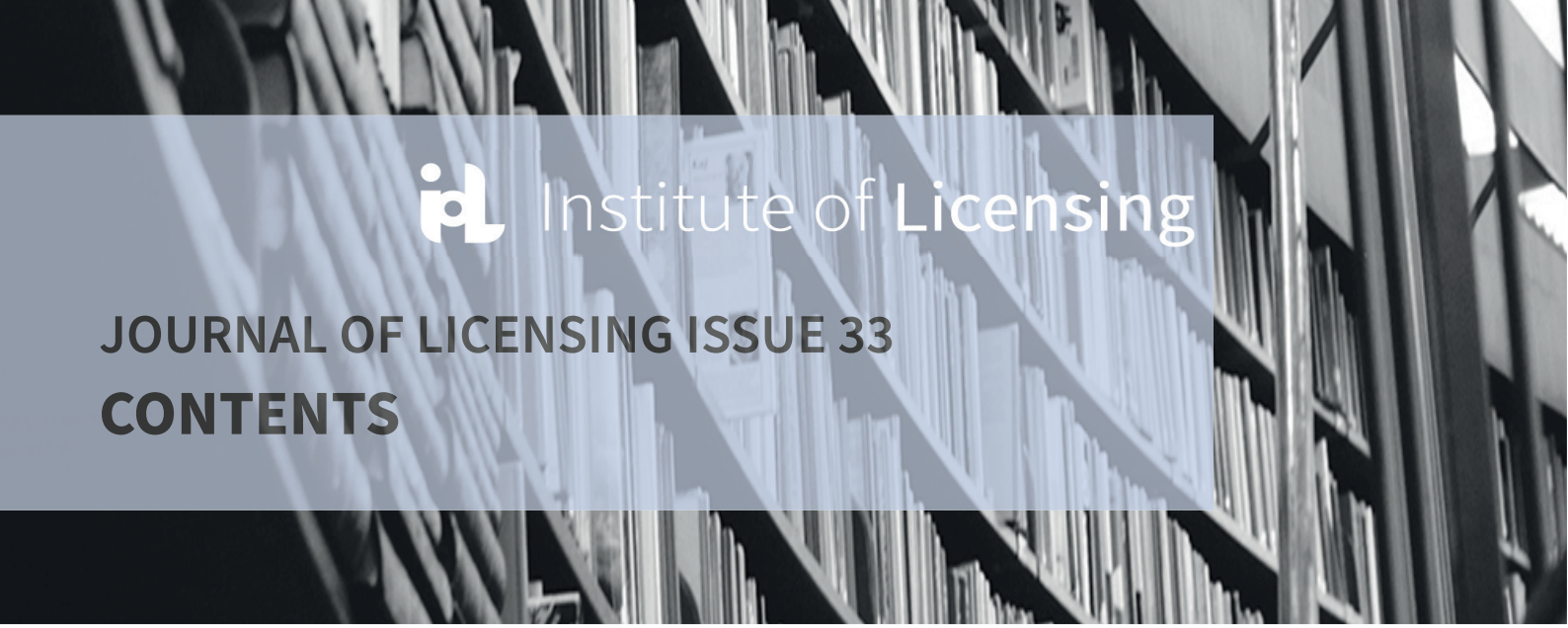
Hopefully Her Majesty the Queen's Platinum Jubilee put smiles on the faces of many, and even those of a more cynical bent seemed to be swept along in the spirit of communities coming together. Hopefully, too, the coffers of operators were swelled, especially with the opportunity afforded by the relaxation of opening hours and generally kind weather.

Speaking of which, the popularity of outside drinking and dining has been demonstrated since the enactment of the pavement licensing regime. As was widely anticipated, the Government has taken steps to make the regime permanent (albeit with some changes) in the Levelling Up and Regeneration Bill 2022, which has just received its second reading in the House of Commons.

We have a stellar roster of writers in this edition covering a range of topics across the licensing spectrum. Sexual entertainment venues and taxi licensing are to the fore. Among the subjects, Jeremy Phillips QC and Michael Feeny analyse the interaction of the former with equality legislation. To stay on this theme we have an opinion piece on SEVs from Silvana Kill. Three other important articles bring readers fully up to date with taxi licensing - the ramifications of the *Uber* litigation with Transport for London becomes apparent in Neil Morley's article; James Button assesses two recent pieces of taxi legislation; and Gerald Gouriet QC and Leo Charalambides look at the cross-border activities of private hire operators.

It is not all sex and taxis, though. Other writers take you on a journey through Scotland and Northern Ireland, gambling news, shisha smoking, and Personal Protective Equipment. In addition we also have a piece on data protetction and licensing from Tony Ireland and our editor.

Finally, a plug for the National Training Conference, which is filling up quickly. Places are still available but it is expected to sell out sooner rather than later, so grab your spot.



Institute of Licensing

JOURNAL OF LICENSING ISSUE 33

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Leo Charalambides, FIoL
Editor, Journal of Licensing

Reading through this issue of the *Journal*, I am reminded of the s 182 Guidance at para 14.13, which states that "licensing law is not the primary mechanism for the general control of nuisance and anti-social behaviour by individuals once they are away from the licensed premises and, therefore, beyond the direct control of the individual, club or business holding the licence, certification or authorisation concerned. Nonetheless, it is a key aspect of such control, and licensing law will always be part of a holistic approach to the management of the evening and night-time economy in town and city centres". (Emphasis added.)

This "holistic approach" is further supported by para 14.63, which recommends that "statements of licensing policy should provide clear indications of how the licensing authority will secure the proper integration of its licensing policy with local crime prevention, planning, transport, tourism, equality schemes, cultural strategies and other plans introduced for the management of town centres and the night-time economy. Many of these strategies are not directly related to the promotion of the licensing objectives, but indirectly impact upon them. Co-ordination and integration of such policies, strategies and initiatives are therefore important."

Those of us who work within the licensing field must recognise that there is more to licensing than that mantra of the four objectives. Recently I found myself responding to a review of a premises licence for a long-established night club. This police review was requesting the addition of several conditions: (i) the use of body worn CCTV by all SIA operatives to be recording at all times; (ii) the use of an electronic ID scanner system for all persons as a condition of entry; and (iii) the use of SIA to patrol the vicinity and near vicinity of the premises (including the local authority-owned car park opposite the night club). What is striking is that on further research it was discovered that these conditions were being requested by the local police for other premises in the wider area. It remains unclear whether these conditions were requested owing to concerns directly relating to the particular premises or a general policy of policing support measures in the wider area – an area which has suffered from diminishing resources.

A matter of particular concern was that the additional measures would contribute to a very high level of surveillance in the night-time economy. The premises had over 80 CCTV cameras. The police officer presenting the case did so on very sound crime and disorder grounds but on being questioned, confirmed that he had not taken into account data protection principles, the relevant Information Commissioner's guidance, or the relevant guidance of the Surveillance Commissioner. The review application requesting such extensive surveillance measures was not accompanied by a data protection impact assessment (DPIA). Members of the licensing subcommittee were equally unaware that they too might be advised to conduct a DPIA in the event that they agreed to the police condition.

They did not agree to the police conditions preferring to adopt a more proportionate response suggested by the licensee. The wider holistic integrated approach was not evident in this wider review application.

The response to the Covid-19 pandemic demonstrated the importance of licensed venues to our personal, social, communal and cultural lives. I've certainly sensed a greater appreciation and recognition of "the important role which pubs and other licensed premises play in our local communities" (s 182 Guidance, para 1.5).

In their responses, local authorities, responsible authorities and licensees were keen to creatively expand and adapt the public safety objective to include concerns in respect of the personal, social and community wellbeing and health of staff and patrons. Wellbeing must, it seems to me, include a recognition that licensed premises (even those with *robust* impacts) and the night-time economy contribute to the sense and experience of well-being in our societies.

This Covid-19 legacy informs a recent speech by Philip Kolvin QC, the text of which is a reproduced as our leading article. It's a legacy that supports a vision for the entertainment and night-time economies to be characterised by tolerance, diversity, respect, sustainability, safety and good working conditions. My reading of the shisha article by Richard Brown and Charles Holland discerns the application of these ethical principles to the mooted regulation of smoking and shisha.

What we are seeing, perhaps, is that we in licensing, and in particular those of us that keep close to the Institute of Licensing, are more experienced, more mature and more nuanced in our outlook and approach than many others. Long may this continue.

The ethical social economy

Posing some major questions about the future of cities and the way we interact, **Philip Kolvin QC** addressed an audience at the Sociable City Summit event in Washington DC recently. It was an important speech, and we reproduce it here

I last spoke to this summit in Seattle about 2,500 miles from here and what seems like 200 years ago, as the plague descended. I was privileged to deliver a closing address. In what was the last Powerpoint slide of the conference, I propounded what I termed an "ethical social economy".

I suggested that the social economy is where we express and delight in our common humanity. So it should be a repository of ethical practice, going beyond regulation. It should champion:

- Tolerance
- Diversity
- Respect
- Sustainability
- Safety
- Good working conditions

I said that in an increasingly atomised society, it is ever more important that where we commune, we model a good society for those who follow us.

I have not spoken about this topic since. Like you, I have been somewhat distracted. But that small pinprick in our peripheral vision may be the light at the end of the tunnel, so now seems an opportune moment to pick up these threads.

In doing so, I am not purporting to lecture you about the particular needs of your own social economy.

The days of grandees from England lecturing this great nation on how to model a good society went out with the Boston Tea Party.

To the contrary, I am convinced that local places need local solutions which respect and reinforce their own stories, cultures and needs. Nothing could be worse than a world full of homogenised cities.

My modest hope is that in planning your own towns and cities you might benefit from knowing a bit more about the experience from elsewhere, and that you might also consider viewing the challenge, not so much as regulating the social economy, but as forging an ethical social economy.

Now, as the Bible tells us, there is nothing new under the sun. So I started by asking myself whether my baby steps on this subject are ones taken in the footprints of giants. And, luckily for me, it transpires that they are.

Nearly 2,500 years ago, the Greek philosopher Plato was formulating the tenets of a good society in his book *The Republic*.

It is written as a Socratic dialogue, and in one chapter, Socrates propounds a simple society which meets its necessities by assigning skilled individuals to identified needs. So the farmer farms. The blacksmith forges the plough. The merchant sells the produce. The weaver weaves clothes. The cobbler cobbles. And so the inhabitants live in peace in their simple, elemental, healthy city.

Now Plato's brother, Glaucon, takes issue. He says that would be a city fit only for pigs. I paraphrase, what about culture?

All right, all right, retorts Socrates, we'll have paintings, embroidery, pastries and music. So now we will need poets, actors, dancers, dressmakers, hairdressers and chefs. But, and there is a but, our greater consumption in this "feverish" city will require further resources, beyond the ability of the simple city to provide. And that, he said, leads to war with neighbours, which will then need a standing army.

The Republic is a fictional dialogue from before Christianity, but it underlines that in every choice there are externalities. In our case the externalities from our consumption may be environmental harm, or perhaps gout, rather than actual war. But Plato's book demonstrates the essential balance between meeting consumer desires and the needs of sustainability.

The ethical social economy

In considering the ethical social economy, we remember the Native American proverb that we do not inherit the earth from our parents, but borrow it from our children. In our striving for the cultural richness of the feverish city, we should not leave the simple city out of the equation altogether.

Over the last two years we have all seen much. We have lost much. And we have suffered individually and collectively. Yet we have also pulled together in surprising and heartening ways. Technology has enabled us to keep our economy going, educate our children, and to connect with our friends and family remotely. New communities have arisen internationally, including those involved in advocacy around the social economy. New ways of producing and disseminating art have been invented. And our wonderful scientists and primary carers have created and administered vaccines and medical care which have prevented the death toll becoming still more calamitous. As human beings we have stepped up to the plate, made connections, helped each other and exercised our ingenuity to preserve what is best in our society.

Now, here is the question. Can we use just a smidgeon of that intelligence and resolve to plan a post-pandemic ethical social economy? For it takes planning. It won't happen all by itself.

Before the pandemic, there were structural changes afoot in our society and our economy: the loss of retail from the high street, the growth of home entertainment, the reduction of alcohol consumption, particularly among young people and, in my country at least, the closure of bars and clubs. All of these posed challenges for those planning for sustainable cities of the future.

Clearly, the pandemic has hastened some of these trends, particularly the growth of online retail and the loss of shops from the high street.

But the biggest structural change over the last couple of years has been the shift to home working. This has been partially reversed in recent months, but it seems clear that the tectonic plates of working life have shifted. Employers are closing expensive call centres. Others are recognising the economic and environmental cost of making people travel to meet when they can do so without leaving their home. Workers are voting with their feet. It is nice to visit the office but not so nice to have to do it every day, or to have your nose buried in someone's armpit on a sweaty underground train.

Now, you can lament this as a draining away of the lifeblood of city centres. Or, as Bing Crosby said, you can accentuate the positive.

Because one outcome of this has been the rebirth of the suburb as a social hub.

People have been meeting friends in local pubs, cafes and restaurants in the daytime as well as the night, creating and augmenting new local economies.

Pavements have been widened.

Parklets have sprung from the tarmac.

Low traffic neighbourhoods have been promoted, with traffic calming measures balanced by facilitation of walking and cycling.

We can learn much from the "15-minute city" espoused by the Mayor of Paris, Anne Hidalgo, a city in which all services and social needs are expected to be met within a 15-minute walk or bike ride, strengthening community networks, fortifying local supply lines, favouring local traders and craftspeople over national chains. These ideas are taking root internationally, including in cities across USA.

And if you grasp this nettle, you might be ahead of the curve, but only just. In 30 years' time, we won't be belching out burnt hydrocarbons as we drive our kids a mile to school. We won't be travelling 10 miles into a city centre to buy a pair of socks, or be struggling to get home after a heavy night out. We will have local food and energy production facilities. We will have planted more trees to shelter from the heat and to absorb carbon and flood waters. With further advances in medical science, and living to a ripe old age, we will spend our later years in local parks, squares, cafes and bars, communing with friends and neighbours and enjoying our green environment. And that social ecology, with its heterogeneous mix of ages, genders and ethnicities will be safer, self-policing, more inclusive and more caring.

I believe that the 15-minute city, because of its sustainability, diversity and inclusivity, will provide the bedrock for an ethical social economy. Plato would definitely have approved.

Town and city centres

Let's now look at town and city centres.

The rise of online retail and the corresponding decrease in town centre retail is well-documented. Some of it is simply a reflection of consumer demand. Some of it is fiscally driven. In the UK, there is a business rate disparity between online retailers and those occupying town and city centre space. This, together with other advantages in the hands of online retailers such as lower worker benefits and savings on rents, has conspired to drive shops from the high street.

Even some of the proudest names in British retail, such as Marks & Spencer and John Lewis, have shut flagship stores, stores which have for decades anchored the town centres they served. The current situation in UK is that one quarter of retail spending is online, and rising, while one in seven town centre units is vacant. There were 30 retail closures every day last year.

To add to these woes, the flight of workers from town centre offices has drastically reduced the footfall in town centres, which is in turn putting huge pressure on the social economy. In the UK, the loss of workers through Brexit, a staffing crisis in the security industry, rocketing energy and food prices and a return to full VAT on supplies in the hospitality sector is creating a perfect storm, with leisure leaders fretting that 2022 could be a tipping point. This is on top of the decrease in pubs, nightclubs, music venues and LGBT venues over the last two decades, a growing issue which has permeated the consciousness of even the most tin-eared politicians.

What to do?

Let's start with the positives.

1. Our government has married up what are called planning use classes for retail, services and leisure so that one does not need to make planning applications to change use, say, from a shop to a restaurant. This flexibility is in keeping with an ideologically deregulatory agenda.

2. Government has also passed legislation making it much easier to establish a streatery, so useful to expand the capacity of venues and cater for people's desire to eat outdoors or at a safe distance from their neighbours. Rather than needing two different licences and a planning permission, there is now just one short form to fill in and £100 to pay.

3. The gaps left by departing retailers have created a flurry of activity by small independents. We now see former large stores occupied by independent retailers, mini-golf and bar concepts, and by community co-operatives.

4. More generally, falling rents on high street have caused a burgeoning of new entrants to the market. Over 2,000 new independent outlets opened during 2021.

However, to my mind, what looms over all of this is not the ebb and flow of national and independent retailers, or leisure versus services. It is something far more existential.

Much of town and city centre property is held by large institutions such as pension funds which wield considerable political muscle. This, coupled with what is recognised to be a housing crisis in the UK, has persuaded our government to deregulate planning requirements for housing, enabling pubs, shops and offices to be converted to housing without planning permission. This was against the advice of many planning experts, who rightly argued that it will potentially create dead frontage. Putting housing in a chain of shops is like removing a front tooth. It is just one tooth, but it is the one people notice. This may not matter much, save that housing prices are at record levels, so the economic incentive for institutional landlords is to convert, convert and convert. Why wait for rental payments to accrue from struggling publicans if you can develop and sell the site for housing, reaping a large, immediate capital sum?

We have in short turned the future of our town centres over to the market.

Now, the market is a great mechanism for fixing the price of Hershey bars. It is a less reliable friend when you are trying to plan safe, welcoming, diverse and accessible social economies.

To be frank, I would rather place my faith in an Ouija board.

Your own countryman Bill Bryson pointed out that some things can't be fixed by the market: drains for example.

To leave small bars, music venues and LGBT spaces to wrestle it out with housing developers is nothing short of cultural vandalism.

In this wild west world of competition for town centre space, I have no doubt that the large cultural institutions will survive. No-one is going to convert the Smithsonian into sub-standard housing.

I have never been worried about high culture.

It is low culture, popular culture, grassroots culture that needs our protection.

Town and city centres are not a jungle to be ruled over by the oligarch with the deepest pockets.

They are places of wonder, of delight, of celebration, of debate, of artistic movements, all reflections of our common humanity.

Recalling the ethical social economy, we remember its broad tenets of diversity, and of inclusion.

The best town centres are places where rich meets poor, where old meets young, gay meets straight, in a melting pot of music, art, technology, fashion and entertainment and emerging political and social ideas.

I remind you that Dr Martin Luther King did not write "I have a dream" from his duplex apartment. He wrote it from a bar, in this very city.

Nor Hemingway, whose admonition was "write drunk, edit sober".

Or the Cavern Club in Liverpool without which we would never have had the Beatles.

Without the bars, basement music clubs, the fleapits, the dives, the corner pubs, our society is the poorer.

But these are often marginal businesses. They need protection. They cannot be left to the wiles of the market.

I am far from saying that people should not be permitted to live in city centres. I am saying that the balance needs to be carefully planned.

Preserving town centre culture

So what might we do to help protect and preserve town centre popular culture? Try the following:

1. Promote planning policies restricting influx of national chains and preserving space for local independents. This operates in parts of New Orleans and San Francisco.

2. The agent of change principle originated in New York and was adopted in UK. It places the onus on the incoming housing developer to build in such a way as to protect purchasers from disturbance.

3. Adopt schemes which convert old warehouses and markets to multiple food and drink uses. I think of the hugely successful Cains Brewery site in Liverpool, Brixton Market in London and perhaps most of all, Time Out Markets which started in Lisbon and are now going worldwide, enabling great chefs to bring their food affordably to a wider, less formal audience.

4. Favourable tax treatment of popular venues as cultural institutions. I adore how the Berghain nightclub in Berlin is given the same status as the opera house, reducing its business rates accordingly. And please, campaign to make sure there is no fiscal advantage for online providers over bricks and mortar shops, bars and restaurants.

5. I admired how, when developers wanted to demolish one of the most famous LGBT bars in London, The Joiners Arms, Mayor of London (Metropolitan Open Land – equivalent in London to metropolitan green belt) required them to incorporate a new LGBT bar on the site as a condition on their planning permission.

6. I congratulate cities which designate cultural quarters to promote and protect makers and artists who live and work there and to provide a sense of specialness and destination. I would cite Vilnius in Lithuania as a great example.

7. Lighting is such a crucial component, and not just at Christmas. Lighting a bridge or underpass can transform a scary space into an atmospheric one. The light night, notta bianca or nuit blanche festival can bring people into the city who then return again and again. Video mapping of notable buildings can help to tell the story of your town or city. Parks lit at night provide a whole new perspective on ecological spaces.

8. Use street ambassadors to welcome visitors and help to protect vulnerable people.

9. Sweat your buildings so that they can be open all hours, like the Rijksmuseum in Amsterdam which puts on EDM (electronic dance music) at night, or the Natural History Museum in London which permits sleepovers.

10. And nothing helps to promote a great night-time economy as much as safe, cheap or even free night transit, for users, for workers and for artists.

11. Finally, pedestrianise where you can. Do the whole centre like Bruges, encouraging a wonderful, clean, calm, safe, human environment. Or promote low traffic, cyclable cities like Copenhagen. Or just prevent traffic at night, like so many Italian cities on weekend nights, bringing a vibrant, festive atmosphere. Or reduce traffic by alternating days of use for drivers like Paris. Or turn whole freeways into pedestrian space periodically like Sao Paolo.

All of these ideas speak of positive protections. There are many more ideas. The important thing is not to take action for the sake of action, or spend money for the sake of spending

money, or engage in empty gestures, but to analyse, consult, test and learn from elsewhere, so that all you do is to the good.

Before we move on from city centres, let me leave you with three thoughts.

First, city centres always need investment, and nearly always that is private money. Your job is to direct it in the right way. But centres belong to the people. Please beware of the privatisation of public place.

Second, the greatest cities and their social economies are tourist draws and that is a financial benefit. But the purpose of a city is not to support a tourist industry. Rather, create a distinctive, unique, local social economy and the tourists will come. Some cities have had to restrict tourist influx, such as Venice. Others go the extra mile to remind tourists that they are guests not conquerors, like Amsterdam. Many charge a tourist levy on hotel bills, which is then put to good use. That can be controversial. I am in favour. Quite simply, cities are ecosystems for those who live there. They are the hosts, not the subordinates, of those who choose to visit.

And third, the best city centres promote a social economy on a human scale: navigable, legible, welcoming and safe for all sections of the community. Beware messianic urban practitioners. They can do irremediable harm. When the irresistible force of Robert Moses in New York met the immoveable object in the shape of Jane Jacobs, hugely important gains were made in our understanding of what as humans we crave in our urban environments. The same battles took place in London where countless old buildings were saved by campaigners from the futuristic zeal of the post-war planner Abercrombie. Think big by thinking small. The ethical social economy supports small business people, emerging artists, workers and those with little or nothing to spend. All are part of the rich collage of city life.

The social economy

The final area for scrutiny is the social economy itself.

I have left this until last, not to diminish but to underline its importance.

It is very easy to conflate the future of the social economy with the future of the city centre.

That is a huge mistake.

The social economy is not some afterthought in urban planning. It is everything we do when we are not at work.

It is not a small file in a sub-folder of urban planning. It is pretty much the point of being alive.

One of the greatest new developments is the rise of the night tsars, not for what they can do – some do less than others – but because their very existence is a proclamation of the importance of the social economy.

More than that, through lockdown we have seen brilliant communal working between urban practitioners around the world to identify common problems and propound solutions. I would say that night studies can now be considered a professional or academic discipline. Anyone who is into the night should key in to the international thinking. Start with GNRP, the brainchild of Mirik and Lutz. I was honoured to contribute one of the chapters on state assistance, in which I outlined a scientific approach to planning a social economy. All this is online.

Let me now pick out some of the bigger emerging themes, specifically by reference to an *ethical* social economy.

Safety: The Me Too movement has shone a stark light on the experience of women in public and private spaces. It is the worst cases which make the news. But for every tragic headline there are a thousand micro-aggressions: unwanted touching, sexist remarks and so forth. In the UK, our record on spiking with drugs in drinks or even needles is appalling. Sexual harassment on campus is a national disgrace. The ethical social economy deals with this.

- Staff are given welfare and vulnerability engagement training. That includes the WC staff and the bus boys. Anyone can spot a dangerous situation.
- The Ask Angela scheme enables a woman to Ask for Angela at the bar, a codeword meaning she needs protection.
- Staff are told of the “power of hello” to check all is well.
- Doorstaff are told to be as vigilant about who is leaving as who is arriving.
- Victims are always believed and complaints are always acted on.
- Potential perpetrators are messaged about standards of behaviour.
- Most of all, everyone is urged to be an active bystander.

- To the question – am I my brother's keeper, or my sister's? - in an ethical social economy, the answer is always yes.

Drugs: In my country at least, the incidence of drug-related deaths has risen steeply for reasons which are the subject of a different talk. We have a tendency in UK to focus on drug consumption as a crime rather than as something which can kill the user. For that reason, for too long we have eschewed drug testing at clubs and festivals, and helping people to consume safely, arguing that it promotes illegality. A similarly disastrous approach was taken to teenage pregnancies. It turns out that telling underage people to have safe sex rather than no sex reduces unwanted babies. At last, in the case of recreational drugs, the ice is thawing. Police forces are allowing drug testing organisations to test drugs to stop people poisoning themselves. Preventing crime is one thing. Saving lives is another. In an ethical social economy, lives prevail.

Terrorism: This is a serious emerging risk, whether the bombing at the Ariana Grande concert in Manchester Arena, the London Bridge knife terror attack or the gun attack at Bataclan in Paris. An important report has emerged this year in the UK proposing a Protect Duty, with different levels of responsibility depending on the size of the venue. To prevent atrocities, the ethical social economy assigns a role to everyone.

Workers: A word about the lifeblood of the social economy. Workers work long hours in sometimes difficult conditions. They are rarely unionised, are sometimes underpaid and working on zero hours or insecure contracts. The desire to drive down costs for customers in the name of competition is understandable, but those working in the social economy are not just cogs, to be replaced by machines at the first opportunity. They are part of a human ecology which is based on interaction. Their pay and benefits should meet local standards. Their employment should be secure and be part of a career path. They should be allowed to keep all their tips to supplement their salaries. And they should be given a safe means of transport home. The ethical social economy cares for them.

And in our ethical economy, neighbours are also entitled to consideration: they should not have to instigate litigation to be heard. Housing near entertainment uses should be air conditioned to avoid opening windows, bedrooms oriented away from nightclubs, windows glazed sufficiently to block out noise. Forums should operate to bring their concerns to the business community. Street cleaning should ensure that they emerge in the morning to clean streets. As venues close, security staff should come into the street to ensure rapid and quiet dispersal. Taxi ranks should be sited away from housing, and taxi drivers discouraged from using their horns or idling their engines at night. Public transport should swish revellers away quickly. I believe that it is possible to reduce conflict between neighbours and operators, provided that there is good town centre management and a problem solving approach. It is not something which should be left to chance.

Linked to much of this are customers: 99% of them are angels, the rest bring the social economy down. They start a fight in the pub. They slide their hand up someone's skirt. They get drunk. They urinate in the street. They shout under someone's window. If they do something drastic they will be brought to court and punished. But if they don't, there will be impunity. The venue won't investigate: if it does, the police won't respond; if they do, the prosecutor won't prosecute. But if it happens too much, the venue will lose its licence.

This deserves our intense attention. The cost for venues of protections against miscreants is vast. Police resources have to be poured into town centres at night. A&E departments are clogged up. The behaviour of a tiny minority deters users of the night-time economy and closes businesses.

We need to educate kids about how to behave when out at night. And we should keep nudging and messaging in venues and on public transport.

But, ultimately, in an ethical social economy, it is the polluter who pays. We should ensure that crimes in licensed venues are treated particularly seriously in charging and sentencing decisions. I would electronically tag offenders preventing them going out at night, or ban them from licensed venues altogether. I would impose alcohol abstinence monitoring requirements, sentence them to community reparation, and compel them to confront their own alcohol consumption and anger management. In my own country, if someone smuggles a knife into a club in their girlfriend's bra and someone is stabbed, the venue is likely to get closed. In an ethical social economy, we need to ensure the axe falls on the right neck.

The environment

I want to say just a word about the environment. I have already spoken about walkable cities, low traffic neighbourhoods, parks and parklets, public transport, local food production and greening initiatives. The ethical social economy reduces plastic waste, uses grey water, instals water fountains, uses renewable energy, including turning waste into energy, takes delivery from electric vehicles or even better from cargo bikes, uses local suppliers, and rewards non- car borne access. It staggers me how many people in the UK strut down the street with their take-away coffee cup and plastic spoon

and chuck them away five minutes later. You would never see that in an Italian town. Civilised citizens sit and enjoy their coffee at the café for five minutes, chatting to the owner or watching the world go by. An ethical social economy involves neighbourliness and communication. It is a great pleasure to live slow. We should all try it some time. The survival of the planet may depend on it. Plato, with his simple city, would surely have agreed.

Conclusion

Here is my parting thought.

Everyone in this room has experienced more change than any previous generation in history. Advances in science, technology, data processing, nano-engineering and remote communication mean that our world would be unrecognisable to those who lived a generation ago. It has enabled the rise of global corporations influencing our thoughts and behaviour, and of course taking a proportion of our income, with their profits sometimes taxed elsewhere or not at all. I venture to suggest that a century ago, a dollar spent in Washington DC would mostly have stayed in Washington DC. Now I would not be so sure.

In Plato's simple city, a dollar spent here, in a local bar, run by a local entrepreneur, with properly remunerated local workers, selling local produce, providing entertainment by artists who received their arts education locally, stays here and supports a sustainable local economy in a predatory economic world. And if that bar models good behaviour, protects its customers, respects its neighbours and practises exemplary environmental behaviour, then it is part of an ethical social economy which we will be proud to bequeath to those who come after us.

Philip Kolvin QC
Barrister, 11 KBW

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Taxi legislation will improve public safety and help the disabled

Two new Acts will raise standards of public safety and convenience for disabled people, but both could have gone further in the opinion of **James Button**

It appears that alterations to taxi law are like buses - you wait for ages and then two come along at once. Within the space of a month two pieces of legislation received the Royal Assent. Firstly we had the Taxis and Private Hire Vehicles (Safeguarding and Road Safety) Act 2022 which was enacted on 31 March 2022, and then four weeks later on 28 April, Royal Assent was given to the Taxis and Private Hire Vehicles (Disabled Persons) Act 2022. Both these acts started as private members' bills, but were then backed by the Government. I will never understand the workings and machinations of both Parliament and Government, but I am sure there is some perfectly good explanation as to why they could not be combined into one piece of legislation.

There is also the possibility of some hackney carriage and private hire provisions finding their way into the Transport Bill that was announced in the Queen's Speech. No official information has been provided at the time of writing, but the indications are that this may be the opportunity for the Government to introduce the three elements that they promised following the Task And Finish Group report, namely national minimum standards, national enforcement powers and a national licensing database (although they may argue ss 2 to 4 of the Taxis and Private Hire Vehicles (Safeguarding and Road Safety) Act 2022 already satisfies the third promise).

We have also had the consultation on the Draft Revised Best Practice Guidance, together with the proposal in the Levelling Up White Paper that taxi licensing should become a county council (where there is a county with districts) or a combined authority function rather than remaining with district councils.

There has also been an interesting report from the Adam Smith Institute, *A Fare Shake: Reforming Taxis for the 21st Century*,[1] which has such headline grabbing recommendations as removing knowledge tests in London (and obviously elsewhere) and single tier licensing!

It can therefore be seen that this has been an exciting, or at the very least, interesting few months.

The purpose of this article is to look at the new legislation; the revised guidance will be considered in a future edition when it has been finalised.

Taxis and Private Hire Vehicles (Safeguarding and Road Safety) Act 2022

The Taxis and Private Hire Vehicles (Safeguarding and Road Safety) Act 2022 received Royal Assent on 31 March with some sections coming into effect then and others at a later date. The Department for Transport issued Statutory Guidance on 23 May 2022.[2]

Commencement date 31 March 2022
Section 1 (in its entirety)
Section 2(6)
Section 7(1), (2) & (3)
Section 8 (in its entirety)
Section 9 (in its entirety)

Commencement date 31 May 2022
Section 4(1)(b)
Section 4(2)(b)
Section 5 (in its entirety)
Section 6 (in its entirety)
Section 7(4)

1 Available at https://www.adamsmith.org/research/a-fare-shake-reforming-taxis-for-the-21st-century.

2 Available at https://www.gov.uk/government/publications/taxis-and-private-hire-vehicles-safeguarding-and-road-safety-act-2022/taxis-and-private-hire-vehicles-safeguarding-and-road-safety-act-2022.

Commencement date to be appointed by Regulations
Section 2(1), (2), (3), (4) & (5)
Section 2 (7) &(8)
Section 3 (in its entirety)
Section 4 (in its entirety excluding 4(1)(b) & 4(2)(b) already in force)

This introduces two distinct matters:

i. the ability of the Government to identify a database, and once that has been identified, duties are placed on English licensing authorities to record information on, and search the database; and

ii. a duty placed on English licensing authorities to report concerns about drivers working in their area to the licensing authority (in England, Wales or Scotland) that licensed the driver where those two authorities are not the same.

It should be noted that the practical and useful elements of this Act only apply in to England. It is hoped that similar legislation will be introduced by Welsh Assembly Government in short order.

Both matters relate to what is called "relevant information" as defined in s 1 in the following terms:

"(1) In this Act "relevant information" , in relation to a person, means information indicating that the person—

(a) has committed a sexual offence (whether or not the person was charged with, prosecuted for or convicted of the offence);

(b) has harassed another person;

(c) has caused physical or psychological harm to another person;

(d) has committed an offence that involves a risk of causing physical or psychological harm to another person (whether or not the person was charged with, prosecuted for or convicted of the offence);

(e) has committed an offence under section 165, 168 or 170 of the Equality Act 2010 (whether or not the person was charged with, prosecuted for or convicted of the offence);

(f) has done anything that, for the purposes of the Equality Act 2010, constitutes unlawful discrimination or victimisation against another person;

(g) has threatened, abused or insulted another person;

(h) poses a risk to road safety when driving;

(i) may be unsuitable to hold a driver's licence for other reasons relating to—

(i) the safeguarding of passengers, or

(ii) road safety.

The database provisions

The first part of the Taxis and Private Hire Vehicles (Safeguarding and Road Safety) Act 2022 relates to the database.

These provisions cannot be used until the Government (acting by the Secretary of State) either operates the "licensing information database" or designates another person to do so (ss 4(1) and (2)).

Any such database must be accessible to all English, Welsh and Scottish licensing authorities together with the Department for Infrastructure in Northern Ireland. This enables information to be added by all those bodies and the database to be searched by non-English authorities as and when similar legislation is introduced in the other nations.

Any information on the database can only be used for the safeguarding of passengers and road safety (s 4(c).

These provisions only refer to hackney carriage and private hire drivers' licences governed by the English, Greater London and Plymouth legislation.[3]

It should be noted that all entries in the database will only last for 11 years from the date of entry, irrespective of the nature of that information as a consequence of s 4(3)(b). This accords with the length of time after which a conviction can become a protected conviction under the provisions of article 2A(2) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, but will apparently apply to all information, and not just information which would amount to a protected conviction.

3 Town Police Clauses Act 1847; Metropolitan Public Carriage Act 1869; Plymouth City Council Act 1975; Local Government (Miscellaneous Provisions) Act1976; Private Hire Vehicles (London) Act 1998.

In addition, fees that have been agreed with the Secretary of State can be charged to licensing authorities in all four nations of the United Kingdom to cover the costs of running the database (ss 4 (4) to (6)).

Once that designation is in force and the database is running, this act effectively only applies to English licensing authorities.

When a new or renewal application is made to an English licensing authority for a driver's licence, the licensing authority to which that application is made ("the decision-making authority") must search the database for any entries relating to the applicant (s 3(1)). If any information is then found, a written request must be made to the authority that made the entry on the database ("the recording authority") to provide the relevant information that led to the entry, which must be provided within a period of 20 working days from the date the request was received (s 3(2)).

The decision-making authority must then have regard to the information provided by the recording authority when determining the application (s 3(3)). If the recording authority alters or adds to the information on the person at any time after the initial request was made by the decision-making authority, the recording authority must notify the decision-making authority of the change (s 3(4)(a)), but the decision-making authority must only have regard to that additional information if it has yet to determine the application (s 3(4)(b)).

The Act does not refer to any action against a licence once it has been granted, but it must be the case that, where the decision-making authority gets further information, it must then decide whether it is necessary to consider action against the licence. No specific statutory provision is required for that action, because s 61(1) Local Government (Miscellaneous Provisions) Act 1976 allows action to be taken against a driver's licence (revocation or suspension) at any time.[4]

Whenever a licensing authority refuses an application (either new or renewal) for a driver's licence, or suspends or revokes a driver's licence, and the reason for that action was based wholly or partly on relevant information (as defined in s 1), then that licensing authority must enter that information on the database within five working days of the date on which the decision was notified to the applicant / licensee (ss 2(1), (2) and (5)). The specific information is detailed in s2(4), as the following:

a. the person's full name, date of birth, home address and national insurance number;

b. if the person holds a licence to drive a motor vehicle granted under Part 3 of the Road Traffic Act 1988, the driver number shown on the licence;

c. if the person holds a Northern Ireland driving licence, the driver number shown on the licence;

d. if the person holds a community licence, the number of the licence;

e. the name of the licensing authority and details of how further information about the decision can be obtained from the authority;

f. the date on which the decision was made and (if different) the date on which it takes effect;

g. the date on which any subsequent change to the decision was made and (if different) the date on which it takes effect;

h. if the decision is to suspend the person's driver's licence for a period, the date on which the suspension is to end;

i. such other information as the Secretary of State may by regulations made by statutory instrument prescribe.

That authority must update that information if there are any subsequent changes as a result of decisions by that authority (eg, to grant a licence in the future (s 2(3))), or as a result of any appeal, as soon practicable after becoming aware of the change. The information must remain on the database for 11 years, must be updated throughout that period, and the authority must keep its own record of the relevant information and subsequent decisions for the same length of time.

Obviously, none of this can come to fruition until the Government identifies the database by means of regulations, but once that occurs this will require some authorities to alter their approach to applications. While many use the NR3 at present (The National Register of Refusals and Revocations), it is by no means universal.

4 Similar powers exist in relation to: {see bullet points below}
- hackney carriage drivers licensed by Transport for London under article 30 of the London Cab Order 1934;
- private hire drivers licensed by Transport for London under s 16 (4) of the Private Hire Vehicles (London) Act 1998;
- hackney carriage and private hire drivers in Plymouth, under s 19 Plymouth City Council Act 1975.

In addition, licensing authorities will have to ensure their decisions are recorded on the database.

It is important to note that the current NR3 does not cover suspensions, but this database will. It remains to be seen whether the new database will need to be populated with historic information, but if it is not, a major part of its raison d'être will be lost.

As always, the devil is in the detail, and in this case the detail will be in the regulations.

Concerns about drivers

The second part of the Taxis and Private Hire Vehicles (Safeguarding and Road Safety) Act 2022 concerns information reporting. The reporting requirements only apply to English licensing authorities, but relate to a driver licensed in England, Wales or Scotland. This action is triggered when a driver licensed elsewhere (referred to in the legislation as "the second authority"), has behaved in a manner which would fall within the definition of relevant information, in the English authority's district (referred to in the legislation as "the first authority"), and, had the driver been licensed by that English district, the first authority would have considered suspending or revoking the drivers' licence as a result of that information (s 5(1)).

In those circumstances, the first authority must provide the relevant information and any other information which may assist in identifying the driver to the second authority within 10 working days of becoming aware of the relevant information and that person's conduct.

The Act then goes on to explain in s 6 what action should be taken by the second authority, but rather peculiarly alters the terminology, so the second authority becomes "authority A", the first authority becomes "authority B", and s 6 introduces a third authority ("authority C") which is another authority that has relevant information.

When authority A receives information from either authority B or C, it must act quickly, because within 20 working days, it must consider whether to suspend or revoke a driver's licence based on the information received from authority B or C, and any other information that may be available to that authority (authority A). It must also, within that period, inform the notifying authority (B or C) of its actions or intentions, together with the reasons (see s 6 (2)).

These are very short timescales, which realistically can only be complied with by an authority if the powers to suspend or revoke a driver's licence are delegated to officers. Most local authorities would probably struggle to convene a subcommittee to determine a matter within 20 working days of receiving the relevant information, although that is not itself impossible. However delegation to an officer, and I would always suggest that such a delegation should be in consultation with the chair or deputy of the regulatory committee) would certainly reduce the opportunity for delay.

It must also be borne in mind that the driver in question must be informed of the concerns that are going to be considered, and have a reasonable opportunity to address those concerns in front of the decision-maker, before any decision is made.

There are a number of issues arising from this part of the Act.

All authorities have to act within short statutory timescales. There is no sanction for failing to meet those timescales, but failure will be a breach of statutory duty which could lead to justified criticism or judicial review.

There is no mechanism for any recompense to the investigating authority (authority B or C) for their efforts in investigating the matter and reporting it to authority A. Conversely, there is no recompense for the decision-making process undertaken by authority A.

As with the database provisions, these are important provisions which will certainly aid public safety, but licensing authorities will need to ensure that they are fully compliant with the requirements. This may need alterations to schemes of delegation and an understanding by some local authority councillors that the legislation will require delegation to officers, even if that is not the current practice. Alterations to constitutions and schemes of delegation are notoriously slow so authorities need to be preparing for this as a matter of urgency.

It remains to be seen how much information is actually available to authorities where drivers work remotely, but this may encourage the public to complain to the authority in whose area the problem occurred, even if they are not aware of the authority that actually issued the licence to the driver.

Taxis and Private Hire Vehicles (Disabled Persons) Act 2022

It is very easy to dismiss the Taxis and Private Hire Vehicles (Disabled Persons) Act 2022 ("the 2022 Act" for the remainder of this article) as simply amending certain hackney carriage and private hire related provisions of the Equality Act 2010. However that would miss the fundamental importance of this legislation, as it extends significantly the existing provisions for the benefit of all disabled persons, and therefore by

extension, society as a whole.

All these provisions come into effect on 28 June. As the hackney carriage and private hire provisions of the Equality Act 2010 apply across England, Wales and Scotland, these provisions also apply across those three nations.

The provisions apply to disabled passengers and disability is defined in Section 6 of the Equality Act 2010 in the following way

Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities

(2) A reference to a disabled person is a reference to a person who has a disability.

It can therefore be seen that these provisions are going to support far more people than the existing provisions in the Equality Act, which relates to wheelchair using passengers and those with assistance dogs.

The provision in s 166 of the Equality Act to allow exemption certificates to be issued by licensing authorities is extended to cover all disabled passengers, rather than just passengers in wheelchairs (s 2 of the 2022 Act). It is also amended to only allow refusal to provide mobility assistance, rather than a refusal to carry the disabled person. This is a vital alteration which will prevent drivers with exemption certificates simply refusing to carry a disabled person. All they can refuse to do is provide the mobility assistance detailed in sections 164A and 165. This should improve matters for disabled people wanting to use hackney carriages and private hire vehicles.

Section 1 of the Act extends the duty to carry disabled passengers to all hackney carriage and private hire drivers, not just those driving a designated vehicle, by inserting s 164A into the Equality Act.

Section 164A effectively replicates the existing s 165 but ensures that the duty to carry the passenger and provide mobility assistance applies to disabled persons generally, and not those simply in wheelchairs, who are already provided for under s 165.

It is important to note that no additional charge can be made or even proposed to be made for complying with these duties, and clearly the ruling in *McNutt v TfL*[5] will apply to this new section.

The duties placed on the driver include carrying any wheelchair or mobility aids in the vehicle, and taking reasonable steps to ensure the passenger is carried safely and reasonably comfortably (s 164A(5)).

Failure to comply with the duties contained in s 164A is a criminal offence with a maximum level 3 fine on summary conviction (s 164A(10)). However there are a number of defences contained in ss164A(11), (12) and (13).

These include:

the driver "could not reasonably have known that the passenger was disabled" (s164A(11));
the wheelchair or mobility aids could not be carried safely in the vehicle or would not be reasonable to carry them in the vehicle (s164A(12)); and
the driver "could not reasonably have known that the passenger required mobility assistance of the type required by the passenger" (s 164A(13)).

The existing s 165 Equality Act is amended by s 1(3) of the 2022 Act to ensure that drivers of designated vehicles also carry non-wheelchair-using disabled people and any mobility aids they may be using.

Section 1(4) of the 2022 Act inserts another new section into the Equality Act, s 165A. This places the driver of a pre-booked hackney carriage, or any private hire vehicle, under a duty to assist the passenger to identify the vehicle when the driver has been made aware that the passenger or somebody accompanying passenger is disabled. This specific requirement is contained in ss 1 6 5 A (5) (a) and (b):

The duties are—

to take such steps as are reasonable to assist the passenger to identify and find the vehicle which has been hired;
not to make, or propose to make, any additional charge for complying with the duty mentioned in paragraph (a).

Moving forward to s 4 of the 2022 Act, this also inserts a new section into the Equality Act, s 167A. This makes it a criminal offence for a private hire operator to refuse to accept a booking, or make any additional charge for the journey, because the passenger is disabled, provided the reason for

5 [2019] LLR 332 Admin Crt.

the refusal or failure to accept the booking is because the passenger was disabled or to prevent the driver having to fulfil any of the duties imposed on the driver.

Again, the penalty on summary conviction is a fine not exceeding level 3 (s 167A(3)), and the only defence available is for the operator to show that it was not reasonable to accept the booking owing to a lack of suitable vehicles (s 167A(4)).

These new provisions should make it less difficult for disabled people to access hackney carriage and private hire services. It is for the drivers and private hire operators to ensure that they are conversant with the new duties: as always, ignorance of the law is no defence. It is well established that disabled people struggle to use hackney carriages and private hire vehicles, even under the existing provisions, whether that is a disability involving the use of a wheelchair, or the use of an assistance dog. It is hoped that these extensions to the Equality Act, and the surrounding publicity, will improve matters for disabled people. However, it remains imperative that people who feel they have been mistreated complain to the relevant licensing authority that licensed the driver and / or private hire operator, and then that those authorities take robust action against those who break the law.

Returning to s 3 of the 2022 Act, this alters s 167 of the Equality Act and makes it a duty (as opposed to the previous power) for licensing authorities to make a list of wheelchair accessible hackney carriages and private hire vehicles that they licence.

This list must be available from 28 June so local authorities who have not already complied with s 167 must ensure that this is in place.

Conclusions

These two pieces of legislation are important contributions to public safety and convenience for disabled people, but they still only amount to minor amendments to an archaic and outdated regulatory regime for hackney carriages and private hire vehicles. They are welcomed, but they fall a long way short of the comprehensive updating and reform that this industry deserves.

James Button
Principal, James Button & Co, Solicitors

SEVs and the PSED

Given the controversial nature of lap-dancing clubs and the local opposition they regularly attract, many thought that the public sector equality duty would offer a conclusive argument against granting SEV licenses. **Jeremy Phillips QC** and **Michael Feeney** beg to differ

In an unreported judicial review against the grant of a sexual entertainment venue (SEV) licence, which was settled by consent in May 2017, Mrs Justice Jefford said: "There is no direct evidence that the defendant [Sheffield City Council] has had due regard to the public sector equality duty (as it is required to do under s 149 of the Equality Act 2010). The decision gives no indication that it has been considered… Further, there is a tenable basis for the claimant's inference that the defendant has wrongly ignored objections based on the potential impact on gender equality, treating them as moral objections and irrelevant."[1]

Despite the relevance of the public sector equality duty (PSED) and considerations of gender equality to SEV licences, there is no other caselaw, guidance or information on how the PSED interacts with SEV licensing. The Home Office Guidance on SEVs briefly discusses the applicant's rights under Article 10 and Article 1, Protocol 1 of the European Convention on Human Rights without mentioning the PSED, and the Home Office's Guidance issued under s 182 of the Licensing Act 2003 references the PSED in two short paragraphs, again without explaining how the PSED might apply in practice.[2]

Given the arguably obvious relevance of the PSED to SEV licensing and the lack of current guidance or information, this article seeks to explore how the PSED might properly interact with SEV licensing. Part I provides an outline of the relevant legislative background for SEV licensing and the PSED. Part II argues that while the PSED might at first blush appear to militate against the grant of *any* SEV licence, in practice the application of the PSED is more complicated. Finally, Part III concludes with suggestions as to how local authorities should approach their duty under the PSED when performing their statutory functions related to SEVs.

Part I: Legislative background

The Local Government (Miscellaneous Provisions) Act 1982

The control of SEVs via licensing was introduced for the first time by s 27 of the Policing and Crime Act 2009, which amended Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 (LG(MP)A) to bring SEVs within the regulatory regime governing "sex establishments".[3] The provisions of Schedule 3 only come into force if local authorities resolve to adopt them and take the steps prescribed.[4] It is believed that most (if not all) local authorities in England and Wales have resolved to adopt the 1982 Act.

In para 2A(1) of Schedule 3, an SEV is defined as "any premises at which relevant entertainment is provided before a live audience for the financial gain of the organiser or the entertainer". Para 2A(2) defines "relevant entertainment" as any live performance or any live display of nudity "which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means)". The definition of SEVs is therefore broad and can include gay clubs, burlesque venues, and "swingers" bars as well as lap-dancing and other similar venues.

A licence for an SEV can be granted for up to one year, and the licence can be subject to conditions.[5] A local authority can also make regulations prescribing standard conditions which apply to all licences granted for sex establishments, unless specified otherwise.[6] Under para 12(3), an application for renewal or grant of an SEV licence can be refused on the following grounds:

> *(a) that the applicant is unsuitable to hold the licence because of a criminal conviction or any other reason;*
>
> *(b) that if the licence were granted the business would be carried on for the benefit of someone who would not have been granted the licence;*
>
> *(c) that the number of sex establishments in the relevant locality is equal to or exceeds the number which the authority considers appropriate; and*

1 *Paterson's Licensing Acts* (130th Edn, 2022), para 1B.20.

2 Home Office's *Revised Guidance issued Under s 182 of the Licensing Act 2003* (2018), paras 14.66-14.67.

3 See the Home Office's Guidance on SEVs (2010) for more background information on SEVs.

4 Section 2(1)-(4), LG(MP)A.

5 Schedule 3, para 8, LG(MP)A.

6 Schedule 3, para 13, (LG(MP)A.

(d) *that the grant or renewal of the licence would be inappropriate having regard to the character of the relevant locality, the use to which any premises in the vicinity are put, or the layout character or condition of the premises in respect of which the application is made.*

Finally, an SEV licence can be revoked on any of the grounds set out above. It should be noted that, importantly, para 12(4) specifies that "nil" may be an appropriate number for the purposes of deciding how many sex establishments are appropriate to the relevant locality.

The Equality Act 2010

The PSED is imposed on public authorities by s 149 of the Equality Act 2010 which, in its material parts, provides as follows:

(1) A public authority must, in the exercise of its functions, have due regard to the need to-

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular to the need to-

(a) tackle prejudice, and

(b) promote understanding.

The main protected characteristics that are of potential relevance for SEVs are sex, gender reassignment and sexual orientation. The Court of Appeal has provided a summary of the legal principles governing the PSED in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [26]:

(1) Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements.

(3) The relevant duty is upon the decision maker personally and the decision maker cannot be taken to know what their officials know.

(4) A decision maker must assess the risk, the extent of any adverse impact, and the ways in which such a risk may be eliminated before the adoption of a proposed course of action and not afterwards.

(5) Quoting from *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), the PSED must "be exercised in substance, with rigour, and with an open mind", and the PSED is a non-delegable, continuing duty.

(6) Quoting Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84]: "General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.".

(7) Officials reporting to the decision maker must not merely tell the decision maker what they want to hear.

(8) Quoting from Elias LJ in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) at [78]: "The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker".

(9) If there is not sufficient information available to fulfil the statutory requirements, then there is a duty to acquire relevant material, which will frequently involve consultation with appropriate groups.

Part II: The PSED in practice

At first, it might seem as if the PSED would militate against

a local authority *ever* granting an SEV licence. Of particular concern, arguably, will be the safety of women both inside and outside of a venue, as well as the potential for SEVs to contribute to the sexual objectification of women, which leads in turn to inequality and violence. If a local authority must have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between men and women, then how, it is often said, can an SEV licence ever be justified?

These are strong arguments, and in many cases they may carry significant weight, especially since as previously noted, the legislation allows local authorities to conclude that it is not appropriate to have any SEVs in a relevant locality. As Karon Monaghan QC put it to the House of Commons Women and Equalities Committee in 2018, SEVs "have an impact on the wider community because they promote the idea that sexual objectification of women and sexual harassment commonly in those environments is lawful and acceptable… How are we [licensing SEVs] in the 21st century? We are not going to get rid of sexual violence if we mandate the sexual objectification of women in licensed venues."[7]

Despite the force of these arguments, the relationship between the PSED and SEV licensing is, we suggest, more complicated than it might at first appear. To start with, many organisations (such as the International Union of Sex Workers) argue that sex workers have a right to work in gainful employment in a safe and properly regulated environment. Licensing, in particular the ability to impose conditions, gives local authorities considerable power to control and regulate SEVs. If SEV licences are not granted then this power will not be exercised, the practical effect of which might be that sex workers are unable to find lawful employment, or are obliged to work in more far more dangerous and unregulated conditions. For example, a study into the nature and prevalence of sex work in the UK commissioned by the Home Office noted that "some erotic dancers identified the revocation of many SEV licences following the Policing and Crime Act 2009, without attendant scrutiny of working conditions, as problematic: 'suddenly [there were] fewer venues to work in, and a surplus of labour. Not enough work to go around creates a race to the bottom in terms of value… The clubs that survived the cull now have a monopoly, and can control working conditions to their own benefit.' (Female Erotic Dancer)".[8] A complete ban on SEVs and subsequent deregulation would create a tension between the supporters of such a measure and those who see sex work as a legitimate and consensual form of entertainment, provided it is made safe for those concerned and properly regulated.

Second, it is necessary to consider those with "protected characteristics" other than women, such as those who have undergone gender reassignment or who are not heterosexual. In recent years, there has been a proliferation of pansexual and polysexual sex clubs. In certain circumstances, refusing a licence for such clubs could possibly amount to discrimination, as doing so might deprive those with such protected characteristics from having access to safe, regulated SEVs that cater to their own sexual preferences. The same regulatory considerations highlighted above for "traditional" SEVs such as lap-dancing clubs also apply, of course, to pansexual or polysexual sex clubs. If there is no safe, regulated environment for such venues, then underground versions of these clubs might become dangerous places to work or frequent.

Therefore, while the PSED is highly relevant to SEV licences, it is not obvious that the application of the PSED in practice will always lead to the same conclusion. Everything depends on the facts and circumstances of each individual case, with the number of sex establishments in the relevant locality and the nature of the SEV proposed being particularly important factors. The arguments of those who oppose SEVs on the grounds of gender equality will often carry great weight, but should not necessarily be determinative. The PSED might even, in certain circumstances, be a factor supporting the granting of an SEV licence.

Part III: Suggestions for local authorities

The fact that the PSED can cut both ways leaves local authorities in a difficult position when considering SEV licence applications and the adoption of SEV policies. This article concludes by offering a few points of advice for how local authorities might discharge the PSED.

First, it is crucial to remember that the PSED does not require a specific outcome, and the duty is to have "due regard" to the three equality objectives set out in s 149(1). *The Equalities and Human Rights Commission (EHRC) Technical Guidance on the PSED* states that "how much regard is 'due' will depend on the circumstances and in particular on the relevance of the aims in the general equality duty to the decision or function in question. The greater the relevance and potential impact, the higher the regard required by the duty."[9]

The emphasis is, therefore, on taking the general equality considerations in s 149(1) seriously and placing them at the heart of decision-making; there is no requirement that

7 House of Commons Women and Equalities Committee, *Sexual Harassment of Women and Girls in Public Places*: *Sixth Report of Session 2017-2019* (2018), para 135.

8 Professor Marianne Hester, Dr Natasha Mulvihill, Dr Andrea Matolcsi, Dr Alba Lanau Sanchez and Sarah-Jane Walker, *The Nature and Prevalence of Prostitution and Sex Work in England and Wales Today* (2019), p 20-21.

9 *The EHRC Technical Guidance on the Public Sector Equality Duty* (February 2021), para 2.20.

equality concerns must be determinative. So long as a local authority has applied its thinking conscientiously and specifically to the equality objectives, then a judicial review challenge against the grant of an SEV licence would have to surmount the high hurdle of showing that the local authority had acted irrationally.

Second, local authorities must consider what *evidence* they would have to show that they have properly discharged the PSED requirement. If a local authority does not have sufficient information to consider the equality objectives, then they are under a duty to acquire that information.[10] There is no requirement to have, in every instance, hard statistical data, and a public body can also use external sources, such as information available from the EHRC and local or national representative groups.[11] *The EHRC Essential Guidance on the PSED* also states that "engagement should be proportionate to the size and resources of your organization, as well as to the significance of the policy to the aims of the general duty. It may be particularly important where you need to build or improve your evidence base."[12]

For SEVs, local authorities should consider consulting as early as possible with local stakeholders including sexual violence specialists, women's groups and (where relevant) LGBTQ+ groups.[13] Local authorities should also seek to obtain data on sexual crime statistics in the relevant locality. Where a local authority has adopted an SEV policy, it might be possible to rely in part on the data that informed the SEV policy. When considering an individual application, local authorities should, however, be wary of relying exclusively on an SEV policy to say that the PSED has been discharged; in the planning context, an argument that the PSED had been discharged when granting planning permission because the relevant planning policy had itself been designed to address issues of equality was unsuccessful.[14] Although the existence of guidelines and criteria for determining individual applications can help demonstrate that the PSED has been discharged,[15] the potential impact of each individual application needs to be assessed on its own merits and within its own context.

Finally, conditions on SEV licences can be a vital way of discharging the PSED, as the ability of local authorities to impose conditions is one of the main benefits of regulation. In October 2018, the House of Commons Women and Equalities Committee published a report on the sexual harassment of women and girls in public places which recommended that local authorities should "consider adopting stringent zero tolerance conditions for any existing sexual entertainment venues. These conditions should make it clear that they will withdraw licenses following evidence of harm to women in and around sexual entertainment venues and following evidence of any failure to follow conditions designed to keep women safe within venues."[16] The PSED is a continuing duty, and local authorities must monitor the impact of any SEV licence to ensure that it is not leading to an increase in discrimination or harassment. The EHRC Technical Guidance on the PSED also advises that "a body subject to the duty should remain alert to new evidence suggesting that discrimination or other prohibited conduct is, or could be, occurring and take appropriate action to prevent this happening."[17] Conditions aimed at promoting the safety of women through careful monitoring and enforcement are therefore an effective way of discharging the PSED.

Conclusion

This article has provided some initial observations on the interaction between the PSED and SEV licensing. Our views must, however, remain somewhat speculative until published guidance or caselaw explains how the PSED should be applied in the SEV licensing context. All that can be said with confidence at present is that local authorities are under a duty to consider the PSED when performing their statutory duties in relation to SEV licensing - and that the application of the PSED is perhaps far more nuanced than some commentators have suggested.

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10 *R (Rahman) v Birmingham City Council* [2011] EWHC 944 at [35]. See also *R (on the application of KE and Ors) v Bristol* [2018] EWHC 2103 (Admin) at [105]: "In my view this is a case where the defendant was under a duty to acquire further information, including through consultation, in order to comply with the PSED, yet did not do so."

11 *The EHRC Technical Guidance on the Public Sector Equality Duty* (February 2021), para 5.19.

12 *The EHRC Essential Guide to the Public Sector Equality Duty* (March 2022), page 20.

13 See the House of Commons Women and Equalities Committee, *Sexual Harassment of Women and Girls in Public Places: Sixth Report of Session 2017-2019* (2018), para 142.

14 *R (on the application of Buckley (on behalf of Foxhill Resident's Association) v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin) at [33]: "It is not, therefore, possible to regard the fact that the application for outline planning permission complied with Policy H8 in the defendant's development plan as automatically involving compliance with the defendant's duties under s 149 of the 2010 Act."

15 *The EHRC Technical Guidance on the Public Sector Equality Duty* (February 2021), paras 5.46-5.48.

16 House of Commons Women and Equalities Committee, *Sexual Harassment of Women and Girls in Public Places: Sixth Report of Session 2017-2019* (2018), para 142.

17 *The EHRC Technical Guidance on the Public Sector Equality Duty* (February 2021), para 3.6.

Pavement licences and noise nuisance - new battlelines emerge

Will fresh proposals to the pavement regime help curb noise nuisance experienced by local residents since the pandemic? **Richard Brown** considers the latest developments

The worst kept secret in licensing is out. The Queen's Speech (or to give its official title, Her Majesty's Most Gracious Speech) was delivered on 10 May 2022 not by the Queen herself but by HRH The Prince of Wales, Prince Charles as a 'counsellor of state'. The Levelling Up and Regeneration Bill 2022 (LURB 2022) was flagged up in the Queen's Speech as follows: "To drive local growth, empowering local leaders to regenerate their areas, and ensuring everyone can share in the United Kingdom's success."[1] This seems to be old buzzwords reheated – as Alan Partridge said of the Mini Metro "they've rebadged it you fool!".

LURB 2022 was published on the following day, 11 May 2022. It sets out concrete plans to make the pavement licensing regime introduced by Business and Planning Act 2020[2] (BPA 2020) permanent by amending BPA 2020.

It came shortly after the Local Government Association (LGA) had confirmed its support for a permanent locally-led regime but called for changes to the regime to reflect that the country is no longer in a national emergency, and to ensure local communities are protected from adverse effects, specifically:

- Better enforcement powers to take actions where businesses are flouting the rules, for example by blocking pavements.
- Ensure councils are able to set fees at levels that cover administrative costs.
- A longer period of time for comments from local residents.
- A longer period of time for local authorities to determine applications.[3]

Although the "headline" news is simply that the pavement licensing regime is to be made permanent, there are important changes of which applicants, local authorities and concerned residents will need to be mindful. I set out the relevant changes below.

To recap, BPA 2020 constitutes a package of emergency measures put together as a result of the Covid-19 pandemic. It included a low cost, light touch, fast track pavement licensing regime for outdoor seating for the stated and specific purpose of helping to mitigate lost floor space due to social distancing measures for a temporary period until 30 September 2021. As the pandemic dragged on, the pavement licence provisions were extended for a further year, to 30 September 2022. Pavement licences became a vital lifeline for many hospitality venues during subsequent lockdown restrictions when customers were not permitted inside premises. Needless to say, neither social distancing measures nor restrictions on serving inside remain although the ramifications of losses incurred during the pandemic do.

BPA 2020 also deregulated off-sales of alcohol such that the vast majority of licensed premises could sell alcohol until 11pm for consumption off the premises in an open container for consumption on the street or at home for the same temporary period.[4] It is not proposed that this should be made permanent, which has implications for operators seeking to utilise the permanent pavement licence provisions and for residents who wish to effectively express concerns about noise and other nuisance from pavement licences.

LURB 2022

The pavement licence provisions of LURB 2022 are set out at clause 184 in Part 10, and schedule 17.[5] As with BPA 2020 as enacted, planning permission is deemed granted.[6] The nuance now is that the "tables and chairs" licence regime in s 115E Highways Act 1980 which continued to run alongside "pavement licences" is effectively replaced.[7]

1 https://www.gov.uk/government/speeches/queens-speech-2022.

2 See s 1-10.

3 https://www.local.gov.uk/about/news/embrace-summer-spirit-permanent-outdoor-seating-regime-works-everyone-says-councils.

4 See s 11.

5 https://bills.parliament.uk/bills/3155.

6 Section 7(2) BPA 2020.

7 See *LURB 2022* Schedule 17 para 10 and para 11(3), and below.

Given that we are no longer in a national emergency, the original stated purpose of the legislation no longer pertains. The Government has squared this circle in its press release of 7 May 2022 trumpeting its forthcoming legislative programme:

> *During the pandemic, restaurants, pubs and bars were granted temporary powers to serve guests on pavements, helping to mitigate lost floorspace for tables due to social distancing requirements. Through new legislation, these powers will be made permanent to expand capacity for businesses to boost local economies and inject life into local communities.*[8]

Clause 184 states simply that:

Schedule 17 makes—

(a) provision to make the regime for pavement licences under sections 1 to 9 of the Business and Planning Act 2020 permanent, and

(b) other provision relating to pavement licences.

Schedule 17 fleshes out the proposal.

The previous extension of the pavement licensing regime had been achieved by regulations issued under s 10(2) BPA 2020, which conferred this power on the Secretary of State if "reasonable to do so to mitigate an effect of coronavirus".

While it may have been possible to shoehorn a further extension into this existing power, it could not have made it permanent. Making pavement licence provisions permanent will therefore be achieved by the simple expedient of omitting s 10 BPA 2020 entirely so that there is no expiry date for the provisions.

Many of the other changes echo the calls for changes to the regime made by the LGA. Whether they go far enough to protect residents under a permanent regime will become clear in due course.

The fee

Paragraph 3 of Schedule 17 increases the maximum licence fee from £100 (s2(1)(c) BPA 2020) to £350 for "a person who already holds a pavement licence", if the application is "in respect of the premises to which that existing licence relates (whether or not it is a renewal application)", and to £500, in any other case. There is a provision for the Secretary of state to "substitute" a different amount, ie an increase or decrease.

8 https://www.gov.uk/government/news/prime-minister-to-give-local-leaders-power-to-breathe-new-life-into-high-streets.

Renewals

Paragraph 5 sets out the procedure for a renewal of a pavement licence, a concept not included in BPA 2020 as enacted, by amending s 2 as follows:

> *5(2) - insert "(2A) If the application is a renewal application— (a) subsection (2) does not apply, but (b) the application must contain or be accompanied by such information or material as the local authority may require."*
>
> *(3) After subsection (9) insert - "(10) For the purposes of this section, an application is a renewal application if— (a) it is made by a person who already holds a pavement licence, (b) it is in respect of the premises to which the existing licence relates, and (c) it is for a licence to begin on the expiry of the existing licence and on the same terms."*

In other words, s 2A exempts an applicant for a renewal from complying with the requirements of s 2 (a)-(e) which require an applicant for a pavement licence to *inter alia* specify the premises, the part of the relevant highway, the days of the week on which, and the times of day between which, it is proposed to put furniture on the highway, and the type of furniture to which the application relates, but does require an applicant to comply with s 2(f), ie that the application "must contain or be accompanied by such other information or material as the local authority may require."It is hard to envisage that this information or material will be substantively different from (a)-(e).

Consultation

Paragraph 6 increases the "public consultation period" from seven days beginning with the day after that on which the application is made, to 14 days.

Determination

Likewise, para 7 increases the "determination period" from seven days beginning with the first day after the public consultation period, to 14 days.

Duration

Section 4 BPA 2020 limits the duration of a pavement licence to not less than three months and not beyond 30 September 2022 for applications which were determined. For applications which are deemed granted (ie because the authority did not make a determination within the 7 day period for doing so) the duration is a year or until 30 September 2022, whichever is sooner.

Paragraph 8 amends these provisions such that a pavement licence may be granted by a local authority "for such period

as the authority may specify in the licence".

Authorities will wish to be careful to ensure that they determine applications within the relevant time period, as the duration of a licence which is deemed granted will be two years.

Enforcement of licences

The enforcement powers of local authorities under BPA 2020 are wide and comprehensive.

Section 6 BPA 2020 sets out the enforcement and revocation powers. If the local authority "considers that" the licence holder has breached any condition of the licence, it may revoke the licence, or serve a notice on the licence holder requiring the taking of such steps to remedy the breach as are specified in the notice within such time as is so specified. It may then revoke the licence if the notice is not complied with.

Under s 3(a) and (b) BPA 2020, a local authority may also revoke a licence if it considers that the highway has become unsuitable, or if the highway is being obstructed, or if there is a risk to public health or safety, or if anti-social behaviour of public nuisance is or risks being caused.

Note that the discretion of the local authority is extremely wide. If in its opinion any condition has been breached even once, or there is a "risk" of public nuisance it may revoke the licence.

Paragraph 9 of Schedule 17 moderates this position slightly, adding a power for the local authority to amend the licence, with the curious proviso that this must be "with the consent of the licence-holder", although there is no such option to amend the licence if a condition is being breached (except for the "no obstruction" condition). The power to unilaterally revoke a licence remains as set out above.

Paragraph 13 adds a specific new power for a local authority to issue a notice requiring removal of unauthorised street furniture and, if the notice is not complied with, to remove and store the furniture, require payment of its costs of doing so and, after a period of three months, dispose of the furniture and retain any proceeds of sale if the costs have not been paid and the furniture recovered.

It would seem that this clause would apply both to wholly unlicensed furniture – that is, where no pavement licence exists at all – and to furniture which goes beyond the scope of a pavement licence, eg more tables and chairs than permitted under the licence.

Effect of licences

Under s 7 BPA 2020 the pavement licensing regime operates alongside the "tables and chairs" licensing regime in part 7A Highways Act 1980 (HA 1980). That is, an applicant could choose whether to apply for one permission or the other. Of course, give the reduced fee and short time frame, the pavement licensing regime would be favoured unless there was some good reason why it could not be used.

In contrast, para 10 of Schedule 17 amends s 7 BPA 2020 so that the pavement licensing regime will now replace the relevant provisions of s 115E HA 1980.

Section 7(4)-(6) and (8)-(10) BPA 2020 afford primacy to the temporary pavement licensing regime while retaining the ability to apply under s 115E HA 1980.

These provisions will be omitted. Section 115E HA 1980 will be amended to add a new sub-section 5:

> *(5) A council may not under this section grant a person permission to do anything which is capable of being authorised by a pavement licence under section 1 of the Business and Planning Act 2020.*

Analysis

The fee increases speak for themselves and while some local authorities may be disappointed that they cannot set fees at a local level to ensure full costs recovery, at least there is an increase from £100.

Absent that, it seems to me that local authorities will be afforded more discretion as to how they implement the regime.

They will have a little more breathing space with the 14-day deadline for determinations. Nevertheless, local authorities will need to ensure that they publish a comprehensive list of standard conditions under s 5(2) BPA 2020 given that not only does the previous provision regarding deemed grants apply (under s 5(3) , they are automatically subject to the standard conditions under s 5(2)) but the length of a deemed grant is two years.

There will be more discretion to specify the duration of a licence. It may be noted that the fee remains the same regardless of the duration of the licence.

Concerned residents will no doubt be relieved that the consultation period has been extended to 14 days which, although still half of a LA03 consultation period, is double the seven-day consultation period as enacted. There is no right to a hearing, though, with decisions continuing to be made

at officer level having taken account of any representations submitted.[9] The ability to make effective representations is partly dependent on sufficient information being included in an application, which as noted above for renewals is within the discretion of the local authority rather than prescribed by statute.

One area which residents concerned by the extent of and cumulative impact of an increase in outside activity may find comfort is conditions. Section 5 BPA 2020 (conditions) will not be amended by LURB 2022 as presented.

There are in effect two mandatory conditions – a "no obstruction" condition and a "smoke-free seating" condition. Outwith that, the local authority's discretion is about as wide as it could be. The local authority can also publish what are in effect standard conditions which it will apply to every licence.[10] It is important to do this rather than rely on doing so on a case-by-case basis due to i) the volume if applications there will no doubt be; and ii) that if an application is deemed granted (ie not determined) it will automatically be subject to the standard conditions.

Local authorities can impose such conditions as they consider "reasonable", whether by way of standard condition or not.[11] This seems to me to be a lower threshold than the Licensing Act 2003 test of "appropriate" (which itself is arguably a lower threshold than the previous test of "necessity", although that is an entire debate in itself). It is not difficult to imagine how a local authority may deem it "reasonable" to frame its standard conditions (or bespoke conditions) in a stricter fashion than during a pandemic, particularly in residential areas and / or where there is a high volume of licences.

It remains to be seen how and to what extent the really quite remarkably wide enforcement powers are used. It may be that local authorities loathe to use such powers during a pandemic may be more willing to do so under a permanent regime, particularly if the increased fee level funds enforcement activities.

Concerns have been expressed to me about the individual pavement licences under residential accommodation and intensity of use of pavement licences in busy areas such as Soho where residents live cheek-by-jowl with a dense concentration of hospitality premises. A fundamental part of the problem has been the interaction of the pavement licensing regime with the deregulation of off-sales in s 11 BPA 2020, which tied a local authority's hands to some extent.

If s 11 BPA 2020 is not made permanent, local authorities will have more flexibility in how they require external areas to operate in terms of, eg i) hours of operation; and ii) conditions of operation, to manage issues which have occurred under the pavement licensing regime while retaining the benefits.

There should also be more scope for local residents to express concerns (or, of course, support) where it is necessary for an applicant to also apply to vary their premises licence to either permit off- sales, or to remove conditions restricting off-sales to, eg, sealed containers, or to increase external seating areas.

It is also important to remember that the pavement licensing regime in BPA 2020 worked in tandem with both the off-sales deregulation in s 11 *and* initiatives from local authorities to increase opportunities to utilise outdoor spaces. In town centres with narrow pavements, the pavement licensing regime will be of limited assistance to the premises situated there without measures taken to pedestrianise roads / suspend parking bays etc either all the time or at certain times, or set aside areas for external licensed activity, or allow semi-permanent structures / heaters etc to prolong the months where outdoor drinking and dining is comfortable and feasible.

By the same token, disturbance to residents will be limited by a return to the pre-2020 *status quo* but perhaps extended and made permanent by measures such as pedestrianisation being made permanent. Therein lies the challenge of maintaining a balance. It should also not be overlooked that many premises do not have space they can utilise for external activity. They may be forgiven for thinking that the "levelling up" rhetoric rings hollow.

Each local authority will have its own competing interests and circumstances with which to wrestle. External drinking and dining has proven popular, but the challenges of implementing a permanent regime, particularly in an era where more and more people require quiet enjoyment of their homes during the day-time due to working from home, will exercise the minds of the hospitality industry, local authorities and concerned residents this summer with the 30 September 2022 deadline in mind.

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9 Section 3(2)(a) BPA 2020.

10 Section 5(2) BPA 2020.

11 Section 5(1) BPA 2020.

SEVs, alcohol advertisements and new licensing boards

A broad overview of developments across different topics in Scotland by **Stephen McGowan** takes in SEV licensing, potential new restrictions on advertising alcohol and the changing of the guard on numerous licensing boards

The last couple of months has seen a flurry of activity as local authorities in Scotland finally get round to deciding their stance on SEV licences. The vast majority of local authorities have voted to have a nil-cap position, essentially preserving the status quo in their area that no such premises exist. There are in fact only four authorities in Scotland where recognised SEV venues exist: Edinburgh, Glasgow, Aberdeen and Inverness. Each of these has taken a very different approach to its own policy, some creating significant controversy.

Glasgow has agreed that a nil-cap policy is the way forward for them; however, they have also agreed that grandfather rights will apply for the existing premises. So as long as they choose to apply, the nil-cap will not be in play when their applications are determined. I anticipate the application window will begin later this year, probably after the council recess in July.

Aberdeen shot out of the traps early and announced a cap of five, based on the number of premises it believed existed. It has already started and finished its window for applications in a blink-and-you'll-miss-it approach. I think there had been some suggestion that, by going so early, they might have been able to determine the applications prior to the May 2022 elections but that hasn't happened. So, we can expect Aberdeen Licensing Committee to have a hearing to determine the applications perhaps in the next few months. These will be the first to be heard in Scotland.

Highland Council has taken the most relaxed approach. It only has one recognised SEV venue, in Inverness, but it has not imposed a cap on the number of licences.

Edinburgh's decision was the most controversial. As the city perhaps most commonly associated with a liberal approach to sex venues, it was a significant surprise to see that the committee agreed a nil- cap policy – and on top of that, with no grandfather rights akin to Glasgow. The decision was met with uproar by the clubs themselves as well as unions representing the dancers. Chatter of a judicial review persists so watch this space.

New restrictions on alcohol advertising?

At a meeting of the Health, Social Care and Sport Committee of the Scottish Parliament on 3 May 2022, the Public Health Minister Maree Todd MSP gave evidence and was questioned on a broad topic entitled "Tackling Alcohol Harms".

The Minister made a number of broad points about what she sees as the negative impact of alcohol advertising on children and young people. The following passage from the Minister summarises the general submissions made:

> *We know that there is a direct link between exposure to alcohol marketing and children and young people starting to drink alcohol. That can increase the likelihood that they will drink in ways that can be risky or harmful in later life. I find that deeply troubling and I am determined to cut down on the volume of alcohol advertising and promotion that young people see, and to reduce the appeal that alcohol has to them. That is why we are planning and consulting on a range of new measures to restrict alcohol advertising and promotion in Scotland in the autumn.*

She later clarified that these new measures may not necessarily be *licensing* measures, so we shall have to see what comes of this. There is a lot of discussion around minimum pricing and the impact of the pandemic on consumption patterns. There is, for me, a disconnect when the Minister makes a number of comments throughout this session about pursuing the classic "whole population" approach model; but at the same time also leans on evidence that suggests that alcohol consumption has risen amongst those who are the most harmful drinkers. Those same Scottish studies, a number of which have been released by Drinkaware and others, also suggest that the moderate majority have not really changed their consumption levels, and those who drink little are now drinking less or none at all. These studies appear to suggest that the pandemic has therefore had a polarising effect at the opposite ends of that spectrum.

It may be suggested that pursuing a policy where alcohol is viewed as something which should be hidden away is a moralistic one; and for licensing practitioners of a certain vintage, it will chime with the "frosted glass" approach in betting law from the 1960s, to make premises as unwelcoming as possible. These issues were also well-ventilated in the Clayson Commission which led to the Licensing (Scotland) Act 1976, which was moved to propose a "Children's Certificate" in order to encourage family-friendly spaces where alcohol could be consumed.

What is of greater interest, and worry, for licensing practitioners is some of the later references to the licensing system made by MSPs suggest a lack of finesse if not comprehension. At one point, Sandesh Gulhane MSP says:

> *A lot of councils feel that, when they are presented with applications for alcohol licences, they cannot say no because of the worry of going to court and losing. I know that Glasgow City Council is doing particularly well in trying to look at the issue, but is there anything that the Scottish Government can do to strengthen the hand of councils around the country so that they can say no to people who present for licences?*

It may perhaps be a little unkind to point out the common error that the council is the alcohol licensing authority (it is not) but it is one repeated by the Minister; and as someone who appears in front of all the boards in Scotland, the portrait of them making decisions as they quiver in fear about losing an appeal is not one I recognise, and I have the bruises to prove it.

The issue of home deliveries was also raised in this debate. This has been an area of keen focus for many licensing boards following the pandemic, with many imposing additional conditions, or seeking details of licence holder's policies on how alcohol is delivered responsibly. The Minister said this is under review but noted the reality that many online businesses are not regulated in Scotland. However, a policy officer said that this would be looked at as part of the wider review to be published later in the year.

Five-year licensing policy statements – and a nod to *Aldi v Dundee Licensing Board*

Following the May 2022 local elections, new licensing boards and committees are being appointed across the country. Under the Licensing (Scotland) Act 2005 the five-year statements of licensing policy are, in general, supposed to broadly mirror the local election calendar so that a new licensing board is not hamstrung by the policy of its predecessor. We will therefore start to see consultations taking place as the new boards look to gather evidence to inform them as they move their own policies forward. The timelines on these will vary wildly; for example, the Inverclyde Licensing board consultation has already been and gone, closing at the end of March 2022. One thing that the new boards will no doubt be mindful of is the relevance of minimum unit pricing and how that has affected alcohol harms: a recent appeal decision from the end of March 2022 for Aldi in the Dundee Licensing Board jurisdiction (as yet unreported) has confirmed that the absence of this data in the formulation of the policy undermined the lawfulness of an overprovision statement. This meant that a refusal of a new off-sale licence was unlawful, and the sheriff has remitted the case back for reconsideration.

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Cross-border hiring: achieving a measure of local control

The issue

The Courts have said that *the hallmark of the licensing regulatory regime is localism*,[1] and that *that the authorities responsible for granting licences should have the authority to exercise full control* over *all vehicles and drivers being operated … within its area*.[2] The cross-border activities of some private hire operators, however, may be thought to drive a coach and horses – or, rather, a PHV – through that principle. It is not uncommon for vehicles and drivers to be licensed by authorities far removed from where they fulfil PHV bookings, self-evidently undermining local licensing control.

The legality of what is sometimes called 'cross-border hiring' is long established. Private hire drivers licensed by any local authority in the country may lawfully fulfil bookings for any journey provided the operator taking the booking, the driver and the vehicle are all licensed by the same authority: *Dittah v Birmingham City Council* [1993] RTR 356. An operator *…can use such vehicles and drivers for journeys which have ultimately no connection with the area in which they are licensed*: *Per* Latham LJ in *Shanks v North Tyneside BC* [2001] EWHC (Admin) 533.

It is to be expected that the local licensing requirements of one licensing authority may not always match those of another; and however much an authority may value '*full local licensing control*', the loss of it is an unavoidable consequence of lawful cross-border hiring. It is now widely (if not universally) accepted that insofar as greater local control ***is*** desirable it will require primary legislation to enable it.[3]

Licence conditions: a partial solution?

Section 55(3) (licensing of operators of private hire vehicles) of the Local Government (Miscellaneous Provisions) Act 1976 provides that a licensing authority *may attach to the grant of a licence under this section such conditions as they may consider reasonably necessary*. That broad power is subject not only to the qualification that it must be exercised reasonably but also that it should not be used to frustrate the policy and objects of the enabling Act.[4]

In *R v Knowlsey Metropolitan Borough Council* [2018] EWHC 757 (Admin) [55], Kerr said: [*I]n principle, a condition on a licence could be imposed which, if otherwise lawful, would require a fit and proper person who is a licence holder to abide by whatever restrictions are contained within the condition that are considered reasonably necessary to meet any perceived erosion of localism in the governance of PHV licensing*.

A recent appeal in the York relied heavily on that *obiter* observation.

Mohammed Iqbal v City of York Council

Mr Iqbal is a long-established PHV operator. He holds licences in York and in Wolverhampton. When, as a York operator, he began sub-contracting bookings to himself as a Wolverhampton operator, and using Wolverhampton-licensed drivers to fulfil bookings in York, it was found that some of those drivers had failed the York Knowledge and Safeguarding Test and accordingly been refused York driver's licences, only obtaining their Wolverhampton licences subsequently. The initial *impasse* between the Council's understandable concerns, and the undoubted lawfulness of Mr. Iqbal's cross-border operation was resolved by pragmatic agreement, and by attaching conditions on Mr. Iqbal's (York) operating licence. Material conditions included –

i. Not to use any driver licensed by the City of Wolverhampton ("Wolverhampton licensed drivers") onto the [York Cars] platform who is known to have taken and failed the York Knowledge and Safeguarding Test within the previous 3 years, unless the driver has subsequently passed the test.

ii. To require that before fulfilling a sub-contracted booking from York Cars, each Wolverhampton-licensed driver must complete topographical training, namely 2-3 hours of in-house training consisting of classroom or in-car training, including the York Pedestrian Zone, city centre roads and routes, and important venues such as hospitals, the railway station, tourist attractions, etc.

iii. To require that before fulfilling a sub-contracted booking from York Cars, each Wolverhampton-licensed driver must take and pass a driving

1 *Blue Line Taxis v Newcastle upon Tyne City Council* [2012] EWHC 2599 (Admin)

2 *Shanks v North Tyneside BC* [2001] LLR 706

3 See, for example, the decision of the Chief Magistrate in *Uber London Limited v Transport for London* (2018).

4 *Padfield v Minister of Agriculture, Fisheries and Food* [1968]UKHL 1.

assessment administered by a DVSA accredited assessor, such as The Blue Lamp Trust, Green Penny or any such other organisation as may be authorised by or agreed with the City of York Council to undertake the said driving assessment.

The judge hearing the appeal congratulated the parties for arriving at a sensible compromise. Whether such conditions may lawfully be imposed on an operator's licence without agreement, however, is another matter. Kerr J's observation indicates that they might be, all other things being equal – but we would predict a turbulent ride through the courts if there were resistance from operators.

Gerald Gouriet QC
Barrister, Francis Taylor Building

Leo Charalambides
Barrister, Francis Taylor Building

SEVs deserve a fairer hearing

Sexual entertainment venues should not be discriminated against on the grounds they lead to violence against women, argues **Silvana Kill**

On 8 March 2021 Bristol City Council's licensing committee held a meeting to debate the future of the city's sexual entertainment venues (SEVs) at which the majority voted in favour to move the proposed nil-cap policy to a 12-week public consultation. The concern from the industry community is that the two remaining SEV venues, Urban Tiger and Central Chambers, both family-owned businesses and both run by females, would be unable to renew their licences, effectively closing them permanently once their current licences expire; this despite being in good standing with Avon and Somerset Police, Bristol Nightlife and the British Association of Restaurants, Bars, and Independent Establishments (BARBIE).

The current SEV licensing policy was introduced in Bristol in 2011. Licences, which are renewed annually, set out strict CCTV and security regulations, and are required in addition to the other licences and health and safety requirements necessary to run a hospitality and live entertainment venue. Each SEV venue is subject to a specific set of conditions that it must adhere to in order to retain its licence.

One of the main arguments presented for the nil-cap is that SEVs increase the rate of violence against women and girls (VAWG) in their surrounding areas. Statistics collected from Swansea, Chester, and Exeter where nil-caps have been implemented demonstrate that the closure of SEV venues has had no impact whatsoever on reducing VAWG; to the contrary, rates of sexual assault increased in the years following the implementation of nil-caps.

By law, the local authority must accept and consider all SEV applications, whether or not there is a cap on the number of such premises in a locality. The locality cannot be the entire administrative area of a local authority; it is typically the area determined at the time an application is considered and may be quite a small area depending on the circumstances of an application.

Due regard for the protection of performers, patrons and the public ought to be at the heart of decision making. Apart from what is commonly understood as the public interest, SEVs require a consideration of the wider impacts on equalities and ought to be considered as part of the Public Sector Equality Duty (PSED), including worker's rights. Our concerns are therefore more focused on the application of the policy rather than the policy itself.

In Scotland on 30 March members of Edinburgh's regulatory committee voted for a similar nil-cap policy to that of Bristol. This policy may affect current businesses in some parts, exposing them to risk of closure simply because they are reclassified as a sexual entertainment venue.

The Night Time Industries Association (NTIA) believes that the expression and entertainment of sex and sexuality has an important role to play within a vibrant, diverse, and inclusive night-time economy. Local authorities are tasked with ensuring that this is achieved by properly informed decision making on a case by case basis. The Equalities Impact Assessment is a key tool towards ensuring that the decision makers are properly informed.

SEVs are safe working environments and have better regulation in place than most regular venues and businesses.

We need to see the correct PSED and Equality Impact Assessments with respect to all genders, sexualities, and other protected characteristics in order to inform the policy, and in line with any new or renewal licensing applications brought forward. Furthermore, robust, and transparent evidence must be presented on the increased rate of crime including violence against women and girls with a fair comparison with other day and night-time businesses in surrounding areas provided as part of the decision-making process. A fair evaluation of the potential increase in risk to violence against women and girls as well as safeguarding our LGBTQ+ communities following the closure of SEV venues must also be included as part of a full and balanced impact assessment.

The NTIA cannot provide support for or against the vote on a specific nil cap policy, as under UK law the policy itself does not place current businesses at risk, nor does it prevent new applications being considered. We do, however, work hard to ensure the correct approach to the application of the policy is lawful, and considers the appropriate safeguarding policies and equal rights for businesses, SEV workers and customers within their communities. We will support any business which is subject to restrictions or challenges on the basis of unlawful or discriminative application of any policy.

Silvana Kill
Director of Operations, Night Time Industries Association (NTIA)

Institute of Licensing News

March 2020 was the last time the *Journal* pages were prepared without reference to lockdown rules or restrictions as a result of Covid-19, and only then because the pages were written before the implementation of the first, unexpected and unforeseen lockdown in March which signalled the start of more than two years of varying restrictions on our lives and businesses. More than two years later, in May 2022, the last of the Covid restrictions were finally brought to an end in the UK.

"Business as usual" though is far from normal when compared with pre-Covid times. The hospitality, events and transport industries, and many others, remain in a fragile state of post-Covid recovery, with yet more hurdles ahead.

Businesses, councils and families all now face the additional challenges of the cost of living crisis driven by surging energy and fuel prices, increases in national insurance and council tax, inflation reaching 9.10% at the time of writing, and prices of food and household goods increasing exponentially. Reduced VAT rates for hospitality have ended, and local councils are warning of disastrous cuts to local services. The Local Government Authority has estimated that inflation, energy costs and projected increases to the national living wage will add £2.4 billion in extra cost pressures to council budgets this year alone, rising to £3.6 billion in 2024 / 25.[1]

So, the challenges are set to continue for everyone. One thing most of us agree on, though, is that working together is the best possible means of success and in some cases of business survival. Businesses will need to diversify, and licensing and planning services can and should be enablers of good diversification. A new report from UKHospitality, *Level up hospitality – level up society*,[2] highlights how the sector is uniquely positioned to deliver growth and opportunity across the country and play its part in delivering the Government's and society's priorities, by generating jobs and economic growth.

News from the Board

It has been a pleasure to welcome Laura Driscoll and Stewart Broome to the Board of Directors / Trustees following their elections as both Regional Director and Chairman to the Home Counties and Eastern regions respectively.

In December 2021, Clare Bradley stepped back from her role within the Home Counties region. Clare had been Regional Director since 2017 and had worked hard for the region and with excellent contributions as a Board member and Director. Our grateful thanks to Clare for her work and support to the IoL.

Myles Bebbington is one of our longest serving Board members, having originally started when he was elected as Chair of the Eastern region in 2003. Myles has stepped down from the region but has agreed to stay on the Board as a co-opted director for a further 12 months to ensure a smooth handover of directorship of our trading subsidiary company, and we are grateful for his continued support.

Our Board and regional officers are critical to the Institute of Licensing, and we are grateful to each and every person on the Board and our regional committees throughout the UK. And it was a pleasure to host a regional officer training day in Nottingham on 14 June, giving us a much-needed opportunity to bring our regional officers together to share information and discuss ideas and experiences across the region.

Sean Williams

We were incredibly sad to hear recently that former South West Regional Chair and Board Director Sean Williams has passed away following a short illness. Sean chaired the South West Region from 2009 until 2012 while still serving as an Inspector for Avon & Somerset Police. Since his retirement from the force, Sean had established Blue Owl Events, and was a well-respected consultant for licensing with a focus on outdoor events. He had developed the IoL's Public Safety at Events training course, which had been on hold throughout the pandemic, and was looking forward to delivering the course in May 2022 but was unable to do so because of his illness. Sean was a fantastic licensing practitioner and a good friend to the IoL and will be very sadly missed.

Meetings, Training and Events

Summer Training Conference 2022

We were delighted to visit Nottingham in June for our Summer Training Conference, which took place at the Crowne Plaza Hotel. We enjoyed a fantastic line up of speakers, who covered protective security, the Protect Duty, gambling, appeals and taxis. Positive feedback from delegates has been exceptional, and it was lovely to be back in the room seeing people face-to-face again.

1 https://www.local.gov.uk/about/news/inflation-and-national-living-wage-pressures-add-ps36-billion-extra-costs-council

2 https://www.instituteoflicensing.org/news/ukhospitality-releases-levelling-up-report/

We look forward to next year when we hope that the Summer Training Conference will be hosted by our Welsh region in Cardiff. The intention is that this event will move from region to region each year now, in the way that the November conference used to, with our regions hosting and chairing each time and giving us the opportunity to hear from local leaders and initiatives.

27 September - Large Events Conference

We have more face-to-face opportunities coming up, including our Large Events Conference which we will host at the Manchester Arena on 27 September. There is a superb line up of speakers in a fantastic venue, and the location itself serves to remind us, poignantly and forcefully, of the need for good regulation, thorough risk assessment and awareness of the potential hostile reconnaissance and targeting of venues.

12 October - Taxi Conference

Birmingham will see the second of our Taxi Conferences, on 12 October. Join us at Novotel Birmingham Centre to hear from our expert speakers, who will be looking at the current issues (information sharing, etc) and likely impact of changes ahead including the Levelling Up agenda and plans for reform of legislation in Wales.

16 - 18 November - National Training Conference

Planning for the NTC2022 is well underway and we are looking forward to returning to Stratford-upon-Avon for our signature three-day residential training conference. The 2021 NTC was a delight to host and was lucky to fall between various lockdown / guidance restrictions. There was a tangible sense of relief from those present that they were finally back with colleagues from all over the country, and it really was a joy to welcome delegates, both those new to the event and our regular attendees, who came together to learn, discuss and debate all areas of licensing.

Consultations

DEFRA Zoo Standards

The IoL responded to the DEFRA consultation on proposed new zoo standards, advising that on the whole we consider the new proposed standards to be a big improvement on the existing standards, and believe they will improve regulation and, in turn, animal welfare. We noted the need for a reasonable transition period to enable information to be disseminated and for regulators to update their procedures and processes and to undertake training where required. Similarly, a transition period will allow zoos to make necessary adjustments to comply with the new standards.

We requested an estimated timescale for implementation at the earliest opportunity and noted that IoL would be happy to work with DEFRA to cascade information across our local authority networks and to raise awareness generally of the incoming requirements.

DfT Best Practice Guidance *Consultation*

The DfT consultation on the long-awaited *Best Practice Guidance* has recently closed, and the IoL has made a response following a survey of our members and with assistance from our Taxi Consultation Panel members. The key areas of the response included:

Point-based systems - generally (but not always) supported. Where a points system is in place, retention of historic information for a reasonable period (from imposition date) will assist in ensuring that the system actively encourages good behaviour.

Driver proficiency - responses show strong support for a higher degree of driving ability to be required by licensed drivers, with many making the point that they are professional drivers and should demonstrate that.

Vocational Qualifications - 70% of our member survey respondents disagree with this and it is important that the BPG is very clear on this issue. The BPG states that "licensing authorities should not require applicants for a licence to have obtained a vocational qualification", while there are various references to other training including English proficiency, topographical knowledge, safeguarding and county line and disability awareness, all of which could be covered through vocational or other training.

Some licensing authorities require BTEC, or similar vocational qualifications, and survey responses cite improved standards as a result.

Tinted windows - While little detail is provided within our survey responses, the issues around tinted windows are complex and have been subject to debate for many years now. On the one hand, licensing authorities are charged with ensuring that vehicles are safe and suitable, and a view could be taken that dark window tints which prevent people outside from seeing what is going on within the vehicle is a potential public safety issue. A counter argument is that the privacy provided by window tints is expected by executive passengers and valued by special needs passengers. Manufacturer tints are commonplace now and expensive to replace, adding a significant financial burden to the vehicle owners if they are required to replace them.

Livery and signage - The issues of signage and livery on PHVs are highly contentious. First and foremost, considerations in licensing are public safety and it is hard to argue that signage

and livery will not assist the public in immediately identifying a licensed vehicle and reduce instances where unlicensed vehicles are approached. The counter argument is that the public do not understand the difference between hackney carriage and private hire vehicles and as a result, may approach a PHV for an immediate hire. Clear signage stating "pre-booked only" or similar would address this issue, and licensed drivers are fully aware of the restrictions for PHVs and should act accordingly.

Vehicle checklist and staying safe guidance – generally supported.

Membership

IoL memberships are now overdue, and the IoL team have made every effort to contact members direct to offer assistance in renewing. If you have any queries about membership, or if we can help with a membership renewal, please contact us via email: membership@instituteoflicensing.org

Jeremy Allen Award 2022

2022 will mark the 11th Jeremy Allen Award, and nominations are now open (details are on our website).

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

Nominations are invited **by no later than 1 September 2022**. The Award criteria are:

a. Local authority practitioners, for 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 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 showing a real interest and getting involved in the licensing world.

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

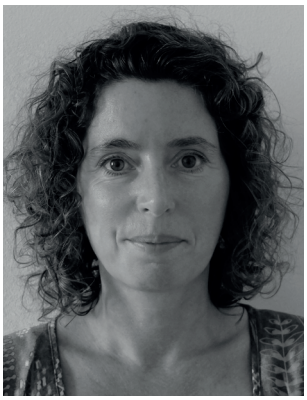
Fellowship

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

Sue Nelson
Executive Officer, Institute of Licensing

Will the updated Regulations for Personal Protective Equipment affect you?

Julia Sawyer explains what the new PPE regs mean in practice



On 6 April 2022 the Personal Protective Equipment at Work (Amendment) Regulations 2022 (PPER 2022) came into force, amending the 1992 Regulations (PPER 1992).

Personal Protective Equipment (PPE) is defined as "all equipment (including clothing affording protection against the weather) which is intended to be worn or held by a person at work and which protects the person against one or more risks to that person's health or safety, and any addition or accessory designed to meet that objective".

Where an employer finds PPE to be necessary after a risk assessment, using the hierarchy of controls explained below, they have a duty to provide it free of charge.

Hierarchy of controls

PPE should be regarded as the last resort to protect against risks to health and safety. Engineering controls and safe systems of work should be considered first.

Controls should be considered in the following order, with elimination being the most effective and PPE being the least effective:

- **Elimination** – physically remove the hazard.
- **Substitution** – replace the hazard.
- **Engineering controls** – isolate people from the hazard.
- **Administrative controls** – change the way people work.
- **PPE** – protect the worker with personal protective equipment.

What are the updates to the PPE at Work Regulations?

PPER 2022 splits workers into two limbs: limb (a) and limb (b).

Previously, you only had to provide PPE to official employees – the limb (a) workers.

In the new PPE regulations, your responsibility remains the same but extends to every other worker who isn't an employee – the limb (b) workers.

There are additional updates relevant to importers, distributors, retailers and manufacturers which this article does not cover.

Definitions of limb (a) and limb (b) workers

Section 230(3) of the Employment Rights Act 1996's definition of a worker has two limbs:

- Limb (a) describes those with a contract of employment. This group are employees under the Health and Safety at Work etc Act 1974 and are already in scope of PPER 1992.
- Limb (b) describes workers who generally have a more casual employment relationship and work under a contract for service – they do not currently come under the scope of PPER 1992.

PPER 2022 draws on this definition of worker and captures both employees and limb (b) workers:

'"worker" means 'an individual who has entered into or works under –

a) a contract of employment; or

b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform

personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any references to a worker's contract shall be construed accordingly.

Not every worker is an employee. An employee – a limb (a) worker – works for you under an employment contract. They're typically contracted to work a specific number of hours and will receive a regular wage or salary. They'll also receive a holiday and sick leave allowance, the terms of which you should set out in their contract.

If your worker has an employment contract, they'll still be an employee whether they have a short contract, or work flexibly or part-time.

A limb (b) worker can be anyone who works for you on any other type of contract but isn't self-employed. They might be a casual worker, an agency worker, or a freelance worker who works short-term jobs for multiple businesses.

They'll typically:

- Carry out casual or irregular work.
- Not get the same benefits as an employee, such as getting holiday pay or statutory notice.
- Choose the work they do.
- Work for businesses, not themselves (they do not advertise services directly to customers who can then also book their services directly).

As every employment relationship will be specific to the individual and employer, the precise status of any worker can ultimately only be determined by a court or tribunal.

The employer will be responsible for the maintenance, storage and replacement of any PPE they provide. As a worker, you will be required to use the PPE properly, following training and instruction from your employer. If the PPE you provide is lost or becomes defective, you should report that to your employer.

If you hire self-employed workers, the new PPE regulations will not apply to them. Workers who are "self-employed" typically:

- Run a business and are responsible for it.
- Work flexibly and can carry out work whenever and wherever they like.
- Provide their own tools and equipment they need to do their job.
- Submit invoices for the work they've done.
- Are responsible for paying their own National Insurance and tax.
- Do not get holiday or sick pay when they're not working.
- Operate under a contract (sometimes known as a "contract for services" or "consultancy agreement') that uses terms like "self-employed", "consultant" or "independent contractor".

Non-employees

Although these regulations do not apply to people who are not workers (for example, volunteers, children while in school, students at university, and visitors to worksites), there is provision within s 3 of the HSW Act that requires every employer to ensure, so far as is reasonably practicable, that people not in their employment but who may be affected by the work are not exposed to risks to their health and safety. If employers are required to provide PPE to comply with a s 3 duty, they are likely to do so by following the requirements of these regulations: for example, by having a stock of hard hats, hi-vis jackets or disposable overalls for the use of visitors. The regulations do apply to trainees and students on work experience programmes.

Clothing that is not defined as PPE

The regulations do not apply to the following types of clothing:

- Uniforms provided for the primary purpose of presenting a corporate image.
- Ordinary working clothes.
- Protective clothing provided in the food industry, primarily for food hygiene purposes.

However, where any uniform or clothing protects against a specific risk to health and safety (for example, high-visibility clothing worn by the emergency services), it will be subject to the regulations. Weatherproof or insulated clothing is subject to the regulations if it is worn to protect workers against risks

to their health or safety, but not otherwise.

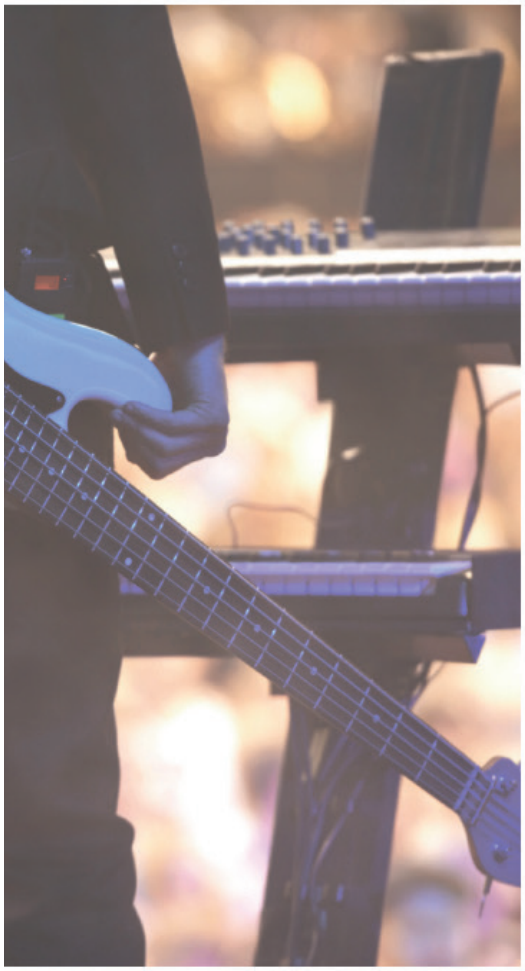
How this legislation will be enforced

HSE inspectors / Environmental Health Officers already include assessment of PPE as part of their routine inspections. Enforcement action can range from verbal or written advice to enforcement notices and, in the most serious cases, prosecution of duty holders.

Recommendations to follow up on:

- Understand the employment status of all workers in your business so you know who is affected by the change. Every business is different in how they engage work so this may be different to other businesses you are comparing to.
- Take the opportunity to review your use of PPE and make sure that it is only your last line of defence for residual risk, and not just used in place of more robust engineering control measures.
- Use the publicised change to focus on employees and make sure that where PPE is needed as part of their risk assessment, that they are trained and instructed in its use and care and know how to report damage or obtain replacement.

Julia Sawyer
Director, JS Consultancy



Large Events Conference

27th September 2022

AO Manchester Arena

The Manchester Arena is located in the city centre, on the corner of Trinity Way, Hunts Bank and Great Ducie Street, and is adjacent to Victoria Station.

The aim of the day is to provide a valuable learning and discussion opportunity for everyone involved within the licensing field or concerned with the licensing, regulation or operation of large scale events. The event will consider recent inquiry findings and reports and aims to increase understanding and promote discussion in relation to the subject areas and the impact of forthcoming changes and any recent case law.

Taxi licensing: new guidance on passenger contracts

Transport for London becomes the first licensing authority to publish guidance for private hire operators on passenger contracts. **Neil Morley** gives an overview

On 6 December 2021 the High Court handed-down its judgment in the matter of *Uber London Limited v Transport for London & Others* [2021] EWHC 3290 (Admin).

The court had been tasked with hearing a claim, brought by Uber London Limited, for clarification on contractual relationships under the Private Hire Vehicles (London) Act 1998. Uber London sought from the court:

> *…a declaration that an operator licensed under the 1998 Act who accepts a booking from a passenger is not required by the Act to enter as principal into a contractual obligation with the passenger to provide the journey in respect of that booking…*[1]

Submissions were heard from each party on the central question of statutory interpretation and, at its base, Parliamentary intention. Consideration was given to provisions within, not only the Private Hire Vehicles (London) Act 1998, but also the Local Government (Miscellaneous Provisions) Act 1976.[2] Ultimately, the court found:

> *…that in order to operate lawfully under the Private Hire Vehicles (London) Act 1998 a licensed private hire operator who accepts a booking from a passenger is required to enter as principal into a contractual obligation with the passenger to provide the journey which is the subject of the booking…*[3]

In coming to this view, Lord Justice Males and Mr Justice Fraser concluded that Transport for London (TfL):

> *…will need to reconsider its current practice which is that it does not review the contractual terms of an operator when considering a licence application. Since an operator which does not undertake the required contractual obligation is not operating lawfully, TfL will need to consider how best to ensure that the basis on which…operators conduct their operations is in accordance with the requirements of the 1998 Act…*[4]

TfL immediately acknowledged its duty, as interpreted by the court, and directed operators to *"…carefully consider the High Court's judgement and take steps to ensure they comply with it…".*[5] Supplemental TfL communications re-iterated the need for operator compliance, indicated regulatory checks had begun and confirmed guidance would be forthcoming.[6]

Subsequently, on 22 April 2022, TfL introduced Regulation 9(14) as an amendment to the Private Hire Vehicles (London) (Operators' Licences) Regulations 2000. This regulation, which came into force on 23 April 2022, introduces a new condition of licence:

> *The operator shall enter into a contractual obligation as principal with the person making the private hire booking to provide the journey which is the subject of the booking and any such contractual obligation must be consistent with the 1998 Act and these Regulations.* [7]

With a view to assisting said operator compliance, and in a first for licensing authorities, TfL announced the publication of guidance specifically focussed on:[8]

- *…what operators' responsibilities are when they contract with passengers…*;
- *…how the law applies in practice…*; and

1 See para 3, *Uber London Limited v Transport for London & Others [2021] EWHC 3290 (Admin).*

2 For additional comment on this aspect see *Private Hire Bookings – With Whom Are They Made?*', Button, J., *Journal of Licensing*, March 2022.

3 See para 57, *Uber London Limited v Transport for London & Others [2021] EWHC 3290 (Admin).*

4 See para 36, *Uber London Limited v Transport for London & Others [2021] EWHC 3290 (Admin).*

5 See Notice 19/21 *Private Hire Operators' Contracts with Passengers,* Transport for London, 6 December 2021.

6 See Notice 22/21 *Private Hire Operators' Contracts with Passengers – Next Steps*, Transport for London, 20 December 2021 & Notice 04/22 *Private Hire Operators' Contracts with Passengers – Roadmap*, Transport for London, 9 March 2022.

7 See Private Hire Vehicles (London) (Operators' Licences) (Amendment) Regulations 2022.

8 See Notice 06/22 *Private Hire Operators' Contracts with Passengers – New Regulation & Guidance*, Transport for London, 22 April 2022.

- *…what TfL is doing to help ensure compliance….*

Initially, the *Guidance for London Private Hire Vehicle Operators: Contracts with Passengers*[9] covers the background High Court judgment, the new regulation and its purpose before moving onto the need for compliance. It then outlines the responsibilities required to meet the prescribed licence condition:[10]

(1) *…a London PHV operator must – itself – accept bookings from its passengers, rather than anyone else (eg, a driver") doing so;*

(2) *…a London PHV operator must – itself – take responsibility for the journey from point A to point B, rather than anyone else (eg, a driver) doing so;*

(3) *…the booking must be carried out in a London licensed PHV (or taxi) driven by a London licensed driver; and*

(4) *…the booking must be carried out for a fare which was either agreed or for which an accurate estimate was provided in advance…*

These, TfL states, apply to all operators regardless of *"…* how they operate…and whether or not they use written contracts…".[11] Where a written contract exists, TfL provides clarification on its approach to finding an operator is compliant when its services:[12]

a) *…makes it clear that the London PHV operator is responsible for both accepting the booking as well as the provision of the journey [also known as transportation services]…*;

b) *…states that a contract is created between the operator and passenger for the booking as well as the provision of the transportation services…*;

c) *…refers to fares for the journey being collected by the operator or collected by the driver on behalf of the operator…*;

d) *…makes it clear that only the operator can cancel a booking with a passenger…; and*

e) *…makes it clear that liability in relation to the transportation services belongs to the operator…*

It also clarifies terms which would not be considered compliant in a written contract. These include instances where an operator:

a) *…retains responsibility only for accepting bookings and that the drivers are responsible for providing the transport service or journey, or that the passenger's contract is with the driver…*;

b) *…acts only as an agent for the driver…*;

c) *…is not a transportation provider or does not provide transportation services…*;

d) *…is an intermediary between the passenger and driver who is the transportation provider…*;

e) *…has established payment arrangements by which passengers pay drivers directly, with the operator taking a fee or proportion of the fare as the driver's agent…*;

f) *…transfers liability for its obligations under the 1998 Act onto anyone else such as drivers…*; or

g) *…has no responsibility in relation to the performance of the contract to provide transportation services because such services are provided by the driver…*

Whilst these factors represent *likely* considerations for TfL, it is clear account must be taken of them in any such agreement. If, in the alternative, an operator does not possess a written contract, TfL will request evidence of its *…processes, systems and procedures….*[13] This will, at minimum, cover:[14]

a) *…any wording that operators use to describe their operating model which may be available to passengers on their website or in publicity materials about their services…*;

b) *…whether operator's take responsibility for*

9 See *Guidance for London Private Hire Vehicle Operators: Contracts with Passengers*, Transport for London, 22 April 2022.

10 See page 2, *What does this mean for London PHV operators?*', *Guidance for London Private Hire Vehicle Operators: Contracts with Passengers*, Transport for London, 22 April 2022.

11 *Ibid.*

12 See page 3, *Operators with written contracts*, *Guidance for London Private Hire Vehicle Operators: Contracts with Passengers*, Transport for London, 22 April 2022.

13 See page 4, *Operators Without Written Contracts*, *Guidance for London Private Hire Vehicle Operators: Contracts with Passengers*, Transport for London, 22 April 2022.

14 *Ibid*.

anything that may occur on the journey…;

c) *…whom passengers should make complaints to about the journey…*;

d) *…where applicable, payment of VAT on fares…*; and

e) …how bookings are cancelled….

Such evidence may in any event, as TfL later states, be sought to check compliance regardless of whether a written contract is used or not.[15] TfL has indicated it will also require an explanation from each operator on how it complies.[16] These requirements, it should be borne in mind, are subject to review and the guidance itself may be periodically updated.[17]

Moving forward, it is of paramount importance London operators heed this guidance. While it has no legal effect,[18] it does outline the basic approach taken by TfL to assessing whether an operator is, or will be, compliant with the licence condition. The burden to meet this obligation remains with the operator and, if TfL is not satisfied, the repercussions for non-compliance may be refusal of an application or enforcement action.[19]

Ultimately, while taking some four months to appear, the guidance must be welcomed as providing at least some clarification on TfL's stance for applicants and licence holders. Given Uber has commenced proceedings against Sefton MBC seeking a declaration as to the construction of the legislation applicable in the provinces,[20] and that uncertainty pervades around the full impact on tax law[21] and employment law, this may offer a useful insight to future regulatory approach.

Neil Morley
Managing Director, Travis Morley Law

15 *See* page 4, *Compliance*, *Guidance for London Private Hire Vehicle Operators: Contracts with Passengers*, Transport for London, 22 April 2022.

16 *Ibid*.

17 See page 5, *Action to be taken*, *Guidance for London Private Hire Vehicle Operators: Contracts with Passengers*, Transport for London, 22 April 2022.

18 See page 1, *Purpose of this guidance*, *Guidance for London Private Hire Vehicle Operators: Contracts with Passengers*, Transport for London, 22 April 2022.

19 Note: TfL also expects to be notified of material changes, under Regulation 9(13) Private Hire Vehicles (London) (Operators' Licences) Regulations 2000 (as amended), to contractual relationships which affect bookings or the provision of transportation services (see *Private Hire Operators: Guidance on Changes to Operating Models*, Transport for London, 22 April 2022).

20 *High Court Declaration Proceedings…* Notice, Sefton Council, 14 April 2022.

21 See *…TfL is not able to advise operators in relation to their tax responsibilities…*at page 2 *Purpose of this guidance*, *Guidance for London Private Hire Vehicle Operators: Contracts with Passengers*, Transport for London, 22 April 2022.

Gambling Act 2005 review may spring wholesale changes on gambling premises controls

New developments are expected in the delayed Government review of the Gambling Act 2005, the announcement of a new National Lottery operator may also be delayed, and vigilance on illegal lotteries has stepped up – all subjects reviewed by **Nick Arron** in his latest update

As I write this latest gambling update for the *Journal*, we are hearing reports of further delay to the publication of the White Paper and further consultation regarding the Government review of the Gambling Act 2005. The suggestion is that the White Paper will now not be with us until the summer. The review of the Gambling Act 2005 terms of reference and call for evidence were published on 8 December 2020. The original expectation had been that the Government would publish further proposals for more detailed consultation and consideration in autumn 2021. One effect of the delay has been a noticeable slowdown in amendments to existing regulations, conditions and codes, as stakeholders await the wholesale changes expected to be proposed in the White Paper.

One development on the review of the Gambling Act 2005 is that the Local Government Association (LGA) and the Association of Police and Crime Commissioners (APCC) have written to Government seeking greater control over gambling premises. Further regulation of land-based premises was secondary in the Government review of the Gambling Act 2005, which focused on online gambling. There are extensive controls under the Gambling Act 2005 for local and police authorities to review premises licences which do not uphold the licensing objectives, do not comply with licence conditions or social responsibility code provisions, or do not comply with the conditions attached to their gambling premises licences. In my view, the LGA and the APCC concerns relate to perceived wider societal issues of problem gambling, rather than issues relating to the operation, or need for greater control, of premises. Gambling premises causes fewer local issues then alcohol-licensed venues, as demonstrated in one way by the very few reviews of gambling premises licences by authorities or the police.

The National Lottery

On 15 March, Allwyn Entertainment was named the preferred applicant for the 4th National Lottery licence. The current incumbent, Camelot UK Lotteries was selected as reserve applicant. It has been a long process. The competition was launched in August 2020, with invitations to apply in October 2020 with the final application deadline October 2021. The start of the 4th licence should be February 2024, but this could be subject to delay as Camelot has initiated legal proceedings in the High Court in relation to the competition process.

This will not be the first time that Camelot has taken action against the Gambling Commission. In the summer of 2012, the High Court handed down a judgment refusing Camelot permission to proceed with a claim for judicial review following the Commission's decision to grant external lottery manager operating licences to the Health Lottery.

The announcement on the 4th licence followed close behind the Gambling Commission imposing a financial penalty on Camelot for failures of its mobile application, which resulted in breaches of the licence requirements under the National Lottery etc. Act 1993 (as amended). A £3.15m fine was imposed following a Commission investigation into three failures. These included the National Lottery mobile app informing approximately 20,000 players that their winning ticket was not a winner, with the error affecting players from November 2016 to September 2020. A similar number of players purchased single tickets through the application but were charged for, and received, two tickets. Finally, the smartphone application sent out marketing messages to users who had self-excluded through Gamstop (the national online self-exclusion scheme) or had been identified by Camelot as showing signs of gambling harm. Any further harm was limited as none of the 65,400 players were able to play on the app.

The Commission found that Camelot had placed the statutory objectives at risk and considered that the potential impact on the reputation of the National Lottery could be significant. There was evidence that players had been

disadvantaged, misled and treated unfairly as a result of the breaches. There was no evidence of any impact of the failures on funding for good causes, or any financial gain from Camelot as a result of the failures.

The penalty imposed by the Gambling Commission demonstrates that operational challenges experienced by online gambling operations can impact severely on our National Lottery, and are not limited to commercial operators licensed under the Gambling Act 2005.

We can speculate that the action taken by the Gambling Commission may have impacted on Camelot's application for the 4th National Lottery licence, with the investigation at the same time as the application process.

Illegal lotteries

In our last gambling update, I wrote about the Gambling Commission's annual Compliance and Enforcement Report for 2020 / 2021, which included reference to the work the Gambling Commission had undertaken in respect of lotteries on social media. The Commission referred to an increase in illegal lotteries, and to a total of 823 instances being identified when allegations of a social media platform either hosting or advertising illegal gambling were reported. The vast majority of these related to Facebook, with a smaller number on Instagram, Twitter and YouTube. Certainly, from our experience, and particularly in relation to bingo, we have heard from the industry of a number of potentially illegal gambling operations delivered via social platforms.

During the year, the Commission reported 391 lotteries to Facebook and, of these, 378 have been removed. The Commission refers to continually evolving lotteries on Facebook, both in relation to volume and complexity, and that prizes are increasing in value and becoming more diverse.

Developing this narrative, in February 2022 the Commission published information regarding partnership working to shut down illegal Facebook lotteries. The Commission worked with the Government Agency Intelligence Network and specialists from the social networking platforms. They identified lotteries which offered a variety of cash prizes, children's toys and clothing. Working with the North East Regional Special Operations and South West Regional Organised Crime Units, two individuals were identified promoting illegal activity. These were removed from associated Facebook groups and issued with cease and desist letters. The Commission reported that there were hundreds of people taking part in these lotteries.

In another recent example, Cleveland Police investigated a man from Middlesbrough who was suspected of running illegal lotteries from his Facebook page. There were a number of lottery-style games, including "bonus balls" and "raffles" which were for his personal gain. Thousands of transactions were reported to have been processed through his bank accounts. Being delivered via Facebook, that was an illegal remote lottery, for private gain. At a proceeds of crime hearing in March 2022, a forfeiture order was made for approximately £140,000 held in bank accounts belonging to the individual, money it is believed had been paid by members of the public to participate in the unlicensed gambling activity.

In our experience, entrepreneurs had more time during the pandemic to consider lottery-style games, which is one of the reasons why we are seeing an increase in activity from the Gambling Commission in relation to illegal lotteries.

Local authorities regularly receive enquiries from those looking to operate various approaches to lotteries. Here at Poppleston Allen we often review proposed lottery arrangements found in pubs, holiday parks and hotels. It is no surprise that lotteries are at the forefront of many people's minds when it comes to gambling. Participation in the National Lottery is the most prevalent form of gambling in this country.

Other than the National Lottery, it is only lotteries for charities, non-profit or other good causes, or lotteries run by local authorities which can be operated here in Great Britain lawfully. They cannot be run for private or commercial gain. So, local sports clubs, schools, churches and external lottery managers can make profits but they must be operating on behalf of a registered or licensed charity or other non-profit organisation. And the external lottery managers are required to contribute at least 20% of the proceeds of the lottery to the charity or good cause.

I mentioned the Health Lottery earlier: it is an umbrella corporation representing 51 society lotteries with a common draw and prize pool. Each draw is held on behalf of one or more of the society lotteries. It is a commercial organisation but acts on behalf of charities to generate funds for the good causes those charities support.

Lotteries appeal as a simple and effective way to generate money but, as with other gambling, they can be susceptible to frauds and scams.

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Solicitor, Poppleston Allen

No smoke without fire: is tougher regulation of shisha premises on the cards?

The Government is looking into the possibility of a licensing regime for shisha premises. About time too, suggest **Richard Brown** and **Charles Holland**

Comprehensive tobacco control is the best thing a local authority can do for public health – Local Government Association, July 2019.[1]

The time has come to enhance the legislative framework surrounding shisha premises and, I believe, institute a licensing regime specifically for shisha premises. – Shabana Mahmood MP, 5 December 2019.

In its July 2019 green paper *Advancing our health: prevention in the 2020s* the government announced its ambition for England to be "smoke-free" by 2030 (meaning only 5% of the population would smoke by then).[2] The government was then able to make the point that good progress had already been made in moving towards a smoke-free society. Smoking rates had halved over the previous decades, with the country having one of the lowest rates in Europe. Fewer than one in six adults smoked cigarettes.

In her recently published independent review of the government's progress towards that goal, *Making smoking obsolete*, Dr Javed Khan observed:

> *Most people don't see smoking as a problem anymore. As a nation we've moved on. Smoking in restaurants, pubs and clubs is long gone. It's no longer common for living room ceilings to be stained yellow from chain-smoking in front of the TV. You have to be my age to have any memory of tobacco adverts on TV and billboards. The problem is less visible.*

However, what was "less visible" was still concerning to the review. Smoking remains the single biggest cause of preventable illness and death. Approximately 64,000 people are killed by smoking each year. Smoking costs society about £17bn per year, with the cost to the NHS alone being £2.4bn. This dwarfs the annual £10 billion tax revenue from tobacco products. Dr Kahn's conclusion was that without further immediate action, England would miss the smoke-free target by at least seven years, with the poorest areas not meeting it until 2044. His fifteen recommendations included radical steps such as raising the age of sale of tobacco from 18, by one year, every year, and licensing the sale of all tobacco.

The growth in shisha over recent years stands in contrast to the visible decline in cigarette consumption in the hospitality sector, and indeed the two may be connected.[3] It was thought that the introduction of the smoking ban in 2007 had encouraged a business model based on outdoor smoking.

This has not gone unnoticed by local authorities, which have multi-faceted concerns in relation to shisha. There are reports of nuisance, anti-social behaviour and crime and disorder arising from badly managed premises. The public health role of local authorities is engaged, as their responsibilities include the enforcement of legalisation relating to smoke-free premises, tobacco sales, payment of duties, planning and fire safety.

In 2019, the Local Government Association (LGA) called for a new licensing system for shisha premises. Simon Blackburn, Chairman of the LGA's Safer and Stronger Communities Board said that "the growing popularity of shisha bars and the lawless way some of them are being run exposes the loopholes that exist in our out-dated and inflexible licensing system."[4]

A campaign headed by the MP for Birmingham Ladywood, Shabana Mahmood, has long lobbied for a "more effective regulatory regime", prompted by a more than tenfold increase

1 https://www.local.gov.uk/publications/must-know-tobacco-control.

2 https://www.gov.uk/government/consultations/advancing-our-health-prevention-in-the-2020s.

3 British Heart Foundation media release, 14 March 2012, '*Rise in shisha bars prompts warning on dangers of waterpipe smoking'*.

4 https://localgovernmentlawyer.co.uk/community-safety/393-community-safety-news/39942-councils-should-be-allowed-to-opt-in-to-license-shisha-bars-says-lga.

in the number of shisha bars in Birmingham between 2007 and 2016.[5]

The Government is now looking into the possibility of a licensing regime for shisha premises. In August 2021, Luke Hall, Minister for Regional Growth and Local Government, announced that the Government is in the process of drafting a consultation document in relation to possible amendments to the Local Government (Miscellaneous Provisions) Act 1982 (LG(MP)A 1982) to allow for an adoptive regime for licensing of premises offering shisha.[6]

This article will summarise current regulatory requirements, examine the context of the calls for tougher regulation, and evaluate the possibilities going forward.

What is shisha?

Shisha is known by a variety of different terms, such as waterpipe, hookah, hubble-bubble or narghile smoking. It is a method of smoking tobacco (or sometimes a herbal mixture) through a bowl and a pipe / tube. Shisha smoking has existed for several hundred years as a traditional practice in the Middle East and parts of Africa and Asia, and has become increasingly popular in western countries, including the UK, in recent years. Specially prepared tobacco (often mixed with other flavours such as mint, coconut or pineapple) is heated to produce smoke which bubbles through a bowl of water and into a long hose-like pipe to be breathed in. Shisha pipes have a mouthpiece fitted to inhale the smoke. It is usually heated by burning wood, coal or charcoal.

Is shisha harmful?

A joint report from the Association of Directors of Public Health (ADPH) and Public Health England (PHE) in 2017, *Waterpipe smoking (shisha) in England - the public health challenge*,[7] observed that the health effects of waterpipe smoking have received less research attention than cigarette smoking.

However, it reported that the available evidence indicates that waterpipe smoking is associated with cancer, heart disease and lung disease. There have also been reports of increased risk of infectious disease, and the large amount of carbon monoxide created by the constant heating of tobacco by burning charcoal introduces the risk of carbon monoxide poisoning. Regular waterpipe tobacco smokers may report or display signs of addiction, and misperceptions about the potential health risks appear to be widespread. Overall, the report concluded, the existing evidence base underlines the need to minimise waterpipe use, particularly regular use.

There is evidence that smoking herbal shisha is similarly harmful to health as smoking tobacco shisha, yielding similar levels of toxicants such as carbon monoxide, nitric acid and tar.[8]

How prevalent is shisha use?

The main source of data on adult waterpipe use in Britain is the annual ASH Smokefree GB survey. At the time of the ADPH and PHE report in 2017, this survey was showing a slight increase in the proportion of adults who had “ever” used a waterpipe, from 11% in 2012 to 12.9% in 2106. “Current” waterpipe use (up to once or twice a month) remained around 1%.

While waterpipe use in the general population is low, there is substantial variation in prevalence between ethnic groups. On average, ethnic minority groups in England have lower rates of smoking than among the general population – except for those of mixed / multiple ethnicity, who have the highest smoking rates. However, waterpipe use in Great Britain is concentrated among ethnic minorities, in particular South Asian groups and those of other / mixed ethnicity. The ASH Smokefree GB survey for 2019 showed the following responses:

Shisha use	White	South Asian	Black	Other/ mixed
Ever tried	10%	21%	16%	29%
>Once a year	2%	11%	6%	7%
<Once a year	9%	11%	10%	22%
Never tried	77%	58%	64%	57%

The Khan review has called for the Government to commission further research on health disparities, particularly ethnic disparities, where not enough is known about the different impact of tobacco use on particular communities. The review said this should include commissioning research on the effects of shisha, paan and kaat, where it was already well known that these substances were linked to increased risk of cavities and oral cancer.

Local authorities and health

In 2019 the Local Government Association (LGA) and Cancer Research UK jointly published *Tobacco Control: how do you*

5 https://www.shabanamahmood.org/category/shisha/.

6 https://www.birminghammail.co.uk/news/midlands-news/tougher-rules-shisha-lounges-mooted-21306891.

7 https://www.adph.org.uk/2017/03/adph-and-phe-report-waterpipe-smoking-shisha-in-england-the-public-health-challenge/.

8 Shihadeh, A *et al*, ‘Does switching to a tobacco-free waterpipe product reduce toxicant intake? A crossover study comparing CO, NO, PAH, volatile aldehydes, tar and nicotine yields’. (2012) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3407543/.

know that your council is doing all it can to reduce smoking-related harm?[9] It recommended that local authorities "should have a local tobacco control strategy that is monitored and tracked against the Public Health Outcomes Framework."

This echoed messaging from central Government. In July 2017 the Government had published *Towards a Smokefree Generation: A Tobacco Control Plan for England (2017-22),* which included as a national ambition "the first smokefree generation". That plan emphasised the importance of "focused, local action, supporting smokers, particularly in disadvantaged groups, to quit."

The need for local action was repeated in the 2019 green paper, which made the point that prevention policies were not experienced in the abstract, but in the neighbourhoods and communities in which people live, with local authorities having a key role to play given that they:

- Have specific responsibilities around prevention (for example sexual health, children's health. adult social care and support, and drug and alcohol abuse).
- Control many of the assets for good health (for example parks and green spaces, leisure facilities, and cycling and walking infrastructure).
- Have decision-making power for areas like housing policy, planning and social care and support; and
- Shape other policies relevant to health including economic development, education and growing the voluntary and community sector.

According to the LGA, central government messaging placed significant responsibility on local government to contribute towards a reduction in smoking rates. This reflects the increased role for local authorities in the last decade to address public health issues, following changes brought about by the Health and Social Care Act 2012 (HSCA 2012).

The LGA recommended that "councils should implement a robust tobacco control strategy that embeds a health-in-all-policies approach. Lead members for health are well placed to drive political and financial support for tobacco control within the Health and Wellbeing Board, Sustainability and Transformation Partnerships and the wider council."

This reflected the changes in public health policy and delivery brought about by HSCA 2012, which transferred responsibility for various areas of health provision to local authorities, on the basis that they were best placed to take a holistic approach to the health and wellbeing of its residents and assess the public health needs of their residents.

Section 2B(1) of the National Health Service Act 2006 (as amended by HSCA 2012) confers on each local authority a duty to "take such steps as it considers appropriate for improving the health of the people in its area."

These steps include (s 2B(3)):

- Providing services or facilities designed to promote healthy living (whether by helping individuals to address behaviour that is detrimental to health or in any other way).
- Providing services or facilities for the prevention, diagnosis or treatment of illness.
- Providing assistance (including financial assistance) to help individuals to minimise any risks to health arising from their accommodation or environment.

Given the well-known health risks associated with consuming tobacco products, it is hardly surprising that local authorities should seek to target this activity in the context of this duty under NHSA 2006. This is particularly the case when (as the LGA report pointed out) the National Institute for Health and Care Excellence estimates that every £1 invested in smoking cessation saves £10 in future health care costs. A statement of local authority intent can be found in what is now known as *The Local Government Declaration on Tobacco Control*, first passed by Newcastle City Council in May 2013 and now signed by over 120 councils, and recently re-launched to be brought in line with the Government's ambition to be smoke-free by 2030.[10]

Smoke-free legislation

The Health Act 2006 (HA 2006) introduced a ban on smoking in many of the country's indoor places. Section 2(1) provides that premises in England are smoke-free if they are open to the public. This is subject to the important qualification in s 2(4) that premises are smoke-free "only in those areas which are enclosed or substantially enclosed".

The Secretary of State specified in regulations what "enclosed" and "substantially enclosed" means, specifically in regulation 2 of the Smoke-free (Premises and Enforcement) Regulations 2006. These provide premises are "substantially

9 https://www.local.gov.uk/publications/must-know-tobacco-control.

10 https://smokefreeaction.org.uk/declarationsindex-html/.

enclosed" if they have a ceiling or roof but there is an opening in the walls, or an aggregate area of openings in the walls, which is less than half of the area of the walls (including other structures that service the purpose of walls and constitute the area of the walls). In determining the area of an opening or aggregate area of openings, no account is to be taken of openings in which there are doors, windows or other fittings that can be opened or shut. A "roof" includes any fixed or moveable structure or device which is capable of covering all or part of a premises as a roof, including, for example, a canvas awning.

In the hospitality sector, this has had the effect of confining smoking to premises that are "outdoor" to the extent that they are not "substantially enclosed" within the meaning of HA 2006. Such is human ingenuity that in certain types of premises such as cigar lounges and shisha bars, what is technically an "outdoor area" can be a close approximation of, and nearly as comfortable as, an indoor area.

A person who smokes in a smoke-free place commits an offence (s 7 HA 2006). "Smokes" in this context refers to "smoking tobacco or anything which contains tobacco, or smoking any other substance" (s 1(2)). It thus includes the tobacco-free herbal offerings of some shisha lounges.

Any person who controls or is concerned with the management of smoke-free premises is under a duty to cause a person smoking there to stop smoking (s 8(1) HA 2006). It is an offence to fail to comply with this duty (s 8(4)). The maximum penalty is a fine not exceeding level 4 on the standard scale, which is currently £2,500. In some areas, this has not been considered to be a sufficient deterrent to rogue premises providing shisha indoors or in non-compliant "outdoor" areas. One option for repeat offenders is to seek compensation orders under the Proceeds of Crime Act 2002.[11]

Shisha on the pavements: anti-social behaviour and the Westminster experience

Shisha smoking is a social activity, and a core part of the business model of shisha bars and lounges is offering places to smoke shisha pipes in comfort and in company. The coming into force of the HA 2006 moved these places outdoors, often onto pavements.

The ADPH/PHE report of 2017 summarised experiences in the City of Westminster. Here, the movement of shisha smoking outdoors had an impact on quality of life for many residents, with breaches across a wide range of legislation, including noise nuisance, smoke and odour complaints, unauthorised use of premises, unauthorised structures and alterations, unauthorised use of tables and chairs outside premises, highway obstruction and health and safety concerns. Despite concerted enforcement efforts, the council found that employing the range of powers available has been an insufficient deterrent to persistent offenders.

In 2011 the council began to take action under the anti-social behaviour legislation (see now the Anti-social Behaviour, Crime and Policing Act 2014). Closure orders gave immediate respite to people affected by the anti-social activity, and provided a period of time in which other enforcement and regulatory powers could be pursued. However, this is a resource-intensive use of powers which provides only temporary closure of premises. Large-scale targeted enforcement operations, including one conducted in May 2016 in collaboration with local police and HMRC, was only able to achieve brief respite from the problems, with shisha services back up and running at those premises very shortly afterwards.

Following the council's commission, in July 2013 Dr Mohammed Jaward produced *The Public Health Implications of Shisha Smoking in London.*[12] The report highlighted the desirability of raising awareness of the risks of waterpipe smoking in local communities, and identified a need for multi-agency work in tackling problems such as antisocial behaviour, illicit tobacco, inadequate health warning labelling and non-compliance with smoke-free legislation.

Westminster Council established a shisha working group, which brought together councillors and officers from licensing, planning enforcement, trading standards, health and safety, communications and public health to consider how the issue could be effectively addressed. Having conducted public consultation, in February 2017 the group published *Reducing the Harm of Shisha: Towards a Strategy for Westminster*.[13] The council's approach took three strands:

- Educate and engage.
- Regulate the activity.
- Lobbying and partnership.

Education and engagement was seen as a priority, given that many of those who smoke shisha were unaware of its health impact. The council wished to look at how it could encourage changes in behaviour and challenge misconceptions about

11 See 'POCA shocker: the unforeseen effects of the Proceeds of Crime Act 2002', Charles Holland, (2017) 17 JoL .

12 http://westminster.moderngov.co.uk/Data/Adults,%20Health%20and%20Public%20Protection%20Policy%20&%20Scrutiny%20Committee/20130718/Agenda/Item%207%20-%20Shisha%20Smoking.pdf.

13 https://www.westminster.gov.uk/health-and-social-care/shisha-westminster.

the safety of shisha smoking.

In terms of existing regulatory intervention, the council's strategy identified a wide range of regulations that shisha premises need to comply with, which serves as a useful checklist. It is not the case that shisha smoking is not regulated at all. On the contrary, it is subject to a panoply of regulatory requirements but, crucially, in the view of Westminster and other campaigners, none effectively deal with the problems caused by shisha smoking specifically.

The council expressed particular interest in lobbying for shisha smoking and sales to be a licensed activity, "to address the anomaly that while selling a cup of tea after midnight requires a licence, none is required for shisha".

Health and safety legislation

The Health and Safety at Work etc. Act 1974 ss 2 and 3 impose duties on employers to ensure, so far as is reasonably practicable, the safety and welfare at work of all their employees, and not to expose persons - not in their employment who may be affected by their undertakings - to risks to their health and safety. The Management of Health and Safety at Work Regulations 1999 requires the conduct of risk assessments and the implementation of health and safety arrangements to comply with these duties. In the context of shisha this will concern matters such as ensuring adequate ventilation so persons are not exposed to the risk of carbon monoxide poisoning and other ill-effects,[14] the cleaning of shisha pipes, the safe storage and use of charcoal, and the safety of structures erected and equipment used.

Pavement activities

The recent pandemic and the desirability of activities being conducted outdoors rather than indoors brought an urgent legislative focus on the regulation of pavement areas, with the Business and Planning Act 2020 introducing the concept of a pavement licence as a fast-track alternative to the requirements of a permit under the Highways Act 1980, the Town and Country Planning Act 1990, and (in London) street-trading legislation.

Such was the success of this initially temporary regime that it is proposed to be made permanent in provisions in the Levelling-up and Regeneration Bill.

Pavement licences are focused at food and drink-led premises, and it will be a question of fact in each case whether the premises to which the pavement licence applies, and whether shisha activities under the licence, are sufficiently ancillary to the usage of the area to the consumption of food or drink. Some authorities have standard "no shisha" conditions on pavement licences.

The pavement licensing regime is an alternative to the suite of consents required under highways, planning and (in some circumstances) street-trading legislation, and in cases where a shisha lounge cannot bring itself within the pavement licensing regime, that suite of alternatives will have to be pursued.

Planning

Westminster's approach is that shisha smoking is an identifiable land use which should be treated as *sui generis* and thus outside any defined use classes. Its strategy provides:

> *A key issue with regard to shisha smoking is the impact on residential amenity arising from noise, odour and fumes often late into the evening. In addition, the material change of use of premises to use for shisha smoking may lead to the loss of a retail unit or part of a retail unit's use thereby potentially reducing the vitality and viability of local shopping areas. Other issues might include alterations to shopfronts to make them fully openable to make the premises more conducive to shisha smoking and/or businesses operating outside of their permitted conditioned hours.*

Trading standards

By virtue of s 7(1) of the Children and Young Persons Act 1933 it is an offence to sell tobacco to a person under the age of 18, tobacco here encompassing "any product containing tobacco and intended for oral or nasal use and smoking mixtures intended as a substitute for tobacco". Section 91(1) of the Children and Families Act 2014 criminalises the proxy purchasing of tobacco for children (tobacco having the same meaning as in s 7 of the 1933 Act).

Section 12A-12D of the 1933 Act gives the magistrates' courts jurisdiction to make restricted premises and restrict sales orders against premises and persons in the event of persistent sales of tobacco to children.

Section 4 of the Children and Young Persons (Protection from Tobacco) Act 1991 requires a notice displaying the statement "It is illegal to sell tobacco products to anyone under the age of 18" at every premises at which tobacco is sold by retail to be exhibited in a prominent position.

14 One study of machine-smoked waterpipes found that compared with cigarette smoking, shisha smoke contained five times the number of ultrafine particles, four times the carcinogenic polyaromatic hydrocarbons and volatile aldehydes and 35 times the CO. These are all toxic or carcinogenic substances. Daher N, et al, *Comparison of carcinogen, carbon monoxide, and ultrafine particle emissions from narghile, waterpipe and cigarette smoking: Sidestream smoke measurements and assessment of second-hand smoke emission factors*. PMC. 2010; 44 (1): 8 - 14.

Regulations make provision for the dimensions of the notice and the size of the statement.[15]

There are detailed labelling requirements for tobacco products found in Part 2 of the Tobacco and Related Products Regulations 2016. Some authorities have indicated that in view of the difficulties in labelling waterpipes, they will accept other, similar labels on menus or cards given with the pipes themselves.

Section 2 of the Tobacco Advertising and Promotion Act 2002 provides that it is an offence to publish a tobacco advertisement in the UK, a "tobacco advertisement" meaning an advertisement whose purpose is to promote a tobacco product, or whose effect is to do so (s 1). A tobacco product here means "a product consisting wholly or partly of tobacco and intended to be smoked, sniffed, sucked or chewed" (s 1). This is a prohibition which appears to be honoured more in the breach than the observance by many operators.

Since January 2014, all herbal smoking products including those used for shisha smoking were made liable for excise duty, with the effect that all substances smoked in shisha bars will have to have duty paid. Tariffs are in excess of £100 per kilogram and product available for sale at less than this amount is indicative of duty evasion.

One of the Kahn review's recommendations was enhanced enforcement in relation to alternative tobacco products such as shisha "because they are routinely sold with no regard to regulations on packaging, display or notification".

Fire safety

Premises need to have regard to potential fire risk and comply with the Regulatory (Fire Safety) Order 2005. Issues and hazards include lit coals and lack of appropriate ventilation within premises, inadequate fire risk assessment to identify the hazards and risk and implement general fire safety precautions, locked rooms and locked fire exits, and lack of emergency lighting and appropriate firefighting equipment. South Wales Fire and Rescue Service has produced detailed guidance on shisha bars.[16]

Licensing Act 2003

The Licensing Act 2003 only impacts tangentially, if at all, on shisha operations. Premises selling alcohol, providing regulated entertainment or late-night refreshment require licences under the Act; premises that do none of these things do not. Where a 2003 Act licence is required, conditions can arguably extend to the shisha activities if to do so promotes the licensing objectives.[17]

Anti-social behaviour and nuisance

Closure orders under the Anti-social Behaviour, Crime and Policing Act 2014 are one option for problem premises, and this avenue was pursed by some authorities to deal with operations that remained open in breach of the business closure regulations passed to deal with the Coronavirus pandemic (which contained the first specific mention of shisha in statute-book).

Noisy and / or malodorous premises may constitute a statutory nuisance under the Environmental Protection Act 1990.

Should shisha be licensed and if so, how?

While the question of whether or not shisha should be licensed is ultimately a matter of politics, the Westminster strategy's point that a licence is required to serve a cup of tea after 11pm but not to provide the significantly more dangerous service of tobacco smoked through a waterpipe would seem to underline the need for specific regulation of shisha, not least given the disproportionate effect it has on minority groups in society.

It would be fairly straightforward to extend the ambit of the LG(MP)A 1982) to allow for an adoptive regime for licensing of premises offering shisha, in much the same way as an amendment to the Act was made to bring sexual entertainment venues within licensing.

However, a further option would be to add the provision of shisha as licensable activity under the Licensing Act 2003.

This would afford the provision of shisha the same level of scrutiny and public consultation that is already given to other activities, such as the consumption of alcohol. It would also allow the responsible authorities and local residents to make representations on new applications and full variations, if they had concerns about the applicant's ability to uphold the licensing objectives.

It would also provide the ability to review the whole premises licence if it was suggested that one or more of the licensing objectives were not being upheld. This means that there would be a higher level of accountability on the premise licence holder to carry out the activities in line with this legislation.

15 The Protection from Tobacco (Display of Warning Statements) Regulations 1992.

16 https://www.southwales-fire.gov.uk/app/uploads/2019/09/2925-Shisha-Bar-booklet_en_v2.pdf.

17 By analogy to the approach to licensing areas not used for licensinable activities in *R (Developing Retail)* v. *East Hampshire Magistrates' Court* [2011] EWHC 618 (Admin).

Including the provision of shisha within the 2003 Act would facilitate a joined up approach within the hospitality sector. It may also constitute an opportunity to consider the long-debated possibility of expanding the "public safety" licensing objective to include "public health".

Shisha has long been the Cinderella of public health smoking intervention, with its effects under-researched and regulatory control not being targeted to anything like the degree of specificity found with cigarettes, which in turns hampers enforcement. What evidence there is points to disproportionate harm to sectors of the community that already suffer from health inequality. It is appears to be hard to see how the status quo does anything other than exacerbate those existing health inequalities, and it might be said that it is high time that a targeted scheme of licensing is brought into effect.

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

Charles Holland
Barrister, Francis Taylor Building & Trinity Chambers

Institute of Licensing

eLearning opportunities

There are six gambling eLearning modules, provided in collaboration with the Gambling Commission. The modules are designed to help Licensing Authorities (LAs) and other co-regulators to improve their understanding of gaming machines and how they are regulated.

Gaming Machines – Module 1

- The role of LAs in the regulation of gambling
- What is a gaming machine; and
- The various types of gaming machines

Gaming Machines – Module 2

- The physical components of a gaming machine
- How gaming machines work
- The signage displayed on gaming machines

Gaming Machines – Module 3

- Compliant machines in inappropriate places (illegal siting)
- Examples of types of non-compliant machines
- How to take regulatory action

Inspection powers and preparation

- Overview of the licensing framework
- Gambling Act powers
- Pre-inspection preparation

Inspecting a betting premises

- Visual assessment inside and outside a betting shop to see if the conditions on a premises licence are being met.
- The steps that betting operators must take in order to achieve compliance with licence conditions and codes of practice in relation to children and vulnerable people, crime and disorder and fair and open gambling.

Pubs and the Gambling Act 2005

- This module is designed to help LAs and police improve their understanding of what to consider when undertaking compliance checks on the various forms of gambling permitted in pubs.
- The module provides an introduction to gaming machines, exempt gaming (bingo and poker) and lotteries in pubs along with the Codes of Practice which pubs must adhere to, including requirements in relation to preventing under age gambling.

The gambling eLearning modules are available to everyone. To access the modules, you will need to log in to the IoL website.

If you do not have log in details, please email us via **info@instituteoflicensing.org.**

Webinars – Civic Licensing in Scotland

A series of webinars aimed at providing an overview of civic licensing in Scotland are also available online

Stephen McGowan, Chair of the Scotland Region and solicitor at TLT, is joined by licensing practitioners from local authority, police and legal practices, each giving an overview of different licensing subjects.

There are ten webinars in total:

1. Civic Licensing – Introduction and Overview – Stephen McGowan, TLT LLP
2. Civic Licensing Offences – Sgt Gareth Griffiths, Police Scotland, National Licensing Unit
3. Overview of Taxi and Private Hire Licensing – Michael McDougall, TLT LLP
4. Enforcement and Taxi/Private Hire Licensing – Michael McDougall, TLT LLP
5. Late Hours Catering Licensing – Archie MacIver, Brunton Miller
6. Street Trader and Market Licensing – Stephen McGowan, TLT LLP
7. Metal Dealer Licensing – Douglas Campbell, Renfrewshire Council
8. Public Entertainment Licensing – Caroline Loudon, TLT LLP
9. Miscellaneous Civic Licensing – Joanna Millar, Millar Campbell
10. Animal Licensing - Scott Blair

The webinars are available to IoL members at no charge, but can also be accessed by non-members for only £25 + VAT per webinar or £200 + VAT for the complete package of ten.

Email training@instituteoflicensing.org to access the webinars.

Northern Ireland liquor licence renewals

Don't let premises lose their licenses unnecessarily, says **Orla Kennedy**

The deadline to renew liquor licences in Northern Ireland is approaching fast. The Licensing (Northern) Ireland Order 1996 states that licence holders must renew their licence every five years with the current period ending on 30 September 2022. This renewal process applies to every licensed restaurant, hotel, pub or off-licence in Northern Ireland.

Renewal applications must be submitted to the local court by 9 August 2022. Notice of application must also be served on the police and the local council.

It is essential that licence holders submit their renewal application in advance of this deadline as failure to do so may result in the licensed premises being forced to close immediately and remain closed until the licence is renewed. This would most likely have a detrimental impact on any business, especially after the impact the Covid-19 pandemic has had on the hospitality sector.

Licence holders should also be aware that any alterations to licensed premises since their last renewal should have been approved by the court. If this has not happened, an application for approval will need to be made prior to renewal. Many businesses in the hospitality sector have adapted their premises to maximise space while complying with the varying restrictions, eg the use of outdoor spaces etc. Therefore, it is important for licence holders to review their licencing plan and check that they have the suitable licence for any alterations. If there is any discrepancy then it is possible to remedy this before the renewal deadline.

Renewal applications must be submitted to the local court by 9 August 2022

Next steps for licence holders

1. Review and check your existing licence.
2. If there have been any alterations to the premises within the last five years, check they have been permitted by the court. If the changes have not been approved, the licence holder will need to apply to have the alterations approved.
3. Submit your renewal application in advance of 9 August 2022.

Orla Kennedy
Solicitor, TLT Solicitors

The Licensing Act 2003, data management and the ICO

The issues concerning data protection and how these relate to the various licensing regimes is a very current and sometimes troubling matter for those acting as data controllers or processors. **Tony Ireland** and **Leo Charalambides** give their views

For licensing authorities, applicants and those making representations there are occasions where there are apparent conflicts between those matters of public interest and engagement within the licensing regimes and seemingly competing data protection principles.

This was the very situation that Luton Council found itself dealing with when in August 2021 the council, in its capacity as the licensing authority under the Licensing Act 2003 (LA 2003), received an application for the grant of a new premises licence (s 17) for premises known as La Mama located in Marsh Road, Luton. The application was submitted through an agent.

The Licensing Act 2003 Administration Process and the Hearing Regulations

The council as the licensing authority then carried out its functions within LA 2003 with a view to promoting the licensing objectives of (a) the prevention of crime and disorder, (b) public safety, (c) the prevention of public nuisance and (d) the protection of children from harm (s 4(2)). The authority also had regard to its own statement of licensing policy and the s 182 Guidance issued by the Secretary of State (s 4(3)).

Of particular note, the s 182 Guidance, at paragraph 1.5, states that the Act supports a number of key aims and purposes and that these are vitally important and should be principal aims for everyone involved in licensing work. These aims include: "encouraging greater community involvement in licensing decisions and giving local residents the opportunity to have their say regarding licensing decisions that may affect them".

Such applications must be advertised in a prescribed form and in a manner that is likely to bring the application to the attention of persons who live, or are involved in businesses, in the licensing authority's area and who are likely to be affected by it (s 17(5)(a)(ii)).

The application was advertised for a prescribed period during which responsible authorities and other persons have the opportunity to make representations to the licensing authority. (s 17(5)(c)). A responsible authority or any other person may make representations during a period of 28 consecutive days starting on the day after the day on which the application to which it relates was given to the local authority (Licensing Act 2003 (Premises Licences) Regulations 2005, reg 22(1)(b)).

A local resident sent a representation to the council by e-mail on 6 September 2021. It was accepted that the representation was relevant although it did not contain a postal address or a contact telephone number.

As relevant representations had been made then, the licensing authority arranged for a hearing to be held to determine the application (s 18(3)). Section 18(3)(a) provides: "Where relevant representations are made, the authority must hold a hearing to consider them, unless the authority, the applicant and each person who has made such representations agree that such a hearing is unnecessary."

This provision envisages communication between the parties. For each of the parties to agree that a hearing is unnecessary, they must be able to effectively and in a timely manner communicate with each other. The s 182 Guidance encourages contact between the parties even before the conclusion of the statutory time limits. Paragraph 9.34 of the s 182 Guidance provides: "Applicants should be encouraged to contact responsible authorities and others, such as local residents, who may be affected by the application before formulating their applications so that the mediation process may begin before the statutory time limits come into effect after the submission of an application". (Underlining added: see also paras 9.32 & 9.33.)

The s 182 Guidance further emphasise (para 8.48) that "All parties are to work in partnership to ensure that the licensing objectives are promoted collectively". Local residents are on an equal footing with the applicant and responsible authorities such as the police. While decisions are made in the "overall interests of the local community" (see s 182 Guidance, para 9.38) and "not those of the individual licence

holder" (s 182 Guidance, para 11.26) this is a clear indication of the importance attached to the wider public interest and the proper participation of civil society.

A relevant representation means representations which are about the likely effects of the grant of the premises licence on the promotion of the licensing objectives (s 18(6)(a)). While representations may be made by any persons within the local authority's area, the Court of Appeal confirms the importance of the particular location of a premises for decision making: "Licensing decisions … … … involve an evaluation of what is to be regarded as reasonably acceptable in a particular location'. (See *R (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court & Ors* [2011] EWCA] CIV 31 [42]; see also the s 182 Guidance, para 8.42.)

The particular location of a person making representations and the likely impact of the operation of a premises in that location vis-à-vis the likely effects of that impact generally in that location and specifically to the person making the representation will have a direct impact on the weight to be attached to a representation.

The physical location and the address had not been disclosed in the representation and was not relevant in the circumstances. It is nonetheless important to recognise that the disclosure of the address to the applicant and in certain circumstances to the members of a licensing subcommittee determining an application will be of the significant probative value and of the utmost necessity.

The applicant and those making relevant representations become a "party to the hearing" (see reg 2, Licensing Act 2003 (Hearings) Regulations 2005), the effect of which is to impose certain rights and obligations upon the parties (see reg 7, Licensing Act (Hearings) Regulations 2005). The processing of that data falls within clear legal obligations placed upon the council (see Art 6(1)(c) GDPR) and within the clear performance of its public licensing functions as a licensing authority (see Art 6(1)(e)).

The Court of Appeal confirms in *Hope & Glory* (above) that [41]:

> *The licensing function of a licensing authority is an administrative function. By contrast the function of the district judge is a judicial function. The licensing authority has a duty, in accordance with the rule of law, to behave fairly in the decision-making procedure, but the decision itself is not a judicial or quasi-judicial act. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires.*

Reg 7(2) and Schedule 3 make express provision for the notice of hearing to be given to persons (???) and the documents to be supplied. Where a hearing is to be determined in accordance with s 18(3)(a), the person who has made the application under s 17(1) is to be given notice of the hearing. The documents to accompany the notice of hearing are the relevant representations as defined in s 18(6) which have been made. The disclosure of effective and timely contact details between the applicant and those making relevant representations is lawful, and for a legitimate purpose.

In the circumstances the only detail disclosed by the complainant for the purposes of inter-party communication was the email address, which was legitimately shared with the applicant and / or their agent.

On 7 September the licensing service wrote to the objector to acknowledge receipt of the representation. This acknowledgment contained the following information:

> *Please note that, to assist the Committee members determining the application, a report will be produced. This report will contain full details of the application along with details of any representations made against the application. The Council is obligated to make such reports available to the public. We are required by the Licensing Act 2003 (Hearings) Regulations to make details of those making representations available to the applicant and the Committee members.*

Similarly, as a matter of policy, Luton Council informed residents in the vicinity of a new application and invite representations. In this letter the Council stated:

> *Please be aware that the Act requires the Licensing Service to make copies of any valid representations received available to the applicant at the end of the statutory period. We are not able to withhold personal details, nor are we able to accept anonymous representations.*

Furthermore, the Luton Council licensing service produced and published on its website a guidance note, *How to make a licensing representation* (3 September 2018). This guidance note provides details on the disclosure of personal details of persons making representation (page 3) which states, *inter alia*:

> *Where a notice of hearing is given to an applicant, the licensing authority is required to provide the applicant with copies of the relevant representations that have been made. It is only in exceptional circumstances that*

personal details will be removed from representation correspondence.

Further, in setting out the consequences of making a representation this guidance note states:

If the licensing authority decides that representations are relevant, it must hold a hearing to consider them. In the meantime, the licensing authority, the applicant and any person or body who had made representation can negotiate an agreeable way forward, and where written agreement is reached between all the parties, the hearing may be cancelled.

Finally, the Luton Statement of Licensing Policy (2021-2026) provides at para 4.16:

Where a notice of hearing is given to an applicant, the Licensing Authority is required under the Licensing Act 2003 (Hearings) Regulations 2005 to provide the applicant with copies of the relevant representations that have been made.

It goes on to state: "Applicants will be provided with the complete address of all objectors. Other personal details will be redacted i.e. mobile numbers and email addresses." In the present case there was no physical address given in the representation.

The importance of full disclosure to the applicant in accordance with the Licensing Act 2003 (Hearings) Regulations 2005 is made clear in paragraphs 9.26-9.30 of the s 182 Guidance which state that withholding personal details should only be permitted in "exceptional circumstances" such as where there is a "genuine and well-founded fear of intimidation" and where the "circumstances justify such action".

This guidance had been previously provided to the case worker. The circumstances of this case do not raise exceptional circumstances – the representation raises no such concerns.

The council clearly set out to inform parties that by submitting a letter of representation they are entering to and participating with a public interest legal regime that grants rights as well as imposes obligations.

The determination of the application was made at a hearing of the licensing sub-committee on 7 October 2021. The public report pack included a copy of the representation made by the objector and their e-mail details therein were redacted. The council recognised that there is a clear and nuanced distinction between the disclosure of the relevant representation (including the email address) to the applicant and / or their agents and the disclosure of the email address within the public agenda pack.

Complaint to the ICO

Subsequent to the hearing there was a complaint made to the Information Commissioners Office (ICO) with regard to what the objector considered to be a breach of privacy relating to their personal data being provided to an external third party without express consent being given to Luton Council and specifically the licensing service.

The complaint was handled in accordance with s 165 of the DPA 2018 and on 30 September 2021 a case officer at the Information Commissioner's Office wrote to Luton Council in reference to the complaint that the Council "inappropriately disclosed personal data in the form of an email address to a third party without consent or reasonable expectation". The case officer concluded: "I have considered the information available in relation to this complaint and I am of the view that you have not complied with your data protection obligations. This is because you have inappropriately disclosed personal information to a third party." (Emphasis by the case officer.)

The letter then set out further action required to improve information right practices but did not explain the basis upon which such action was deemed necessary.

On the basis of this response from the Information Commissioners Office, the complainant then lodged a complaint with the council seeking a formal apology and a suitable gesture of compensation to recognise the material stress, inconvenience and anxiety.

Seeking a review of the case offi er's decision

Having reviewed the matter, the council decided to made representations to the case officer on the 25 October 2021. The letter it sent raised the Licensing Act 2003 (Hearings) Regulations 2005 and focused upon those parts of the s 182 Guidance which provide that in exceptional circumstances personal details may be withheld (s 182 Guidance, paras 9.26 – 9.30). Additionally, the submission raised the importance of transparency and fairness along with the importance of mediation to the operation of the Licensing Act 2003 regime.

On 15 November the case officer stated: "Having viewed the further evidence you have provided, I can confirm that I see no basis to overturn the decision in relation to this particular complaint."

Interestingly, in both the letter of 30 September and 15

November 2021 the case officer did not set out reasons for the conclusions. The case officer stated that a record of this complaint would be kept by the Commissioner and "may form the basis for action … in the future". The complainant had already stated that they would be seeking addition remedies from the courts and that they would rely upon the findings of the case officer. It followed that the impact on Luton Council of this conclusion was significant, yet the council was still unsure of the case officer's reasoning, which was a further matter for concern.

The case officer in the 15 November 2021 letter invited the council to request a case review if it wished to challenge the decision.

It was unclear to the council as to the extent, if at all, which the case officer had given consideration to the following key submissions:

[1] Licensing functions are exercised in the public interest.
[2] The role of civil society and in particular local residents and business cannot be underestimated and is a crucial element to the proper functioning of the licensing regime.
[3] On making a representation an individual becomes a party to a legal process.
[4] Disclosure of representations including personal details for the purpose of inter-parties communication is a legal obligation and a necessary mean to further the statutory objectives which include early negotiation, mediation and disclosure.
[5] Luton Council provided ample and clear guidance in respect of the consequences of making a representation and becoming a party to the licensing process.
[6] In the present case the representation was disclosed to the applicant and / or its agent in furtherance of a clear legal duty to do so.
[7] The disclosure of the e-mail contact was necessary so as to provide an effective and timely means of communication and mediation pursuant to s 18(3)(a) and the s 182 Guidance.
[8] Disclosure of the email details was nuanced in that it was limited to the applicant and / or its agents and was redacted in the public agenda pack.
[9] The withholding of personal details contrary to the clear legal obligation should only be undertaken in exceptional circumstances. There are no such exceptional circumstances in the present case.
[10] The council acted lawfully and in compliance with the data protection principles in disclosing the complainant's email details to the applicant and / or the agent.

Based on counsel's advice, it was the view of the council that disclosure of personal contact details for the purposes of the Hearings Regs Notice is well within the legal obligation – art 6(1)(c) and public function art 6(1)(e) provisions of the GDPR. Additionally, the decision of the ICO case officer contained no reasoning and did not seem to have grappled with the legal principles. Therefore, in February 2022 the council submitted its challenge, asserting that it had complied with the data protection obligation, given these particular circumstances.

The Information Commissioners Office did respond and having reviewed the submission stated that it was now of the view that in fact the council *had* complied with its data protection obligations in relation to the way in which objector's personal data was handled by the council. This is because the council had not inappropriately disclosed personal information in providing the objector's details to a third party as part of the council's licensing function in line with the relevant policies and procedures administered by the council.

Conclusion

The relationship between licensing functions and data protection raises new challenges that require a fresh look at familiar legislation and practices. In this case it was clear that having clear and well documented processes and policy in respect of how the council will handle representations was important. We suggest that local authorities should consider:

- Clear reference to how representations and personal information will be dealt with within the SLP.Detailed and clear reference in any correspondence as to how personal details will be dealt with as part of the licensing process; and
- A published privacy statement for how the council will deal with relevant representations under the Licensing Act 2003 and personal information contained therein.

In our view, care should be taken that "data protection" is not used in a totemic way to undermine both the Licensing Act 2003 and the GDPR. A little forethought and care in the handling of personal data can ensure that the aims of both regimes are effectively advanced.

Tony Ireland, MIoL
Head of Public Protection, Luton Council

Leo Charalambides, FIoL
Barrister, Francis Taylor Building

Phillips' case digest

PREMISES LICENSING

Queen's Bench Division, Administrative Court
Mr Mathew Gullick QC, sitting as a Deputy High Court Judge

Judge's decision on the application for permission to apply for judicial review

Mount Eden Land Ltd v Westminster City Council & James Spallone
CO/3340/2021

Decision: 22 November 2021

Facts: The Interested Party requested that the Claimant's consent to the transfer of the shadow' premises licence. The Claimant refused, but did not suggest what other steps the Interested Party was required to take in order to come within section 44(6)(a) of the Licensing Act 2003.

Point of dispute: Whether section 44(6)(a) LA 03 had any application in circumstances where consent to transfer of the premises licence has been refused.

Held: A premises licence holder who has refused a request to have their licence transferred in effect had no absolute veto on a transfer to a person who fulfils the second criterion in section 44(6)(b). Had Parliament intended that to be the case then it would have said so expressly. The language of "all reasonable steps" used in the statute was clearly apt to include both circumstances where the proposed transferee had been unable to obtain any decision from the holder of the licence and also where the holder of the licence had (as in the present case) positively refused to transfer the licence.

Claimant to pay the Defendant costs, summarily assessed in the sum of £7,265.00.

PREMISES LICENSING

Queen's Bench Division, Administrative Court
Mrs Justice Cheema-Grubb

Challenge to display of notices around festival site

Wrotham Parish Council v Tonbridge and Malling Borough Council & Anor
CO/2637/2021

Decision: 3 August 2021

Facts: The claimants challenged the decision of the Council on 28 July 2021 to grant a new premises licence for a festival to be held in the "Wings of the Morning Fields" in Wrotham despite the fact that only 3 'blue notices' had been displayed along a 1500 metre perimeter. The claimant suggested that the size of the site required in excess of 30 such notices. The licensing officer has said that it would be sufficient to display just 6 located at the principal entrances to the site.

Point of dispute: Whether the licence grant was lawful

Held: The Parish Council's initial application for permission to judicially review the decision was refused, the single judge saying that "the grounds of review are unarguable." Neither the Defendant nor the Interested Party, however, were awarded costs. The Parish Council elected not to renew its application for permission at an oral hearing.

COVID

Bromley County Court
Deputy District Judge Paul

Prison term for Covid breaches of injunction granted by the civil courts

Peabody Trust v Offomah
Case No: G00BR641

Decision: 22 December 2020

Facts: In April of 2020 complaints were being made about Mr Offomah's occupation of his one-bedroom flat at Beverage Court, Saunders Way in SE28 in relation to groups of people attending and noise during the day and night. The problem was exacerbated so far as other residents were concerned by the fact of the Covid pandemic. The claimants brought an application for an injunction, which was subsequently granted on 16 April 2020 by Her Honour Judge Major. This provided for the standard terms of an antisocial behaviour order in relation to behaviour causing a nuisance, the selling or producing of any illegal drugs, excessive noise, and the presence of visitors. There was a complete prohibition made on the presence of visitors either entering or remaining at the address at Beverage Court.

Breaches of 11 December 2020 and 15 December 2020 led to the defendant being arrested and produced before Judge Brooks on 16 December. The judge then made an order, the defendant having accepted and effectively pleaded guilty to

the allegations that were made against him. The defendant was remanded in custody. The court accepted that this was not behaviour that either breached the highest level of culpability or harm. Nevertheless, they were breaches and not only was Mr Offomah aware of an injunction prohibiting him from having people at his flat, there had been on a previous occasion penalty notices issued to people who were present at his flat.

Held: That a punishment of the deprivation of his liberty for 6 days aptly met the seriousness of the breaches committed in the case.

REMOTE MEETINGS

Queen's Bench Division (Administrative Court)
Dame Victoria Sharp, President of the Queen's Bench Division, and Mr Justice Chamberlain

Primary legislation required to allow local authority "meetings" under the 1972 Act to take place remotely.

(1) Hertfordshire County Council (2) Lawyers In Local Government (2) The Association Of Democratic Services Officers -v- Secretary of State for Housing, Communities and Local Government and (1) Local Government Association (2) National Association Of Local Councils and (3) Welsh Government Minister For Housing And Local Government
[2021] EWHC 1093 (Admin)

Decision: 28 April 2021

Facts: Local authorities in England had made extensive use of the power to hold remote meetings since the Flexibility Regulations (laid before Parliament on 2 April 2020 and in force from 4 April 2020. Parts 2 and 3 related to local authority meetings & applied to England only. The Regulations dealt with remote attendance (Part 2) and modified existing provisions dealing with the frequency of local authority meetings and with public and press access (Part 3). In June 2020, the Lawyers in Local Government Group surveyed its members. 88% were in favour of continuation of remote meetings. 75% supported the continuation of hybrid meetings. Flexibility Regulations were due to expire on 7 May 2021 and the Secretary of State accepted that there would be "uncertainty around whether such meetings are permitted by legislation other than the Coronavirus Act 2020 after this date". Having considered the arguments advanced by the Claimants in their pre-action letter, the Secretary of State agreed that it was possible to interpret Schedule 12 to the 1972 Act "in a way that enables remote or hybrid meetings to take place". He was therefore supportive in principle of the proposed claim, though suggested that the Claimants' objectives could be achieved if the court were to give its opinion on the meaning of the words "meeting", "place" and "present" in the 1972 Act without making a declaration.

Points of dispute: (1) what "meeting" meant in the particular statutory context of Schedule 12 to the 1972 Act; (2) whether a "place within or without the area" was most naturally interpreted as a reference to a particular geographical location; and (3) whether being "present" at such a meeting would involve physical presence at the specified location.

Held: That primary legislation would be required to allow local authority "meetings" under the 1972 Act to take place remotely. Once the Flexibility Regulations ceased to apply, such meetings were required to take place at a single, specified geographical location. Attending a meeting at such a location meant physically going to it; and being "present" at such a meeting involved physical presence at that location. There were powerful arguments in favour of permitting remote meetings. There were also arguments against doing so. The decision whether to permit some or all local authority meetings to be conducted remotely, and if so, how and subject to what safeguards, involved difficult policy choices on which there were a range of competing views. These choices have been made legislatively for Scotland by the Scottish Parliament and for Wales by the Senedd. In England, they were for Parliament, not the courts.

The claim would be dismissed.

Note: After the judgment was circulated in draft, it was pointed out that the court had not determined the question whether a meeting which is required by the 1972 Act to take place in person is "open to the public" or "held in public" if the only means by which the public are permitted to access it are remote. The court decided to permit the parties to address it separately on it in the light of our conclusions on the meaning of "meeting", "place", "present" and "attend" in the 1972 Act and gave directions for the parties to make submissions on this point.

TAXIS

Queen's Bench Division
Peter Marquand, sitting as a deputy High Court judge

Alleged unlawful failure to transfer hackney carriage vehicle licence

Camayo v Colchester Borough Council
[2021] EWHC 2933

Decision: 3 November 2021

Facts: Mr Camayo alleged that the Defendant Council had failed to transfer a hackney carriage vehicle licence onto a vehicle that he owned. The Defendant Council disputed that it was under any obligation to do so. Mr Camayo further alleged that Essex Magistrates' Court had made a mistake following a hearing appealing the defendant's decision. He alleged that directions were made at that hearing for him to obtain a document and return for further hearing. However, the Defendant Court recorded that the claim was withdrawn.

Point of dispute: Whether the licensing authority had been bound to transfer a hackney carriage vehicle licence to the owner of the vehicle as opposed to the proprietor of the taxi business using that vehicle.

Held: (1) The Defendant Council had initially transferred the relevant licence to a VW Golf, on the mistaken (as it turned out), understanding that Mr Bryant wished to transfer the licence to the Golf, whilst remaining the proprietor and owner of the Golf. The fact that Mr Camayo was the owner of the Golf was irrelevant to the issue of who was the proprietor of the business that was to use the Golf as the taxi. In January 2018 when Mr Camayo presented his first application, the Defendant Council had already recorded Mr Bryant as the proprietor. No criticism could be made of them in failing to respond to that application in the absence of any evidence from Mr Bryant that either he was transferring the proprietorship associated with the Golf to Mr Camayo, or that the latter had bought the Golf and the associated proprietorship from Mr Bryant, given the records that they held following Mr Bryant's earlier application. Although Mr Camayo owned the vehicle, he was not the proprietor of the taxi business using that vehicle. There was no basis to criticise the Defendant Court's decision in September 2018 or September 2020.

(2) The District Judge at the Defendant Court did dismiss/ held withdrawn Mr Camayo's summons. It was likely that the basis for the court recording the summons as withdrawn was that the parties had agreed that the court did not have jurisdiction (i.e. it was the wrong court).

The claim would be dismissed.

TAXIS

Queen's Bench Division (Administrative Court)
Lord Justice Males and Mr Justice Fraser

Taxis. Declarations. Acceptance of bookings. Contract. Principals and Agents. Uber v Aslam.

United Trade Action Group Ltd, R (on the application of) v Transport for London
[2021] EWHC 3290 (Admin)

Decision: 6 December 2021

Facts: The parties sought declarations in respect of the present law under The Private Hire Vehicles (London) Act 1998.

Points of dispute: (1) whether, in order to comply with the provisions of the Private Hire Vehicles (London) Act 1998 ("the 1998 Act"), a licensed operator must accept a contractual obligation to the passenger as a principal to carry out the booking ("the Operator issue").

(2) whether a driver soliciting passengers by means of an app in all material respects identical to the Uber app was "plying for hire" within the meaning of and therefore contrary to the Metropolitan Public Carriage Act 1869 ("the 1869 Act") ("the Plying for Hire issue").

Held: (1) ("the Operator issue"): The 1998 Act established three kinds of licence which must exist in order for a private hire vehicle journey in London to be lawful. This was described in argument as a "triple lock". There must be a licence for an operator (the requirements for which are dealt with in sections 2 to 5), the vehicle (sections 6 to 11) and the driver (sections 12 to 14). In *Uber v Aslam* ([2021] UKSC 5, [2021] ICR 657) Lord Leggatt had made observations by reference to the statutory provisions in the 1998 Act. The context was an argument by Uber that a driver should not be regarded as a "worker" because there was no contract whereby the driver undertook to perform work or services for Uber; rather, drivers were performing services solely for, and under, contracts made with passengers through the agency of Uber. Uber maintained that its only role was to act as a booking agent providing technology services and collecting payment as agent for the drivers. In Lord Leggatt's view one of his concerns was that if the contractual scheme was as described by Uber, it would be unlawful because the 1998 Act requires acceptance by the operator of a contractual obligation owed to the passenger to carry out the booking and to provide a vehicle for that purpose. Considering that analysis the court now determined that if the passenger's only contractual relationship was with a driver he or she had never heard of and who was in any event unlikely to be worth claiming against, any claim was likely to be practically worthless. Conversely, if the obligation must be undertaken by the operator, the operator would have a powerful incentive to ensure that the drivers it uses were reliable and, if something did go wrong, a remedy against the operator was likely to be worthwhile. Section 56 of the 1976 Act supported this view. It provided that every contract for the hire of a licensed private hire

vehicle outside London shall be deemed to be made with the operator who accepted the booking for that vehicle whether or not he himself provided the vehicle. That demonstrated a clear parliamentary intention that the operator should undertake contractual responsibility. The language of the 1998 Act was different, but there was no reason for any different parliamentary intention in relation to private hire vehicle services in London. *Kingston upon Hull City Council v Wilson* did not stand in the way of that analysis. The case was not about whether there was a contract between the operator and the passenger. That issue could not have arisen in view of the terms of section 56 of the 1976 Act, which made clear that there was, due to the deeming provisions. Rather, the court was concerned to avoid technical arguments about where a contract is concluded when a series of telephone conversations take place between persons in different areas: jurisdictional issues aside, such questions were only rarely of any practical significance. In short the court agreed with the analysis of Lord Leggatt in *Uber v Aslam* and made a declaration accordingly.

(2) ("the Plying for Hire issue"): there was no definition of "plying for hire". Parliament must have considered that no definition was needed. The court considered analysis of the concept in *Sales v Lake* [1922] 1 KB 553, *Cogley v Sherwood* [1959] 2 QB 311 and *Reading Borough Council v Ali* [2019] EWHC 200 (Admin), [2019] 1 WLR 2635. In the latter case the facts found by the Chief Magistrate included the following:
(1) The vehicle in question had no markings indicating that it was for hire; it did not advertise any telephone number to contact in order to hire the car.
(2) The vehicle was parked lawfully, not waiting in a taxi stand or next to a bus stop.
(3) The vehicle was not available to a person hailing it on the street, but could only be booked by means of the Uber app.
(4) The vehicle was one of a number shown on the Uber app, where it was visible to any Uber customer; it was depicted by an icon showing the outline of a car.
(5) The app did not show any features which might identify a particular driver or a particular car. As a consequence: first, the mere depiction of the defendant's vehicle on the Uber app, without either the vehicle or the driver being specifically identified or the customer using the app being able to select that vehicle, is insufficient to establish 'exhibition' of the vehicle; second, on any view, there was a pre-booking by the customer, which was recorded by Uber as PHV operator, before the specific vehicle which would perform the job was identified. This was all in accordance with the transaction being PHV business, not unlawful plying for hire. Third, the waiting here was of a completely different character to that in *Rose's* case [*Rose v Welbeck Motors Ltd* [1962] 1 WLR 1010]. Unlike in that case, the defendant was not waiting to solicit custom from passing members of the public, but he was waiting for a private hire booking via the Uber app. Putting the example given by Lord Parker CJ in Cogley's case of what would not be plying for hire into the context of the Uber app, if approached in the street, the defendant would have been saying: 'You cannot have my vehicle, but if you register for the Uber app and make a booking on it, you will be able to get a vehicle, not necessarily mine'." It was the duty of the court to follow *Reading v Ali*. It concluded, therefore, that Free Now did not facilitate or encourage its drivers to ply for hire and that this ground of challenge to TfL's decision to grant it an operator's licence must fail.

GAMBLING

First-Tier Tribunal (Gambling)
First-Tier Tribunal Judge Aleksander

Conduct of Gambling Commission compliance assessments

Stakers Limited v The Gambling Commission
GA/2020/0002/V

Decision: 13 April 2021

Facts: Stakers Limited, which was incorporated and licensed in Malta, held an operating licence to provide remote gambling. Following a lengthy process of investigation, the Commission invited Stakers to attend a remote compliance assessment, at which Stakers was expected to screen-share its computer records in relation to customers and other gambling-related records. Stakers refused to attend the meeting. The Commission commenced a review of the operating licence, and imposed an interim suspension of the licence. Stakers appealed, and its appeal came before the Tribunal (Judge Aleksander).

Points of dispute: (1) Whether the Commission had been obliged to follow PACE Code C when conducting earlier compliance assessments and its failure to do so rendered the evidence from such assessments inadmissible.

(2) Test on appeal .

(3) The test for interim suspension under section 118(2) of the Gambling Act 2005.

Held: (1) The proceedings were civil and not criminal in nature. The assessments were compliance assessments and not investigations by prosecutors. The latter power could include the ability for the Commission to designate Skype as the form and manner by which records and information are to be produced or provided. In this regard, it did not matter that Skype was not used when the Gambling Act was passed.

The Judge, however, did not consider that the powers in the Act entitled the Commission to compel the provision of a test account or watch a live demonstration via Skype of the licensee's systems. On the other hand, there was nothing to prevent the Commission requesting such access or making compliance with the request obligatory by amendment to the Licence Conditions and Codes of Practice. Further, the Tribunal was not bound by the strict rules of evidence applicable to disputes before courts and would admit a wider range of evidence, albeit there was an exclusionary discretion where unfairness would result from admission.

(2) The principles in *R (Hope and Glory) v City of Westminster Magistrates* [2011] EWCA Civ 31 were of general application and that there was no authority to the contrary. The appeal was de novo and required the tribunal to stand in the shoes of the Commission and make a fresh decision on the basis of the evidence before it (including evidence that may not have been before the Commission), having given appropriate weight to the Commission's original decision. The burden remained on the Appellant throughout.

(3) The Commission may suspend a licence at the outset of, or during, a review, if it suspects that any of the conditions in section 120 apply. These conditions were that the licensed activity is being or has been carried on in a manner which is inconsistent with the licensing objectives, that that a condition of the licence has been breached, that the licensee has failed to cooperate with a review or is unsuitable to carry on the licensed activities. By way of contrast, the other suspension powers under section 118 require the Commission to "think" rather than merely suspect. In interpreting those provision, the Judge stated: "… I do not need to resolve any factual issues, I only have to determine whether there are grounds to suspect that one of the s 120(1) conditions may apply." The Judge found that there was evidence in the case which at least caused suspicion as to whether each of the s 120(1) conditions applied.

The appeal was dismissed.

Jeremy Phillips QC, FIoL
Barrister, Francis Taylor Building

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

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JOURNAL OF LICENSING - CONTRIBUTOR PROFILES

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

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

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

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Charles is a barrister in independent practice working out of Francis Taylor Building in London and Trinity Chambers in Newcastle upon Tyne. His work covers Chancery / commercial litigation, property issues and licensing. His first licensing brief was in 1996 - obtaining an off-licence in Sunderland in the teeth of a trade objection. He works across a range of areas, and presently spends a lot of time thinking about taxis.

ORLA KENNEDY

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

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

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Neil is the founder of Travis Morley Law. He specialises in Taxi Licensing Law and Contract Law. Over a 20-year legal career, he has fulfilled roles as a lawyer, lecturer, licensing officer and consultant. His views have been sought on national reforms, government briefs and High Court cases.

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

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

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

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Gerald's licensing practice is principally in alcohol & entertainment, taxi and gambling licensing. He appears at first-instance before licensing committees and magistrates' courts throughout England and Wales, before licensing boards in Scotland, and also at Gambling Commission panel hearings. On appeal he appears before the First and Second Tier Tribunals, the High Court and the Court of Appeal.

TONY IRELAND

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Tony manages a range of regulatory services including licensing. Tony moved to regulatory services in 2005 to implement the Licensing Act 2003. He has delivered key projects for the town including the award of a Small Casino Licence under the Gambling Act 2005, Introduction of a Business Improvement District and led successful applications for Purple Flag since 2018. He has 38 years' experience working in Local Government.

SILVANA KILL

Director of Operations, NTIA

With over 25 years working within the late night entertainment industry specialising in Operations Management, Employment Law, and Diversity and Inclusion (Inclusive Behaviours, Inclusive Leadership, Allyship, Micro Behaviours), Silvana is an integral member of the leadership team at the NTIA, working behind the scenes building the infrastructure, development of entity formation and management, and member lifecycle.

STEPHEN MCGOWAN

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

SUE NELSON

Executive Officer, Institute of Licensing

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

JULIA SAWYER

Director, JS Consultancy

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

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