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Daniel Davies, MIoL
Chairman, Institute of Licensing

Welcome to the summer edition of the IoL's *Journal of Licensing*. As we move into sunnier climes, we are delighted to have recently hosted a range of flagship events, all of which are crucial in supporting specific areas of licensing, facilitating continual professional development and driving public awareness.

In February this year, the IoL released a consultation document, *Guidance on determining the suitability of applicants and licensees in the hackney carriage and private hire trades*. This is an important step forward for taxi licensing standards. As licensing practitioners, it's essential we make every provision to ensure that applicants and drivers are fit for purpose. The majority of applicants and licensees are exemplary professionals, but in recent times we have seen examples where this has not been the case.

We hope the *Guidance* will assist local authorities in setting the bar for entry into the trade and ensure that professionalism is preserved. It forms an important part of our strategy to promote public safety and, in particular, protect the most vulnerable people in society. We were pleased to formally launch the *Guidance* at the Taxi Conference in April. The next conference is scheduled for July in Leeds, and I urge members, especially local authorities, to take up this opportunity and learn more about our approach.

Every year we hold our National Training Day (NTD). It's a wonderful chance for everyone in the licensing field to engage, learn and discuss, particularly in relation to the impact of forthcoming changes and recent case law. As always we have a diverse agenda and a fantastic selection of speakers lined up, including Rob Burkitt of the Gambling Commission and Simon Garrett from X-Venture. I'm writing this in advance of the event, so I hope you were there with us on 20 June at the Oxford Belfry Hotel and had a very enjoyable and worthwhile day.

Coinciding with the NTD, this year's National Licensing Week ran for five days from 18-22 June. Again, as I'm writing before the week began, I hope many of you were able to support the campaign and raise the national profile of licensing. We had certainly prepared a great agenda this time round: we were looking to recruit bar managers and licensing officers who would be interested in switching positions. It would be an opportunity to understand and appreciate what it's like working on the other side of the fence – an excellent way of encouraging collaborative working between operators and authorities. In addition, the Gambling Commission became involved this year, and we were hoping to see lots of joint-working between local compliance and local authority officers. I'm sure the whole week was an enormous success, and I look forward to writing about it in the next issue.

So, on to this issue, in which we're covering a broad range of topics and inevitably one of them is the arrival of GDPR, or General Data Protection Regulation. We have three articles looking at how GDPR will impact on licensing, and how practitioners in local authorities and legal professionals can achieve compliance.

In addition, Sarah Clover, regional chair of the IoL West Midlands, writes about the licensing and planning regimes in relation to the night-time economy. James Button and Stephen Turner shed more light on the guidance on determining the suitability of applicants and licensees in the hackney carriage and private hire trades. And Charles Holland examines a case of a disputed SEV licence.

To conclude, I'd like to thank everyone involved in the production of the *Journal*. We are fortunate to benefit from a hardworking team who dedicate their time and effort to produce this publication throughout the year. I hope you enjoy reading this issue.

Until next time, thank you for reading.

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Leo Charalambides, FIoL
Editor, Journal of Licensing

On 28 April, the Institute launched its *Guidance on determining the suitability of applicants and licensees in the hackney and private hire trades*. The aim of the *Guidance* is to assist local authorities making decisions about the suitability of applicants and licensees in connection with taxi and private hire driver, vehicle and operator licences. The *Guidance was* produced in partnership with the Local Government Association, the National Association of Licensing and Enforcement Officers and Lawyers in Local Government.

The *Guidance* gets to grip with the time worn, time tested and dated test of "fit and proper" and boldly proposes a national standard for "suitability". The IoL recognises that its *Guidance* cannot have the force of legislation, new or amended, the need for which is both abundantly clear to and fully supported by the Institute and the other organisations working with it. But the IoL does recognise that the *Guidance* can be used by local authorities as a basis for their own local policies, and if adopted will achieve greater consistency so that applicants are less able to shop between authorities. It is acknowledged that consistency cannot be fully achieved without the imposition of national minimum standards.

IoL Chairman Daniel Davies has praised the initiative, saying: "This is an important step forward for taxi licensing standards. It provides an opportunity for local authorities to raise standards and consistency in the licensing of taxi and private hire drivers, vehicles and operators. This is needed to provide a better standards for safeguarding passengers, including children and vulnerable adults.

"The majority of applicants and licensees are professional, hard-working people and this *Guidance* will assist local authorities in setting the bar for entry to the trade to ensure that that professionalism is protected and preserved. I commend the *Guidance* to local authorities and hope that it will prove invaluable in their role as licensing authorities charged with the sometimes difficult task of vetting applicants and licensees in the hackney and private hire trades."

IoL President James Button added: "Hackney carriage and private hire drivers, operators and vehicle proprietors are responsible for public safety: in the case of drivers, on a direct, face to face basis. Passengers and others must not only be safe, but must also feel safe, and high standards of integrity must be demonstrated and upheld. These guidelines are the result of over two years' work by the working party, which recognised there was a clear need for up-to-date guidance to assist local authorities in determining whether a person was safe and suitable to hold a hackney carriage or private hire licence. I would urge local authorities to adopt them."

The reactions so far have been welcoming. Rachel Griffin of the Suzy Lamplugh Trust said: "Suzy Lamplugh Trust welcomes the Institute of Licensing's *Guidance* as an important step towards reforming current regulation and improving the personal safety of passengers. The current lack of detailed legislation outlining how decisions by licensing authorities about the propriety of licence applicants should be approached leaves the process open to inconsistency and is potentially putting passengers' safety at risk. The *Guidance* is a step towards such legislation and highlights important considerations for licensing authorities moving forwards."

In the absence of much-needed legislative reform this initiative by the Institute is to be welcomed. It remains to be seen how local authorities will make use of the *Guidance* and thereafter the reaction of the courts. I suspect that it will come to represent a significant milestone in the growth and impact of the IoL and its membership.

Finally, Hannah Keenan, our editorial assistant, is leaving the IoL for further studies and a new career. She will be familiar to many of us as one of the indefatigable team that ensures our National Training Conference runs smoothly and on time. She performs a similar role here with the *Journal,* not only managing our time table but also the formatting and layout of our copy. She has always done so with good humour and good tact. She will be greatly missed, and we wish her the very best.

Good night? The future of the night-time economy

A new approach that sees our planning and licensing regimes work in harmony is much needed and long-overdue. Bring it on, says **Sarah Clover**

Recent years have seen a dramatic shift in the way we consider the night-time economy. Traditional assessments of our economic activities at night, and particularly those involving alcohol and entertainment, equate them with trouble. This is frequently epitomised in the approach of the police and other enforcement agencies, and the typical "cure" has been to curtail, contain and to close.

This attitude is increasingly viewed as outdated and inappropriately restrictive. A far wider range of considerations has come into view, highlighting the benefits and revenue given by a night-time economy to its area, and not just the drain it might represent on the enforcement authorities. The balance sheet has been re-examined.

The Mayor of London has championed an entirely new approach to the night-time economy in London in recent years, working with models imported from other global cultural centres, and the new approach has seen significant success. As a key example, the concept of "Night Czar" was imported from Europe, from cities such as Paris, Amsterdam and Zurich. It has since spread to the States, and New York has adopted the role for its night-time administration. In London, the role has been deployed to great effect. In November 2016 the Mayor, Sadiq Khan, appointed American-born British performer and comedian, Amy Lamé, as the city's first Night Czar. Her position was renewed, for the full mayoral tenure, after her first year. It is a significant achievement.

The role of a Night Czar varies as much as the cities in which the appointment is found, but there are some constants, and the rapid spread of the concept is testament to its success. Ms Lamé explained recently what her personal role involved: "I realised from the beginning this is much bigger than just night life: this job is about life at night, which encompasses every aspect of life in London".

She identified that she spends much of her time working with London's deputy mayors for policing and crime, transport, culture, planning and housing: "If you take a slice of everything they do and flip it into the dark, that is my brief", she said.

This is a valuable and important brief and, as each of the Night Czar cities will confirm, one well worthy of a full-time appointment to service it. It is far more than just a figure-head or a ceremonial role.

The economic figures for London have consistently justified this attention. London's night time economy is worth an estimated £26 billion and rising.

"We ignore this at our peril", Ms Lamé has said. "We are facing an uncertain future with Brexit, and we have an opportunity to really craft and create a dynamic, balanced 24-hour London."

It is important to grasp that this focused activity is about far more than simply promoting a city's night life as represented by the activities of licensed premises. Although these are always key to the success of a city's night-time economy, they form only a part of it. The infrastructure required to service a truly 24 hour city is specific and complex, and requires dedicated attention and co-ordination. London's night-time entertainment industry is estimated to employ just under 50,000 people. Its health and social care industry provides over 100,000 jobs at night, as does the transport sector. The specific figures for other cities are harder to establish because, to date, the same level of research simply has not been done – which is telling in itself. Other cities will demonstrate lower figures that London, no doubt, but still at levels significant enough to warrant similar attention and input.

There is a whole framework surrounding an effective 24 hour city, including such varied elements as transport, workers' rights, lighting, waste management, planning and, in short, all the necessary infrastructural elements that make working or living in a city after dark more accessible and convenient. In London, the Night Czar works alongside a Night Time Commission. The stated aim of the commission is to help realise the Mayor's "Vision for London as a 24-Hour City"; to carry out research to understand the finer details of life between 6pm and 6am; and to consult with London residents, evening and night workers, councils, businesses, community groups, public sector organisations and visitors

to the capital in order to understand how to make London better for everyone in the night-time. The intention is that the commission will report back in late 2018 and recommend how London can become one of the world's most forward-thinking and successful night-time cities.

Other UK cities are set to follow suit with the introduction of a commission, a night czar or whatever variation that suits them. Each city will adapt the model in a way unique to its needs. The way in which the Night Mayor, Mirik Milan, has operated in Amsterdam since 2014 is bespoke to that city. Amsterdam is very different to London, but the night role works well there, and clear benefits are seen for licensed premises, tourists and residents and the night-time economy as a whole.

The importance of this new focus of attention on the night-time economy has been recognised in various quarters, and has seen the rise of campaigns and membership organisations, such as the Night Time Industries Association, established exclusively to promote it. The debate was taken up and extended by the House of Lords Select Committee in 2017, in the committee's report on the ten year review of the Licensing Act 2003, which said:

437. Over the past few decades many UK cities have seen considerable growth in the night-time economy (NTE) - businesses and industries that stay open late into the night and early in the morning. Following the Licensing Act's liberalisation of 24-hour licences, the licensed trade has accounted for a large share of this growth. According to the Department for Communities and Local Government, the NTE today accounts for 10–16% of UK town centre employment (and an even higher proportion in London), and contributed over £1 billion in business rates in 2013/14.

444. We have considered a range of measures aimed both at promoting the NTE and at mitigating and regulating some of its more harmful aspects. These include night czars, the recently opened night tube in London, as well as measures such as the Late Night Levy and Early Morning Restriction Orders, which have respectively aimed to tax and curtail the NTE in places where it has generated problems.

Night Czars and Night Mayors

449. ……., we were informed that together, the Night Czar and the Chair of the Night Time Commission will:

• "… work with the Mayor and his Deputy Mayors to ensure a well planned and strategic approach as London develops into a genuine 24-hour city. They will ensure that all stakeholders have a strong voice in the development of policy for London's night time economy …

• develop, promote and articulate a vision for London as a 24-hour city. They will publish a roadmap setting out how the vision will be implemented …

• create a better understanding across all sectors of the challenges and opportunities for London's night time economy."

450. We believe that the appointment of the Night Czar and other champions of the night time economy (NTE) has the potential to help develop London's NTE and ease the inevitable tensions that arise between licensees, local authorities and local residents.

The Government's response to the committee's report agreed with this recommendation, providing a green light for progress.

We are currently experiencing one of the most extensive and radical periods of change that this country has seen in a long time. Thirteen years ago, the commencement of the Licensing Act 2003 saw perhaps the biggest ever shake up of the alcohol and entertainment regime. It changed radically the landscape of the licensed industries. The much vaunted flagship change of being able to apply for a 24 hour licence transpired to be one of the least dramatic changes in reality. By contrast, for example, the shift in decision making from the magistrates to local councillors had a much more wide-reaching effect, and introduced seismic change that still has not settled down.

The 2003 Licensing Act was undoubtedly introduced to tackle the problems and negative elements of licensable activities. Its remit, comprised in the four licensing objectives, was overtly to "promote the prevention" of the least desirable impacts of alcohol and entertainment, especially late at night. These impacts are commonly identified as crime, noise, litter, disorder, street fouling and angry, upset residents. These were all to be expected as the focus for a piece of regulatory legislation. However, as far as the whole of the night-time economy is concerned, this is only one piece of a puzzle. It is an important piece, but it does not represent the whole picture. Herein lies the problem, and the deficiency in the 2003 Licensing Act, and, at times, in those responsible authorities that enforce it. The night-time economy is habitually treated as a negative problem, blighting our towns and cities, which needs to be cured. This is the equivalent of examining our transportation systems and thinking only in terms of congestion, collisions, air pollution and deaths. That is not what the resource is all about: the positive benefits cannot be ignored, and should not be underestimated. Tackling negative elements must be approached in the context of the value of the resource overall, and the positive elements protected, even while the harmful impacts are addressed.

Many of the valuable elements that we appreciate about the night-time economy are not specific to the night at

all. Eating, drinking, socialising and accessing cultural experiences are not exclusive to the night. There is nothing inherently problematic about any of these activities. The reasons why any of them might become a problem at night bear some examination, particularly when it comes to trying to introduce corrective measures. Banning them as options for all-comers is not a viable solution.

One of the key issues that must be examined is the relationship between different land uses and users. Conflicts arise all too frequently from the inappropriate juxtaposition of sources (of noise, movement, waste products, light, fumes and so on) and the potential receptors of those (usually unwanted) impacts, typically residents. The inevitable clash of interests arising from close proximity is usually entirely predictable, and largely preventable with the right processes in place.

That is not what the different regulatory regimes deliver at the moment. The lack of co-ordination that we currently experience between the different land use regimes is inexplicable and unsustainable. We attempt to police the relationships between businesses, operators, customers and patrons, residents, tourists and enforcement bodies through a bewildering panoply of regulatory legislation that was not designed nor written with the other, overlapping regulation in mind. Only a highly trained regulatory lawyer could pretend to understand the mire of detailed legal requirements, and even then, with no confidence of certainty.

The three key regimes are planning, licensing and environmental protection (particularly noise nuisance).

Planning is the place making, place shaping regime that changes the landscape (urban and rural) around us. From major structural, infrastructure, road and transport changes to the massive re-configuring and regeneration of city centres, transport hubs and the intense introduction of residential development: all of this takes place within the planning regime. The planning system is responsible for the classic problem that everyone recognises: the new block of flats or housing that is permitted in close proximity to long-established, but potentially highly impactful licensed premises, without pre-emptive consideration of the likely consequences. Sure enough, all too frequently, residents move into new developments with inadequate sound insulation, and then, having apparently embraced the "vibrant city living" experience by buying into the area, they soon begin to complain about it when they realise that it means that it is too noisy for them to sleep.

This is not an isolated example, and the very fact that it sounds so familiar is testament to how badly our land use regimes operate together. It is not an insignificant problem either, impacting as it does so heavily upon people's lives, whether at the noise producing premises, or in the noisy residential units, and, of course, there is the strain it imposes on the resources of the local authorities which have to police and enforce these situations. The current high profile debate about the night-time economy provides an opportunity to address this problem, amongst many others.

The licensing system has seen its major shake-up, and the planning system could be next. A major review of planning, the Raynsford Review, was launched in 2017 to identify how the government could reform the English planning system to make it fairer, better resourced and capable of tackling the major challenges which confront the nation, including housing and climate change. The review was sparked by widespread concern that the planning process is no longer capable of shaping the kinds of places which will support our environment and economy and secure the health and wellbeing of communities, now and in the future.

Chaired by former housing and planning minister and President of the Town and Country Planning Association, Nick Raynsford, the review has been informed by a task force of experts in policy, law, planning practice and public participation. The review aims to provide recommendations to reshape planning completely, restoring its democratic and creative purposes.

Nick Raynsford has said: "More than ever we need a planning system which commands the confidence of the public and delivers outcomes of which we can feel proud. After too many years of piecemeal changes and tinkering with the system, we need to go back to first principles and seek to develop a practical blueprint for the future of planning in England. That is the objective of this review."

The roots of planning go back to early nineteenth century, when the purpose was heavily focused upon social health and well-being. Tackling slums, sanitation and poor living conditions, planning was fundamentally a regime for supporting disadvantaged people in poor communities. That is very far away from what the planning regime has become now, with the primary focus being upon the delivery of more and more housing, and the apparent result that the major beneficiaries of the system, particularly financially, are the big developers.

The review contemplated for the planning system would be as radical as the overhaul of the licensing system in 2005 – starting again with a blank sheet of paper, and trying to design a system that achieves what everyone agrees it should be trying to achieve. It is as important as it is ambitious.

The Raynsford Review reported its first findings in May this year. If the Raynsford recommendations appear capable of delivering better results such as more growth, more housing, more infrastructure and boosts to local economies, including night- time economies, particularly in a post-Brexit era when everyone is looking for new ways to achieve these desirable ends, then it seems entirely likely that the proposals will be supported politically. The review took some limited notice of the licensing system, and recognised the overlap, but its work was not designed to harmonise the two regimes.

The third pillar of the land use regulatory trinity is the Environmental Protection Act 1990. It is of the same vintage as the foundations of our planning system, but operates in a very different way. The law of nuisance was regrettably imported into the Licensing Act 2003 in a mutated form, in the guise of the licensing objective of the prevention of public nuisance, and we have never really been able to reconcile the two branches of noise nuisance control.

The structure of the EPA requires local authorities to detect and police nuisances actively in their area, and, where found, to enforce against them, as an inescapable duty; almost regardless of the reasons and the context of that nuisance. The fact that the nuisance has been "approved" under the planning regime or the licensing regime does not matter. It is entirely (theoretically) possible for a noise source to be granted planning permission and a licence, and to be prevented from trading almost immediately under the noise nuisance regime. It is also entirely possible for the noise source to be fully authorised to undertake its noisy activities, and for the authorities nevertheless to approve sensitive residential receptors to be installed right next door, under a new planning permission: sometimes without taking proper account of the consequences and sometimes without ever pausing to reflect on what they might be. None of this would affect or preclude the exercise of the authority's duty to curtail a noise nuisance, even though it was their actions that had caused the conflict in the first place. This is illogical, and inimical to effective sustainable communities.

None of these three regimes operate in splendid isolation in reality, and yet we all behave - and are encouraged and required to behave by the law itself - as if they do. The discussion about licensing law and regulation, and the discussion about noise regulation are just parts of the wider discussion about planning law and regulation, which is part of the discussion about value of property, business rates, taxes, fees and levies, the costs of resourcing public services, like the police and health, and the costs of servicing the streets, and providing transport and infrastructure. They are all connected.

As soon as a debate begins about any of these topics in any detail, the cross-over quickly becomes apparent. It did to the House of Lords Select Committee almost immediately as they began their investigation, which is why one of their key recommendations, which came wholly out of the blue, was that licensing committees should be merged with planning committees. This took many by surprise, but it was only a reflexive reaction to the obvious illogicality of the current separation and lack of joined-up thinking between those two regimes. The Lords committee could not understand why the planning and licensing systems did not talk to each other; why planning officers so rarely participate in licensing proceedings; and why licensing officers even more rarely involve themselves in the planning process, notwithstanding the fact that future conflicts are obvious to see long before they come to pass on the ground.

The committee suggested a solution: it may not have been the ideal one, but a solution is certainly required, and if its report sparked the start of that debate, then it was an extremely valuable trigger. Their solution may have seemed shocking, but is it really so difficult to believe that ten, or twenty years from now, we will be looking at a completely different regulatory landscape, and that it would be an improvement? The transfer of licensing decision making from the magistrates to local authority committees seemed just as shocking at the time. It would be very easy to argue that investing our key place-shaping decision-making, in licensing and planning terms, with politically motivated lay councillors, is not the ideal vehicle for optimum quality and legally defensible outcomes. Those who work in these regimes see the consequences of that every day. It may be that the proper answer to that argument is a shrug of the shoulders, and an acknowledgment that, like democracy, it is the worst way of controlling our boroughs and districts - except all the other ways.

Whether that is true or not hardly matters, since there is no prospect of any change in the foreseeable future, but that is no good reason not to talk about it, and about any potential that there might be for improvement.

Change is inevitable. Many of the responses to the House of Lords Committee which the Lords found the hardest to understand were those that indicated that there was no good empirical reason for approaching decisions one way or another, but only that "we have always done it this way". That is an unacceptable and complacent approach.

A more recent House of Lords Select Committee has just concluded its examination of the impact of the advance of artificial intelligence. Expert witnesses pointed out that the first revolution to change the shape of society, from hunter

gatherer to agricultural civilisation, took many thousands of years to achieve. The industrial revolution that transformed our civilisations so dramatically, again, took hundreds of years to come about. The computer and internet revolution took decades. The artificial intelligence revolution is happening now; we are in the middle of it, and many of us have not begun to consider the consequences, which will happen to us, whether we like it or not. In only twenty years' time there will be changes to our society that we cannot imagine today – because no one has thought of them yet.

It has been suggested by eminent academics that this is the real factor that separates us from the animals. Not consciousness (of self, or generally); not having a soul; not religion; not star gazing - but our ability to co-operate in vast numbers. Animals can only co-operate in tens, or at their very best, in their hundreds. We have evolved and learned to communicate in our thousands, and tens of thousands, and millions. That is an evolutionary advantage: but it is the communication that is key. For all our awesome options for communication in the 21st century, we do not, in fact, communicate together as effectively as we should, and particularly when it comes to organising our societies along optimum lines. For all our internet access, emails and online abilities, we still work in silos - locally, nationally, even globally. We gravitate to many separate conversations and decision-making bodies, discussing the same topics but not joining up our discussions. At best, it slows progress down and misses golden opportunities. At worst, it results in conflict, and frustrates progress completely. The sharing of good ideas is vital. Sharing the benefit of mistakes and experience is crucial.

It can be complicated to have bigger conversations, and to involve more affected stakeholders. It makes resulting decisions complex and unwieldy, which is, no doubt, why it is often avoided, but that may not be the right approach. If the resulting decision is the right decision, and sustainable in the long-term, the painful process of reaching it might be worth the struggle.

That is a very key element of what night czars and commissions and anything that looks like them can achieve. This cross communication and cross pollination of ideas does not happen spontaneously; it requires dedicated orchestration, and the resulting outcomes are improved as a result.

Land is a diminishing resource everywhere: our societies are going to have to co-exist ever more closely together - this is an irreversible trend. Separation and segregation of activities are luxuries that we will not be able to afford, and the sooner we begin to focus upon the challenges of successful harmonisation and integration of competing land uses, the better.

At present, we focus our energies on keeping the sources of negative impacts and the sensitive receptors as far apart from each other as physically possible. We eject sexual entertainment venues (SEVs) from their long-term city-centre homes because the "character of the area" has changed. We review premises licences because new residents moving in object to the licensable activities that were never seen as a problem before. We serve noise abatement notices on long-standing grass roots music venues, and force them to close, because their new neighbours don't appreciate their brand of culture. This is as unnecessary as it is senseless and depressing.

Working on harmonisation rather than segregation involves challenges for more than one regulatory regime at the same time. Our relationships with our town and city spaces, and indeed, with alcohol and entertainment, are different now to what they were 10, 20, 30 years ago or more, and it will all change again. For example, the younger generations now are less interested in drinking alcohol and a far higher proportion of them would describe themselves as teetotal. It is the middle aged and indeed the middle classes that are the more prolific drinkers, with much of their supply purchased from the off-trade and a large proportion of it drunk at home with home entertainment. That is not a good thing, nor a bad thing to which we should apply a value judgement *per se*, but it does have impacts on the night-time economy that need to be considered. Some people who drink at home before embarking on their evening out are said to indulge in the comparatively new phenomenon of "pre-loading": not a familiar term prior to the Licensing Act 2003. Now it is something that we take for granted, although the research conducted into its prevalence and consequences is close to nil, as members of the Lords Select Committee discovered when they asked to see it. The consensus is that pre-loading has changed the game in our town and city centres, causing added pressure for the on-licensed premises and the agencies that police them, when the root of this issue would appear to emanate from the off-licensed premises, particularly supermarkets, which are long closed when the potential aftermath of the sales of their alcohol are being visited on their districts. To date, we appear to be doing precisely nothing about it.

Spotting patterns, predicting trends and meeting them on their own terms is an important part of the evolution of the night-time economy and the regulatory systems that serve them. A method for capturing that data and translating it into ideas for action is required: it is a correlative exercise, involving the all-important need for communication. Those

regulatory systems, properly informed, need to be co-ordinated so that they are working smoothly together, and their various policies are harmonised, and not in conflict, as so frequently happens now. To date, we are very far away from co-ordinating even licensing and planning policy, which seems the most obvious relationship, and yet the discord between them is barely recognised but universally tolerated. The National Planning Policy Framework (NPPF) has things to say about licensing. The s 182 guidance has things to say about planning. However, they are not the same things, and make no sense together.

A good example of this is seen in the concept known as "agent of change". A current buzz phrase, agent of change is applied more as a label to different scenarios than as a concrete rule. It is intended to convey the idea that the agent - usually a developer - who comes into an existing land use situation and changes it to the detriment of one or other of the land users already in situ should be responsible for installing any mitigation that is required to restore the harmonious status quo. Agent of change reflects the challenges of bringing people into ever closer proximity with each other. There is a struggle to know how to express the idea effectively, however, such that it could be applied in any given decision-making exercise. Ironically, given its significant impact on licensed premises, the agent of change concept is most clearly set out in planning policy and guidance. Licensing has nothing to say about it. The clearest expression of what it means is to be found in the NPPF, current and emerging, but even that is not very clear at all.

Intense proximate co-existence in our town and city centres is not undesirable, nor to be avoided. As the years roll by, it will be necessary and unavoidable. We must get to grips with our ever-decreasing land resource, and the consequences of it. As with so many challenges facing modern living, we have to focus on finding new solutions, and not getting stuck in outmoded ways of thinking. Considering the night-time economy as a problem is no longer an option: the benefits and revenue it brings are vitally important to our societies, and must be nurtured. This is not only in terms of the immediate benefits of experiencing the night-time economy, but in more indirect ways, such as job provision, tax and revenue raising, life flexibility and enhancement. The problems to which the activities of the night give rise will not disappear and must be tackled, but the new and exciting ways of approaching these problems that are currently emerging should be fully recognised and embraced.

Sarah Clover, MIoL
Barrister, Kings Chambers

GDPR is here – are you ready?

The details and implications of the new data protection regulation need to be thought through very carefully, as **Sam Karim QC** and **Hannah Price** explain

The General Data Protection Regulation 2017 replaced the Data Protection Act on 25 May.

Who does the GDPR apply to?

GDPR applies to "controllers" and "processors".

- A controller determines the purposes and means of processing personal data.
- A processor is responsible for processing personal data on behalf of a controller.

If you are a processor, GDPR places specific legal obligations on you; for example, you are required to maintain records of personal data and processing activities. You will have legal liability if you are responsible for a breach.

However, if you are a controller, you are not relieved of your obligations where a processor is involved – GDPR places further obligations on you to ensure your contracts with processors comply with GDPR.

GDPR applies to processing carried out by organisations operating within the EU. It also applies to organisations outside the EU that offer goods or services to individuals in the EU.

GDPR does not apply to certain activities including processing covered by the Law Enforcement Directive, processing for national security purposes and processing carried out by individuals purely for personal / household activities.

What information does the GDPR apply to?

GDPR covers both personal data and sensitive personal data.

"Personal data" means any information relating to an identifiable person who can be directly or indirectly identified in particular by reference to an identifier.

This definition provides for a wide range of personal identifiers to constitute personal data, including name, identification number, location data or online identifier, and reflects changes in technology and the way organisations collect information about people.

GDPR applies to both automated personal data and to manual filing systems where personal data are accessible according to specific criteria. This could include chronologically ordered sets of manual records containing personal data.

Personal data that has been pseudonymised - eg key-coded - can fall within the scope of GDPR depending on how difficult it is to attribute the pseudonym to a particular individual.

GDPR refers to sensitive personal data as "special categories of personal data" - see Article 9. For relevant provisions in GDPR – see Articles 3, 28-31 and Recitals 22-25, 81-82. The special categories specifically include genetic data, and biometric data where processed to uniquely identify an individual.

Personal data relating to criminal convictions and offences are not included, but similar extra safeguards apply to their processing (see Article 10).

The main principles of the GDPR

Personal data should be:

a. Processed lawfully, fairly and in a transparent manner in relation to individuals.
b. Collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.
c. Adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.
d. Accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay.
e. Kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed.
f. Processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

The controller shall be responsible for, and be able to demonstrate, compliance with the principles.

Lawfully processing personal data

For the processing of personal data to be lawful, one of the following grounds found in Article 6 of the GDPR must be present:

- Art. 6(1)(a) - Consent of the data subject.
- Art. 6(1)(b) – Necessary for the performance of a contract with the data subject or to take steps preparatory to such a contract.
- Art. 6(1)(c) – Necessary for compliance with a legal obligation.
- Art. 6(1)(d) – Necessary to protect the vital interests of a data subject or another person where the data subject is incapable or giving consent.
- Art. 6(1)(e) – Necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.
- Art. 6(1)(f) – Necessary for the purposes of legitimate interests.

Reporting requirements / record keeping

Controllers and processors will be required to maintain a record of their data-processing activities, which must be available upon request to the relevant DPA. This requirement *will not*, however, apply to small and medium-sized enterprises (SMEs) with fewer than 250 employees, unless the processing they carry out is a high risk or they process sensitive criminal data.

Consent

The conditions for obtaining consent have become stricter:

- There must be a positive opt in for consent, which is clear and specific; and
- The data subject must have the right to withdraw at anytime.

Right of access

Individuals have the right to access their personal data and supplementary information. The right of access allows individuals to be aware of and verify the lawfulness of the processing.

Under GDPR, individuals will have the right to obtain the following: confirmation that their data is being processed; access to their personal data; and other supplementary information – this largely corresponds to the information that should be provided in a privacy notice (see Article 15).

GDPR clarifies that the reason for allowing individuals to access their personal data is so that they are aware of and can verify the lawfulness of the processing (Recital 63).

You must provide a copy of the information free of charge. However, you can charge a "reasonable fee" when a request is manifestly unfounded or excessive, particularly if it is repetitive. You may also charge a reasonable fee to comply with requests for further copies of the same information. This does not mean that you can charge for all subsequent access requests. The fee must be based on the administrative cost of providing the information.

Information must be provided without delay and at the latest within one month of receipt.

You will be able to extend the period of compliance by a further two months where requests are complex or numerous. If this is the case, you must inform the individual within one month of the receipt of the request and explain why the extension is necessary.

Where requests are manifestly unfounded or excessive, in particular because they are repetitive, you can charge a reasonable fee taking into account the administrative costs of providing the information; or refuse to respond.

Where you refuse to respond to a request, you must explain why to the individual, informing them of their right to complain to the supervisory authority and to a judicial remedy without undue delay and at the latest within one month.

You must verify the identity of the person making the request, using "reasonable means".

If the request is made electronically, you should provide the information in a commonly used electronic format.

GDPR includes a best practice recommendation that, where possible, organisations should be able to provide remote access to a secure self-service system which would provide the individual with direct access to his or her information (Recital 63). This will not be appropriate for all organisations, but there are some sectors where this may work well.

The right to obtain a copy of information or to access personal data through a remotely accessed secure system should not adversely affect the rights and freedoms of others.

Where you process a large quantity of information about an individual, GDPR permits you to ask the individual to specify the information the request relates to (Recital 63).

GDPR does not include an exemption for requests that relate to large amounts of data, but you may be able to consider whether the request is manifestly unfounded or excessive.

Right to rectification

GDPR gives individuals the right to have personal data rectified. Personal data can be rectified if it is inaccurate or incomplete.

This right has the same timescales and implications as above.

Exemptions

European Union member states can introduce exemptions from GDPR's transparency obligations and individual rights, but only where the restriction respects the essence of the individual's fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:

- National security.
- Defence.
- Public security.
- The prevention, investigation, detection or prosecution of criminal offences.
- Other important public interests, in particular economic or financial interests, including budgetary and taxation matters.
- Public health and security.
- The protection of judicial independence and proceedings.
- Breaches of ethics in regulated professions.
- Monitoring, inspection or regulatory functions connected to the exercise of official authority regarding security, defence, other important public interests or crime/ethics prevention; and
- The protection of the individual, or the rights and freedoms of others; or the enforcement of civil law matters.

Breach of GDPR

A notification of breach is potentially triggered by "accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data".

It is now mandatory to report a breach to the Information Commissioner's Office within 72 hours if the breach is likely to "result in the risk for the rights and freedoms of individuals". There is also a duty to notify the individuals affected by the breach "as soon as is reasonably practicable".

A company can now be fined up to 4% of annual global turnover, or 20 million Euros, whichever is more. There is no longer a need to find financial loss, there just needs to be evidence of distress being caused.

GDPR - top tips

1. *Register with the ICO*. It is a legal requirement - and sign up to the ICO newsletter.
2. *Identify personal information and keep it protected*: For example the likely sources of personal information relevant to a licensed premises. These would include CCTV, ID scanners, body-worn camera footage, table / party booking information, refusal log details, accident report forms and staff HR information. Evaluate the reason why personal data is required and retained, and ensure it meets the Article 6 lawful requirements.
3. *Create a policy which clearly identifies a process and procedure*: For example each of the identified areas where personal data is likely to be taken and stored, there should be a clearly defined process and policy in relation to the retention and storage of the data. This should include restrictions as to access and time limits as to the holding of the information. Ensure that all your policies are GDPR compliant, particularly your data policy, confidentiality policy and privacy policy.
4. *Consider retention policies*. It is crucial that this is reconsidered. In particular, make sure that you are disposing of personal data that you no longer require.
5. *Re-train staff.* All staff should be re-trained in relation to the policies and procedure updates. The importance of upholding the regulations, complying with the policies and procedures, and reporting of breaches to the appointed internal person is all staff members' responsibility.
6. *Update subject access request policy*. There is a now a shorter timeframe for response (one month) and no fee payable, so make sure your policy reflects this.
7. *Workout the transfer of data*. Examine whether personal data is being transferred. For instance, look at all personal data outsourcing which could include long-term storage / archiving.
8. *Consider special categories of data.* Determine whether you hold "sensitive personal data", for example relating to data subjects disability, ethnicity, religion or health. Consider whether your organisation has any special security measures in place for the processing and transfer of this type of information.
9. *Identify main threats and mitigation of threats.* It is important to conduct a risk assessment in relation to data protection, and identify where the main threats are and how these can be mitigated. It is likely that cyber threats and accidental loss by staff will be the highest threats. Mitigation such as fire walls, encrypted files, bans on external devices, VPN servers etc, identification of scams / bogus emails should all be assessed. Staff should be made aware of the threats when signing in to public Wi-Fi if not on a VPN. They should be aware of bogus calls and requests for bank information etc. Hardcopy information should

be kept safely and only accessible to those who absolutely require it. If taken off the premises, a log etc should be kept.

Asking for consent

☐ We have checked that consent is the most appropriate lawful basis for processing.
☐ We have made the request for consent prominent and separate from our terms and conditions.
☐ We ask people to positively opt in.
☐ We don't use pre-ticked boxes, or any other type of consent by default.
☐ We use clear, plain language that is easy to understand.
☐ We specify why we want the data and what we're going to do with it.
☐ We give granular options to consent to independent processing operations.
☐ We have named our organisation and any third party controllers who will be relying on the consent.
☐ We tell individuals they can withdraw their consent.
☐ We ensure that the individual can refuse to consent without detriment.
☐ We don't make consent a precondition of a service.
☐ If we offer online services directly to children, we only seek consent if we have age-verification and parental-consent measures in place.

Recording consent

☐ We keep a record of when and how we got consent from the individual.
☐ We keep a record of exactly what they were told at the time.

Managing consent

☐ We regularly review consents to check that the relationship, the processing and the purposes have not changed.
☐ We have processes in place to refresh consent at appropriate intervals, including any parental consents.
☐ We consider using privacy dashboards or other preference-management tools as a matter of good practice.
☐ We make it easy for individuals to withdraw their consent at any time, and publicise how to do so.
☐ We act on withdrawals of consent as soon as we can.
☐ We don't penalise individuals who wish to withdraw consent.

The implementation of the GDPR 2017 is going to evolve over the coming months, as everyone navigates their way through the requirements and makes changes / updates to the way they process and store personal data.

Sam Karim QC
Barrister, Kings Chambers

Hannah Price
Associate Solicitor, Poppleston Allen

Geography lessons

Restricting private hire drivers' area of activity, 24/7 telephone services and justifiable fee levels – all subjects scrutinised by **James Button** in his survey of the ever-changing taxi scene

Can a local authority impose any geographic restriction on the use of a private hire driver's licence?

This was the question considered by the High Court in the recent decision of *R (app Delta Merseyside Ltd) v Knowsley MBC* Queen's Bench Division.[1]

Knowsley Metropolitan Borough Council was concerned by a significant increase in the number of applications for private hire drivers' licences (which it is suggested was fuelled by its decision to reduce its fees, although this is not covered within the judgment). It decided it would suspend determining applications, which led to concern by a large local operator, Delta.

Delta contacted the council suggesting that it would not object to a condition being attached to Knowsley drivers' licences, saying that its drivers must drive predominantly within Merseyside (Knowsley being one of five metropolitan boroughs within the metropolitan area of Merseyside).

This led to the council taking this approach and following a four-week consultation period the matter was considered by the licensing committee. It resolved to adopt this approach, and adopted a policy which stated (so far as is relevant):[2]

> *7. . . .*
> *Applications for the grant of a new private hire drivers licence will be expected to demonstrate a bona fide intention to predominantly carry out private hire work via their chosen Knowsley licensed private hire operator within the controlled district or as permitted by s.55A of ... [the 1976 Act] ….*
>
> *Further on, the document stated at (vi):*
> *If a driver obtains a licence in Knowsley, he must operate predominantly in Knowsley; otherwise his licence may be refused or revoked.*

That was followed by a bullet point and the following text:

> *With the above in mind there will be a presumption that applicants who do not intend to work predominantly within the prescribed area, or cannot demonstrate an ability to work predominantly within the prescribed area, will not be granted a private hire or hackney carriage driver's licence.*

As a consequence of that policy, applicants for drivers' licences were required to sign a declaration in the following terms:

> *I ... hereby declare that I do not now or in the future intend to work mainly or solely remotely from the Knowsley district and adjacent authorities. I further declare that I understand that if I am found in the future to be working mainly or solely in an area remote from Knowsley … the council will most likely revoke any issued licence in the terms of Part II of the Act of 1976 that by my actions I will have given 'reasonable cause'. In that event, I further understand that the council will consult my listed insurer and if that insurer decides that my policy was void from inception as being obtained via false information or material omission then I may be prosecuted for any 'no insurance' offences disclosed at that time.*[3]

Delta, joined by Uber, sought judicial review to quash the policy. Both held private hire operators' licences in Knowsley, and in other boroughs within Merseyside.

The matter was heard by Mr Justice Kerr and judgment was handed down on 7 February 2018 (although the transcript did not become available until 23 April).

The case hinged on whether the council could legitimately restrict the area(s) in which a licensed driver could work once he or she had been considered to be a "fit and proper" person.

The judge gave a brief resume of the legislative provisions and requirements,[4] and then came to the heart of the matter:

> *22. The provision at the heart of this case is section 51.*

1 (Administrative Court), 07 February 2018 (unreported) before Kerr J.

2 At paras 7 and 8 of the judgment.

3 See para 15 of the judgment.

4 Paras 16 to 21.

The authority shall, on receipt of an application from any person for the grant to that person of a licence to drive a PHV, grant the licence, provided that it shall not do so unless satisfied that the applicant is a "fit and proper" person to hold a driver's licence (section 51(1)(a)(i)) and (at (ii)) is not disqualified from holding one by the person's immigration status. The authority "may attach to the grant of a licence under this section such conditions as they may consider reasonably necessary" (section 51(2)). The licence lasts for up to three years (section 53(1)(a)). A badge must be issued to the licence holder, who must wear it (section 54).

The judge than considered the role of the private hire operator:

25. The provisions concerning operators are difficult. I need not attempt a full exposition of the law. The effect of those provisions has been considered in a number of cases. One clear and useful proposition is that uttered by Latham LJ in Shanks v North Tyneside Borough Council,[5] *at paragraph 26:*

> "The operator can use the vehicles within his organisation for journeys both inside and outside the area of the local authority in which he is licensed and, indeed, can use such vehicles and drivers for journeys which have ultimately no connection with the area in which they are licensed."

26. Blue Line Taxis (Newcastle) Limited v Newcastle City Council[6] *concerned the validity of a condition that a Newcastle-licensed operator must use a different telephone number from its sister company licensed in North Tyneside. Upholding the validity of the condition, Hickinbottom J, as he then was, referred at paragraph 8 to the private hire regime being "inherently local in nature". He said the operation of a licensed operator is "geographically fixed in the operator's licensing area: that area must be where the operator's premises are located, bookings made and from which vehicles are despatched"; and "[i]t is an offence for operators to operate outside that licensing area".*

The judge agreed with the proposition from *Shanks*. He was less than certain whether the approach taken in *Blue Line Taxis* was correct, and he expressed his doubts in this fashion.

27. The authorities there cited include Shanks *(cited above),* Windsor and Maidenhead Royal Borough Council v Khan[7] *and* Dittah v Birmingham City Council [8]*. Without, I confess, complete conviction, I will assume that the law is as set out in a note from the Department of Transport endorsed by the Divisional Court in the course of Kennedy J's judgment in Dittah at 363D-E:*

> "… applying section 80(2) to sections 46(1)(d) and (e) has the effect that an operator requires a licence from the area in which he intends to operate and may operate only in that area vehicles and drivers licensed by the same district".

In similar vein, Hickinbottom J in Blue Line Taxis *said at paragraph 64:*

> "… the public vehicle hiring operation must in fact be locally based, and the obligations imposed on operators must be capable of enforcement locally by the relevant local licensing authority.".

28. My hesitation in accepting Hickinbottom J's propositions at paragraphs 8 and 64 in Blue Line Taxis *arises from my inability to find in the statutory provisions any requirement that the operator must have a physical presence in the area of the licensing authority or, indeed, that it must have conventional "premises" at all. Nowadays, it may provide its operation through a server that could be located anywhere. Indeed, in the present case I was told that both Uber and Delta have a condition attached to their operator's licence that they must have premises in Knowsley's area and therefore do. That condition would be unnecessary if the statutory provisions already compel that requirement.*

29. I also have difficulty in reconciling the "inherently local" character of the licensing regime with Latham LJ's correct proposition in Shanks *that the operator can use "vehicles and drivers for journeys which ultimately have no connection with the area in which they are licensed". That area bears an uncomfortable resemblance to a "flag of convenience" state in which a ship owner chooses to register its ship because of a preference for that state's regulatory regime.*

30. It is not necessary for me in this case to attempt a resolution of these difficult and at times seemingly contradictory propositions, but in the light of them I do well understand, and have sympathy with, the concern of KMBC to preserve elusive local control over the operator's drivers and the vehicles which it licenses.

5 [2001] LLR 706.

6 [2013] RTR 8.

7 [1994] RTR 87.

8 [1993] RTR 356.

Turning to the first ground of challenge:

> *that the policy was contrary to the 1976 Act because it provided that KMBC would normally treat an absence of intention to work predominantly in Knowsley as showing that a driver was not a fit and proper person to hold a licence.*[9]

There was considerable discussion on this point. Delta and Uber both argued that the concept of "fit and proper" related to the nature and character of the applicant, not his or her geographic location, citing cases such as *McCool v Rushcliffe Borough Council;*[10] *Leeds City Council v Hussain;*[11] and *R v Warrington Crown Court*, ex p RBNB[12] in support of that approach.

In contrast, the council argued that in those cases, the possibility of other factors being taken into account could be considered, and in particular, the concept of localised control of drivers was inherent within the 1976 Act.

In oral argument, [Mr Leo Charalambides, for the Council] accepted my suggestion that his case was that a fit and proper person was someone who was visible to the local authority; thus, the location or predominant location of that person was relevant to whether he or she is fit to be licensed as a PHV driver.

Reference was also made to the ability of a local authority to adopt a policy which included other matters to determine fitness and propriety such as driving tests (see *Darlington Borough Council v Kaye*[13]).

Despite this robust defence of the policy, the judge concluded the policy was flawed and must fail:

> *42. In my judgment, Uber and Delta's submissions are correct and KMBC is wrong. I agree with their contention that it is wrong to describe KMBC as having any discretion in the matter of determining applications for drivers' licences for PHVs. It is unfortunately part of judicial life that one frequently hears the word "discretion" lazily misused. Here, the issue of the licence is a mandatory consequence of a finding that an applicant is a fit and proper person to hold the licence.*
>
> *43. I do not accept that the authorities relied on by KMBC justify the proposition that a person may be fit and proper to hold a licence if willing to sign up to work predominantly from Knowsley, yet unfit to hold a licence if unwilling to do so. I accept that the phrase "fit and proper person" in this context refers to the personal characteristics and professional qualifications of the driver and not to his or her work preferences and visibility.*
>
> *44. The cases cited from other contexts do not, in my judgment, support KMBC's argument. In the Newington Justices case, the issue related to fitness to run particular premises. The licence was, in Mr Gouriet's classification, specific not generic. A driver's licence in the present context is generic, not specific; it is a licence to drive any PHV provided the PHV and its operator are also licensed by the authority for the same controlled district.*
>
> *45. I do not think a driver with an impeccable driving record can be fit to hold a licence if working in Knowsley, yet become unfit if he or she happens to move to Cornwall. If you are fit and proper in Gateshead, you are fit and proper in Minehead. In none of the cases cited to me involving licences issued to drivers of hackney carriages or PHVs, has a court ever held that issues not personal to the applicant, such as location, are relevant to determine fitness to hold a licence to drive any licensed PHV. The seminal work in the field, Button on Taxis, Licensing Law and Practice (4th edition), contains no reference to any such case (relevant extracts at pages 526-572 and 752-756).*
>
> *46. The position is obviously different if a person is applying for a licence to run specific premises. The premises may be relevant as well as the person. That is not the position in the case of an applicant for a PHV licence: the licence holder can work in any controlled district provided the "trinity of licences" issued by the same authority is in place. I conclude that KMBC's policy does indeed attempt to curtail the freedom of a PHV driver lawfully to do so.*

So, does this signal the end of any attempt at restricting the lawful use of taxi licences away from the district that issued them?

A number of authorities have policies which impose restrictions on the use of hackney carriages for pre-booked work elsewhere, although these have never been the subject of Senior Court decisions.

It certainly seems that this decision will make the use of such an approach much more difficult to justify. The wider points were mentioned by the judge:

> *54. . . . I would add by way of postscript that there was some discussion during oral argument to test the limits of*

9 Per Kerr J at para 3.1.

10 [1998] 3 All ER 889 , DC, per Lord Bingham CJ at 891(f).

11 In *Leeds City Council v Hussain* [2002] EWHC 1145 (Admin) per Silber J at paragraphs 13-16 and 24-25.

12 [2002] 1 WLR 1954 , per Lord Bingham at paragraph 9.

13 [2005] RTR 14.

the parties' positions about whether KMBC could lawfully impose a condition on the licences of PHV drivers or their operators requiring the drivers to work predominantly out of Knowsley, or some similar condition replicating, or largely replicating, the effect of the policy.

55. I need express no view on this, since it is not necessary for the purpose of deciding this case and could become a live issue in future litigation. Mr Kolvin, for Uber, submitted that any such condition would offend against the Padfield principle because it would be an attempt to curtail the "right to roam" inherent in the 1976 Act. Mr Gouriet for Delta was prepared to accept my suggestion that an appropriately narrow clearly defined and proportionate geographical restriction might be lawful.

56. I refrain from expressing any view on the point, but I am fortified in my conclusion in this case by the consideration that, in 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.

This amounts to a judicial "trailer" for the forthcoming Reading prosecution of a non-Reading licensed private hire driver and private hire vehicle for illegally plying for hire in Reading, by appearing on the Uber app as being available in Reading.

In the meantime, it seems very unlikely that any similar attempts at geographic restriction on the legitimate use of hackney carriage or private hire licences will be successful.

Telephone contact for private hire operators

The Court of Appeal has handed down its judgment in *Transport for London v The Queen on the Application of Uber London Limited and others,* [14] the appeal by Transport for London against the High Court decision which concluded the requirement that TfL had imposed on private hire operators to have a permanently-manned telephone service available was too broad and needed to be re-considered.[15]

The original case concerned not only the telephone contact but a spoken and written English requirement, and also insurance. Lady Justice Gloster, giving the judgment of the Court, explained the appeal thus:[16]

4. This appeal concerns whether the judge was correct to conclude that the imposition by TfL of a requirement on PHV operators in London to provide a "listening" service to the passenger for whom a booking had been made, which was to be available at all times during the operator's hours of business (and at all times during a journey), and in respect of any matter (referred to in argument and in this judgment as "the Voice Contact Requirement") constituted a disproportionate interference with the rights to freedom of establishment of PHV operators, contrary to Articles 49 and 54 of the Treaty on the Functioning of the European Union ("TFEU").

The Court of Appeal only considered the telephone contact, the challenge to the English test having been withdrawn, and an acceptance by the High Court that the insurance point was moot. In the time between the High Court decision and the Court of Appeal hearing, Uber had announced that it was going to introduce a "click to call" function which would enable riders and drivers to access trained support staff 24 hours a day, through a dedicated telephone line. Unfortunately, this is not yet in effect.

Thee was significant discussion surrounding proportionality, with the Court drawing heavily on the Supreme Court decision in *R (Lumsdon) v Legal Services Board.*[17] That determined that proportionality means:[18]

[p]roportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method . There is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately.

The questions for the Court were as follows:[19]

i) Whether the judge erred in relying on the distinction between an emergency and a non-emergency contact facility?
ii) Whether the judge accorded TfL a proper margin of

14 [2018] EWCA Civ 1213 25th May 2018 (unreported).

15 *R (on the application of Uber) v Transport for London* [2017] ACD 54.

16 At para 4.

17 [2016] AC 697 SC.

18 Per Lord Reed and Lord Toulson at para 33.

19 *Transport for London v The Queen on the Application of Uber London Limited and others* [2016] AC 697 SC at para 53.

appreciation in this area?

iii) Whether the Voice Contact Requirement achieves a higher level of protection than the Emergency Telephone Alternative and achieves legitimate objectives beyond safety, such that the latter is not a less restrictive alternative?

iv) Whether the Voice Contact Requirement was a proportionate and lawful interference with Uber's freedom of establishment in any event and the judge erred in concluding otherwise?

v) Whether it was unlawful that TfL had not imposed a similar requirement on taxis [hackney carriages]?

They were answered as follows:

i) The judge had erred by substituting his view for that of TfL. There were also practical difficulties in differentiating between emergency and non-emergency sitations, which would make any requirement difficult to frame, apply and enforce, and as a consequence TfL was entitled to conclude it was not practicable. In addition, the suggested "emergency telephone alternative" was not less burdensome than the Voice Contact Requirement and did not provide all of the benefits of the Voice Contact Requirement.

ii) In my judgment, having accepted TfL's case that it was necessary and proportionate to require operators to provide a voice contact facility in the case of genuine emergencies, the judge should not have quashed the Voice Contact Requirement. He erred in relying on the distinction between an emergency and a non-emergency contact facility. I would thus allow the appeal on this point.[20]

iii) This was considered together with question iii), and in both cases the court found for TfL. The regulator TfL had discretion concerning the level of consumer protection and how it should be achieved and once again, the judge substituted his view for that of the regulator. It was also determined that there was no less restrictive alternative available and that the overall requirement was not disproportionate. This latter point was partly because Uber were in the process of introducing a "click to call" facility which would enable passengers to access a person at all times via their mobile phone.

iv) See ii) above

v) This particular point was abandoned at the hearing.

vi) There was some considerable discussion as to whether a similar requirement could be imposed on hackney carriages. The Court accepted the distinction between the two types of vehicle as detailed by the High Court in Eventech Ltd v Parking Adjudicator [21] *reinforced by the views of the Advocate General when the same case reached the European Court of Justice (it was a case concerning state aid and the use by private hire vehicles of bus lanes).*

Accordingly, the appeal was successful and at some point in the future a Voice Contact Requirement condition will be applied to private hire operators licences within London.

On the last point, the distinction between hackney carriages and private hire vehicles is important. They do fulfil different functions (a hackney carriage can stand or ply for hire, whereas a private hire vehicle cannot) but they also fulfil identical functions (pre-booked journeys). The judge made great play of the distinction between a licensed private hire operator taking a booking for a private hire vehicle and an unlicensed booking agent taking a booking for a hackney carriage.

The judgment of Lady Justice Gloster on this point is interesting if somewhat dispiriting:[22]

94. There are two main problems with Uber's argument that it is unlawful that TfL has not imposed a similar requirement on taxis that mean TfL's position on this issue is to be preferred.

95. First, a key distinction between PHVs and taxis is the lack of a person in the position of an operator in respect of the latter. Mr de la Mare submitted that TfL could impose the Voice Contact Requirement as a condition on taxi drivers' licences for permitting them to provide pre-booked services through the agency of a dispatcher. I cannot accept this argument. TfL cannot impose conditions on taxi licences in order "indirectly" to regulate taxi booking agents. I accept Mr Chamberlain's submission that this would be an improper use of that licensing power, where TfL does not have the power to regulate the booking agent directly.

96. Second, even if I were wrong on this and TfL could impose such a condition on the licences of taxi drivers, I agree with Mr Chamberlain's submission that it would be too difficult for TfL to monitor and enforce such a condition. Unlike with PHVs, it would not have the power to inspect the records of these booking agents because they are not licensed individuals. In a situation where TfL had evidence of a booking agent's non-compliance with the Voice Contact Requirement, I am not persuaded that there would be an effective method of enforcing compliance. With a PHV operator, such non-compliance could be enforced via threat of suspension or the removal of the licence. With a taxi booking agent, there is no licence to suspend or revoke. An option for TfL would be to threaten to revoke the individual licence of the taxi driver. In my judgment, this would be punishing a taxi driver for the non-compliance of a booking agent, over whom he has no control. I consider this to be unreasonable.

20 Per Gloster LJ at para 64.

21 [2012] EWHC 1903 (Admin).

22 Paras 94 to 96.

It remains to be seen how this will be considered in the future.

Private hire operators' fees in London

Transport for London has proposed significant increases in fees for private hire operators. Following consultation, it introduced a sliding scale fee for operators based upon the number of vehicles that they controlled. This was challenged by the Licensed Private Hire Car Association in *LPHCA Ltd (t/a Licensed Private Car Hire Association) v Transport for London.*[23]

It should be noted at this point that the fee-levying provisions contained within London hackney carriage and private hire legislation are significantly different from those contained in the Local Government (Miscellaneous Provisions) Act 1976 ss 53 and 70 in relation to England and Wales. Accordingly, this is not a judgment on the fees themselves outside London, but is useful in relation to the process that was undertaken.

TfL engaged in non-statutory consultation before the fees were introduced. The two grounds of challenge were: that there was a lack of financial information made available before and during the consultation period; and there was cross subsidy under the proposed fee structure from private hire operators to other licensees.

In relation to the consultation issue, the court referred to the Supreme Court decision in *R (Moseley) v London Borough of Haringey*[24] which in turn upheld the Court of Appeal decision in *R v North and East Devon Health Authority, ex parte Coughlan,*[25] itself previously regarded as the leading case on consultation. This section of the judgment is extremely useful, as it goes much further than the question of fees. The judge, Mr Justice Ouseley, expressed it like this:[26]

> *The law on consultation*
> *31. There was no dispute on this. Though there be no statutory obligation to consult, yet if an authority has decided to consult, its process of consultation must be fair in order for the decision which rests upon it to be lawful. The most recent authority on what is required for a consultation to be fair is R (Moseley) v London Borough of Haringey:[27] at [25] Lord Wilson said:*

In R v Brent London Borough Council, ex p Gunning,[28] *Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said at p 189:*

> *"Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third,… that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."*

Clearly Hodgson J accepted Mr Sedley's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in the *Baker* case, cited above (see pp 91 and 87), and then in *R v North and East Devon Health Authority, ex parte Coughlan* at para 108. In the *Coughlan* case, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated at para 112:

> *It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.*
>
> *Mr Matthias [for the LPHCA] rightly did not contend that TfL was not entitled to choose for itself the scope of this non-statutory consultation. It is not open to legal attack on the basis that the scope of the non-statutory consultation should have been wider, save on those grounds which would have required a consultation exercise in the first place, perhaps irrationality apart. It was not alleged that the scope of this consultation was unlawfully narrow.*

There was significant discussion about the consultation. The claimant maintained that insufficient information had been given, and in particular very little or no information about the financial background to the proposals. TfL argued that it was a very narrow consultation and the information provided was sufficient.

The conclusion was detailed in paragraph 51 of the judgment:

23 [2018] EWHC 1274 (Admin) (unreported) 30th May 2018.

24 [2014] UKSC 56.

25 [2001] QB 21.

26 At para 31.

27 [2014] UKSC 56.

28 (1985) 84 LGR 168.

Overall, I have come to the conclusion that the true scope of the consultation, intended by TfL, did not cover the way in which £38m was the costs of licensing regime attributed to operators, and was confined to the structure whereby operators' fees would raise that sum. Accordingly, there was no unlawful failure to disclose the information about how that was worked out, in order for consultees to be sufficiently informed about the proposal actually under consultation in order to make an informed response. This ground of challenge fails.

In relation to the question as to whether the private hire operators' fees were being used to cross-subsidise other taxi licence fees (hackney carriage vehicles, private hire vehicles, hackney carriage drivers and private hire drivers), again there was significant discussion. TfL maintained that a significant amount of its compliance activity involved some element of private hire operators, and there were significant studies undertaken by TfL into its activities. This was summed up as follows:[29]

70. I appreciate that Mr Wright [Chairman of the LPHCA] does not agree with TfL, but he produced nothing of substance to show a cross-subsidy had been created, beyond his expressions of disagreement. It is unlikely that any methodology, data, or judgment on such an apportionment would meet either approval amongst all licence streams or be beyond criticism, let alone one which could produce a perfect fit between fees and costs.

71. What TfL have done is to produce a reasonable method, with some evidence, to which reasoned judgment has been applied. It has not been shown to be wrong on its face, and on the analysis which I have had, I am not persuaded that there is any unlawful subsidy. If the Mayor did intend to convey that operators would pay a fee for costs which properly belonged to taxis or drivers or vehicles, the TfL officers have not in fact carried through any such intention. It would have been unlawful, had they done so.

In the absence of any clear evidence of cross-subsidy, and excepting TfL's approach as being a reasonable one, this second ground of the challenge also failed.

While this judgment relates to the legislation concerning London, this last element is important for all local authorities.

Setting a licence fee can never be precise process. There will always be variables and there will always be people who are dissatisfied with the calculations. Provided a reasonable approach has been taken, based upon evidence, and then a reasoned decision has been made on the basis of that, it is going to be difficult to show that the resulting licence fees are unlawful.

That is not to say that authorities should be cavalier or sloppy about the way in which they set their licence fees. It is a complex and involved process and they must be prepared to justify any fee that they set.

James Button, CIoL
Solicitor, James Button and Co

29 At para 70 and 71.

Revised Guidance offers some succour to residents

The Government has decided the appeals process needs to be fairer to residents and is introducing greater transparency around legal decision-making, as **Richard Brown** explains

Many readers will be aware that the Guidance issued under s 182 Licensing Act 2003 has recently been amended. The new version, weighing at a hefty 155 pages, was issued on 24 April 2018 and applies to all applications made after that date.

Given the general tenor of the Government's response to the House of Lords Select Committee's recommendations regarding the 2003 Act[1] (ie, to reinforce the Guidance to reflect some of the less controversial proposals[2], using the carrot of guidance and training rather than the stick of legislation) it might have been expected that the revised Guidance issued in April would have undergone a fairly significant overhaul. Although there are certainly fundamental additions, for example dealing with the new s 5A of the Act, the majority of the other changes, while not insignificant, will not have practitioners waking up in a cold sweat. Other areas where the Government had indicated amendments to the Guidance would be forthcoming have not found their way into this iteration of the Guidance.

What I will focus on in this article is, as will hardly be surprising given my remit, how the changes to the Guidance impact on "other persons" – resident objectors. When one looks at the April 2018 Guidance in detail, it becomes apparent that there has been at least an attempt to mitigate some of the unfairness which residents can sometimes feel is heaped at their door.

Foremost among such complaints is the appeal process, which can leave resident objectors feeling that having taken the trouble to respond to an application or submit a licence review, their rights are effectively denuded once an appeal has been made. There were a number of comments to this effect in evidence considered by the Select Committee. It is, I think, sometimes overlooked that a number of important higher court decisions under the 2003 Act have either been instigated by or have heavily involved "other persons". In the former category is Mr Taylor of Manchester, the Saughall Massie Conservation Society, and the Albert Court Residents' Association. In the latter category are the residents whose evidence was crucial to *Hope and Glory* and *Funky Mojoe*.

A licensing authority is, of course, under no obligation to consult with residents over, for example, appeal settlement proposals, even when the evidence of residents was either important to the decision being appealed (eg, refusal of a variation application), or fundamental to it (eg, a resident-led review). In its response to the Select Committee Report, the Government committed to giving effect through amendments to the Guidance to the Select Committee's conclusion that licensing authorities "should publicise the reasons which have led them to settle an appeal, and should hesitate to compromise if they are effectively reversing an earlier decision which residents and others intervening may have thought they could rely on."

To this end, there is a small amendment to para 13.10, from the former "It is important that a licensing authority *should give* comprehensive reasons" for its decisions to the current "It is important that a licensing authority *gives* comprehensive reasons". The important change is a new para 13.11: "It is important that licensing authorities also provide all parties who were party to the original hearing, but not involved directly in the appeal, with clear reasons for any subsequent decisions where appeals are settled out of court. Local residents in particular, who have attended a hearing where the decision was subject to an appeal, are likely to expect the final determination to be made by a court."

This does not quite give effect to the Lords' recommendation. Para 13.11 seems to be very carefully worded so as not to fetter the discretion of the licensing authority to respond to an appeal as they see fit, whether or not that involves consulting the residents who may have provided the evidence on which the original decision is based. Indeed, the guidance on a licensing authority's response to an appeal at para 13.5 is unchanged (the

1 The Government Response to the Report from the House of Lords Select Committee on the Licensing Act 2003 Session 2016-17 HL Paper 146.

2 Para 25 to the preamble.

licensing authority *may* call an "other person" as a witness; the licensing authority "should *consider"* keeping "others" informed of developments in relation to appeals to "allow them to consider their position".[3] When read together, paras 3.5 and 3.10-11 do seem to be a rather watered down version of the Government's statement in response to the Select Committee Report that "licensing authorities should give full consideration to the level of interest in a case when considering whether to reverse any decision which other parties to the original hearing may be relying upon".[4] This is not reflected in the April 2018 Guidance. Nevertheless, it provides some welcome succour to residents that at least the licensing authority would have to inform them of the reasons where an appeal is compromised. Residents sometimes spend a great deal of time and effort putting a case together, particularly on a licence review, and the least they deserve is to be kept informed of the situation once control of it has passed from their hands to the licensing authority. A licensing authority can still wholly ignore the views of residents on an appeal if they wish, but at least residents now have an expectation of being told why.

Of course, licensing authorities are understandably very mindful of costs on licensing appeals. It is not inconceivable that the threat of an adverse costs order may push itself towards the top of the licensing authority's list of considerations when considering settlement proposals, relegating the residents' "expectation of a final determination in court" to a lower position. The case of *Mayor and Burgesses of London Borough of Tower Hamlets v Ashburn Estates Limited (trading as The Troxy)*[5] may provide some comfort in this regard. I wrote about this case in the fourth edition of the *Journal.*[6] The council had defended an appeal at a hearing in the Magistrates' Court nowithstanding a late compromise proposal from the appellant company, on the basis that they could not possibly properly consider such an offer without taking into account wider community interests; the tardiness of the compromise proposals made this impossible. Although the Magistrates' Court made an adverse costs order against the local authority, this was overturned in the High Court, which ruled that the District Judge had erred in awarding costs against the local authority in these circumstances.

The role of residents is recognised a little more in the amended Guidance in two further ways.

"Mediation" seems to be the current buzzword in licensing. Mediation can start even before an application is submitted. This is not new – consulting and seeking the views of the responsible authorities has always been a sensible step for an applicant prior to submitting an application. The Guidance has now given more prominence to residents in the pre-application stage. Para 9.34 of the April 2018 Guidance now reads (new additions in italics): "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…".

The Government also committed to amend the Guidance to make clear that parties should be given sufficient time to speak at a hearing, as a result of recommendation number 16 in the Select Committee report. Thus, para 9.37 now reads (new additions in italics): "[Other persons] may not add further representations to those disclosed to the applicant prior to the hearing, but they may expand on their existing representations *and should be allowed sufficient time to do so, within reasonable and practicable limits."*

Para 9.32 continues the theme of keeping residents involved and recognising the importance of their role. A familiar bugbear for residents is last-minute amendments to applications. This can be immensely frustrating and unfair to residents, who may have spent considerable time and energy on responding to a case only to learn shortly before (or even during) the hearing that the goalposts have shifted and they have a different case to which to respond. The amended Guidance envisages that an extension of the time limits set out in the Hearings Regulations in such circumstances might be appropriate (ie, adjournment of the hearing). Where this happens, everyone not just the applicant, should be kept informed. Although this basically just reflects what is already in the Hearings Regulations, it is nevertheless a helpful piece of affirmation for residents.

Although most of these changes are relatively minor in the grand schemes of things, they give some succour to those residents who feel that they are the poor relations of the licensing family.

Richard Brown, MIoL
Solicitor, Licensing Advice Centre, Westminster CAB

3 My emphasis.

4 P13 of the Government response.

5 [2011] EWHC 3504 (Admin).

6 (2012) 4 JoL, p30-31

The wide but often overlooked duties of council decision-making

A recent judicial review concerning sex licensing in Sheffield is important in its own right but has wider ramifications for all licensing fields too, writes **Charles Holland**

The settlement last summer of a judicial review brought by a campaigner against a local authority decision to renew a sexual entertainment venue (SEV) licence for a lap-dancing club, and its sequel, to be heard in June 2018, serve as useful reminders of the general importance of the wide duties placed upon local authority decision-making. These duties are sometimes left by the wayside as committees, officers, legal advisers and practitioners all direct their focus on the licensing statute in question.

That first judicial review caused the local authority in question, Sheffield City Council, to consult on and adopt a new sex establishment policy which directly grappled with the duty in question (the Public Sector Equality Duty or PSED).

The issue of whether the new policy adequately dealt with the PSED is on the way back to the Administrative Court this summer. A crowdfunded campaigner secured permission for a judicial review of the adoption of that policy on the basis that, in considering the PSED, the council failed to give consideration to what the campaigner described as "the negative impact on all women and the wider impact on gender equality in resolving not to set a limit on sex establishments in the city".

By way of background, the SEV in question was (and remains) a lap-dancing club operated by the national chain Spearmint Rhino. It is located on Brown Street in the Cultural Industries Quarter of Sheffield City Centre. It is close to Sheffield Hallam Student's Union, galleries and other community buildings.

SEV licences have to be renewed annually. When the licence came up for renewal before the licensing sub-committee in May 2016 there was concerted objection from campaigners, with 132 pages of representations adverse to renewal in the agenda pack.

Many of those objections took the form of a template letter, found on a campaign website, which made the point that the local authority had a duty under the Equality Act 2010 to work to eliminate unlawful discrimination, harassment and victimisation, and asked whether the council had undertaken an equality impact assessment (EIA) in formulating its policy.

These were astute points to make. Section 149(1) of the 2010 Act provides that a public authority has a duty (the Public Sector Equality Duty or PSED), in the exercise of its functions, to have due regard to the need to:

a. Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.
b. Advance equality of opportunity between persons who share a relevant protected characteristic (ie, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation) 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.

The council had a policy which had been published in April 2011. It made no reference to the 2010 Act or PSED. The report to the sub-committee was similarly silent as to the topic.

The potential role of PSED in sex licensing had been canvassed by Philip Kolvin QC in his book *Sex Licensing*, published by the Institute of Licensing in 2010. The view he expressed was:

> *[7.29] Section 149 of the Equality Act 2010 obliges public authorities in the exercise of their functions to have due regard to the need to eliminate discrimination, harassment and victimization, to advance equality of opportunity between the sexes and to foster good relations between the sexes. The role of gender equality is not well understood, and is far less well carried through, in licensing processes. However, gender equality may well influence decision-making under the LCMPA.*
>
> *[7.30] First, authorities may use the licensing process – and in particular the attachment of conditions – to protect performers from harassment and any threat to their*

dignity, by requiring proper supervision and facilities.

[7.31] Second, any suggestion that women would be less protected and would be less welcome in premises than men can be met by a protective condition.

[7.32] Third, and most significantly, the fears of women using the vicinity of premises may be reflected in decisions as to the location of such facilities. The importance of gender in relation to town centre planning was underlined in a research report for the Office of the Deputy Prime Minister:

> Women, children and men use towns and cities in different ways, and thus face different problems. A good quality environment for women should be attractive, easy to use, convenient and safe and meet their specific needs. Women are particularly concerned about issues of personal safety and security, the provision of facilities and the detailed design of buildings and spaces particularly in residential areas, public buildings, shopping areas and city and town centres. Many women feel vulnerable in getting around, as users of public transport and as pedestrians, and their movement is often constrained by fear of attack. This is particularly true for older women and women with children travelling alone. Environments that work well during the day can feel hostile at night.

[7.33] These concerns are directly reflected in the Royal Town Planning Institute's Gender and Spatial Planning Good Practice Note, which states:

> In relation to the 24-hour economy policy, ensure that the views of women are considered. Evidence shows that in certain locations, lap-dancing and exotic dancing clubs make women feel threatened or uncomfortable.

[7.34] If a woman, whether objectively justified or not, fears to use a part of the town centre characterised by sex establishments, this may be argued to amount to discrimination, in that her access to the public infrastructure of the town is impaired in comparison to that of men. Where relevant these considerations ought properly to be taken into account by authorities at the decision-making stage, and possible also at the policy-making stage.

[7.35] Of course, the equality duty is not confined to sex. It extends to religion or belief and disability. There may well be views expressed by faith groups as to the location, prominence or number of sex establishments in their locality, which ought to be duly weighed. And the needs of disabled customers must be reflected in decisions as to access and layout.

At the hearing in April 2016, the licensing sub-committee were persuaded by Spearmint Rhino (coincidentally represented by Mr Kolvin) to renew the licence.

The objectors complained that many of their objections were said to be irrelevant and inadmissible by those advising the sub-committee on the basis they were "moral" objections, and therefore not relevant for the reasons given in *R* v *Newcastle City Council, ex parte The Christian Institute* [2001] LGR 165. There, Collins J had said:

> *… it might be perfectly reasonable to refuse a licence for a sex shop which is in the vicinity of a school or a some religious building. That is a recognition that sex shops may attract a particular clientele whose presence may not be considered desirable in some areas and that is something again which can be taken into account, but it has nothing to do with the morality of sex shops as such. It is the effect on the locality and on those living nearby which has to be taken into account and it is that that is the distinction which is drawn. Thus, straightforward objections on the ground that sex shops should not be allowed to exist have no part to play in my or a local authority's consideration of the case.*

One objector, who sought to remain anonymous, obtained public funding to bring a judicial review, using the services of DPG Law, the civil rights and judicial review law firm, and Karon Monaghan QC. On 1 November 2016, permission was granted by Jefford J, who made the following observations in her order:

> *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.*

A further challenge to the 2011 policy was refused permission on the basis it was out of time. A hearing was listed for 9 and 10 May 2017.

Prior to this hearing, such is the annual nature of SEV licences, Spearmint Rhino's annual renewal application came before the licensing committee, on 11 April. A substantial number of objections were made, many of them now

referring them to the passages above from *Sex Licensing*. As might be expected, the officer's report to the sub-committee did now deal with the PSED, and an EIA had been completed. This stated that while previous representations that contend that SEVs contribute to the objectification, victimisation and harassment of women had been not taken into account as "moral" objections, the authority had considered this, and formed the view that it should be taken into account on an equalities basis. It was said that the licensing authority must endeavour to reduce the normalisation of sexualisation and objectification of women, avoid exploitation of woman and promote healthy sexual practices. However, it was also stated that the authority felt it would be a negative move to impose a total ban on SEVs. The report to committee made the point that the SEV policy was under review.

The sub-committee renewed the licence. Shortly after that, Sheffield reached a compromise on the judicial review, recognising that it had failed to have due regard to the PSED in the 2016 decision.

Sheffield has since consulted on and adopted a new policy, which came into effect on 1 January 2018. This provides:

> *A detailed Equality Impact Assessment (EIA) has been undertaken and kept under review throughout the drafting of this policy and then finalised on publication of the policy. Further EIAs will be conducted where necessary.*
>
> *It is not considered likely that the equalities obligations are at risk as there is no perceivable risk of unequal access to the services between different equality groups, save for those under 18.*
>
> *Licensing Committee members have undertaken equality and diversity training and will be reviewing their learning on a regular basis to ensure their knowledge and understanding of all matters concerning equality and diversity are at the highest standard to allow them to make decisions.*
>
> *This policy includes a clear and unequivocal commitment to meeting the PSED in the exercise of all of the functions under the Act. The policy and the documentation flowing from it are intended to be a key means of facilitating compliance with all of the Council's obligations. Great care has been taken in developing a policy that is fit for purpose in this regard but it is only when it is tested in action that it will be possible to evaluate its effectiveness. This assessment will be kept under regular review, particularly in the early period of implementation, so that any shortcomings identified in the document itself and/or the way it has been implemented can be addressed.*

This has not satisfied the campaigners, who have now secured permission to judicially review the policy, with a hearing of the substantive claim listed for June.

Although important in the sex licensing field, particularly in relation to policy formulation and decision-making, the Sheffield judicial reviews have wider ramifications for all licensing fields.

The effect of the Equalities Act 2010 and the PSED in the sex licensing regime will be the subject of detailed consideration by the Administrative Court in the near future. The name given to a premises, signage and external visibility and advertising may be important considerations to promote gender equality in the vicinity of venues. There may indeed be PSED arguments on the other side (the clubs providing a place of work for performers who are predominantly female), and equality issues that concern other protected characteristics (such as age, disability and sexual orientation). There is much to be said for a detailed, area-wide strategy (along the lines of local area profiles suggested by the Gambling Commission under the Gambling Act 2005).

PSED has a role to play in Licensing Act 2003 regime, as the s 182 Guidance recognises in paragraphs 14.66-14.67, recommending publication by locations of information *at least annually* to demonstrate compliance. In practice, it may be that PSED is often forgotten about. It is not hard to find major licensing authorities whose very recent policies and officers' reports make *no mention* of the duty.

Taxi/PHV licensing is another regime where the PSED might be at the fore. It might be asked, for example, what impact do vehicle licensing policies have on disabled passengers (and drivers), and has that impact altered because of the changes caused by the explosion in numbers of PHVs and their drivers; and has the impact of English language polices or overseas criminal record checks been properly considered.

As Sheffield's new policy points out, there are a number of wide statutory provisions that apply to all local authority decisions. This is set out in plan terms in paragraph 1.19 of the s 182 Guidance ("licensing authorities and licensees should be mindful of requirements and responsibilities placed on them by other legislation" - examples being given). However, Sheffield's experience in 2016 is, I suggest, the rule rather than the exception.

By way of conclusion and reminder, licensing authorities and licensing practitioners might wish to run through the following (by no means definitive) checklist:

- Environmental Protection Act 1990, s 89 - imposes a duty on local authorities to keep the highways they

are responsible for, so far as practicable, free of litter and clean.

- The Human Rights Act 1998 - makes it unlawful for a local authority to act in a way which is incompatible with a convention right under the European Convention on Human Rights. Convention rights include:
- Article 6 - in relation to the determination of civil rights and obligations: everyone is entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law.
- Article 8 - Everyone has the right to respect for one's home and private life, including, for example, the right to a "good night's sleep".
- Article 10 - freedom of expression.
- Article 1 of the First Protocol (A1P1) – the right to peaceful enjoyment of possessions, which can include the goodwill associated with a licence (*Crompton (t/a David Crompton Holdings) v Department of Transport for North Western Area* [2003] RT 34 and *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, *per* Auld LJ at ¶[46], which therefore the holder cannot be deprived of except "in the public interest and subject to the conditions provided for by law". If a measure (such as the refusal of a licence) is to be A1P1 compliant, it needs to comply with the concept of proportionality (see Lord Reed in *Bank Mellat v Her Majesty's Treasury (No. 2)* [2014] 1 A.C. 700 at ¶[74].
- Legislative & Regulatory Reform Act 2006, s 21 - it is the duty of a local authority when exercising a regulatory function (defined to include functions under the Licensing Act 2003 and taxi / PHV licensing) to have regard to the principles that regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent and regulatory activities should be targeted only at cases in which action is needed. Under s 22 of the same Act, in formulating policies, the regulator must have regard to the Regulator's Code. It is in the author's experience not usual to find a policy or a local authority website that complies with the Regulator's Code.
- Provision of Services Regulations 2009 - apply to many regulatory functions (not taxis / PHVs), affecting the level fees (see the *Hemming* litigation), the speed of processing applications, tacit consent and other matters including, potentially, the role of trade objectors in the licensing process.
- Crime & Disorder Act 2009, s 17 - it is the duty of a local authority to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent (a) crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment); (b) the misuse of drugs, alcohol and other substances in its area; and (c) re-offending in its area.

Charles Holland, MIoL
Barrister, Trinity Chambers

MUP-pets - a tale about minimum unit pricing in Scotland

The inherent inconsistencies and unintended consequences of Scotland's minimum unit pricing legislation will soon reveal themselves and problem drinkers will still have problems, says **Caroline Loudon**

It's time to face the music, it's time to dim the lights, it's time to meet….. MUP.

We all know the song, and this is an article about something that is "getting started". It might be "sensational" in terms of coverage and spotlight, but I am not sure whether it will be "inspirational" or "celebrational" in the long run. Time will of course tell - as well as a £20 million spend, approximately, on evaluation reports. I must also say that I am expressing only my own views and opinion in this article

MUP is, of course, a measure introduced by the Scottish Government to try to tackle Scotland's unhealthy relationship with alcohol. The thought behind the move is that the affordability of alcohol directly links to consumption, so increase the price of cheap strong alcohol and see a positive health impact amongst the heaviest drinkers. Impact assessments and Monitoring and Evaluating Scotland's Alcohol Strategy (MESAS) reports will be discussed later in this article. Suffice to say, it will be statistician heaven for some over the next five years.

The rather battle-weary Alcohol (Minimum Pricing) Scotland Act 2012 (the 2012 Act) came into force on 1 May 2018, having survived journeys through the Outer House of the Court of Session, the European Court of Justice and the Inner House of the Court of Session and finally ending in a judgment of the Supreme Court, *Scotch Whisky Association and others (Appellants) v The Lord Advocate and another (Respondents) (Scotland) [2017] UKSC76*. Here, in the Supreme Court, it was accepted that MUP could be a measure having equivalence to a quantitive restriction under Article 34 of the Treaty on Functioning of the European Union (The Lisbon Treaty) and contrary to Common Market Regulation, but that any restriction which caused a breach could be justified on the grounds of protection of public health. The Court assessed the proportionality of the measure and found in its favour.

The wheels of the Scottish Government moved swiftly following the judgment and almost overnight we had the *Alcohol (Minimum Pricing) (Scotland) Act 2012 (Commencement No.2) Order 2018* which gave the appointed day for the 2012 Act coming into force.

Next up was price setting. A public consultation was held from December 2017 to January 2018, following the requirement for consultation under *EC Article 9 of Regulation 178/2002* and a price of 50 pence per unit of alcohol, (a unit being 10ml or 8g of pure alcohol) was preferred. The Alcohol (Minimum Price per Unit) (Scotland) Order 2018, setting MUP at 50 pence per unit, was approved after an evidence session and debate on 17 April 2018 and the draft Order was recommended to Parliament by the Health and Sport Committee.

The MUP formula/calculation is:

Price per unit of alcohol (£0.50) x strength of alcohol (ABV) x volume in litres

It is so simple, there should be an App for it, as they say (which would save licensing standards officers from carrying around laptops with Excel spread sheets).

The formula is a new condition that attaches to all premises licences and occasional licences. It follows that there needs to be a premises licence in use for it to attach (tabloid press recently ignored that rationale) and even then, there are exemptions. The condition requires all alcohol sold "under and in accordance with" the premises licence to be sold at or above the MUP. Failure to comply with the conditions on a premises licence is a breach of the licence and a criminal offence attracting a fine of up to £20,000 and / or six months' imprisonment.

Licensing standards officers (LSOs) are charged with the unenviable task of being the first line of enforcement of MUP. Their role, as defined by statute, is to: 1) provide interested persons with information and guidance concerning the operation of the Licensing (Scotland) Act 2005; and 2) to supervise compliance. They are currently undertaking

visits to licensed premises to check compliance, including reviewing pricing and products relative to MUP. If they find non-compliance, their first line of action would be to serve a notice under s 14 of the 2005 Act requiring action to be taken and providing the specifics of such action. If a licence holder fails to act in terms of such a notice, they might well find themselves involved in an application by the LSOs for review of the premises licence before the relevant licensing board. Police Scotland also has a role, in taking forward a criminal case if there has been a breach of the condition and the weight of such a conviction if there is a finding of guilt.

There is much debate and comment about which defined "class" of drinker will be most affected by MUP. The heaviest drinker is the intended target, but what will the impact be on the moderate drinker? Indeed, there even seems to be some confusion about the definitions of types of drinkers to be evaluated, with words such as "heavy", "harmful" and "hazardous" making their way into evaluation documentation produced by MESAS.[1] The 2012 Act contains a "sunset clause". The Act will expire after six years of implementation, unless the Scottish Parliament votes for it to continue. The Minister will present a report on MUP to the Parliament after five years. Discussions about cause and effect will run for five years at least, but the initial impact on brands can be seen now.

My own research shows that some ciders have almost trebled in price over-night and the cost of packs of beers / lagers has also increased fairly significantly. Own brand whisky / vodka / gin have risen by approximately £3 per bottle and some wines have increased by approximately £1. Much is often made of Buckfast Tonic Wine and, interestingly, it is usually sold for well over the MUP by retailers (calculation: 50p x15% ABV x 750ml = £5.63).

"Only the strongest survive" might not be correct adage here, as high strength cider / beer / lager may well be driven out of the market and replaced by spirits. It follows in my view that brands will have to look at the education piece and their customer base. Premium brands will require to be "even more premium" as "standard" products push the market. Innovation will be necessary if brands wish to retain their foothold in this changing market.

What changing market? Those that can are heading to Carlisle to fill up their car boots with Southern booze; or ordering via the internet to avoid Scottish points of despatch, or so I have read in the media. While keen consumers of one featured cider may well decide that the petrol costs are outweighed by the price saving, I'm not sure that others will be too concerned to make the journey. Equally, some supermarkets are abiding by the "spirit of the law" and will not deliver certain products that are under MUP to Scottish customers, even where point of despatch is South of the Border and therefore the sale is not covered by a Scottish premises licence.

Sadly, those who are the supposed intended target group of MUP have probably already had to vary their product of "choice", heading for harder spirits as they look at other ways to create the oblivion that they feel is required and having less money to spend on feeding their family. I have heard so many different voices say "we have to try something". Yes, we do. I just hope that full and fair[2] analysis of the impact that MUP will have on the family life of those heaviest drinkers is properly undertaken, because it may well be heart-breaking.

But what about the money? It is true, MUP is not a tax. The revenue raised does not go back into the very resource that we all need to rely on, the NHS. It will sit with retailers and others; though there is support for monies raised by MUP to be put back into charities / research. This situation is certainly one to watch.

MUP is a health-driven measure and while the economic impact on the industry will be evaluated, it is not to, (and indeed does not) apply to all sales of alcohol. Sales of alcohol that are not "under and in accordance with" or regulated by a premises licence are not caught by MUP. For example, wholesalers who might hold a premises licence[3] to enable them to lawfully sell to the general public or staff will be able to operate "dual pricing" on their premises. One price for the licensed sales; and one price for those sales not caught by the premises licence or the MUP condition.

Under the 2005 Act, there are exemptions from the requirement to hold a licence. These exemptions relate

1 http://www.healthscotland.scot/health-topics/alcohol/evaluation-of-minimum-unit-pricing.

2 I say that because MESAS say the following: "Impact on those drinking at harmful levels. The University of Sheffield have been commissioned to lead this study. There are three work packages in this study: a survey and interviews with those accessing alcohol services; in-depth interviews with those not accessing services; analysis of market research data." The University of Sheffield, of course, provided the original MUP modelling.

"A major modelling study by the University of Sheffield found minimum pricing was a well-targeted and effective policy1. A 50p minimum unit price was estimated to reduce consumption amongst harmful drinkers by 10.1% compared to 3.8% for moderate drinkers. The Sheffield study also estimated the policy would lead to 42,500 fewer crimes in the first year and over 10 years lead to 14,960 fewer deaths and 481,373 fewer hospital admissions."

3 Section 117 (1) limits the places where a lawful sale to trade can occur ie licensed premises or premises used exclusively for the purpose of selling goods to trade.

to defined exempt premises (such as an aircraft, train on a journey) but also sales to trade. The 2005 Act defines[4] sales to trade as, "selling alcohol or goods to a person for the purposes of the person's trade". These sales are not made "under and in accordance with" any premises licence, they are exempted sales. The ability of wholesalers to sell alcohol at a different price to trade customers is not a new concept, but the position has been highlighted by the 2012 Act coming into force.

While the 2012 Act does not mention the exemption referred to above, it equally does not seek to amend this part of the 2005 Act. The two pieces of legislation can be read together, meaning that those licensed wholesalers who make sales to trade (considering that definition) can continue to operate dual pricing, including sales to trade under MUP. After all, the measure is to tackle health harms for the end consumer - who will be purchasing alcohol under a premises licence and therefore paying at or above MUP. The measure was not to adversely impact the relatively small volume of trade sales. I have referred to wholesalers here simply for ease, but distilleries / breweries etc who might hold a premises licence for sales to the general public can equally engage in trade sales, under the MUP.

Many eyes are on our small nation. Others are watching with interest the Welsh and Irish Governments and Northern Irish Executive, which are all considering following suit fairly shortly and campaigners continue to push Westminster.

I said once that this measure was not a silver bullet, nor a bullet of any other colour, and I stick by that. My view is that while we may see a small positive impact on health data, there will be a disproportionate impact on moderate drinkers. The unintended consequences of this measure have the potential to create much worse situations for the very souls that those in charge are trying to help. I hope that I am wrong, but I have to say, that is not often.

Caroline Loudon
Partner, TLT

4 Section 147 (2).

Institute of Licensing News

It's summer already (how did that happen so quickly!), and 2018 has been a busy year so far.

In common with every business, the IoL has been doing its housework in preparation for the General Data Protection Regulations, which landed on 25 May 2018. In the main, this has involved updating privacy statement and data protection policies, reviewing retention periods and ensuring that we have the relevant permissions from contacts to stay connected. The membership renewals in April helped us a great deal with this and we are grateful to everyone who renewed their memberships promptly.

We were also able to provide an eLearning GDPR training course, and hope this proved helpful to all those who took this up.

Membership renewal reminder

All our membership renewals were sent out before April, and a big thank you to all who have renewed and paid. If you have not received yours, please email membership@instituteoflicensing.org

It's more important than ever that memberships are renewed promptly this year due to GDPR so please help us to ensure our records are up to date. To view the benefits of membership, view our member benefits pages http://www.instituteoflicensing.org/member_benefits.html

For subscription payments, we have various ways to pay, including telephone card payments and annual direct debits. For either of these please contact our Financial Controller, Caroline Day, on 0845 287 1347 or via email: accounts@instituteoflicensing.org

The team will continue to work hard to increase member benefits and to provide the best membership service we can. We are always open to suggestions for improvements, which can be emailed to membership@instituteoflicensing.org

Regional officers

One of the key strengths of the IoL is its regional network. Our 12 regional committees across the UK continue to work voluntarily to ensure that there are regular regional meetings providing unrivalled local networking opportunities to our members. A massive thank you to all those regional officers and of course the regional chairs / directors who not only head up the regions but are also responsible for the governance of the IoL nationally.

Guidance on determining suitability of applicants and licensees in the hackney and private hire trades

At long last, we were able to consult on and then subsequently publish our *Guidance on determining suitability of applicants and licensees in the hackney and private hire trades* which was officially launched at the IoL's Taxi Conference in Swindon on 26 April 2018 by IoL President Jim Button and Stephen Turner, chair of the working party responsible for drafting the *Guidance*. The Taxi Conference took place in Swindon with an audience of over 100 licensing practitioners hearing from a range of expert speakers.

The *Guidance* has been formally endorsed by the LGA, LLG and NALEO, and was very well received at the Taxi Conference. We are delighted to be able to provide printed copies of the *Guidance* with this edition of the *Journal*, and hope it is widely adopted across the country. We will be surveying members soon to find out the impact of the *Guidance*. We are already aware of a number of local authorities intending to take it forward.

Jim Button presented the *Guidance* to the Private Hire and Taxi Expo in Milton Keynes in May, and again the reception was positive.

IoL Chairman, Daniel Davies said: "This is an important step forward for taxi licensing standards. This *Guidance* has been produced by the IoL in partnership with the LGA, LLG and NALEO and provides an opportunity for local authorities to raise standards and consistency in the licensing of taxi and private hire drivers, vehicles and operators. This is fundamentally needed in the absence of new law, to provide a better standards for safeguarding passengers, including children and vulnerable adults.

"The majority of applicants and licensees are professional, hard working people and this *Guidance* will assist local authorities in setting the bar for entry to the trade to ensure that professionalism is protected and preserved. I commend the *Guidance* to local authorities and hope that it will prove invaluable in their role as licensing authorities charged with the sometimes difficult task of vetting applicants and licensees in the hackney and private hire trades."

DEFRA call for evidence – a ban on commercial third party sales of puppies and kittens in England

The IoL surveyed members in relation to the call for evidence and responded to DEFRA accordingly. There were mixed views, but the survey responses clearly showed some common themes. It is quite clear that there is an urgent need to address the current situation, and puppy farming in particular. There is a need to regulate animal imports as a matter of urgency. The import concerns include the distress and trauma caused to animals in transit, and this is likely to be even more the case in overseas transit.

Local authority resources are another cause for concern. This crops up a number of times in member responses, together with the suggestion that animal welfare and licensing is currently not a priority for local authorities. There is an evident need for the proper resourcing of enforcement against illegal activity, through the provision of officers and appropriate training. Multi-agency approaches are seen as important in enforcement and it is crucial that the relevant agencies are encouraged to work together, share information and co-ordinate their investigative activities.

Penalties and sanctions are seen as wholly ineffective at present and this should be addressed to provide adequate deterrence.

Finally, public awareness is critical. Respondents refer to whistle-blowing as a major intelligence source, as well as the simple fact that educating the public about the very real risks of purchasing from unlicensed breeders / third party sellers, and particularly online sales, is key in addressing the current issues. It is also clear that a ban will be easier for the public to understand than a licensing system where seller A is legitimate, but seller B is not.

The full response to DEFRA is available in the website library for IoL members to download.

Jeremy Allen award nominations

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

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

Nominations for the 2018 award are invited by no later than 7 September**.** The criteria are shown below and we look forward to receiving nominations from you. Please email nominations to awards@instituteoflicensing.org and confirm that the nominee is happy to be put forward.

Award criteria

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

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 in order to provide information and advice in complying with legal licensing requirements.
k. Regulators undertaking work experience initiatives to gain a more in-depth understanding of industry issues, or industry practitioners undertaking work experience initiatives to gain a more in-depth understanding of regulatory issues.
l. Practitioners embracing and developing training initiatives / qualifications.
m. Elected councillors promoting change within local authorities / industry areas; showing a real interest and getting involved in the licensing world.

The annual award seeks to recognise individuals for whom licensing is a vocation rather than just a job. Everyone nominated for this award should feel very proud that others

have recognised their commitment and dedication. Previous winners of the Jeremy Allen Award are:

2017: Clare Perry - Licensing Partnership Manager, Sevenoaks, Tunbridge and Maidstone Councils
2016: Bob Bennett - Licensing Enforcement Officer, Ipswich Borough Council
2015: Jane Blade - Senior Licensing Enforcement Officer, London Borough of Redbridge
2014: Alan Tolley - Senior Licensing Officer, Sandwell Metropolitan Borough Council
2013: David Etheridge - Senior Practitioner, Worcestershire Regulatory Services
2012: Jon Shipp - Association of Town Centre Management
2011: Alan Lynagh - Westminster City Council

Fellow and Companion nominations

Don't forget that in addition to the Jeremy Allen Award, the IoL has a Fellowship category for members following nomination and award.

Fellowship is intended for individuals who have made exceptional contributions to licensing and /or related fields. Companionship is intended for individuals who have substantially advanced the general field of licensing. Fellowship will be awarded, following nomination by two members of the Institute, to an individual where it can be demonstrated to the satisfaction of the Institute's delegated committee that the individual:

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

It is stressed that Fellowship is intended for individuals who have made exceptional contributions to licensing. Nominations are welcomed at any time and should be emailed to awards@instituteoflicensing.org

All awards are presented annually at the Gala Dinner during the IoL's National Training Conference, held this year at the Crowne Plaza Hotel, Stratford-upon-Avon on the evening of Thursday 15 November.

National Licensing Week

National Licensing Week started in 2016 as a means of highlighting and promoting the importance of licensing in everyday life. The theme for 2016 was "Licensing is everywhere" and nationally we have had teams of people getting involved. There were job swaps from Government Departments, local authorities and the trade. The Gambling Commission organised a national day of action and there was a lot of social media activity from all sides promoting the week.

Building on the success of the last two years, this year's National Licensing Week was again held over five days, from 18 to 22 June 2018, with each day focusing activities to reflect the wide reach of licensing in everyday life:

- • Day 1 – Positive Partnership
- • Day 2 – Tourism & Leisure
- • Day 3 – Home & Family
- • Day 4 – Night time
- • Day 5 – Business & Leisure

A big thank you to everyone who contributed to this important initiative, and we look forward to planning and progressing NLW2019. If you didn't get a chance to get involved this year, start thinking about what you could do next year – this is the biggest chance to showcase your organisation and how and where licensing fits in to people's everyday lives.

IoL Training and Events

Taxi conferences (Swindon and Leeds)

The Taxi Conference in Swindon on 16 April was an excellent event and it was great to see so many of our members there to join us for the launch of our *Guidance on determining suitability of applicants and licensees in the hackney and private hire trades*.

We were joined by Chris Brown from the Department for Transport (DfT), who gave us an update on the forthcoming DfT guidance consultation, and we had an interesting update from Steve Chamberlain from the Welsh Government who advised that there is a high chance that Wales will see a single tier system, with national minimum standards being brought in under devolved powers. We were also pleased to meet Mortimer, a beautiful assistance dog who accompanied owner Vivian, while Jess Leigh from Guide Dogs for the Blind talked about the persistent issue of drivers refusing to carry assistance dogs. It was good to meet representatives from Uber who answered questions posed by delegates, and we were joined by Rebecca Johnson from LGA & Tracy Howarth from NAFN who gave an update on the NAFN database. We heard too from Freddie Humphries on CCTV in taxis, Roy Light on how best to defend appeals, Andy Eaton on effective

enforcement and Leo Charalambides on intended use policies.

A packed agenda, and a thoroughly enjoyable and productive day – many thanks to all involved. We are repeating this event in Leeds on 10 July and will look to run similar events next year. It has been a long time since we have had a taxi conference and it is clear that there is much to talk about!

National Training Day 2018

The IoL's National Training Day took place during National Licensing Week on 20 June at the Oxford Belfry Hotel. A huge thank you goes to our speakers who delivered an excellent training day for all concerned, to our sponsors who supported the event and, of course, to our delegates for joining us.

National Training Conference 2018

The IoL's signature event, the National Training Conference (NTC), returns to the Crown Plaza Hotel in Stratford-upon-Avon for the third year running, from 14-16 November.

The National Training Conference programme is, as usual, a comprehensive programme with sessions covering the whole range of licensing topics, delivered by an extensive range of excellent speakers. The programme is designed to enable delegates to tailor their individual training package to suit their interests and training needs.

The days are themed to ensure there is always a training topic that will be of interest to delegates. The programme can be viewed by clicking the Learn More button on the Events page of the website.

We are always happy to have suggestions and ideas for sessions and speakers, and feedback on how we can continue to improve the event generally is also very welcome. This is a fantastic event to organise and participate in and we look forward to welcoming new and regular delegates for three packed days of discussion, debate and unrivalled networking.

The Early Bird Discount ends on 31 August so be sure to book your place now.

Event queries and booking requests should be directed to events@instituteoflicensing.org . When emailing to book your place, please include details of how many days and nights you wish to book, and provide a purchase order number if you use a purchase ordering system.

This will be the 22nd NTC, and we are sometimes asked why the event is no longer moved from region to region as it was originally. In the main this is down to the size of the event and the limited options available in terms of venues capable of hosting it. We avoid as much as possible the need to use an overflow hotel and try to maintain a town / city centre location with relatively good transport links. Cost is a major consideration as this directly impacts the conference fees and we strive to keep those costs down as much as possible. Finally, we need a venue with conference capacity (cabaret layout) of 350+, enough syndicate training rooms and at least 250 bedrooms available to IoL.

That said, we loved the regional ownership of the NTC in the early days and are considering using the National Training Day to recreate a moveable licensing conference hosted from region to region.

County Lines Poster Campaign

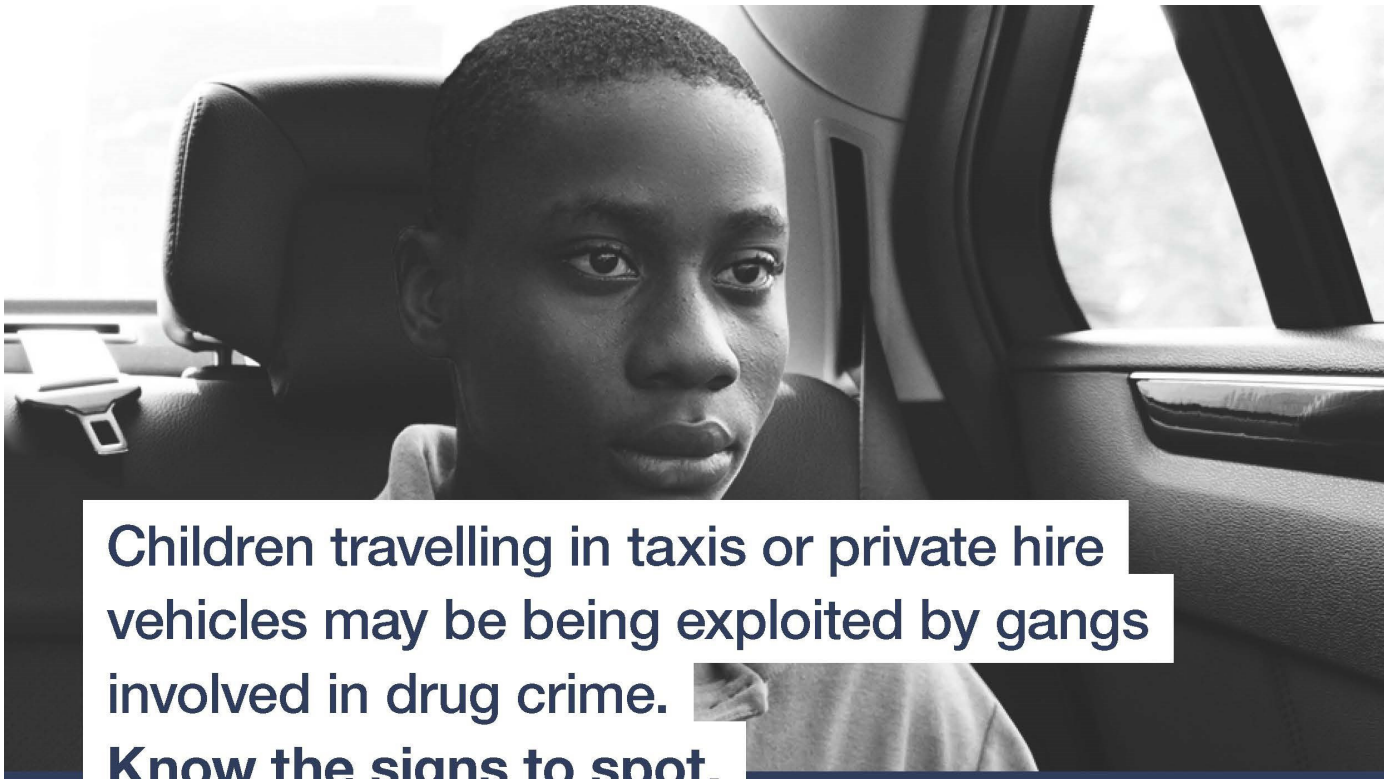
Thousands of children and teenagers - some as young as 12 - are being exploited by criminal gangs (county line gangs) to carry drugs from urban areas to coastal and market towns. Many of these children travel between the city and rural towns in a criminal activity known as 'county lines'.

Taxis are a popular form of transport for children being exploited by these gangs. Children may make the whole journey between the city and rural town in a private hire vehicle or taxi, or else use one for part of the journey. To help safeguard these vulnerable children and protect them from gangs, the Home Office, Institute of Licensing and CrimeStoppers are working to increase awareness among taxi and private hire vehicle drivers, and licensing staff, of the signs to spot a potential victim.

The signs to spot are:

- A child, normally 14-15 years old, but can be as young as 12 travelling a long train journey alone.
- They may be from another area, so may not be familiar with an area (may look lost) and may have a distinct urban accent.
- They may be travelling during school hours or unusual hours (e.g. late in the evening).
- An obvious relationship with controlling, older individuals.
- Suspicion of self-harm, physical assault or unexplained injuries.
- Excessive receipt of texts or phone calls.

The Home Office has produced posters (one of which is overleaf) to help taxi and private hire vehicle drivers and booking staff recognise the signs to spot potential victims. Taxi drivers who spot a vulnerable young person should report their concerns to CrimeStoppers.



Children travelling in taxis or private hire vehicles may be being exploited by gangs involved in drug crime. **Know the signs to spot.**

County lines gangs use children to courier drugs and money across the country. Many of these children travel by taxis or private hire vehicles.

Have you seen:

- A child, sometimes as young as 12, travelling alone
- Are they travelling during school hours or unusual hours (early in the morning, late at night)?
- They might seem unfamiliar with the local area, or not have a local accent
- Are they travelling a long distance?
- Are they paying for these journeys in cash?

If you see something that doesn't feel right, or looks suspicious, concerning a child or young person you should report it to Crime Stoppers on 0800 555 111.

Home Office

Working in partnership with CrimeStoppers.

Bright Lines? Absolutely

For far too long, criminals or those with poor track records have been able to exploit licensing authority inconsistencies and obtain a taxi licence. To address the problem, the Institute of Licensing has drawn up new *Guidance* which every local authority is invited to consider and apply, as **James Button** and **Stephen Turner** explain

We have all seen, and far too often, horror stories in the press where an individual has committed a serious offence or a series of offences and it has come to light that said individual was the holder of a private hire or hackney driver's licence. Just look at the recent media storm surrounding the Worboys case.

Sometimes the licence and the licenced vehicle has been used in the perpetration of a crime. That is no surprise when you accept that it is perfectly normal to see a hackney or a private hire vehicle at any time of the day or night in any place with or without passengers on board. It is the norm and does not cause eyebrows to be raised or ears to be turned in today's 24/7 society.

Is it actually conceivable that if Worboys is ever now released, he could seek and be granted a new licence under an assumed identity? The answer, bluntly, is yes.

Why you cry, how could that ever happen in a modern country with a respected legal system and with a licensing system where the bottom line is the protection of the public?

Let us explain. The Department for Transport's *Taxi and Private Hire Licensing – Best Practice Guide* recommends that local authorities in fulfilling their licensing functions should have a policy against which the character of an individual seeking a licence can be assessed in terms of any previous convictions, cautions or other matters impacting on their fitness and propriety. Sadly, even today there are some authorities which do not have such a policy, others which have one but don't use it and yet others which have one but have not reviewed or updated it for more than two decades. Of course, there is no statutory requirement to have such a policy but it is certainly best practice and more modern legislation (the 2003 Licensing Act and the 2005 Gambling Act) requires each licensing authority to have one.

Of those authorities that have policies and use them, there is often inconsistency and wide variation between the approach each one takes, which can lead to different decisions being made on the same set of facts. That presents an inviting opportunity for those with an adverse history who are seeking a licence to target what they perceive as a weak authority. Chances are that such applications will succeed and undermine the very purpose of the fit and proper person test. The only permanent solution to this is the setting of national standards and conditions which would require primary legislation, and this is unlikely to be forthcoming in the near future.

The first, albeit temporary solution, is therefore for all authorities to review existing policies or establish such policies where they are absent. In doing so, the opportunity can be taken to drive up standards and set the bar high in determining what level of "criminality", if any, is acceptable in a licence holder or potential licence holder.

Such a policy could include "bright lines", for example, such that the policy could state that "an applicant with a conviction for sexual assault will not be granted a licence" or "an applicant with a conviction for supplying drugs will not be granted a licence until at least 10 years have elapsed since conviction".

Such bright lines within a policy can also be referred to as "absolute" provisions, though this prompts some to think that because of their "directional" nature they are binding in their effect and at the very least fetter the discretion of the decision makers. But they do not, simply on the basis that no policy is binding in its nature, rather it is there to guide or to offer a reference or starting point against which to exercise a discretion. It makes no difference to the fundamental principal that each case must be determined according to its own facts and merits. Further there is now ample authority from the Senior Courts to that effect (*see R (on the application of S) v Brent LBC* [2002] All ER (D) 277 CA; *R (on the application of Nicholds) v Security Industry Authority* [2007] 1 WLR 2067 Admin Ct, which was referred to with approval by the Court of Appeal in *R (on the application of Sayaniya) v Upper Tribunal (Immigration and Asylum Chamber)*, [2016] 4.WLR.58 CA).

Therefore, an applicant whose adverse history has triggered a bright line within a policy has the opportunity (in their attempt to satisfy the authority as to their fitness and propriety) to present evidence and make submissions that persuade the decision makers that they should depart from the bright line in the exceptional circumstances of that

particular case. The reasons for that departure, if departure is indeed made, should be recorded as part of the decision so as to show that the departure is peculiar to the facts and merits of that case. As future cases will also be decided on their own particular facts and merits it is highly unlikely that any two cases will turn upon identical or even largely similar facts and this all but eliminates any precedent argument. In any event, a departure from policy cannot create a precedent *per se*; at most it might be seen as a possible direction of travel for future decisions.

So much for policy, what about guidance? Here, essentially the same considerations and parameters apply. Guidance is guidance, it is not law. It is not a set of rules; it is there, once again, to assist the decision makers in the exercise of their discretion. Guidance cannot, of itself, take account of the facts and merits of any particular case. It is more a distillation of a collection of knowledge gathered over time about a particular function. Guidance may be statutory or non-statutory and the norm is a direction in legislation or otherwise to "have regard" to it. Even in the absence of such a legislative instruction, it will be a relevant factor that must be considered in Wednesbury terms (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). Because it is guidance not law, rules or policy and because it does not direct them, in the same way that a policy guides or forms a reference or starting point for consideration, so does guidance. It can be followed or departed from for good reasons pursuant to the exercise of discretion. And again, the reasons for any departure should be recorded as part of the decision, and there is minimal danger of precedent being set.

The second solution delivered in order to assist authorities achieve greater consistency in their decision making and to drive up standards was launched in April this year when the IoL launched its paper *Guidance on determining the suitability of applicants and licensees in the hackney and private hire trades*. This document has been developed with the cooperation of and in partnership with the Local Government Association, Lawyers in Local Government and The National Association of Licensing and Enforcement Officers and is endorsed by all three organisations. Additionally, the Suzy Lamplugh Trust has expressed its support for the *Guidance*.

A copy of the *Guidance* accompanies this edition of the *Journal* and may be downloaded from the publications section of Institute's website at www.instituteoflicensing.org/Publications.aspx.

The *Guidance* has been developed and issued against the background of outdated legislation and a lack of recent statutory, ministerial or other guidance as to how licensing decisions should be made. Its aim is to enhance licensing authorities' ability to protect the public in the delivery of their licensing functions in respect of hackney and private hire drivers, vehicle proprietors and operators. It cannot satisfy the basic and long-standing need for legislative reform, in particular in respect of national standards and conditions, but it can help, if widely adopted, to create far greater consistency between decisions and standards in different authorities which itself would prevent applicants "shopping around".

Initially the Institute's working party put out a consultation to establish the extent of differing practices up and down the country. The results showed that standards, policies, procedures and consequently decisions varied to an even greater extent than had been feared. The results provided a very clear evidence base proving the need. However, areas of good practice and procedure were discovered, and these were later absorbed into the mix when drafting the document.

It was also felt that the *Guidance* should contain some form of "justification" for the bright lines and indeed for the settings of the bar in relation to time lapsed since conviction. Consequently, consideration was given from criminological and probation points of view, particularly with regard to re-offending tendencies. It was hoped that such opinions and theories could be backed up by hard science but rather surprisingly there does not appear to be any. However, what can be said is that the prospects of re-offending do diminish with time, but the periodicity is uncertain. Chapter 2 therefore gives a detailed exposition of offenders and offending.

For there to be greater consistency between different authorities, then irrespective of an increase in commonality of any policy or guidance there must also be a more uniform understanding, interpretation and application of the relevant law under which all such decisions are made. Chapter 3 is written to deliver just that.

Turning to Chapter 4, which is the *Guidance* itself, the first thing to say is that it applies equally to drivers, operators and vehicle proprietors. All are involved in the trades and form the so-called trinity of licenced activity. It would be counter-productive and inequitable to say that one aspect of a trade should permit a greater potential involvement of those who exhibit or have exhibited criminal tendencies than another, and would certainly not serve to protect the public.

Chapter 4 contains bright lines in that it says "No" and "Never" without fettering any discretion as explained above. The time periods specified are longer than many authorities' current terms, based on the survey evidence, but not as long as one or two others. They have been carefully considered

and on further consultation widely supported. The omission of a long list or schedule of specific offences is perfectly deliberate. It is considered that simply categorising offences by the nature of the offence removes the possibility of substantial argument as to whether or not a specific offence is included on the list, or whether an offence involving a knife is less or more serious that a like offence involving a gun.

Having prepared a complete working draft, the Institute again consulted widely, both by survey and with targeted individuals and organisations. The responses were overwhelmingly supportive of the approach in general and the majority of the detail, particularly in Chapter 4. The results and responses again form a significant volume of evidence justifying the Institute's approach. A final meeting of the Institute's working party was held to consider the response and that resulted in some of the bars set in Chapter 4 being raised yet further.

Now it is over to you. The *Guidance* is there for your use and it is hoped that many authorities will adopt it in both principal and in detail. Chapter 4, of course can, in whole or in part and with any necessary "localisation", form the basis of an authority's policy and the entire document can be available to both officers and members as Guidance.

Adoption of the principles contained in Chapter 4 cannot be required nationally: it is for each authority to decide whether to take this route, and unless a significant number do, it will not improve the national position. Authorities should be keen to do so, however. It lays down a clear marker that criminality will not be tolerated within the hackney carriage and private hire trades and that the authority sees public protection as paramount. Authorities that do not adopt these standards should be prepared to explain why they are less concerned about public safety than other authorities, and why they are prepared to become an "authority of convenience" for criminals who want to remain in the taxi industry.

The Institute will continue to advance the cause of new legislation in the strongest possible way but in the mean time it is submitted that this Guidance is a powerful tool which will help afford enhanced protection of the public at large.

James Button, ClOL
Solicitor, James Button and Co

Stephen Turner
Solicitor, Hull City Council

GDPR – a guide to getting it right

Handling data and privacy issues are a crucial part of any licensing officer's role, but where to start when aiming for compliance with GDPR? **Sarah Meeten** has some good ideas

I don't know about you but I don't seem to go an hour right now without hearing someone utter the dreaded acronym GDPR. "You can't do that because of GDPR" seems to have overtaken "you can't do that because of health and safety".

I am a local authority licensing officer (like many of you, I grew up dreaming of a career in licensing!). GDPR, or to give it its full name, General Data Protection Regulation, seems to be presenting some challenges but it has become clear to me that it is knowledge and experience in our specialist fields that is required to achieve the right outcomes, not expertise in data protection. There are too many times when we are faced with new challenges and simply don't know where to start, so I am sharing some of my experience with you in the hope it is useful and puts you on the right track. It may just save you a few headaches or help you resist the urge to throw your PC out of the nearest window!

It is said that these regulations have been brought about to keep up with technology, to protect our data from misuse and keep us safe. The 1998 Data Protection Act didn't consider that so much technology would be easily accessible in public places or accessible via the web. Revealing personal or sensitive data to the nosy parker sat next to you on the train or people being contacted by third parties who are trying to sell them the world because their information has been shared without consent, and theft of data to be used for fraudulent purposes, are all very real modern day issues.

Where to start

Consider what is going on in your area and build yourself a profile (or steal it from your own policies). You need to understand what you are dealing with so you can build a supportive picture with your data. What is the scope of what you are dealing with? What functions do you administer within your area? Where are your issues? How does safeguarding fit in? If you delete records too soon are you going to open a door to non-detection of safeguarding issues which may typically arise as patterns of reports over time? If you have large numbers of houses of multiple occupation (HMOs) in your area it is worth considering any issues relating to these and what impact your record keeping will have on any issues. If you delete records for problematic taxi drivers too soon, are you then faced with a dilemma when a driver re-applies? It isn't about deleting as much as possible: this exercise is about establishing what information is needed for business purposes and how long it should be kept. It could be argued that an authority is failing in its obligations if it does not keep adequate records.

Local information will build a picture of what information you need and start the process of looking at why you then need to retain it. The aims and objectives of pieces of legislation will also be a key driver for your decision making. For example, zoo licensing is concerned with preservation of species.

As an aside, it may be worth having a think about "right to be forgotten" and its consequences. If records were deleted upon request to suit an individual, would you then hold accurate and historic records suitable for business purposes?

Building a data retention schedule

As a licensing specialist you should be able to:

- Identify what data you obtain and hold (a good starting point is looking at the documents you receive).
- Determine why you are holding it.
- Determine how long you should keep it.

This can be achieved this using a spreadsheet, using a separate sheet for every piece of legislation administered and a general tab which can be used for common considerations such as pocket note books, complaints, inspection reports etc.

Each page of the sheet can be used to record what data is held, why and how long for. Information can be recorded under the headings in figure 1; underneath you can make a note of all the documentation you store and the reasons why:

It is also worth making a note of any public register requirements under the legislation and any policies with a note of when they are due for revision. For taxis, don't forget to include the convictions register.

Things to remember:

- Only collect data you need to.
- If you have it, remember it may be disclosable (FOI, data access etc).
- Only keep it for as long as you need it.
- Don't get rid of what you may really need - that could get messy. (Are your eyes rolling yet?!)

Document	Document Category	Summary of data	Data gathered for (purpose)	Retention required for (duration)	Where data is held	Retention period	Any Anonymisation required

Figure 1

Once you have created your schedule you will need to ensure your IT supports the approach. It will help your IT experts to help you if you can draw some parallels across document types so that a retention period can be defined; this needs to be justifiable within your schedule though. Do not let someone send you off saying that you will have to retain information you should not because it will be too difficult to get rid of it. This excuse will not stand up!

Privacy and fair processing notices

You will need to tell anyone who provides you with personal information how you are going to handle it. This can be done via placing of notices onto application forms. Information can also be placed on web pages in greater detail. This information should allow the customer to form a view on how their data will be maintained and use; it will not be practical to include every single last detail. Such notices could:

- Specify the purposes for which you collect and hold data and who you will share it with.
- Give an overview on your data retention principles.
- Advise what information is placed in the public domain.
- If payment data is encrypted you can specify that.
- Outline your statutory obligations in relation to maintaining data.
- If a person tells you they hold a qualification, you may wish to advise them that you may make enquiries with the relevant awarding body.
- Outline how long you will retain data.
- Include what will happen with any information you receive from the police and other agencies such as the DVLA that may be used to consider if a licence holder is fit and proper.
- Remember that you disclose information to agencies such as the Cabinet Office as part of the National Fraud Initiative.
- Consent – do not give illusion of choice if there is none. If you are not seeking consent, do not ask them to do so. Provisions recognise that you cannot always gain consent to process special data.
- Extra note for taxis regarding the convictions register – tell them you will publish convictions even if they don't declare them and they later come to light from elsewhere.
- Reasonable expectation of what data should be used for – if you have existing customers who you send renewal reminders to every year, it would be a reasonable expectation that you continue to do so (and would probably cause annoyance if you didn't send a reminder). In these circumstances it may not be considered necessary to ask for consent to use information for these purposes.

Review your efforts

Keep the documents you have created under periodic review, as things will change as your operational needs do. Don't forget to keep a check on things when you review policies.

Other things to consider day-to-day may be where and how you store paperwork to keep it secure. You must ensure you do not allow any unauthorised persons to access personal and sensitive data. When you are out of the office, give consideration to keeping information secure and having an awareness of who can see electronic screens and where you store devices when not in use. When in the office be sure you know where your documents are printing to. Do be clear about provisions under which you are sharing information with other agencies etc. If you are sharing anything sensitive ensure you have the facility to email securely.

If you identify anything that does not appear right, apply the same principles as you would with your day-to-day work. Look to provide reason and transparency exploring the reasons behind what has happened and if something isn't right demonstrate how you will remedy it.

So, once you have a data retention schedule, your privacy and fair processing notices and you have considered you day-to-day operational requirements, you should be feeling a little more confident. I hope so anyway.

Sarah Meeten, MIoL
Licensing Manager, Arun District Council

Inflatables – not to be taken lightly

Proper control measures are essential when using an inflatable structure – yet too many people seem unaware of the risks they entail and fail to address all that can go wrong. **Julia Sawyer** explains the steps necessary to safeguard against disaster

Inflatable structures that are used as decoration for branding at an event, for promotional stands, for marquees and for children's play structures are, of themselves, not the problem.

It's not the way they are designed or manufactured that raises concerns, rather it's how they are managed at a venue, how they are maintained and the decision-making about when they should or shouldn't be used externally. Too many people view inflatable structures as harmless because they are full of air and don't seem to realise the consequences if they don't apply adequate control measures. Yet inflatables are like any other temporary structure that has support poles / bars and loads within it, and should be treated with the same care and attention.

Two people in charge of a bouncy castle at a fair in Harlow, Essex in 2016 have recently been found guilty at Chelmsford Crown Court for gross negligence, manslaughter and failing to discharge their health and safety duties following the tragedy of Summer Grant who died when the bouncy castle she was playing on was lifted in the air by a strong gust of wind. Nicola Rutter of the Crown Prosecution Service said afterwards: "William and Shelby Thurston failed to ensure that the bouncy castle was adequately anchored to the ground and failed to monitor the weather conditions to ensure that it was safe to have it in use. They denied their actions were negligent but the CPS and the police built a strong case, together with assistance from the Health and Safety Executive, and demonstrated to the jury that the Thurston's had breached their duty of care to Summer."

On the same day this incident occurred, in China's Henan province, one child died and approximately 40 were injured when the bouncy castle they were playing on was blown 50m into the air by strong winds.

Prior to this, in 2006, at a park in Chester-le-Street, the Dreamspace inflatable structure broke from its moorings because of strong gusting winds and two people died. The artist Maurice Agis was found guilty of gross negligence manslaughter as well as an offence under Section 3(2) of the Health and Safety at Work Act 1974.

What should be in place

Inflatable structures used as children's play equipment are regulated and have stringent control measures. Promotional inflatables or ones used as marquees are not so heavily regulated. Yet the risk of what could happen if they deflated when not under controlled conditions or were pulled from their fixings still need to be considered, and appropriate and relevant control measures should be put in place to protect the public. Health and safety law applies to the supply, hire and use of inflatables for commercial purposes. It does not apply to private, domestic buyers and users.

The following points should be considered and detailed in the risk assessment when using an inflatable structure designed for children to play on:

- Ensure it has been built to the current British Standard (BS EN 14960). There should be a test certificate with it or label on it stating it complies with this BS.
- Check the label - it should tell you when it was made, how many people can use it and what height they should each be.
- After its first year and annually thereafter, have the inflatable tested by a competent person to make sure it is still safe for use. Inspectors registered with PIPA[1] or ADIPS[2] are considered competent persons.
- Every inflatable should have at least six anchor points, though bigger ones will need more. The manufacturer's / designer's guidance supplied with the inflatable will tell you how many anchor points there should be, and this must be adhered to. BS EN 14960 also provides more information regarding the calculations to be used to work out anchor point requirements.
- All the anchor points *must* be used and securely fixed - preferably with metal ground stakes of at least 380mm

1 Pertexa Inflatable Play Accreditation (PIPA) is an inspection scheme set up by the inflatable play industry to ensure that inflatable equipment conforms to recognised safety standards.

2 Amusement Device Inspection Procedures Scheme is the fairground and amusement park industry's own adopted standard for inspection and certification of fairground rides and amusement devices.

length and 16mm diameter with a rounded top. Anchor points on the inflatable should have a welded metal '0' or 'D' ring fitted to the end. If ground stakes cannot be used then a system of ballast using water or sand barrels or tying down to vehicles that will give at least the same level of protection should be used. Each anchor point should have the equivalent of 163kgs to give this ballast security.

- The whole inflatable should look symmetrical and upright when fully blown up. If it looks misshapen or deformed there may be internal problems which may make bouncing unpredictable.
- If there is an electrical blower with the inflatable this should be tested like any other portable electrical appliance. The tube that connects the blower to the inflatable should be of sufficient length that the electrical equipment can be positioned safely.
- There should be constant supervision when the inflatable is blown up, ensuring the correct air pressure is being maintained.
- Operating instructions should be supplied by the manufacturer or supplier and these should include at least the following instructions. If no instructions were supplied, the user needs to ensure these instructions are followed:
  - Restrict the number of users on the inflatable at any one time to the limit as specified by the manufacturer or supplier. Don't exceed the user height limit given by the manufacturer/supplier and keep bigger users separated from smaller.
  - Ensure users can get on and off safely and that there is safety matting at the entrance in case of falls or ejections. The mats should be of a suitable thickness that they do not cause a trip hazard to those getting off the inflatable.
  - Users should not wear shoes, should take their glasses off if they can see well enough without them and should empty their pockets of all sharp or dangerous items.
  - Users should not eat or drink while playing or bouncing and anyone obviously intoxicated should not be allowed on.
  - The person supervising the use of the inflatable should ensure play activity does not get too rough and should not let users climb or hang onto the walls.
  - A weather plan *must* be in place if the inflatable is being used outdoors, and someone should be made responsible for regularly monitoring the weather and taking action in accordance with the weather plan for the structure.
  - Ensure there is a way to manage the trip hazards caused by fixing the anchor points.
  - Ensure that any electrical equipment or generator used to pump the inflatable up is barriered off so that no unauthorised person can tamper with it.
  - Consider the position of the inflatable as this may present other hazards, such as obstructing exit routes, or is placed in an area which has a higher wind exposure, etc.

The following should be considered and detailed in the risk assessment when using an inflatable structure for décor or branding at an event:

- The manufacturer / supplier of the inflatable will detail how many anchor points are required and this *must* be adhered to.
- All the anchor points must be used and securely fixed, following the manufacturer's guidance.
- The whole inflatable should look symmetrical and upright when fully blown up.
- If there is an electrical blower with the inflatable it should be tested like any other portable electrical appliance. The tube that connects the blower to the inflatable should be of sufficient length that the electrical equipment can be positioned safely.
- There should be regular supervision when the inflatable is blown up, ensuring the correct air pressure is being maintained.
- A weather plan *must* be in place if being used externally and someone should be responsible for regularly monitoring the weather and taking action in accordance with the weather plan for the structure.
- Ensure there is a way to manage the trip hazards caused by fixing the anchor points.
- Barrier-off any electrical equipment or generator used to pump up the inflatable so that no unauthorised person can tamper with it.
- Consider the position of the inflatable: does it obstruct exit routes, or is it sited in an area with higher wind exposure. Also consider what to do if the inflatable deflates: what implications will this have on the area around it, how quickly will it deflate and will there be time to clear people standing under it?

Julia Sawyer
Director, JS Safety Consultancy

Documents referenced for this article*:*

Health and Safety at Work, etc. Act 1974
BS EN 14960:2013 – Inflatable play equipment – safety requirements and test methods
Provision and Use of Work Equipment Regulations 1999
HSE website – What is inflatable play equipment?
Fairgrounds and amusement park: Guidance on safe practice HSG175

Commission adopts an increasingly stern line

The Gambling Commission's advice to the DCMS in its review of gaming machines and social responsibility measures is **Nick Arron**'s focus in this update

In the last *Journal*, I wrote about the Department for Digital, Culture, Media and Sport (DCMS) consultation on changes to gaming machines and social responsibility measures. Although the consultation was seeking views regarding all gaming machines, the principle focus was Category B2 gaming machines (or FOBTs), the vast majority of which (approximately 33,500) are located in betting shops. The DCMS is considering regulatory changes to the maximum stake permitted on the Category B2 gaming machines, with options of between £50 and £2. The current stake limit is £100. The rationale behind the consultation is to reduce the potential for large session losses and harmful impacts on players and their wider communities.

The closing date for the consultation period was 23 January 2018. As I write this article, in May, we are awaiting the DCMS response to the consultation. In March the Gambling Commission published its advice to the Government on the consultation.

The key recommendations of the Gambling Commission advice to the DCMS were:

- The FOBT (B2) gaming machines slot stake should be limited to £2;
- The stake limit for the FOBT (B2) non-slot games (which includes Roulette) should be set at or below £30, if it is to have a significant effect on the potential for players to lose large amounts of money in a short space of time;
- Banning the facility for machines to allow different categories of games to be played in a single session;
- There is a strong case to make tracked play mandatory across machine categories (B1, B2, B3);
- Extending to Category B1 and B3 machines the kinds of protections, such as player limits, that are in place on FOBT (B2 machines);
- Working with the industry and others on the steps to make limit setting more effective – this could include ending sessions when consumers reach time and money limits.

Hopefully, by the time you read this article, the DCMS will have published the regulations implementing changes proposed within the consultation.

The detail of the Commission advice to the DCMS is extensive so I have picked out some points of interest.

The Gambling Commission distinguished between different types of games that are available on B2 machines. Slot games, traditional gaming machine fruit machine style games, account for a small percentage of games on B2 machines, but the Gambling Commission points to evidence of greater harm caused by these style games, hence advising the DCMS to reduce the maximum stake on these slot games from £100 to £2. This is an exceptional reduction and this stake level on slot games on B2 machines will probably bring an end to this style of game.

The Gambling Commission's approach to other games, which include roulette which is by far the most popular game on B2 machines, of a reduction from £100 to at or less than £30, probably does not go far enough for those who are anti-gambling, but gives hope to bookmakers. The Gambling Commission considered evidence of problem gambling behaviour, consumer choice and potential impact on how other gambling products are regulated.

On problem gambling the Commission refers to evidence that the lower the stake limit, the lower the potential rate of loss on the B2 non-slot product but also the more restricted the consumer choice. However, it accepts impacts on actual loss rates are more uncertain because they depend on consumer responses. The Commission refers to experience from the £50 staking regulation, which led to far fewer stakes above £50, but also to longer sessions. This suggests that players will seek other opportunities to satisfy their appetite for risk. In particular, consumers might choose to play for longer, alter their staking strategies or switch to other gambling products. At a very low stake limit, roulette would no longer be a commercially viable product, limiting

consumer choice and deflecting problem gamblers to other forms of gambling.

Of concern to operators will have been the Gambling Commission's advice on proposed social responsibility measures and, particularly, tracked play and limit setting across all category B machines (B1, B2 and B3) in casinos, bingo halls and AGCs. Tracked play is expensive and with enhanced social responsibility there is inevitably a fall in revenues. Many of the gaming machines will need updating to facilitate server-based gaming, and the infrastructure to connect the machines will need significant investment. In addition the loss of the players' privacy and the barriers to play which come with tracked play will have an impact on machine revenues. The Gambling Commission's advice refers to the changes in Norway, where they removed all gaming machines from the market and re-introduced them with different content, in more restricted locations, with a requirement for registration and account-based play, and built-in deposit limits and breaks. Five years after the introduction of the new machines, revenue was only 15% of what it had been before. Although the Norwegian approach goes further than suggested by the Gambling Commission (with accounts-based play), nonetheless it demonstrates that players value their privacy and any introduction of player tracking will deter players and deflect them to other forms of gambling. Conversely it should also introduce more robust data on play which will be invaluable in assessing actual problem gambling.

Although the focus of the advice was category B2 and B machines, the operation of the more common category C machines in pubs did not avoid criticism by the Commission. It refers to grounds for concern about existing controls around underage access and responsible play for machines in licensed premises. And it asks the industry to demonstrate whether or not the measures it is taking provide a safe environment for gambling and refer to commissioning independent test purchasing exercises specifically aimed at machines and staff training in responsible gambling.

There has already been a hint of the likely licensing changes on the high street resulting from the consultation. Ladbrokes has applied for adult gaming centre (AGC) premises licences to replace betting shops in Acocks Green and Nuneaton, and there will be a hearing to determine their application in Redditch in early May. In part these are due to the Coral/Ladbrokes merger but there is no doubt they are also due to the loss in revenue within LBOs which will result from the B2 machine stake cut. I would expect to see more applications of this nature with bookmakers mitigating their loses with AGCs.

Gambling Commission appoints Neil McArthur as Chief Executive

You will remember in my last *Journal* article, I reported on the Gambling Commission's announcement that Sarah Harrison was to leave in February 2018 to take up a senior role with the Department for Business Energy and Industry Strategy. Neil McArthur, the Commission's Chief Counsel and Executive Director, was appointed as Acting Chief Executive. In April, the Commission announced that Mr McArthur had been appointed as the full time Chief Executive of the Gambling Commission with immediate effect.

Neil has been with the Commission for 12 years as Chief Counsel, and is well known to the industry. One of his first tasks was to publish the Gambling Commission's business plan for 2018 / 2019, and the plan continues to focus on safeguarding and protecting the interests of consumers and the wider public, and preventing harm. This is a theme which was prevalent during Sarah's leadership, and which we should expect to continue with Neil in place.

Gambling Commission Regulatory Action

Since the last *Journa*l, there have been a number of announcements from the Commission on regulatory action involving remote licensees and there can be no doubt of the Commission's focus on the risks posed by the online industry. There have clearly been some significant failings by online operators to uphold the licensing objectives.

Leo Vegas, William Hill, Electra Works, Tabcorp and SkyBet have all paid penalties for failures in anti-money-laundering or social responsibility.

Most recently in early May, Leo Vegas Gaming accepted a Gambling Commission regulatory settlement following marketing failings, with 41 website advertisements published by Leo Vegas or its affiliates misleading customers by failing to include significant offer limitations, or by failing to present those limitations clearly enough. In total, 11,205 self-excluded customers did not have their account balance funds returned to them on account closure, and 1,894 customers who had reached the end of their self-exclusion period received marketing material without first agreeing to accept it. In addition, 413 customers who had reached the end of their self-exclusion period were able to access their accounts and gamble, despite making no positive steps to return to gambling. Leo Vegas paid a financial penalty package worth £627,000.

William Hill's shortcomings in its anti-money-laundering and social responsibility controls led to it paying a penalty of over £5 million. At least 10 customers have been able to use stolen money, or money that may be proceeds of crime, to

gamble in various periods between November 2014 and June 2017. In March, SkyBet paid a £1 million penalty package for failing to protect vulnerable customers: 736 self-excluded customers had been able to open new duplicate accounts to gamble; around 50,000 self-excluded customers received marketing material despite being self-excluded; and over 36,000 customers who had self-excluded did not have their customer accounts balance funds returned to them on account closure.

In addition, there were settlements regarding Electra Works and Tabcorp. These cases should lead little doubt in the mind of the online industry that the Gambling Commission's expectations regarding compliance with the licensing objectives, particularly in relation to the fair and open objective and crime and disorder, are not being fulfilled, and they need to up their game.

Nick Arron
Solicitor, Poppleston Allen

Events Calendar

September 2018

3	Animal Licensing, Stevenage
4	Animal Licensing, Southampton
4	Animal Licensing, Birmingham
5	Animal Licensing, Cheltenham
5	Animal Licensing, Peterborough
5	North East Regional Training Day, York
6	Animal Licensing, Matlock
6	Animal Licensing, Yeovil
7	Animal Licensing, Preston
7	Animal Licensing, London
11	Animal Licensing, Doncaster
12	Animal Licensing, Oxford
12	West Midlands Regional Training Day, Cannock
12-13	Zoo Licensing, Doncaster
13	North West Regional Training Day, Accrington
14	Animal Licensing, Haywards Heath
18-21	Professional Licensing Practitioners Qualification, Stoke
25-28	Professional Licensing Practitioners Qualification, London
27	East Midlands Regional Training Day, Nottingham

October 2018

2	Gambling Training, Swindon
3-4	Public Safety at Events, Leeds
10	Wales Regional Training Day, Llandrindod Wells
10	Pocket Notebooks and Audio Interviews, Esher
11	Gambling Training, Birmingham
16-19	Professional Licensing Practitioners Qualification, Reading

November 2018

14-16	National Training Conference, Stratford-upon-Avon
27-30	Professional Licensing Practitioners Qualification, East Grinstead

December 2018

6	East Midlands Regional Training Day and AGM, Nottingham
6	North East Regional Training Day, York

If you have a training requirement in a subject that is not above please email training@instituteoflicensing.org, clearly stating what you would like covered. We can tailor bespoke courses at your location to suit your training needs.

GDPR and CCTV in taxis

GDPR has many implications for local authorities and taxi drivers but should not prevent CCTV within taxis continuing to be used to safeguard the public, as **Ben Williams** explains

Last year I wrote about the introduction of taxi CCTV policies and the state of the law.[1] Since that time I am aware of a number of local authorities which have begun adopting such policies as a means of achieving a safer environment for drivers and passengers alike.

Now as I write this, nearly a week has passed since the "go live" date for GDPR. Despite being seen as the biggest threat to mankind since the Hadron Collider, no black hole has as yet enveloped the country. Doubtless, though, you have been inundated with requests to "opt in" to future correspondence from a plethora of retailers, memberships and organisations.

For those who have been living under a rock, General Data Protection Regulation (GDPR) is the apparent answer to outdated 1990s legislation which was cracking under 21st century strains as the processing of personal data ramps up with technology.

The Data Protection Act 2018, which implements and extends GDPR, does not necessarily represent a clean slate, for the broad architecture of data protection remains the same. Data controllers must comply with prescribed principles in respect of all processing of personal data, and individuals have rights of subject access, compensation, erasure and rectification.

Pursuant to the Act, there must be a specific purpose for collecting and retaining data. The Act goes on to dictate that the data collected must be adequate, relevant and limited to what is necessary. There is therefore a limit on how long information must be stored and the form data must be kept in which permits identification for no longer than is necessary.

GDPR applies to data controllers and data processors alike. The data controller is responsible for all of the principles and must be able to demonstrate compliance with the same. They are responsible for any breaches or non-compliance by data processors who process data on their behalf. It is worth noting that the new rules have a significant sting in the tail in terms of the financial penalties that may be dished out, albeit the greater penalties are plainly geared towards the larger organisations, in particular the social media giants.

GDPR will require data controllers to maintain records of their data processing activities. Having a complete record of what data you hold, where it came from and how it is processed will enable you to maintain the required records and assist you in complying with the GDPR principles. Thus it can be seen that there are onerous requirements which must be adhered to.

Taxi regulation and GDPR

So how does this impact on taxi regulation?

GDPR dictates that you must have a specific purpose for collecting and processing data; that this must be a specified, explicit and legitimate purpose only; and that you must not process data in an incompatible way.

Plainly the purpose of ensuring public safety is a specific and legitimate reason for collecting CCTV. Furthermore, CCTV assists with the deterrence of crime and anti-social behaviours; it therefore assists the police and assists insurers in the event of accidents.

It is essential that the reason for such CCTV is clear; signage within a taxi may refer the passenger to the local authority's website where a clear explanation of its policy is provided to the public.

The new rules will have a significant impact on the retention of CCTV by local authorities and / or drivers and operators. This is something that may have been lost on various businesses as a recent survey by the Irish Government revealed that around two thirds of respondents did not know GDPR impacted on the use of CCTV.

CCTV captures imagery of "data subjects" or "passengers" as they no doubt prefer to be called in this context. Identifiable imagery is considered as personal data under GDPR. Given that the processing of that data must be lawful, fair and transparent, this requires some consideration by those who make use of it. Because data subjects are entitled to understand when their personal data is being processed, it is essential that signage is used as a means of explaining to taxi users that this is so. The requirement for signage will no doubt be covered in the local authority's policy, and will likely form part of any conditions attached to the licence. Signage signifies the passenger's informed consent to the processing of CCTV data for Article 4 (11) GDPR, which states:

1 (2017) 18 JoL, p32-34.

Any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data.

The ICO has issued draft consent guidance (March 2017), which, to summarise, says:

- Don't use pre-ticked boxes/opt-outs/consent by default.
- Be "specific & granular" but also "clear & concise".
- For explicit consent, it's not much different.
- If you can't offer genuine choice, don't rely on consent.
- Consent may be difficult for employers and public authorities.

On any level, therefore, you should review how you seek, record and manage consent and whether you need to make any changes. This would include a need to refresh existing consents now if they don't meet the GDPR standard. The precise wording of CCTV signage is clearly important and local authorities would be well advised to seek to achieve a consistent approach to the same.

Who is the data controller?

In terms of data controllers, this is something that may prove confusing. Article 4 defines data controllers and data processors as follows:

(7) 'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;

(8) 'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;

Depending on the way a CCTV policy is formulated, while it is the driver who may control the footage to some extent, in that he or she will be transporting the facilities for creating and retaining the footage, it is the regulating authority that has determined the purposes of that data and the way in which it is processed. The driver will physically hold the data, but they will likely be compelled by the regulating authority to produce such footage upon request or submit to the regulator for such footage to be viewed / retained. It is seen as essential that the authority retains significant control so that there is less risk that the footage is tampered with in any way. This requires some careful thought in terms of the wording of a policy, for GDPR imposes significant obligations on the data controller.

What about keeping the CCTV footage?

Thought will need to be given to the terms of any data retention. To that end, the local authority will need to create a retention policy. It is unlikely that data controllers would be able to justify keeping CCTV footage for any longer than six months, for by such time any complaints or crimes should have been investigated. In reality, it is likely that footage would be kept for a lesser period. If the police or local authority wished to investigate, then they would take control of the data for this legitimate purpose within that timeframe. They would then become the data controllers and would have to submit to the same rules.

Requests for information from individuals

As with any other aspect of personal data, data subjects have a right to access, which could result in a local authority having to disclose footage to them; and now within one month rather than 40 days as was the position under the 1998 Act. It is worth noting that a request does not have to use the words "subject access" nor does it have to refer to the Data Protection Act in order for it to constitute a valid subject access request (SAR). The request simply has to be clear that the person is asking for their personal data. If a request is made, the data controller would need to ensure that the requester is present in the footage and that in supplying the footage they do not disclose any personal data of another data subject. It is therefore vital that the controller verifies the identity of the person to ensure that there is no inadvertent data breach. The controller could justifiably request information from the individual to prove that they are who they say they are, but one must be reasonable in what is asked for.

An SAR could even involve blurring out parts of the footage, such as people or license plates. The new rules do not allow the controller to charge an administrative fee (£10) as was previously the case. This could prove onerous to the local authority as there are only specific exemptions to the requirement to provide data.

If a request is "manifestly unfounded or excessive" data controllers can charge a fee or refuse to respond but will need to be able to provide evidence of how it was decided that the request is manifestly unfounded or excessive. Further, data controllers can withhold personal data if disclosing it would "adversely affect the rights and freedoms of others".

What if something goes wrong?

In the event that there is a breach of security leading to the destruction, loss, alteration or unauthorised disclosure of personal data, the data controller must notify the Information Commissioner's Office (ICO) and any involved individual of a breach where it is likely to result in a risk to the rights and

freedoms of individuals. Plainly this would not therefore require every passenger captured on CCTV within a taxi to be notified in every instance of loss or damage. Each instance must be approached on its own facts, but it is essential that there is provision for self-reporting. If there is a risk of significant detrimental effect on the individual data subject, then the self-reporting must be made within 72 hours. This requires careful thought in terms of how and when drivers are required to notify the regulating authority in the event on any issue with regards to footage retained within the car.

Encryption

Another important matter to consider in the context of CCTV and taxis is the use of encryption or other security measures. It is likely that a local authority will adopt a minimum specification of CCTV systems and if so, such systems ought to be properly secure. Of course, this may come at a cost to drivers, and this is where resistance is typically found.

Any act of storage or access is considered to be "processing" and therefore it is imperative that the confidentiality and integrity of footage is maintained. If footage is stored in an electronic format, then encryption is essential, and in the case of footage stored in a physical format, this should be locked safely away and tracked properly.

Conclusion

While GDPR does not actively discourage the use of CCTV, it is arguably seeking to strike a balance between its intended purpose and the privacy of individuals captured therein. CCTV within taxis remains an important tool in ensuring that members of the public are transported safely. GDPR would not seek to interfere unreasonably with this legitimate purpose but would wish to ensure that the imagery captured is thereafter dealt with in a legitimate, appropriate and transparent way.

It is better late than never to consider the terms and practicalities of any existing CCTV policy so that it is GDPR complaint. If a local authority is contemplating invoking a new CCTV policy, then it is essential that it fits comfortably into the parameters of GDPR.

Ben Williams
Barrister, Kings Chambers

Feedback: the key that unlocks customer loyalty

Keeping close to customers is ever more vital in the digital age, writes **Paul Bolton**

Every licensee knows the importance of word of mouth in driving footfall in pubs and bars - and in the digital age it is on social media and review websites that the battle for loyalty is being won and lost.

New GO Technology research by Zonal and CGA shows that nearly two thirds (64%) of people now read or write reviews on social media platforms like Facebook, while more than a third (37%) use TripAdvisor. With usage on this scale, it is vital for landlords and managers to monitor what people are saying about their business online, and to respond to it quickly.

Around three quarters (78%) of customers who leave feedback do so after their visit, with 63% leaving it up to 48 hours later. That makes it important to leave a lasting impression on people, as they may be relying on their memories rather than a snap reaction to their visit.

Many licensees will have first-hand experience of how a negative review on a site like TripAdvisor can impact the reputation of a venue. But CGA's research shows that compensating people for a bad experience can go some way towards repairing the damage. Two thirds (64%) of women say they expect compensation after a bad experience, and more than half (52%) of vouchers issued following a complaint are redeemed. This indicates that people who have had been disappointed by a trip can be encouraged to come back to give a business a second chance.

But CGA's research also shows there is a silent majority (59%) of people who never give feedback after visiting a pub, bar or restaurant. Persuading these people to share their opinions - perhaps by offering an incentive like a voucher or special deal - can help licensees show that they care about their customers.

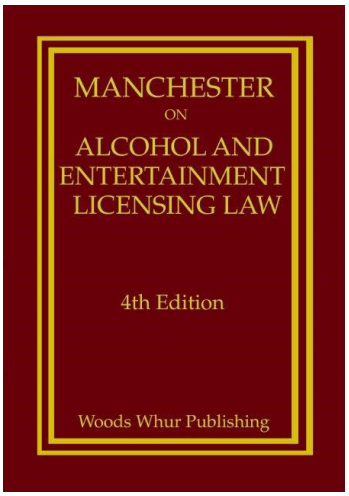
The GO Technology report is based on a survey of 5,000 adults, and features many more insights into consumer feedback and how licensed venues can act on it. The full analysis can be downloaded for free on CGA's website (www.cga.co.uk).

Zonal's sales and marketing director Clive Consterdine says: "Our desires as consumers are constantly evolving, and if hospitality businesses are to keep up they need regular feedback. That's why offering sophisticated feedback platforms is essential and at Zonal we partner with specialists to assist the process in a personal and rapid way to ensure quality data is received for businesses to act upon."

CGA's retail and food director Karl Chessell says: "With a large part of the population not giving feedback, this could point to a lack of compulsion or availability in the brands they frequent. In order to engage this group, offering some form of discount on their next visit would encourage 40% to leave feedback were it available. Our latest findings from GO Technology demonstrate that failure to actively engage with customers and take action as a result of the feedback they provide leaves brands open to competitor incursion and declining footfall."

Paul Bolton,
Senior Client Manager, CGA

Book Review



Alcohol and Entertainment Licensing Law 4th edition
Author: Colin Manchester
Publisher: Woods Whur Publishing
Price: £100 + P&P

Reviewed by **Gary Grant** Barrister, at Francis Taylor Building

When, as Prime Minister, the great Victorian statesman Lord Salisbury was presented with a plan for reform his timeless reply was "Reform! Reform! Aren't things bad enough already?!".

The past five years, since the third and previous edition of Colin Manchester's magnificent volume, *Alcohol and Entertainment Licensing Law*, have seen reform. And plenty of it. From Early Morning Alcohol Restriction Orders (whose rarity value make dodos look common-place) to the Late Night Levy, from the deregulation of regulated entertainment to the Immigration Act 2016 and the major recent reforms within the Policing and Crime Act 2017, the relentless avalanche of reform has shown no quarter.

Many are to be welcomed, others not so much. All systems are capable of improvement. But whether legislative reform was needed or, rather, further investment in skilled licensing and police officers so they can utilise their existing powers under the Licensing Act 2003 to better effect is open to debate. Alcohol has an association with violent crime and anti-social behaviour that can blight a town centre. So much is undeniable. But responsible, dare I say "sober" drinkers, and responsible establishments which can provide communities with a place of joy, fun and focus should not be curtailed because of the disgraceful conduct of a small feckless minority.

There are few opinions of our former Prime Minister Tony Blair which will meet with universal acclaim. But I will wager that this is one of them, uttered as the Licensing Act 2003 was about to come into force:

The law-abiding majority who want the ability, after going to the cinema or theatre say, to have a drink at the time they want should not be inconvenienced…We shouldn't have to have restrictions that no other city in Europe has, just in order to do something for that tiny minority who abuse alcohol, who go out and fight and cause disturbances. To take away that ability for all the population - even the vast majority who are law abiding - is not, in my view, sensible.

While the abuse, rather than use, of alcohol carries a heavy price for those seeking to maintain the peace and keep our nation healthy, how often is a cost-benefit analysis carried out when it comes to alcohol? Kate Nicholls, now CEO of UK Hospitality and a highly impressive and informed spokesperson for the trade, has calculated that for every £1 spent on tackling alcohol-related harm the drinks industry generates £26 to invest in the local economy. How often, she fairly queries, is that reflected in the national debate?

No book will solve the debate over the relative benefits and harms of alcohol use. But if any explorer needs a guide to navigate the choppy and ever-changing waters of licensing law they would be exceptionally well-served by the fourth edition of Colin Manchester's magisterial book. The author, a former professor of licensing law at the universities of Warwick and Birmingham, and current consultant to Woods Whur Solicitors and academic panellist at Francis Taylor Building, is the pre-eminent academic working in licensing law, Colin is also a Companion of the IoL. He never shies away from expressing a clear opinion in uncertain areas where the more timorous would prevaricate or, more likely, avoid altogether. It may be that future courts find otherwise, but the author comforts himself in the words of a leading judge back in 1872 who, in reversing his previous decision, explained "The matter does not appear to me now as it appears to have appeared to me then". There will be many a senior judge who will be advantaged by reading Colin Manchester's views on a tricky issue before coming to his or her own conclusions.

The book has been split into two volumes. The first contains the main text, the other appendices which include the Licensing Act 2003 itself, regulations and guidance (all of which can be digitally downloaded as well). The main text is some 200 pages longer than in the previous edition. Its coverage is comprehensive and brilliant throughout. Amongst other subjects, chapters cover the historical and philosophical underpinning of the 2003 Act, the procedural and decision-making framework, human rights and licensing, the licensing objectives and guidance, licensable activities, premises licences and club premises certificates, conditions, temporary event notices, Part 5A community event notices, personal licences, enforcement and appeals.

While texts such as *Paterson's* ("the bible of licensing law") are updated every six months and are designed for the busy practitioner, Colin Manchester's book takes a broader, calmer and more academic and analytical look at the legal horizon. It is a compelling volume that states the law as it is, probes the ambiguities and proffers solutions. Every licensing practitioner, whether working for local authorities, police forces or the trade, should have it within easy reach.

Colin Manchester deserves all his plaudits and laurels. This book is a major and significant contribution to licensing learning that merits its role as an essential reference tool for those who dabble in licensing or immerse themselves in it entirely. Licensing is richer for its existence and the author's industry and commitment to the field so many of us feel passionately about.

Licensing, in the final analysis, has human fun as its objective - in so far as that fun does not disproportionately impact on our neighbours. Any book that can further our work in achieving that noble aim is well worth reading. Undoubtedly, this is one of them.

National Training Conference

14-16 November, Stratford-upon-Avon

The National Training Conference will be held for the third year at the Crowne Plaza, Stratford-upon-Avon.

Over the three days there will be a great line up of speakers delivering a packed and informative programme and evening activities. The full programme is now online.

The event is three days of training covering all of the major licensing related topics in addition to training on the niche areas of licensing. The days are themed to ensure there is always a training topic that will be of interest to delegates.

The Institute of Licensing accredits the three day course for 12.5 hours CPD, 5 hours on the Wednesday and Thursday and 2.5 hours on Friday.

Fees:
Due to the number of days and night combinations on offer there is a Fee Calculator online under the Fees tab in the event information. Non-members booking for 3 days and 2 or 3 nights accommodation will benefit from complimentary membership for the remainder on the 2018/19 year.

Special thanks to all our sponsors supporting the conference

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ALCOHOL AND ENTERTAINMENT

Court of Appeal (Judicial review)
Lord Justice Treacy, Lord Justice Hickinbottom and Lord Justice Singh

Power of local authority under Local Government Act 1972 s 145 to enclose or set apart any part of a park belonging to the authority and exclude people from it.

R (on the application of Friends of Finsbury Park) v Haringey LBC [2017] EWCA Civ 1831; [2018] L.L.R. 119

Decision: 16 November 2017

Facts: Finsbury Park ("the Park") was a 115-acre park owned by the Haringey London Borough ("the Council"). The Park had played host to large scale events, including commercial ticket-only concerts attended by tens of thousands of people, for many years. Whilst such events were clearly a source of entertainment for those attending they were regarded as a considerable inconvenience to some who do not, particularly local residents. Their enjoyment of the Park was diminished when they were displaced from those parts of the Park that were from time-to-time used for the events. Consequently such events had been the subject of much consideration by the Council.

The Council's Finsbury Park Management Plan 2013-16 included an events policy, namely that there would be a maximum of five commercial events of up to 30,000 to 40,000 people to be held each year, with a further maximum of three separate funfairs. Under the Council's Outdoor Events Policy (which was adopted after full consultation), applications for major events in the Park had to be lodged at least nine months prior to the proposed date of the event, to allow for consultation with (amongst others) an organisation of Friends of the Park (the Appellant) recognised by the Council. In 2014, the Council also set up the Finsbury Park Stakeholders Group, a group of elected councillors, officers from the Council and the adjacent London Boroughs of Hackney and Islington, local businesses, the police, residents and other interested parties including the Appellant. One key role of the Stakeholder Group was "to review and comment on initial and final draft event management plans for major events".

In addition to permission to hire the relevant part of the Park, any promoter of such an event also required a premises licence from the Council's Special Licensing Sub-committee, under Licensing Act 2003. That was also subject to a significant procedure, during which interested parties have an opportunity to make representations. The Wireless Festival was an annual event, promoted by the Second Interested Party ("Live Nation"). Its application for a premises licence in 2013 incorporated an Event Management Plan of over 70 pages, a Crowd Management & Security Plan of similar length, a Medical Management Plan, a Waste Management Plan, a Noise Management Plan, a Show-stop Procedure, an Alcohol Management Plan, and Health and Safety Rules for Contractors. Notwithstanding representations made, the application was granted by the Special Licensing Sub-committee on 16 December 2013, subject to 113 conditions.

The Council received many complaints in relation to the 2015 festival, which resulted in the Council's Overview and Scrutiny Committee setting up a review "to reflect on and understand the impact of recent large events that have taken place in Finsbury Park such as the Wireless Festival". The Appellant was invited to give evidence to the review, which it did. The Committee published its report in early October 2015, which set out various ways in which the impact of the festival could be mitigated.

The First Interested Party ("Festival Republic" - an associated company of Live Nation) then made application for the Wireless Festival 2016. It required closing part of the Park from 25 June to 15 July 2016, with a two stage music event (including a community/charity event) on 2 July and a two or three stage music event on 8-10 July 2016. During the performance days, 27% of the Park would be closed to the public. The Appellant submitted an objection, not only on the merits of the application, but also contending that the Council did not have power to authorise such an event. However, on 18 March 2016, the Leader of the Council, purporting to exercise powers under section 145 of the Local Government Act 1972 (the 1972 Act"), determined to hire the relevant part of the Park to Festival Republic for the festival.

The Appellant commenced judicial review of that decision on 29 April 2016. At an expedited rolled-up hearing on 9 June 2016, Supperstone J granted permission to apply for judicial review, but dismissed the claim, giving his reasons in a judgment handed down on 22 June 2016 ([2016] EWHC 1454 (Admin)). The music festival went ahead, but on the basis that this was an issue of some importance and an annual event, on 19 December 2016 Lewison LJ granted permission to appeal on a single ground, namely that Supperstone J had erred in law in holding that section 145 of the 1972 Act authorised the Council to hire out the Park for the Wireless Festival 2016.

Point of dispute: whether, as a matter of jurisdiction, the Council had power under section 145 of the 1972 Act to hire out part of the Park for the purposes of the Wireless Festival;

or whether, as a matter of jurisdiction, they were limited to considering the application for hire only under section 44 of the 1890 Act (which allowed for the closure of a park to the general public for a limited number of days per year, excluding any Sunday or bank holiday, and the use of it on those days by some particular public institution or for some particular public event), or article 7 of the 1967 Act (which authorised the use of open space in London for the provision of entertainment provided that the area set apart does not exceed one acre or one tenth of the open space, whichever is greater). Both of the latter provisions included a power to exclude.

Held: i) The 1967 Act was adopted after the local government reorganisation in London, expressly to secure "uniformity in the law applicable with respect to parks and open spaces". There was nothing to suggest that it was intended to effect any radical change. ii) It was also noteworthy that section 145(3) of the 1972 Act expressly retained private covenants and conditions upon which a gift of a public park has been made; but remained silent about the rights of the public to enjoy the park. iii) The 1972 Act was, of course, the later statute. Section 145 of it applied to all local authorities, which included all 32 London borough councils. It was especially clear for a range of (given) reasons that the draftsman intended section 145 to apply to London. Section 145 also expressly included the power to enclose (and, hence, restrict general public access to) any part of a park or pleasure ground. iv) Article 7 and section 145 were stand-alone provisions, creating "different powers for different places subject to different limitations". v) Indeed, the various statutes expressly provide that the powers they gave were supplementary to any powers derived from other Acts. vi) Insofar as out of London authorities were concerned, section 145 removed any spatial restriction on the power to enclose or set apart any part of a park. vii) Section 42 of the London County Council (General Powers) 1935 Act (so far as London was concerned) and section 132 of the Local Government Act 1948) gave London authorities two distinct powers, under either of which they could have acted in particular circumstances.
In conclusion, section 145 provided the Council with power to enclose part of the Park for the purposes of events such as the Wireless Festival, entirely distinct and separate from the power in article 7, such that the Council can, in any particular circumstances, exercise either power it chooses. The power under section 44 of the 1890 Act were, likewise, distinct.

ALCOHOL AND ENTERTAINMENT

Administrative Court
Mr Justice Stuart-Smith

Need on appeal to find that the decision of a licensing authority was or is 'wrong' was a necessary prerequisite to magistrates exercising any discretion. Alternatively, reasons given must demonstrate competent consideration of the matters that had given rise to the LA's concerns.

London Borough of Lambeth v Ashu [2017] EWHC 3685 (Admin)

Decision: 21st November 2017

Facts: In January 2016 the Metropolitan Police had applied for a review of the premises' licence. Representations were subsequently submitted from Trading Standards and the Community Safeguarding Team. The main concern was the number of out-of-hours sales of alcohol. At the hearing of the review the Licensing Sub Committee ("LSC") revoked the premises' licence in light of a number of out-of-hours sales that had taken place. The magistrates had allowed the appeal and found that the proposed condition put forward by the respondent was the appropriate and proportionate response. These conditions restricted the opening hours (previously without restriction) and, therefore, the hours for licensable activity to 0800 to 2300 on Monday to Saturday and 1000 hours to 2230 hours on Sunday.

Point of dispute: whether it was sufficient for the magistrates simply to state that they were satisfied that the new condition would achieve the licensing objective and be proportionate.

Held: the need to find that the decision of the LSC was or is wrong was a necessary prerequisite to the magistrates exercising any discretion of their own. The magistrates had made no such finding. Alternatively, even if it was permissible for the magistrates to exercise a discretion of their own, the reasons that they had given did not show any competent consideration of the matters that had given rise to the LSC's concerns. Those were material concerns in November 2016 (the date of the appeal) just as they had been in April and the failure to address them vitiated their purported exercise of their discretion. It was not sufficient for the magistrates simply to state that they were satisfied that the new condition would achieve the licensing objective and be proportionate. The decision of the magistrates was, therefore, be set aside and a direction given that the appeal be heard before a differently constituted court.

Costs: awarded to Appellant licensing authority.

TAXI AND PRIVATE HIRE

Administrative Court (Oral Application for Permission to Apply for Judicial Review)

SUPPERSTONE J

Where a condition is imposed pursuant to a policy, an appeal against the imposition of that condition where the appellant does not contend he has any particular characteristic that would justify the disapplication of a policy is, in fact, a challenge to the policy which should not be entertained by the appellate court.

R (o/a Simmonds) v (1) Guildford Crown Court (2) Guildford Borough Council [2017] EWHC 3002 (Admin)

Decision 26 October 2017

Facts: In December 2015 the Council adopted a policy that all hackney carriage licences would be subject to a condition that the vehicles had to be liveried. The Claimant was granted a hackney licence. He appealed against the condition to the magistrates' court. His appeal was dismissed, and his further appeal to the Crown Court was dismissed. He sought permission to judicially review the Crown Court's refusal to state a case. The application was dismissed on paper, and at an oral hearing in front of Ouseley J. Five of the Claimant's seven grounds were struck out, but permission was given for him to file further particulars of the remaining two. Permission then refused for those two grounds on the paper and the Claimant then renewed his application orally.

Point of dispute: Whether the Claimant could contend on appeal that the policy should not apply to him.

Held: In considering the question as to how an appellate court should approach an appeal where the authority has a policy in *R (o/a Westminster City Council) v. Middlesex Crown Court* [2002] EWHC 1104 (Admin) Scott Baker J. said that the appellate court should accept the policy and apply it as if it was standing in the shoes of the council considering the application - the appellate court was not the right place to challenge the policy; the remedy, if it was alleged the policy had been unlawfully established, was judicial review. Here, although the Claimant sought to emphasise it was not challenging the policy, he identified no reason why he should be treated differently from other hackney carriage proprietors in Guildford. In reality this was a challenge to the policy. There was nothing in s 47 of the Local Government (Miscellaneous Provisions) Act 1976, which dealt with the imposition of conditions on hackney carriage licences, and appeals against such conditions, which justified a different approach to that set out by Scott Baker J.

Costs: No order as to costs. The Administrative Court declined to order the Claimant to pay the Interested Party's costs of attending the hearing.

TAXI AND PRIVATE HIRE

Divisional Court (Case Stated)

HICKINBOTTOM LJ and GILBART J

A private hire vehicle operator licensed in two local authority areas could arrange for a booking accepted in the first area in respect of which it held a licence to be carried out by a driver and vehicle licensed by the second area in respect of which it held a licence pursuant to s 55A(1) of the Local Government (Miscellaneous Provisions) Act 1976 (inserted by the Deregulation Act 2015) by using a computer system to automatically transfer such bookings. The statutory requirement that such "sub-contracted booking is accepted that district" was met if the sub-contracted booking was accepted as a booking subject to the licence in that district.

Milton Keynes Council v Skyline Taxis and Private Hire Limited [2017] EWHC 2794 (Admin)

Decision 10 November 2017

Facts: Skyline held PHV operator's licences issued by Milton Keynes Council ("MKC") and South Northamptonshire District Council ("SNDC"). It used a cloud-based computer system called "iCabbi" to automate the acceptance of booking requests and the dispatch of PHVs and drivers to satisfy those requests. This system includes a facility whereby incoming calls from regular customers are handled by an automated voice recognition system, so that bookings are accepted without human intervention. On 3 April 2015, a regular customer of Skyline he telephoned Skyline on a Milton Keynes number to book a car to collect him from his home in MKC's area the following morning and take him to Central Milton Keynes Station. After a chasing call, a car arrived late. The customer complained to MKC. MKC's investigations revealed that the driver and his vehicle were licensed by SNDC rather than by MKC. Skyline's explanation for this was that its MKC licensed operation had sub-contracted the booking to its SNDC licensed operation. MKC prosecuted Skyline for offences under s 46(1)(e) of the 1976 Act for operating under its MKC licence a vehicle as a private hire vehicle for which a vehicle licence issued by MKC was not in force, with a driver not licensed by MKC. Skyline's defence was that it had lawfully sub-contracted the booking to itself as envisaged in s 55A(1) and (3) of the Act. The District Judge found that MKC had not shown to the criminal standard of proof that the booking had not been "sub-contracted" or "transferred" to Skyline SNDC, and that there was therefore no case to answer. MKC appealed by way of case stated.

Points of dispute: (1) Did a sub-contracting arrangement for the purposes of the Act require some positive engagement by the operator taking over the particular booking including some positive acceptance of that booking? (2) Did the wording of the requirement in s 55A(1)(b) that "the other person is licensed under s 55 in respect of another controlled district and the sub-contracted booking is accepted in that district" require the acceptance to be made, positively and physically, in that district? (3) If MKC could be said to have brought an unnecessary test case, did that constitute an "unnecessary and improper" act for the purposes of s.19 of the Prosecution of Offences Act 1985 so as to entitle the defendants to apply for costs against MKC?

Held: (1) No. Although s 55A(3) requires the question of sub-contracting where both operator's licences are held by the same person to be approached on the hypothetical basis that the licences are held by separate persons, this does not mean that the real world has to be ignored altogether. In the real world, Skyline MKC and SNDC share the same unitary iCabbi computer system, which organises the business and holds the data of each. That made commercial sense and there was nothing in the statutory scheme to prevent it. It was open to Skyline MKC and SNDC to make an arrangement with itself whereby bookings accepted by one would be satisfied by the other if the first did not have a driver and vehicle eligible and available for the job. Indeed this was the purpose of s 55A(1). This arrangement could be managed on a common computer system, and Skyline SNDC had agreed to this, and could not be said to have had it unilaterally imposed on it. The first and second operators did not have to have separate and distinct controlling minds, and there was no requirement for there to be a distinct and positive decision to accept each and every particular booking. That would be out of kilter with modern life and unwarranted by the statute. (2) Whilst the wording of s 55A(1)(b) could have been clearer, the statutory focus was not on the place of acceptance but the district in which the subcontracted booking was accepted as a booking. S 55A(1)(b) should be construed as requiring that "the other person is licensed under s 55 in respect of another controlled district and the subcontracted booking is accepted as a booking subject to the licence in that district". (3) Where a prosecutor brings an unnecessary test case, the court has the power to make an order that the prosecutor pays the costs of the relevant defendant(s), but only where the acts or omissions of the prosecutor are "unnecessary or improper acts or omissions". The council's conduct in this case fell far short of that very high threshold.

Both members of the Divisional Court commented that there had been no harm public interest arising out of Skyline's arrangements.

Costs: MBC was ordered to pay 80% of Skyline's costs of the appeal.

TAXI & PRIVATE HIRE

Administrative Court (Judicial Review)

The setting of fares by Guildford Borough Council for hackney carriages in its area did not constitute an unjustified restriction on the freedom of establishment right in article 49 of TFEU, and in so setting those fares, a challenge that the methodology used by the Council was unreasonable and irrational failed.

JOHN HOWELL QC sitting as a Deputy High Court Judge

Rostron v Guildford Borough Council [2017] EWHC 3141 (Admin)

Decision 5 December 2017

Facts: In 2013 the local authority had approved a method for calculating the table of hackney carriage fares which involved a formula that produced the basic charge per mile travelled with one passenger by an average driver that was required to provide a certain annual salary having covered annual running costs. The running cots were derived from figures published by the Automobile Association. The annual salary was intended to represent the average of the median annual gross salary of residents and workers in Guildford. In 2016 the local authority conducted a non-statutory consultation on the fare table and the costs used in the calculation by circulating all 262 hackney carriage drivers and proprietors, of whom only five responded. The local authority then conducted a statutory consultation under s.65 of the Local Government (Miscellaneous Provisions) Act 1976 on a fare table calculated using the same methodology as before, with some modified and updated figures. 10 representations against this table were made, and a petition was circulated. It was contended that the local authority should have had regard to TfL figures as to the running cost of a London Cab.

Points of dispute: (1) whether the setting of the fares amounted to an unjustified restriction on the freedom of establishment right in article 49 TFEU and (2) whether the fee setting exercise had been conducted irrationally and unreasonably.

Held: On point (1) the Court found that the table of fares did not restrict the freedom of establishment under article 49 TFEU. There was no evidence that, if the table of fares was adopted, it would make the opportunity of providing services as a hackney carriage driver or proprietor in

Guildford any less attractive to EU nationals. Even if the table had constituted a restriction for the purposes of article 49, it was justifiable. The claimant's argued that the table of fares went beyond what was necessary to attain the local authority's objective of protecting consumers by ensuring that the fares were reasonable for the public to pay for an available service. However, the court found that it could be concluded that the maximum fares selected were objectively reasonable and that the table of fares adopted preserved a fair balance between the public interest and the drivers' interests. As to (2), the Court rejected the suggestion that the table was unreasonable in Wednesbury terms. If the Council's estimates were wrong, the trade only had itself to blame in not submitting sufficient reliable evidence in the course of the two consultations conducted by the local authority.

Costs: the Claimant was ordered to pay the Defendant's costs.

TAXI & PRIVATE HIRE

Administrative Court (Judicial Review) (NB only one party appeared and was represented)

The question for a magistrates' court upon appeal is whether, having conducted a rehearing, the decision below was wrong. In allowing an appeal because they considered that the decision below was defective and therefore wrong at the date it was made, the magistrates failed to conduct a lawful rehearing of the decision and failed to consider whether it was wrong at the date of the appeal.

OUSELEY J

R (o/a East Herts District Council) v. North and East Herts Magistrates' Court [2018] EWHC 72 (Admin)

Decision 18 January 2018

Facts: A taxi driver was accused of acting improperly towards a passenger. A subcommittee hearing took place, at the conclusion of which his licence was revoked on the grounds that it was no longer considered that he was fit and proper to hold it. He appealed to the magistrates' court. His appeal was allowed, the magistrates in their written reasons saying their decision was based on the "on the process of the original decision" rather than by conducting a rehearing, giving weight to the original decision. The court expressly declined to make any findings in relation to the incident in question. The local authority sought judicial review of this decision.

Point in dispute: (1) Whether the magistrates' court should have conducted a rehearing (2) Whether the magistrates' court could conflate a defective decision with a wrong decision.

Held: As to (1), the magistrates' court had failed to consider whether the decision was wrong as at the date of the rehearing. As pointed out by the Court of Appeal in *R. (Hope & Glory Public House Ltd) v. City of Westminster Magistrates' Court* [2011] EWCA Civ 31 at the question for the appellate is whether the decision of the licensing authority is wrong. The defendant magistrates in their reasons focused solely on the reasons given by the applicant authority, but that was in fact only one part of their duty to conduct a rehearing. In relation to (2), Lindblom J. had observed in *R. (o/a Townlink Ltd v. Thames Magistrates' Court* [2011] L.L.R. 392 that it was wrong to equate the idea of a "wrong" decision with that of an "illegal" decision. It was not enough for the magistrates' court to conclude that the decision of the licensing committee was wrong. If it considers that there has been an error by the licensing committee, its task is to consider, because this an appeal is by way of rehearing, whether the appeal should be allowed by reconsidering the merits as at the date of its hearing. The magistrates failed to appreciate that, even if they considered that there was an error in the committee's decision, whether of logic or adequacy of reasons or factors ignored, it could not simply allow the appeal. If it were to do that, the whole question of whether the interested party is a fit and proper person is sidestepped and never resolved, simply because of a procedural error or the like by the committee as judged by the magistrates' court.

Costs: No order as to costs.

TAXI & PRIVATE HIRE

Administrative Court (Judicial Review)

A local authority's 'intended use policy' requiring applicants for PHV driver licences to sign a declaration that they did not now or in the future intend to work mainly or solely remotely from its area was unlawful and was quashed.

KERR J

R (o/a (1) Delta Merseyside Limited (2) Uber Britannia Limited) v Knowsley Metropolitan Borough Council [2018] EWHC 757 Admin

Decision 7 February 2018

Facts: Knowsley Borough Council introduced an "intended

use policy" that required applicants for PHV driver's licences (whether on grant or renewal) to demonstrate "a bona fide intention to predominantly carry out private hire work… within the controlled district of Knowsley", with a policy presumption of refusal of a licence to any driver who does not intend to, or is unable to, work "predominantly within the prescribed area". Two PHV operators sought judicial review of this decision.

Points in dispute: (1) Whether the policy was contrary to the Local Government (Miscellaneous Provisions) Act 1976, s 51 of which provided that a local authority "shall" on the receipt of an application from any person for a grant to that person of a licence to drive a PHV, grant the licence, provided that it shall not do so unless satisfied that the applicant is a "fit and proper" person to hold it. (2) Whether the locations where an applicant intends to drive a PHV was an immaterial consideration which was wrongly taken into account. (3) Whether the policy was too vague to be enforceable. (4) Whether the policy was a disproportionate infringement on the freedom of establishment right in article 49 of TFEU.

Held: As to (1), the policy was unlawful. The local authority did not have a discretion in the matter of determining applications for driver's licences for PHVs. The issue of the licence was a mandatory consequence of finding that an applicant is a fit and proper person to hold it. The phrase "fit and proper" in the context of s 51 referred to the personal characteristics and professional qualifications of the driver and not to his or her work preferences and visibility. The licence was generic, not specific, and a person who was fit and proper to hold a licence if working in Knowsley did not cease to be so if he or she happened to move to Cornwall. The locations that the applicant intended to work, point (2), was therefore an immaterial consideration, but that added nothing to point (1). It was not necessary to reach a decision on point (3) but the Court would have been reluctant to hold that the policy was void for uncertainty. Again, it was not necessary to reach a finding on (4) but the Court felt it was strongly arguable that the policy imposed a disproportionate burden on the licence holder.

Although Delta and Uber were at one with regards to their primary contention that the intended use policy was unlawful, they disagreed on an issue which arose in the course of oral argument. Delta accepted that an appropriately worded condition which promotes the principle of local PHV licensing (as identified by the courts) was capable of being lawful; Uber, on the other hand, argued that such a condition would in all cases offend the principle in Padfield because it would curtail the 'right to roam' – which, it was Uber's contention, is fundamental to the legislative scheme for private hire vehicles given by the 1976 Act.
Kerr J. expressly demurred from deciding the point, but towards the end of his judgment he commented that he was "fortified" by what he had heard in thinking that a fit and proper person might, in principle, be required to abide by a condition (otherwise lawful) imposed in order to meet any perceived erosion of localism.

Costs: Costs followed the event.

Jeremy Phillips QC, FIoL
Barrister, Fancis Taylor BUilding

Phillips' Case Digest is based upon the case reports produced by him and his fellow editors for *Paterson's Licensing Acts* of which he is Editor-in-Chief.

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