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Daniel Davies, MIoL
Chairman, Institute of Licensing

May I first extend a very warm welcome to all of you who are reading this as delegates attending the IoL annual National Training Conference (NTC). The *Journal* is provided in delegate packs, and I hope it makes for informative and stimulating reading to complement the learning and debate in the delegate sessions. To those of you receiving the *Journal* through the post as usual, I hope you enjoy it too!

Sadly, a "Big Picture" state-of-the-industry analysis cannot escape the grim reality for many that the anticipated perfect storm of a post-Covid economy, increased running costs (especially food and utilities) and decreased spending power for consumers (for the same reasons) will make the winter challenging. Operators who have adapted, survived, and indeed thrived through Covid while remaining compliant with legal obligations should be applauded, but they must feel like John Cleese's Black Knight of Monty Python and the Holy Grail fame, stoically insisting of the latest heavy blow that "tis but a scratch".

The Government has of course extended the "pavement licence" provisions in the Business and Planning Act 2020 for a further year to 30 September 2023, when it became clear that there would be insufficient parliamentary time for the regime to be made permanent by way of the Levelling Up and Regeneration Bill 2022 before the provisions expired on 20 September 2022. The deregulation of off-sales has also been extended by secondary legislation for a further year, co-terminus with the pavement licence provisions. It is to be fervently hoped that the Government does not see this as the limit of the help they will extend to the industry during these torrid times.

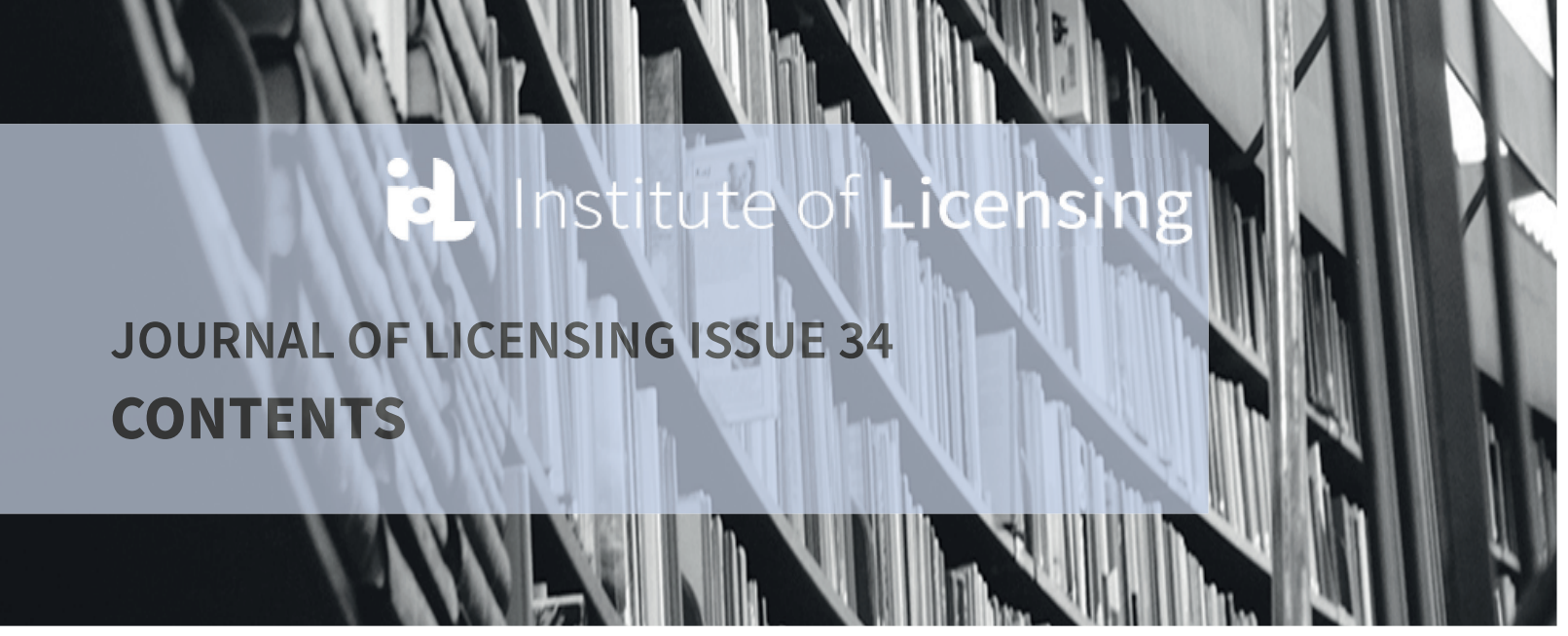
Against this backdrop, we have a *Journal* packed with engaging and topical subjects. Indeed, Sarah Clover takes her cue from my regrettably downbeat assessment above and grasps the nettle of the plight of the industry as well as updating us on the House of Lords Liaison Committee report that follows up the weighty 2017 report by the Select Committee on Licensing Act 2003. Spoiler: the report concludes that there are still flaws in the licensing system, with a particular emphasis on the importance of sufficient training for councillors.

Gary Grant provides an Opinion piece on the unfairness which can result for all sides from delays in appeals under Licensing Act 2003 being heard, particularly those relating to review proceedings. Developments in Scotland and Northern Ireland are covered by Stephen McGowan and Orla Kennedy and Eoin Devlin respectively. Julia Sawyer hopes that the recent tragic firearms fatality on a film set in the United States will heighten a renewed awareness of the relevant technical standards and health and safety requirements.

Leo Charalambides offers a practical example of how a licensing authority is required to grapple with the ever-developing sex club scene, which challenges social mores and legal definitions. Just as cumulative impact policies under Licensing Act 2003 are being abandoned by some licensing authorities, so there are murmurings of the concept creeping into Gambling Act 2005 considerations – Nick Arron reports on this in his regular feature. In the Interested Party, Richard Brown looks at the Government's change of heart on off-sales deregulation and its impact.

There are also two excellent taxi licensing articles, from James Button and Mike Smith.

By the time you read this, the NTC will be in full swing. I hope all delegates find the sessions as stimulating as ever but also, perhaps almost as importantly, find benefit in like-minded licensing practitioners with different priorities yet the same overarching aims coming together, both professionally and socially, to further the common goals of the IoL.



Institute of Licensing

JOURNAL OF LICENSING ISSUE 34

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Leo Charalambides, FIoL
Editor, Journal of Licensing

The articles in this latest issue of the *Journal,* in my view, invite a consideration of the importance of having an effective statement of licensing policy. The s 182 Guidance reminds us (para 14.13) that, for all the expectations we place upon the Licensing Act 2003 and operators within the night-time economy, nevertheless:

> *A statement of policy should also make clear that licensing law is not the primary mechanism for the general control of nuisance and anti-social behaviour by individuals once they are away from the licensed premises and, therefore, beyond the direct control of the individual, club, or business holding the licence, certificate or authorisation concerned. Nonetheless, it is a key aspect of such control and licensing law will always be part of a holistic approach to the management of the evening and night-time economy on town and city centres.*

The extent and necessity of a "holistic approach" is highlighted throughout this issue: safeguarding, the exercise of the Public Sector Equality Duty, wider diversity and inclusion considerations, the relationship between adult entertainment and sex establishments, off-sales, pavement licensing (and other street furniture and uses) and the potential proliferation and harms of gambling. All invite engagement.

The framework for that engagement ought, in my view, to be provided by the local statement of licensing policy. The importance of having an effective statement of licensing policy which contains the "most appropriate licensing strategies for their local area" (s 182 Guidance, para 1.5) cannot be overstated. In carrying out its functions a licensing authority must have regard to its statement of licensing policy (LA 2002, s 4(3)(a)) and it is an equally important resource for applicants: "In completing an operating schedule, applicants are expected to have regard to the statement of licensing policy for their area (s 182 Guidance, para 8.41)."

While the statement of licensing policy is reviewed every five years, a local authority must, nonetheless, keep its policy under review and make such revisions to it, at such times, as it considers appropriate (LA 2003, s 5(4)). The s 182 Guidance (at para 14.2) provides this telling example: "… the licensing authority may make any revisions to it as it considers appropriate, for instance in the light of feedback from the local community on whether the licensing objectives are being met."

Equally important is the relationship between the Licensing Act 2003 and other regimes. What, for example, is the relationship between adult entertainment under the 2003 Act and the sex establishment regime under the Local Government (Miscellaneous Provisions) Act 1982? How should the Public Sector Equality Duty be exercised, if at all, in regard to these Acts, independently of each other but also in parallel to each other?

The application form for the 2003 Act lists gambling activities as adult entertainment. What relationship might there be between the 2003 Statement of Licensing Policy and the Statement of Gambling Principles under the Gambling Act 2005? It remains to be seen how might cumulative impacts assessments under the 2003 Act and 2005 Act inform and interact with each other. It seems to me that policy statements under the 2003 Act have benefitted from the practice of local area profiles encouraged under the Gambling Act 2005. As the Court of Appeal has indicated in *Hope & Glory,* location is a key consideration ([2011] EWCA Civ 31 [42]).

These questions invite a holistic approach to the on-going review and development of statements of licensing policy. It is already quite common to find a statement of licensing policy under the 2003 Act to have a separate and distinct section on adult entertainment and sex establishments within the one policy document. I have also come across policy statements that have a chapter on the use of pavement licenses and other street furniture. Given the amount of time and consideration that is given to the position, capacity and use of smoking areas, it is a surprise that pavement and outdoor space is not more widely considered in policy statements.

While the Act and Guidance remain relatively static, the facts on the ground and the challenges faced by the local licensing authority, the responsible authorities and operators are constantly changing. The ongoing aftermath of Covid recovery, the cost-of-living crisis, changing consumer patterns, the economic impact on-trade operators, the safety of women in the night-time economy, diversity and inclusion, and so on: these are all challenges that require a statement of licensing policy that is holistic, dynamic and under review.

Whose adult entertainment is it, anyway?

A recent legal battle over what level of bodily exposure should be allowed in sexual entertainment venues highlights the issues licensing authorities must consider, as **Leo Charalambides** explains

"An orgy and then a cup of tea: Crossbreed and the new boom in sex clubs" ran the headline to Emma Garland's 7 February 2022 *Guardian* article heralding the recent reawakening of London's sex club scene. In it she wrote:

> "For smoke machines and St Andrew's crosses, try Klub Verboten. For hedonism with a sense of humour you'll want Adonis. And for women and non-binary people, One Night offers a blend of Japanese rope bondage and R&B."

This clubbing renaissance invites licensing authorities to re-consider – or maybe consider for the first time – appropriate licensing strategies for their local area,[1] and how to tailor licence conditions[2] – where appropriate – to the individual type, location and characteristics of the premises and events concerned. In a previous joint article with Charles Holland, we opined that:

> *Sex-positive venues that promote sexual activities between consenting adults are increasingly visible. It is becoming apparent that such venues cater for marginalised communities of self-regulating consenting adults which promote diversity and social inclusion by their increased visibility. They have a social value that is greater than the events that they promote and organise.*
>
> *We are long overdue an adult and mature conversation about the real extent and scope of sexual entertainment in our local authority areas.*[3]

Box K of the application form for a new premises licence is headed "Adult Entertainment" and states:

> *Please highlight any adult entertainment or services, activities, or other entertainment or matters ancillary to the use of the premises that may give rise to concern in respect of children (please read guidance note 9).*

Guidance note 9 states:

> *Give information about anything intended to occur at the premises or ancillary to the use of the premises which may give rise to concern in respect of children, regardless of whether you intend children to have access to the premises, for example (but not exclusively) nudity or semi-nudity, films for restricted age groups or the presence of gaming machines.*

The s 182 Guidance recognises that a premises licensed under the 2003 Act may provide adult entertainment (see paras [2.23] and [2.24]). In these circumstances the primary concern is the protection of children from harm (see para [2.27]). The rationale for regulating and conditioning venues to promote the protection of children from harm is self-evident and uncontroversial.

The s 182 Guidance states:

> *It is not possible to give an exhaustive list of what amounts to entertainment or services of an adult of sexual nature. Applicants, responsible authorities and licensing authorities will need to consider this point carefully. This would broadly include topless bar staff, striptease, lap-, table- or pole-dancing, performances involving feigned violence or horrific incidents, feigned or actual sexual acts or fetishism, or entertainment involving strong and offensive language. [2.24]*

Given the potential range of entertainments and services of an adult nature it will be an assessment that will need careful consideration on a case-by-case basis – part of the adult conversation advocated for in our previous article. Having identified adult entertainment, consideration needs to be given to what conditions (if any) are appropriate for venues of self-regulating consenting adults. A recent variation application in the London Borough of Tower

1 Section 182 Guidance, para 1.5.

2 Section 182 Guidance, para 1.16.

3 Leo Charalambides and Charles Holland, "No sex discussions please, we're British", (2021) 30 JoL, pp 4-10, at p 10.

Hamlets provides a practical example of how to grapple with these considerations.

The variation application

The E1 Studio Spaces venue in East London has the benefit of a premises licence. A condition of the premises licence states the following: "No nudity or semi nudity permitted". As a result of matters arising from an externally promoted Valentine event on 12 February 2022, this condition, and in particular the meaning of "semi nudity", came under close scrutiny.

Occasionally E1 is hired out to independent promoters. Some of these promoters organise and present queer, fetish and / or kink events. The licensing authority, in its capacity as a responsible authority, referred to these type of events as '"KINK" nights'. While the shorthand – "Kink nights" – may have been easier, it seems to me that the s 182 Guidance invites scrutiny and particularisation. Recent trends tend to favour the term "queer" as a broad all-encompassing (inclusive) designation for the range and variety of persons that contribute to the queer, fetish and kink communities.

E1 described these externally organised queer, fetish or kink events as being presented for consenting adults who *may* present themselves in an array of fetish or kink clothing (commonly referred to as fetish or kink "gear").[4] The nature of queer, fetish and kink clothing / gear is such that breasts, pecs, nipples, genitalia and buttocks and more intimate body parts may be visible. Such visibility is intentional and integral to the particular queer, fetish and kink lifestyle or scene. This clothing / gear is integral to the expression of queer individuals to present their particular fetish and / or kink.

E1 acknowledged that at some of these events, arrangements are made and facilities provided by the promoter so as to facilitate sexual activities between consenting adults attending the event. A common term to describe premises where sexual activities take place between consenting adults is "sex-on-sex" or "sex-on-premises" venues. The arrangements for these events, in the case of E1, were made by the promoter who had contracted to operate the venue for their events.

The operator, promoters and persons within the responsible authorities took that view that the condition – "No nudity or semi nudity permitted" – was directed solely as a prohibition towards striptease, lap-, table- or pole-dancing entertainment and services and not activities associated with consenting adult participation by attendees. In the case of E1, the parties were unable to determine the reasoning behind the inclusion of the condition. The relationship between adult entertainment and relevant entertainment under the 1982 Act remains vague with vastly varying approaches across England and Wales.[5]

It seems to me that where entertainment of an adult nature is taking place, bespoke conditions directly tailored to the individual type, location and characteristics of the premises and events are required – this is one of the key general principles that are commended for licensing conditions within the s 182 Guidance [para 1.16].

E1 sought to vary its premises licence to remove the no nudity or semi-nudity condition. It was argued that the condition was too vague to be enforceable, was disproportionate to the aims of the Licensing Act 2003, was moralistic, constituted censorship, and potentially undermined the Public Sector Equality Duty (PSED) (s 149, Equality Act 2010).

In response, the licensing authority in its capacity as a responsible authority argued against the removal of the condition, instead favouring a replacement in the following terms:

> *No nudity by either performance (sic) [performers] or customer (sic) [customers] shall be permitted on the premises. Nudity shall be defined by paragraph 2A(14) of [Schedule 3 of the] Local Government (Miscellaneous Provisions) Act 1982.*

The relevant provisions of the 1982 Act provide:

> *display of nudity' means –*
> *(a) in the case of a woman, exposure of her nipples, pubic area, genitals or anus; and*
> *(b) in the case of a man, exposure of his pubic area, genitals or anus;*

This was later amended by counsel acting for the licensing authority to:

> *No display of nudity by either performers or customers shall be permitted on the premises. "Nudity" is defined as (a) in the case of a woman, exposure of her nipples,*

4 The dress code requirements vary considerably between venues and promoters. The enforcement of a strict dress code can often provide an indication of the nature of the entertainment and whether it might be deemed to be adult entertainment for the purposes of the Licensing Act 2003.

5 See Leo Charalambides and Charles Holland, "No sex discussions please, we're British", (2021) 30 JoL, pp 4-10; also Phil Hubbard and Rachael Colosi, "Determining the appropriateness of sexual entertainment venues", (2013) 5 JoL, p 4 (at p 5).

pubic area, genitals or anus; and (b) in the case of a man, exposure of his pubic area, genitals or anus. References to "man" or "woman" include persons who self-identify as a "man" or "woman".

It must be acknowledged that the inclusion of a gender self-identification clause within the amended proposed replacement condition may come to be considered a radical forward thinking approach by the licensing authority and one with far reaching consequences. It seems to me that the definition in the 1982 Act is binary and fixed. The fluidity and flexibility adopted by the London Borough of Tower Hamlets seems to be a local initiative advocated by the licensing authority.

The licensing authority as responsible authority provided stills, taken from the premises' CCTV, of the event on 12 February 2022 that demonstrated nudity and sexual activity. Its use was said to be purely for safeguarding and the proper regulation of this venue and events. It was accepted that save for the events on 12 February 2022 there were no complaints to the council concerning E1. By the time of the hearing on 26 July 2022 the licensing authority stated that it would not ask the sub-committee to place any weight on the complaint from the February event. The stills were used as an informative of one type of event that took place at E1.

E1 accepted that safeguarding was a relevant consideration for itself, the promoters that it engaged with and the licensing authority. E1 provided a copy of its safeguarding policies and an equality impact assessment. E1 suggested that its safeguarding practice and policies could be codified by way of a condition to that effect to be added to its premises licence.

The strength and engagement of the queer, fetish and kink community was demonstrated with over 200 relevant representations in support of the variation application. The council chamber was filled to capacity, with an overflow gathered outside the council building following the hearing via live stream on temporary screens. There were no representations from other responsible authorities; the licensing officer attended the hearing flanked by counsel and his solicitor. Never, in my experience, has a licensing officer needed such staunch legal buttress at a licensing sub-committee meeting.

The representations in support were compelling: the sub-committee determined that there was "a strong indication that the licensing objectives would not be undermined by granting the application."

Equality Act 2010 – s 149, the public sector equality duty

It was noted that the Tower Hamlets statement of licensing policy did not provide any guidance in respect of adult entertainment. The policy incorporated a sex establishment policy as an appendix, but this was solely concerned with lap-dancing and similar entertainment services and did not address adult entertainment of the type hosted by E1 in any regards. The statement of licensing policy does not mention the Equality Act 2010 although it does include a policy statement in relation to the promotion of racial equality (see LBTH SLP para [29]) but does not mention the other protected characteristics. The s 182 Guidance states that the statement of licensing policy should recognise the Equality Act 2010 and the public sector equality duty (PSED) and the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation (see s 182 Guidance, paras [14.66] and [14.67]).

Given the policy lacuna, E1 invited the sub-committee to have regard to the manifesto (now adopted as council policy) of Lutfur Rahman, the recently elected Mayor of Tower Hamlets, wherein he acknowledges: "Our borough's strength lies in its diversity and different communities and culture living side by side". In his manifesto he pledged to: "Uphold and protect equality and diversity in all circumstances. Nobody of any race, religion, gender, sexual orientation, class or disability should ever face discrimination of any kind, and I want to return to the days when our authority was the highest ranked in London by Stonewall's Equality Index."

It was uncontroversial that the provisions of the 2003 Act and the 1982 Act are subject to the duties contained in the Equality Act 2010. Counsel for the licensing authority as responsible authority confirmed that the PSED was engaged in this case, and that the licensing sub-committee was invited to properly consider it.[6] It remains unclear whether the licensing authority as responsible authority had conducted and considered an equality impact assessment (EQIA) in adopting a definition of nudity for the purposes of the proposed condition in its representation; it seems unlikely.[7]

E1 argued that the existing condition and the proposal for its replacement by the Licensing Authority ought to have benefited from an EQIA, given the proposal to restrict consenting adults in respect of types of clothing, degrees of

6 In *R (Brown) V Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), Aikens LJ giving the judgment of the Divisional Court stated that the duty must be "exercised in substance, with rigour, and with an open mind." See Leo Charalambides, "Councils need to wake up to their public sector equality duty responsibilities." (2021) 30 JoL, pp 23 – 27.

7 Counsel for the licensing authority as responsible authority referred the LSC, and provided copies, of the recent *Journal of Licensing* article by Jeremy Philips KC & Michael Feeney, "SEVs and the PSED" (2022) 33 JoL, pp 17 – 20 for its consideration.

clothing and varying degrees of bodily display. Furthermore, the proposed condition was likely to have an impact on the availability of consenting adult communities to assemble together to express themselves within like-minded consensual social communities.

Essentially E1 asked, why are men permitted to remove their t-shirts, shirts etc and be able to drink, dance and otherwise enjoy themselves and socialise with their nipples exposed yet women, in the present circumstances, are being denied the opportunity to socialise in a form and manner equal to that of men in the very same self-regulating consensual environment?

As part of its submissions E1 took the unusual step of preparing and submitting its own EQIA – an assessment that arguably ought to have been made by both the licensing authority as a responsible authority and the licensing authority itself.

The concession as to self-identification was broadly welcomed, but the implications for E1, staff, promoters and contractors (including SIA-licensed staff) were not fully considered. E1 feared that to enforce the revised conditions, they would have to assume an inappropriate and invasive gender policing policy that could amount to discrimination. Staff members that contributed to the EQIA were particularly concerned about these implications.

Moralistic censorship?

In the context of adult events and entertainment, local authorities should take great care to avoid conditions that are moral (see Collins J in *R v Newcastle upon Tyne City Council, ex p The Christian Institute* [2001] L.G.R. 165 [21] applied in *R (Thompson) v Oxford City Council* [2013] EWHC 1819 (Admin) [50] ; see also Court of Appeal decision in *Thompson* [2014] EWCA Civ 94)). E1 argued that there is a moral element in the council attempting to regulate the dress code and behaviours of consenting adults. Paragraph 10.16 of the s 182 Guidance advises local licensing authorities that censorship, and by extension a censorious approach, is not properly related to the licensing objectives. Moral objections and censorship in these circumstances run counter to the "demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (see *Handyside v UK* (1979) EHRR 737 [49] and can undermine the right to freedom of expression in Article 10 ECHR. Freedom of expression extends beyond the spoken or written work and includes artistic expression (see *Müller v Switzerland* (1988) 13 EHRR 212 [27]) and can include dress (see for example *Vajnai v Hungary* [2008] ECHR 1910), in this case wearing a five-pointed red star on a jacket; also *Tig v Turkey* (2005) where it was accepted that the wearing of a beard was arguable. It can also include nudity but not public nudity (see *Gough v. DPP* [2013] EWHC 3267 (Admin), in this case the G was arrested while walking through the town centre in nothing but boots, socks and a hat).

To some, an uncovered breast may be inappropriate while for others it is a powerful expression of gender, sex and sexuality. Licensing authorities must tread carefully to promote the licensing objectives without straying into moralistic judgments. In the particular present circumstances, the free expression of the queer, fetish and kink community/-ies is a form of expression that takes place in an enclosed, risk assessed and self-regulated space (*cf Müller*). E1 argued that it was disproportionate and unjustifiable – if not plainly moralistic – to impose a condition in respect of nudity and semi-nudity under the 2003 Act to restrict this expression.

Separate regimes

E1 argued that Schedule 3 of the 1982 Act is a separate and distinct licensing regime with its own aims and objects. Paragraph 2A(14) of Schedule 3 was introduced by the Policing and Crime Act 2009, which removed lap dancing and similar venues from the scope of licensing control under the 2003 Act and amended the 1982 Act to establish a distinct and separate regime for sex establishments. Adult entertainment remains regulated under the 2003 Act (save where the adult entertainment is also relevant entertainment).

It is well established that planning permission, building control approval and the licensing regimes ought to be properly separated to avoid duplication and inefficiency. The s 182 Guidance states that "The planning and licensing regimes involve consideration of different (albeit related) matters" (para 14.64). Equally, the *sex establishment* and licensing regimes involve consideration of different (albeit related) matters.

Where there are overlapping statutory regimes it may not always be possible to determine where one control ends and another begins (see *R (Blackwood) v Birmingham Magistrates* [2006] EWHC 1800 (Admin)). In the present circumstances it is clear that the 2003 Act control is concerned with the licensing objective of the protection of children from harm, generally limited to the accessibility of children to premises where adult entertainment is taking place (including external visibility and advertising of adult entertainment). The 2003 Act is not concerned with regulating the dress, conduct or lawful behaviour of consenting adults.

Outcome

The sub-committee determined that the issue for determination was ultimately a simple one: if the condition were removed, would that be likely to adversely impact upon the licensing objectives, in this case the prevention of crime and disorder and public safety? The sub-committee

determined that "given the complete absence of evidence that the licensing objectives would be adversely impacted by the removal of the condition, … the only appropriate and proportionate course of action open to it was to remove the condition entirely."

The sub-committee agreed to impose the following condition:

> *The premises licence holder shall implement, maintain and comply with a wellbeing and safeguarding policy for queer, kink and fetish events. The premises licence holder shall ensure that any external promoter putting on queer / fetish / kink events is aware of and complies with this policy. A copy of the policy will be made available to the Licensing Authority and Police upon written request. Any updates to the policy shall be communicated to the Local Authority and Police within seven days of such updates.*

As to its PSED, the sub-committee took a nuanced and considered approach with regards to the exercise of the PSED and the application of the Licensing Act 2003:

> *In light of this decision, the Sub-Committee considers that it can address the PSED issue quite briefly. The Sub-Committee specifically considered the applicant's EQIA and, in the absence of any other relevant information from the Licensing Authority, felt constrained to adopt the applicant's EQIA. The Sub-Committee noted that the nature of events meant that there was a greater impact on certain groups with protected characteristics. The Sub-Committee noted that although the events at the Premises tended to cater to the queer community, there were disparate groups of people attending these events, some of whom shared one protected characteristic, others who shared another, and some who had none at all. The Sub-Committee was informed that these events were inclusive and welcomed diversity and were open to all; being of the queer community was not a prerequisite for attendance or entry. Given the comments made by some of the supporters as to harassment and discrimination that they faced in mainstream venues, and how safe they felt at events such as Klub Verboten, the Sub-Committee accepted that these events were of considerable importance to the queer community.*
>
> *For completeness, however, the Sub-Committee was aware that the PSED did not require it to achieve a particular result and the above was in no way determinative of the issue. Whilst the Sub-Committee had had due regard to the PSED, the removal of the condition was simply because of the approach required to be taken under the Licensing Act 2003.*

Conclusion

This variation application is, of course, circumscribed by its own facts. However, a number of points of general application can be advanced. First, careful regard needs to be had to the particular nature of the proposed adult entertainment. Second, in developing its statement of licensing policy, a licensing authority should give consideration to adult entertainment that focuses upon consenting adults in enclosed self-regulated environments. Third, adult entertainment raises practical and pressing considerations that may directly engage the PSED: responsible authorities, licensing authorities and operator need to develop the evidence base and experience to properly engage with these matters.

The nub of the variation application was a question over the meaning of semi-nudity. In its press release (16.03.2022) Klub Verboten asked: "Is the sight of an ankle, bare shoulders, buttocks, cleavage and bare chests matters of legitimate public interest?" It remains a question that may need to be considered by other licensing authorities as the trend for adult entertainment continues to grow in extent and visibility.

Leo Charalambides FIoL
Barrister, Kings Chambers

Plying and standing for hire finally settled – we think

The law on plying for hire has been under review again, and **James Button** believes that the long-awaited comprehensive and authoritative definition of the term has at last been delivered

The question of what is meant by plying and standing for hire has taxed the senior courts for well over a century. The matter was considered by the High Court in *R (App United Trade Action Group Limited) v Transport for London,*[1] and in July the Court of Appeal handed down its decision on the subsequent appeal.

The High Court case considered a number of matters including whether Transport for London (TfL) should have granted private hire licences to a range of internet-based operators. That was not considered by the Court of Appeal. The Court of Appeal hearing solely concerned the question of whether or not a private hire driver registered with and available for hire via a mobile phone-based booking system was plying for hire.

This required the court to consider not only the wording of the Metropolitan Public Carriage Act 1869 (the equivalent in London of the Town Police Clauses Act 1847 for the remainder of England and Wales) but also the case law that has developed over time. As Bean LJ put it:[2]

> *It may seem extraordinary that the underlying question of law is one of the interpretation of a statute enacted in 1869, before the invention of the telephone or the motorcar, let alone the internet or the smartphone app. Yet that is the issue before us.*

In the High Court, the view was taken that the court was bound by the High Court decision in *Reading Borough Council v Ali*[3] which determined that a private hire driver, parked lawfully on the highway while awaiting a booking from Uber via the app system, was not plying or standing for hire. The court determined that the appearance of an image or representation of the vehicle on the telephone screen did not amount to an exhibition of the vehicle, and the evidence that the driver stated he was only available following a booking via the app made it clear that the driver was not soliciting custom and the vehicle was not available for immediate hire.

It was that element that was challenged in the Court of Appeal.

Judgment was given by Bean LJ. He stated that: "Prior to the era of the smart phone app the leading case on plying for hire was *Cogley v Sherwood".*[4] That case reviewed a significant number of previous decisions and the High Court stated that they had: "been unable to extract from [the earlier cases] a comprehensive and authoritative definition of 'plying for hire'."[5] The court in *Cogley* then concluded that there were two elements required for the offence to be committed: firstly, the vehicle must be exhibited to the public and secondly, the driver must be soliciting custom as evidenced by the vehicle being available for immediate hire following an approach by a member of the public.

That case was followed by *Rose v Welbeck Motors*[6] where the High Court held that if the vehicle was exhibited in a way to solicit custom from the public, that also amounted to plying for hire.

The Court of Appeal then fast forwarded over half a century to *Reading BC v Ali* in 2019, which the appellants (UTAG) argued was wrongly decided. Having set out the relevant paragraphs of the Reading decision, Bean LJ said (at para 28):

This may be summarised as follows:

i) Depiction of available vehicles in the form used by the App is not "exhibition". The App simply uses modern technology as a substitute for the operator of a traditional minicab firm, who tell customers on the phone that (eg) we have 5 minicabs in your area and could get you one in 5 minutes.

1 [2022] LLR 141 CA.
2 At para 1.
3 [2019] 1 WLR 2635.
4 [1959] 2 QB 311 At para 17.
5 *Per* Parker LCJ at 323.
6 [1962] 1 WLR 1010.

ii) The driver using the App is not soliciting custom during the period of waiting; there is nothing on the vehicle advertising that it is for hire and the driver will not allow passengers simply to hail the vehicle and step into it.

Attempts by the appellants to challenge the decision in *Cogley* by reference to other older cases (*Sales v Lake,*[7] *Cavill v Amos,*[8] and *Griffin v Grey Coaches*[9]*),* and also the decision in *Reading* as being wrongly decided, were given what can be described as "judicial short shrift".

The conclusion of the Court of Appeal was that the decision in *Reading* was correct, upholding as it did the decision in *Cogley*. The salient points of the judgment are as follows:

42. The Appellants argue that as a matter of ordinary language a vehicle plies for hire if it "drives around or parks in a public place waiting for someone to hire it". That cannot possibly be enough. Such a test would criminalise almost the entire PHV industry, except perhaps one person operators working from home; and would mean that the careful provision made by Parliament for regulation of PHVs in London (under the 1998 Act) was contradicted by a phrase in the 1869 statute dealing with hackney carriages. The Appellants have to go further and show that the tests of exhibition and solicitation laid down in 1959 in Cogley v Sherwood are made out.

43. I agree with what Lord Parker CJ said in Cogley about the previous authorities. None of them is binding on this court; and, with respect to Mr Matthias, I do not think it is a useful exercise to consider what various judges said (often obiter) about charabancs or stage carriages in the previous cases which were comprehensively reviewed in Cogley. And while I admire his tenacity in arguing that Sales v Lake is somehow to be preferred to Cogley, that submission is valiant to the point of desperation. Firstly, Sales v Lake was a 1922 case about a stage carriage, not a hackney carriage. Secondly, it is a very rare example of a reported decision of Lord Trevethin CJ, who cannot be said to be an authority of equal standing to Lord Parker CJ, nor anywhere near it. Thirdly, it was one of the cases carefully reviewed by the Divisional Court in Cogley and found not to offer useful guidance.

44. Lord Parker's conclusion that "there is no decided case where a hackney carriage was held to be plying for hire where it was not exhibited so as to be visible to would-be customers" is in my view correct. The two-stage test of exhibition of the vehicle and solicitation of passengers is clear and intelligible and has stood the test of time. If it is still necessary for Cogley v Sherwood to be approved in this court, I would approve it.

45. I agree with the Divisional Court in Reading BC v Ali that plying for hire requires a vehicle to be not just exhibited or on view but, while exhibited, to be soliciting custom in the sense of inviting members of the public to hire it without a prior contract. I do not consider that drivers of PHVs using the FREE NOW app can be said to be plying for hire. Neither the "exhibition" nor the "solicitation" element of the test is satisfied.

46. As to the element of exhibiting the vehicle, I do not consider that the depiction of the vehicle and others as rectangular blobs on the passenger/s smartphone screen amounts to exhibiting. The passenger is not being given any details that would identify a vehicle and no means of finding it or contacting it directly. The individual vehicles depicted on the screen are neither "visible" nor "on view" in any real sense. I agree with Mr Matthias that the case would be the same if, instead of being shown a map of the area with a number of blobs representing cars, the customer was simply told by an on-screen message "there are five cars currently available within five minutes of where you are waiting". But that would not be exhibition either. Like Flaux LJ in the Reading case, I accept that the case is no different from that of the traditional minicab firm which takes phone calls from prospective customers and where the operator tells them "we have five cars within five minutes of you". All that the FREE NOW app does is to speed up that process.

47. The Appellants' case is similarly unpersuasive on the issue of solicitation. I cannot accept Mr Matthias' submission that a PHV or its driver solicits business simply by driving towards (or remaining in) an area of high demand. This would lead to the startling conclusion that the PHV industry has involved inherent criminality for many years, well before the introduction of ride-hailing apps. Moreover, as Mr Kolvin rightly pointed out, PHV drivers cannot dematerialise or disappear between one ride and the next.

48. Once mere presence in an area is rejected as a form of solicitation there is nothing else the FREE NOW driver is doing which amounts to the solicitation of any prospective passenger to take a ride in the car without having previously booked through the operator. There is nothing on the vehicle to indicate that it is a FREE

7 [1922] 1 K.B. 553.

8 [1900] 64 J.P. 309.

9 [1928] 45 TLR 109.

NOW PHV. FREE NOW drivers do not queue at taxi ranks (that being the exclusive privilege of black cab drivers); nor do they solicit passers by to step into the vehicle and reach an agreement on the spot. Since FREE NOW drivers in London do not exhibit a contact telephone number on the vehicle we do not have to consider whether that might make a difference.

49. In my view Reading BC v Ali was correctly decided. For these reasons and those given by Singh LJ, with which I entirely agree, I would dismiss UTAG's appeal against the substantive decision of the Divisional Court on the plying for hire issue.

This conclusion was supported by Singh LJ and Phillips LJ.

Where does this leave the law on plying for hire? Exactly where it was before this litigation took place, but in a reinforced position, as the long-awaited comprehensive and authoritative definition of "plying for hire"" has arguably been delivered. The Court of Appeal has specifically approved the High Court decision in *Cogley v Sherwood*. It has approved the High Court decision in *Reading Borough Council v Ali*.

For there to be an offence of standing or plying for hire the vehicle must firstly be exhibited and secondly there must be a solicitation evidenced by the fact that the vehicle is available for immediate hire, as stated by Bean LJ where he summarised the decision in *Cogley*:[10]

i) Depiction of available vehicles in the form used by the App is not "exhibition". The App simply uses modern technology as a substitute for the operator of a traditional minicab firm, who tell customers on the phone that (eg) we have 5 minicabs in your area and could get you one in 5 minutes.

ii) The driver using the App is not soliciting custom during the period of waiting; there is nothing on the vehicle advertising that it is for hire and the driver will not allow passengers simply to hail the vehicle and step into it..

It would appear that this decision is conclusive, but there is still the question of the appearance of the private hire vehicle to be considered.

In *Reading*, the PHV carried no signage apart from the TfL roundel in the front and rear window. However, many local authorities require significant signage on PHVs, largely to differentiate them from non-WAV hackney carriages, and also to make the public realise these are vehicles which must be pre-booked via a private hire operator. Does that make a difference as it conflicts with the approach taken by Bean LJ where he said "there is nothing on the vehicle advertising that it is for hire"? The PHV signage makes it clear that the vehicle is available for hire, but not *immediate* hire. Is this distinction sufficient to alter the position between what can best be described as "marked" and "unmarked" PHVs?

My submission is that it does. In *Reading*, Flaux LJ put it like this:[11]

His [Mr Ali's] vehicle did not advertise itself as available for hire nor did he do anything which would have suggested to the public that he was available for hire. Indeed, as the Chief Magistrate found, if a member of the public had approached the vehicle and sought a ride, the respondent would have refused to take such a passenger off the street without a prior booking through the Uber App.

Although a marked vehicle could arguably "advertise itself as available for hire", the driver, by simply sitting at the driving seat, would not "do anything which would have suggested to the public that he was available for hire", and provided he did not accept any passengers without the pre booking, it is difficult to see how the offence could be made out.

It is possible that this question may itself be removed in the future, as the draft best practice guidance that the Department for Transport (DfT) consulted on earlier this year[12] makes it clear that the view of the DfT is that there should be no additional signage on PHVs, beyond the plate or disc:[13] *Licensing authorities' private hire vehicle signage requirements should be limited to the authority licence plate or disc and a "pre-booked only" door sign.* In addition, DfT says "the signage on private hire vehicles will be negligible".[14] If this approach is taken in the final guidance, the issue may well be resolved beyond further challenge.

However, feelings run deep, and it cannot be seen as being beyond the realms of possibility that there may yet be further litigation on what appears at this stage to be a clearly settled point.

James Button
Principal, James Button & Co.

10 At para 28.

11 At para 38.

12 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063053/taxi-and-private-hire-vehicle-licensing-consulting-on-best-practice-guidance-for-licensing-authorities-in-England.pdf.

13 At para 8.43.

14 At para 8.47.

Licensing needs reforming says peers committee

The House of Lords has been continuing its work on the licensing system and has re-emphasised the need for government action across a number of issues, as **Sarah Clover** reports

The House of Lords Select Committee on the Licensing Act 2003 reported on 4 April 2017, and gave its recommendations concerning the Act, after its first decade in action. The recommendations were wide ranging, and stretched beyond the limits of the legislation, into parallel regimes, and particularly planning. Five years on, the Act was again selected for further examination by the Liaison Committee for a follow up report, and four former members of the Select Committee reprised their role, together with fellow peers, to see what had happened since 2017.

The Committee held three evidence sessions on 10 March 2022 and heard from representatives from the legal world, from hospitality trade organisations and from the police and relevant government departments. The conclusions, written into the Committee Report on 11 July 2022, were largely critical of the Government responses to their recommendations.

The Lords narrowed their focus to the licensing topics that they regarded as being of key importance. The report focussed on the following areas:

- Coordination of the licensing and planning systems.
- The agent of change principle.
- Training.
- Access to licensed premises for disabled people.
- The night-time economy.
- Pricing and taxation of alcohol.
- Sale of alcohol airside.
- Application systems.
- National database for personal licence holders.

It is of great interest that, in a report ostensibly about licensing legislation, the first two topics selected relate specifically to planning. It became clear from the evidence sessions that the witnesses and the Lords agreed that the relationship between the planning and licensing systems is still seen as being fundamental to the effective operation of the Act, but even more so to the recovery and flourishing of the hospitality industry in these most difficult of times. It is no longer considered acceptable to operate these regulatory regimes in silos, and miss vital opportunities to curate land uses and the juxtaposition of residential development within night-time economy areas. The Lords have fully accepted the evidence that the future operation of licensing, planning and environmental protection must be more closely coordinated to deliver effective outcomes for our town and city centres, and our modern ways of living. This is something that the Institute of Licensing is heavily involved in and paying close attention to.

The committee noted the work done by the Institute of Licensing, with support from the Home Office, scoping solutions to improve coordination between the licensing and planning systems. The Agent of Change Working Group was established, and it held two workshops with key stakeholders in 2019, on the relationship and issues between the two systems. The group produced a report in June 2020 and recommended long, medium and short term goals which included:

- Long Term - a “root and branch” review of the licensing, planning, and nuisance and environmental protection regulatory regimes.
- Medium Term - a new approach to designing and developing towns and cities to ensure the needs of those working, living and visiting them can be met.
- Short Term - a need to tackle the communication and coordination between both Government departments and within local government.

This included a recommendation for local government to take practical steps to implement an “infrastructure of communication”, particularly between licensing, planning and environmental protection departments.

The report suggested a range of solutions to improve communication, including open plan or more joined-up departmental working, coordinated software and a consolidation of application processes. The report also highlighted the need for national coordination of guidance and training.

The committee concluded that it was:

> *… disappointed that no practical progress has been made to address the lack of coordination between the licensing and planning systems. It is clear that issues between the two systems remain and we regret that there has been no initiative from Government to take forward the work undertaken to explore solutions. The Government should work with the Institute of Licensing, the Local Government Association and other interested parties to establish a clear mechanism for licensing and planning systems to work together and communicate effectively. The Government should trial these mechanisms in pilot areas.*

This would include amendments to the s 182 Guidance and the LGA councillor handbooks. The committee also concluded that the Government must consider the coordination between the licensing and planning systems in its ongoing planning reforms in the Levelling-up and Regeneration Bill 2022.

The committee also examined the agent of change principle and concluded that this policy tool for mediating the relationship between new development and existing, noise generating businesses needed to be enshrined in primary legislation, but certainly established in licensing guidance as well as planning policy.

The committee were very concerned about training, commenting that: "Training across the licensing sector is crucial to assist in tackling the issues of consistency and confidence in licensing decisions identified in the 2017 report."

The committee found training needed to be developed for both councillors on licensing committees and sub-committees and police licensing officers.

It was noted that the IoL has carried out discussions with the Home Office and LGA on producing standardised training which could form the basis of mandatory training, but that this work has stalled during the pandemic. The committee was clear that this important work should be resumed as soon as possible.

The 2017 committee recommended "the development and implementation of a comprehensive police licensing officer training programme, designed by the College of Policing."

Certain work had commenced in this regard, but had also come to a halt due to pandemic pressures. This too is regarded as of vital importance. Industry representatives emphasised to the committee that there was a need to include in the training an understanding of the night-time economy and the cultural sector as a whole, including the "economic, cultural and community values … not just the crime stats."

The committee also looked at minimum unit pricing, and reiterated the position that if this is a success in Scotland, it should be followed in England (it has already been adopted in Wales).

With regard to the remainder of the topics considered, the committee largely re-confirmed their conclusions set out in the 2017 report. The committee did not feel that late night levies were successful and repeated the call for them to be scrapped. The committee did reinforce its belief that the Licensing Act had more to offer with regard to disabled access to premises, and the control of alcohol airside. The difficulties caused by inadequate digital application systems and the lack of a national database for personal licence holders was noted, and the Government was urged to fill these gaps.

It should not be assumed that the Government disregards the recommendations of select committees. While the force of the reports can only come through the medium of renewed scrutiny and questions surrounding implementation, this is regarded as being important in the government departments, and failures to live up to commitments and expectations are taken very seriously at all levels. It can be expected, therefore, that the key recommendations highlighted by the Lords will be revisited at ministerial level, and there is more work to come on the key areas of most interest to the Lords Committee.

Sarah Clover
Barrister, Kings Chambers

The curious case of the off-trade extensions

Regardless of whether the Government's u-turn on deregulation of off-sales was the correct approach, it will benefit some premises more than others and may cause problems for local residents living near to these premises. More than that, it is in no way a panacea, writes **Richard Brown**

A week is a long time in politics, and it feels like a long time in licensing too. My article in the last *Journal* (JoL 33)) examined the further extension of the temporary "pavement licence" regime under Business and Planning Act 2020 (BPA 2020) while confidently trumpeting that, in respect of the off- sales deregulation in s 11 BPA 2020, "it is not proposed that this should be made permanent".

My confidence was misplaced. In fairness, I felt I was on solid ground owing to the content of a letter dated 26 May 2022 from the Home Office to the Institute of Licensing stating that (my emphasis) "given the absence of Covid restrictions in England and Wales, there is no legal basis for a further extension and, accordingly, the measure will lapse on 30 September 2022".[1]

This categoric statement seemed to broach no further discussion. Unfortunately, I became the victim of a political Damascene conversion which came at a most inconvenient time in the *Journal*'s editorial and publication timetable. For on 17 July 2022 the IoL reported that the Home Office had had a re-think, and decided that, in fact, and in contrast to the previously stated position that there was no legal basis for doing so, "it would be appropriate to extend the off-sales provision for a further year".[2] Whatever one's view of the extension of the extension, this is a quite startling *volte face*. If there is no legal basis to do something – presumably in this case because it was felt no longer tenable to tie it to its original purpose, namely "to mitigate an effect of coronavirus" – then regardless of whether it is desirable to do so, it should not be done.

It appears that the U-turn came about as a result of lobbying from industry bodies. UKHospitality reported that "persistent lobbying by UKHospitality and others has convinced government that deregulation measures such as this can help businesses, at what is a critical time in their efforts to stay afloat. This will benefit those hospitality businesses that have successfully evolved operating models to incorporate takeaway and outdoor sales, and allow them to continue to do so." Regardless of whether the change of heart is the right decision, it is somewhat disquieting that the Government's official view that there was "no legal basis" to extend the temporary measures changed so quickly, and apparently without notice to other stakeholders. The extension to September 2023 was on the same basis as the extension to 2021, ie, that it is reasonable "to mitigate an effect of coronavirus". How this squares with the previous lack of legal basis because of the absence of coronavirus restrictions is unclear.

Happily, the Government's legislative machinery is more in tune with the *Journal*'s editorial programme this time around, and as luck would have it, any doubt as to further changes of mind has been put to bed by the Alcohol Licensing (Coronavirus) (Regulatory Easements) (Amendment) Regulations 2022 made under s 11(14) BPA 2020, which were laid before Parliament on 22 September 2022. They came into force on 29 September 2022 by way of the "made affirmative" procedure where a statutory instrument comes into force before it is approved (and can come into force before it is laid) but cannot remain in force unless it is approved by Parliament within a specified period. The 2022 Regulations came into force in the nick of time - a day before the 2021 Regulations expired.[3]

The 2022 Regulations are straightforward and simply substitute "2023" for "2022" in s 11(13) BPA 2020 (modification of premises licences to authorise off-sales for limited period: expiry date) and in s 172F(1)(d)(i) Licensing Act 2003 (authorisation of off-sales for a limited period). A

1 https://www.instituteoflicensing.org/news/regulatory-easement-in-respect-of-off-sales-of-alcohol-to-cease/.

2 https://www.instituteoflicensing.org/news/off-sales-regulatory-easement-to-be-extended/.

3 S.I. 2022/978.

full impact assessment has not been produced as no, or no significant, impact on the private, voluntary or public sector is foreseen.

The Home Office is intending to seek views from the industry, local authorities and other interested parties to understand "whether there would be support for a streamlined process for alcohol licences, which would be a permanent alternative to the current alcohol licensing easements."

What might that streamlining be? And, if "streamlined" is a euphemism for "light touch", what difference would it make to concerned residents?

It is important to question whether the further off-sales deregulation extension will have the hugely positive impact which may be assumed, particularly for pubs, given the challenging economic situation.

Of course, now adding to the hammer blow of the Covid-19 pandemic is the cost of living crisis, with inflation spiralling and energy costs straining all but the sturdiest wallets. This has a dual effect on the hospitality industry – increased costs for themselves, and decreased disposable income for customers. There is no easy answer.

One suspects that the cost of living crisis was a factor in the extension of the off-sales deregulation. It is an easy win for the Government, generating positive headlines, but should not deflect from inaction in providing actual direct, tangible and expeditious solutions and help to the industry in terms of energy bills and inflation. Given the importance of the issue to local residents – if I had a pound for every time I had been told by residents that they don't have an issue with what happens inside a premises but are concerned about external noise, particularly in the later evening, I would have no worries about paying my winter energy bill – it is therefore important that the extension of the off-sales deregulation is not seen as a panacea for the ills of the hospitality industry. Retailers will need real, tangible, and swift help from the Government of a granular rather than broad-brush nature, which does not threaten the delicate balance between competing interests which all of us deal with every day.

It is axiomatic that the off-sales deregulation had a hugely beneficial effect during the pandemic[4] in two senses: it helped (and indeed provided a lifeline to) many licensed businesses and it has facilitated the enjoyment of al fresco dining for the general public. When Covid restrictions forbade service inside premises, or social distancing limited capacity inside, or when people were wary of sitting inside, the deregulation was absolutely vital. Yet, there have not been any Covid restrictions on licensed premises for well over a year. It must not be forgotten that the deregulation has also had a deleterious impact on residents living above or near premises - many of whom may now be working from home much more because of the same pandemic which has caused the hospitality industry such suffering - who have experienced increases in noise nuisance. This dichotomy brings into focus the quest for the right "balance", which is or should be the dynamic of a licensing sub-committee hearing, writ large.

It is important to remember that the off-sales deregulation only helps premises with on-sales only licences, or on- and off-sales licences if the licence has a condition(s) restricting off-sales in an open container and / or to before 11pm and / or preventing deliveries. According to the most recent statistics from the Home Office (albeit from 2018 – the exercise did not take place in 2019 and has not taken place since then due to the Covid-19 pandemic) of 164,621 licensed premises in England and Wales, 36,208 were for on-sales only; 76,855 licensed premises benefitted from on-sales and off-sales; and the remaining 51,558 (not far off a third of the total) were for off-sales only.

It goes without saying that the premises licensed only for on-sales (more than a fifth of the total) benefitted greatly from the exemption to allow them to sell alcohol for consumption off the premises during and after the pandemic. Indeed, it is no exaggeration to say that this was a lifeline given that social distancing and various other lockdown restrictions on serving inside would otherwise have rendered such premises unable to operate at all. Since the end of Covid hospitality restrictions in July 2021, outside drinking and dining has of course remained popular.

It is impossible to analyse how many of the 76,855 on-sale and off-sale licences benefitted from the exemption enabling them to undertake off-sales in an open container to 11pm if conditions would otherwise prevent this. However, the vast majority of premises which existed pre-Licensing Act 2003 – ie, most pubs – already have the benefit of off-sales unencumbered by conditions, to the same permitted hours as on-sales – 11pm.

While a proportion of these premises may have acquired such conditions either as a *quid pro quo* for a grant of a variation or imposed on a licence review, or perhaps volunteered on a minor variation as an alternative to a review, these numbers will be relatively small in the grand scheme. Therefore the vast majority of pubs – which the Government is always keen to be seen to be protecting – would not have benefitted at all from the deregulation of off-sales because it

4 By which I mean, for the purposes of this article, the period until all remaining restrictions on hospitality were lifted on 19 July 2021.

did not permit them to do anything they could not already do. Indeed they may have suffered, as the choice for consumers became much wider as on-sales-only premises became able to provide outdoor areas and off-sales, and premises subject to a "restaurant" condition were able to provide off-sales without the encumbrance of the "restaurant" condition, as enforcement of that condition would conflict with the statutory right under BPA 2020 to provide off-sales in open containers to 11pm.

It would in fact benefit pubs and bars, not to mention perhaps local residents, if the Government had legislated to restrict off-sales to the same requirements as for on-sales *vis a vis* any "restaurant" conditions.

There are also inequities in the deregulation regime which could have unfortunate consequences in individual cases. For instance, a premises which had suffered a "disqualifying event" in the three year period prior to "Day X" (22 July 2020) could not benefit from the exemptions. A disqualifying event is:

> *(a) the relevant licensing authority refused to grant a premises licence in respect of the licensed premises authorising off-sales,*
>
> *(b) the relevant licensing authority refused to vary the premises licence so as to authorise off-sales, or*
>
> *(c) the premises licence was varied or modified so as to exclude off-sales from the scope of the licence.*[5]

One can see the logic to this at the time, but it is hardly a nuanced approach as it did not give any thought to the circumstances in which particularly (a) and (b) might have occurred. There are reasons why off-sales may have been refused on a new licence application or a variation application, not all of which are nefarious or indicate that off-sales would be a disproportionate problem compared to premises which were not encumbered by restrictions: premises which had the benefit of off-sales on a converted licence or which had not been reviewed would benefit from the exemption.

The definition of a disqualifying event has remained the same, ie, three years prior to Day X, meaning that if a disqualifying event had occurred on 23 July 2017, it would still prevent the operator from benefitting from the deregulation provisions in 2022, five years later, and indeed for the duration of the extension, six years later.

The use of the word "refuse" could also capture many more premises than intended. For instance, I have dealt with countless applications for a new or variation licence application to include on- and off-sales, but for off-sales to be used as a bargaining chip in negotiations either with responsible authorities or resident objectors. In such circumstances, off-sales may be withdrawn from the scope of the application and the application amended. Or at least, it is commonly expressed in this way. The problem is that there is no power in LA03 to amend an application. While changes to applications are frequently referred to as "amendments" to the application, case law tells us that:

> *the [regulatory] scheme has no express power enabling an applicant to amend an application to vary; and, in my judgment, properly construed, the regulatory scheme does not as such allow or envisage any amendment to an application to vary once it has been made.*[6]

Strictly speaking, as per *Taylor,* what actually happens where amendments are made is that the licensing authority determines whether to reject that part of the application. The same must apply to new licence applications. Of course, in the vast majority of cases the amendment will be accepted, but technically that part of the application has been refused. Thus, it is caught by the wording of s 172F(8) LA03 and is a disqualifying event if it occurred within three years before Day X.

Licences granted since Day X are similarly unable to benefit from the off-sales deregulation.

By contrast, a premises which has had an application to vary the licence to add off-sales to the licence refused since Day X, would still be able to benefit from the deregulation (as long as the licence had effect before Day X).

Another part of the off-sales deregulation provisions which has always struck me as odd is that at s 172F(12) LA03:

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

5 Section 172F(8) LA03 as amended.

6 *Taylor v Manchester City Council and TCG Bars Limited* [2012] EWHC 3467 (Admin), para 71.

This rather impenetrable verbiage has the effect that if the colloquial "red line" delineating the area for licensable activities includes an outside area (ie, sale of alcohol in / to it is an on-sale) and this outside area has a condition restricting consumption of alcohol to, say 9pm, then the premises may not benefit from the exemption to 11pm either in this area or an external area outside the red line. While there may well be very good reasons for the licensing authority having limited the area in this way, it seems odd that a similarly limited outside area outside the red line is not so limited.

Conclusion

The mood music is clearly that the Home Office, encouraged by industry bodies, will look into a permanent deregulation measure for off-sales.

When the Home Office's intention was for the deregulation of off-sales to end on 30 September 2022, it confirmed that anyone wishing to continue operating off-sales in the same way would need to make an application to do so. It suggested that "licensing committees might decide to consider whether any such applications could be decided via the minor variations process, in particular for premises licence holders who are currently taking advantage of the easements". In my view, it is doubtful whether such applications can as a matter of routine fall within the letter of the minor variation provisions of LA03, or within the spirit of LA03 as a whole.

In terms of any permanent arrangements, the Home Office in considering the views of the industry would do well to remember the reasons given in the White Paper *Time for Reform: Proposals for the Modernisation of Our Licensing Laws*[7] which identified three reasons for the transfer of all licensing functions to local councils, the first of which was:

> *Accountability: we strongly believe that the licensing authority should be accountable to local residents whose lives are fundamentally affected by the decisions taken.*

Postscript - when the levy breaks

Making permanent the deregulation of off-sales will benefit some premises more than others and will in some cases cause problems for local residents living near to these premises.

One example of a measure which will have a tangible effect on late-night licensed premises which may not benefit materially from the off-sales deregulation is to cease the late night levy.

Nottingham City Council has confirmed that it will end its late night levy, saying that "as the economic situation for the hospitality industry has changed since the introduction of the levy eight years ago – first with the impact of the Covid pandemic and now the cost of living crisis – it is felt the levy is placing a difficult burden on existing licensed trade businesses and could be a barrier to incoming or expanding businesses". Liverpool City Council is currently consulting on whether to cease its late night levy.

Richard Brown
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7 Cm 4696 (April 2000).

SEV licensing in Scotland – the latest developments

Stephen McGowan brings us up to date with Scottish councils' nil-cap policies and occasional licences

In the last update for the *Journal* I reported on a number of ongoing developments as Scottish local authorities finally got into full swing to introduce their licensing regimes for sexual entertainment venues (SEVs), under the Civic Government (Scotland) Act 1982 as amended by s 76 of the Air Weapons and Licensing (Scotland) Act 2015. All bar four local authorities in Scotland have essentially agreed a nil-cap policy, primarily because they do not have any such premises in the first place. The four regional areas of interest (Highland, Aberdeen, Glasgow and Edinburgh) have progressed in very different and colourful ways.

In the Highland Council area, they have agreed to no cap at all. There is only one trading SEV which is located in Inverness. At the time of writing that hearing had not taken place but barring any significant "merit" based issues, one would expect that licence to be granted.

In Aberdeen, they had a somewhat surprising outcome in that their policy was to fix a cap of five SEV licences, on the basis they thought there were five such premises in the city. However, a mysterious sixth venue came out of the North Eastern Scottish *haar*, or sea fog, and was clearly not on the authority's radar. In the result, the five premises which were "established" SEV premises were all granted licences at a hearing in August 2022, whereas the sixth was refused. I understand that decision may be subject to appeal so watch this space.

In Glasgow, the decision was to set a nil-cap policy but allow grandfather rights for existing premises. This approach deftly avoided the Aberdeen numbers issue. Three premises came forward for licences, all long-established SEV premises. The applications were all granted at a hearing in September 2022.

The biggest controversy has been in Edinburgh, which surprised most licensing commentators by agreeing a nil-cap policy with no grandfather rights. The individual applications have yet to result in a hearing but the policy is now subject to a live judicial review which has been brought, as I understand it, by a union representing the performers who would of course be out of a job if and when the Edinburgh clubs are closed down. Should that judicial review fail, it would mean that the clubs would face a rebuttable presumption against the grant of a licence based on the policy, in addition to any merit-based concerns that may be raised.

Occasional licences and the long shadow of *Keasim*

In one of the most significant licensing appeals in Scotland for some years, *Keasim Ltd v City of Glasgow Licensing Board* [2021] SC GLW 57, the sheriff upheld appeals in relation to a series of occasional licence applications for an outdoor hospitality space which had been refused by the Glasgow board for, amongst other reasons, purportedly "circumventing" the full premises licence route. The decision has been far reaching in that it confirms that an occasional licence does not need a designated "event" in order to be approved; nor is there is legislative limit on the number of such licences, whether consecutive or otherwise (save the established rules for club premises).

The case is casting a long shadow for two key reasons: one, the Scottish Government is well aware of this case, and licensing boards have clearly asked them to do something about it – ie, to legislate for limits. This has obvious parallels to the most famous Scottish licensing case of all, *Brightcrew Ltd v City of Glasgow Licensing Board* [2011] CSIH 46, the ultimate legacy of which was not just to remind licensing boards of their "essential function" in regulating alcohol and not other matters – but also to convince the Scottish Government to introduce the separate sexual entertainment venue regime (discussed above). By a similar fashion, it would not be a surprise to see regulations come forth with some sort of limit on occasional licences. There have, for example, been discussions around introducing a different type of temporary licence, which many refer to as a "seasonal" licence – to recognise the commercial reality of slightly longer-term pop-up spaces or even retail spaces which might be used for, say, six months. In these cases, operators are in essence prohibited from seeking a premises licence as most licensing boards take around six months to process such applications.

The idea of a "seasonal" occasional licence seems to me to be a sensible approach to bridging the gap between occasional licences and full premises licences, and I'd like to see this explored. There are many scenarios where such a licence could be sensible – for example, both Edinburgh and Glasgow licensing boards have recently been granting occasional licences for cruise ships, which are scheduled to be moored for some months, providing accommodation for refugees from the war in Ukraine.

The Scottish Government did consult on this issue, but that was before Covid and pre *Keasim*. It remains to be seen where this will go, but doubtless I shall report on it again for IoL readers with an interest north of the border.

The second reason the *Keasim* case has a wider impact is to do with local authorities using the licensing process to "get at" perceived concerns under other regulatory regimes, such as absence of planning permission or building warrants. Sheriff Reid said: "[the licensing board] has fallen into error by trespassing upon an area of statutory regulation reserved to a different decision maker under a different enactment" (at para 35). In *Keasim* an example of this over-reach was about alleged concerns over safety of structures in the proposed site. In some ways this is simply affirmation of the *Brightcrew* decision, but it is also a restatement of a much wider body of jurisprudence regarding what one might call "proper purpose" – the old idea that licensing should not be used as some wider panacea. Licensing should be for licensing. This perhaps very basic idiom is, I would suggest, a greater truism in Scotland given our alcohol licensing regime is directly aimed at alcohol, and does not have other "licensable activities" such as late night refreshment – with that activity being captured under separate legislation.

It is also incumbent upon me to remark that *Keasim* was the last hurrah of the long-established licensing advocate Robert Skinner, who acted on my instruction for the appellants. He retired earlier this year after decades of practice and was known to everyone and anyone who ever engaged in licensing north of the border. Bob, renowned for his swashbuckling, no-nonsense style, will be missed at the licensing bar.

Lastly, and on a personal note if you'll indulge me, I'd like to post a word of thanks to my now former TLT colleague and the current IoL Scotland region secretary, Michael McDougall, a former contributor to these pages, for supporting me over many years. Michael has now taken up the role of clerk to the licensing board at West Dunbartonshire Council and we wish him all the best in his new position, delighted that he remains within the IoL and wider licensing family.

Stephen McGowan
Partner, TLT LLP

Reviews, fair hearings and appeal delays

Decisions taken at standard review hearings should be applied with immediate effect, argues **Gary Grant**

When Hamlet was musing over whether it was better "to be or not to be" he took a moment in his soliloquy to castigate "the law's delays".[1] The old adage that "justice delayed is justice denied" is being proven all too often in the context of licensing appeals heard, or more often not heard, in the magistrates' courts.

To help stem the current injustices, this article argues that it is now time to look again at the appeal provisions in the Licensing Act 2003 to ensure that the public interest is effectively and expeditiously promoted while also ensuring the rights of operators are sufficiently protected, particularly in the case of standard premises licence reviews.

There have long been delays in licensing appeals being heard in the magistrates' courts. They are rarely given priority over other pressing criminal matters. But because of the additional backlog arising from the pandemic, the delay in many appeals being heard can be intolerable. Some are being heard 18 months or more after the initial decision was made by a licensing authority, the democratically accountable body charged by Parliament to make licensing decisions.

These delays mean, in the context of standard premises licence reviews, that decisions taken in the public interest by licensing authorities are taking far too long to have effect. They also mean that operators aggrieved at a decision to, for example, refuse their new licence application or variation are denied a timely remedy in the appeal court. This can sometimes mean the difference between the survival or failure of a business and the consequent loss of jobs and livelihoods.

For reasons that will become apparent, the greatest wrongs can arise from decisions taken at standard premises licence reviews. These decisions, unlike those taken in summary reviews, do not have effect until the 21-day period for appealing that decision has expired or, if an appeal is launched, until it has been determined in the magistrates' court.[2]

This can mean, for example, that residents suffering the impact of serious public nuisance as the result of the mismanagement of a pub will achieve no relief until the appeal is heard (unless steps are taken under other legislation[3]). It means that children may go to school sleep deprived as a result of the screams of drunken youths pouring out of a bar unsupervised, or scarce police and ambulance resources are having to be diverted each weekend to clean up the human mess left over from alcohol-fuelled public disorder outside a nightclub. For the law to permit this situation to continue – because courts cannot list hearings swiftly enough – is wrong. It can and does damage people's quality of life.

The philosophy of the reformed modern licensing system brought in by the Licensing Act 2003 was one of liberalism. It aimed to expand the opportunities where people could enjoy themselves responsibly. The pleasures of enjoying a social drink with friends or feasting on the drama of theatre and cinema or experiencing the beauty of a dance performance, together with the arguably greater delights of watching mixed martial arts and then savouring a late-night kebab, were considered worth promoting under the new licensing regime without reference to some age-old restrictive licensing practices originally introduced to ensure munitions factories could be operated effectively by sober workers at times of war. As an old advert for *The Economist* once declared "Nobody's last words were ever 'I wish I'd spent more time in the office'". But some of our last words might be that we wished we had spent more time doing some of the fun stuff of life covered by what the law describes, with banality, as "licensable activities".

As the former Prime Minister Tony Blair said at the time the

1 *Hamlet*, by William Shakespeare, Act III, Scene 1.

2 For 'standard' licence reviews see ss 51-53 of the Licensing Act 2003.

3 For example, nuisance proceedings under Part III of the Environmental Protection Act 1990 or closure orders under Chapter 3 of the Anti-Social Behaviour, Crime and Policing Act 2014.

new legislation was being introduced:[4]

> *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.*

One person's freedom can be another's torment, and so together with these new freedoms came robust checks and balances in the 2003 Act designed to protect the public interest. At the forefront of these were licence reviews where problematic premises could be dealt with by the licensing authority on complaint of a responsible authority or the interested party (who has since morphed into an "other person"). Licence reviews are rightly described as "a key protection for the community where problems associated with the licensing objectives occur after the grant or variation of a premises licence".[5]

So, if a licensing authority, having held a full and fair review hearing and carefully considered and weighed up the sometimes competing interests of an operator and the local community, decides that certain steps are required to promote the public interest as reflected in the four licensing objectives, then why should that decision not have immediate effect pending the determination of an appeal that may be a very long way off?

In the case of summary reviews, which can be launched if a senior police officer has certified that a premises is associated with serious crime or serious disorder (or both), a statutory process has been introduced that permits councils to impose interim steps at the conclusion of the full review hearing pending the determination of any appeal. These interim steps pending appeal, which will usually mirror the final decision made at the review, safeguard the public during the lengthy appeal process. So, if a final decision was made to revoke the premises licence, then an interim suspension of the licence pending any appeal would achieve the desired outcome immediately. If either the police or the licence holder is aggrieved by those interim steps pending appeal, they can fast-track an appeal to the magistrates' court against those steps and that appeal must be heard within 28 days.[6]

If this system is appropriate in the case of summary reviews, then I can see no convincing argument why a similar system should not also be applied to standard premises licence reviews as well. But this is subject to one overriding necessity: the conduct of the review hearing before the licensing authority must be full and fair, independent and impartial, and all parties must be given a proper opportunity to have their say.

Why did the provisions of the Licensing Act 2003 not ensure that decisions of licensing authorities taken at standard reviews had immediate effect? The answer appears to rest on a fear among legislators and the trade that local authorities might be more partial to residents' interests (ie, the electorate) than those of the trade and hearings might not be conducted in a sufficiently fair manner. Experience has shown that most local authorities balance the competing interests fairly most of the time.

While every licensing practitioner will have encountered certain hearings before certain councils that have been sub-optimal (to put it diplomatically), the vast majority of councils strive to ensure that all parties before a licence review receive a fair hearing. The rule of thumb for licensing sub-committee members should be this: treat the parties before them as they would wish to be treated if it was *their* livelihood on the line or *their* children being kept awake at night.

A full and fair hearing means, among other things, that:

1) Evidence from all sides should be served in good time before a hearing so that other parties and members can adequately absorb, and if necessary, respond to its contents. Evidence by ambush is an affront to justice. There is no reason why councils should not issue directions that set deadlines by which parties must serve their evidence. The council may, at its discretion, consider late evidence if there is good reason to do so. The interests of justice should override mere practices.

2) Parties at hearing must be given sufficient time at a hearing to address the licensing sub-committee. Those councils which impose a one-size fits all speaking time limit of, in some cases, five or 10 minutes, do themselves and the parties no favours. Some basic cases may only need that time, but any speaking time limit should be flexible according to circumstance. It should consider the

4 In House of Commons, 12 January 2005, see Hansard Column 300: https://publications.parliament.uk/pa/cm200405/cmhansrd/vo050112/debtext/50112-04.htm.

5 Section 182 Guidance to the Licensing Act 2003 (April 2018), paragraph 11.1.

6 For summary review interim steps pending appeal procedures see s 53D and para 8B of Schedule 5 of the Licensing Act 2003.

number of issues to be dealt with, the seriousness of the consequences to the parties involved, and the amount of evidence to be addressed or summarised (even if written submissions are served in advance). If a sub-committee deprives itself of the opportunity to hear full argument from the parties, then the sense of grievance after the hearing will be greater for the "losing" party. It also means that the sub-committee's decision may well be based on insufficient information because the parties were not given sufficient time to address issues. The appeal court, in turn, when considering how much weight to give the decision of the council, is unlikely to be impressed when they are told that in an appeal listed for a couple of days, submissions before the council were limited to just five minutes from each party.[7] Swingeing speaking time limits reduces the value others will give to the council's decision.

3) Written decisions should be fully reasoned. In the words of the Court of Appeal in the *Hope and Glory* decision:[8]

The statutory duty of the licensing authority to give reasons for its decision serves a number of purposes. It informs the public, who can make their views known to their elected representatives if they do not like the licensing sub-committee's approach. It enables a party aggrieved by the decision to know why it has lost and to consider the prospects of a successful appeal. If an appeal is brought, it enables the magistrates' court to know the reasons which led to the decision. The fuller and clearer the reasons, the more force they are likely to carry.

What will help to ensure this best practice at hearings, more than anything else, is the proper training of members and officers who appear at licensing hearings. Councils rightly expect that licensed operators must ensure their staff are properly trained in relevant matters and often condition this into a premises licence. It is indefensible if certain licensing authorities do not ensure their own decision-makers are also well-trained in the tasks they have to carry out. The quality and extent of this licensing training alters enormously between different councils. In July 2022, the House of Lords Liaison Committee, in their follow up report on the Licensing Act 2003, re-emphasised the need for training of members:[9]

The Committee reiterates the original inquiry's recommendations for the Home Office to work with stakeholders to establish a minimum training standard for councillors, including a refresher training standard. This agreed minimum standard should be set out in the section 182 Guidance and councillors who are members of a licensing committee should be prohibited from taking part in licensing committee or sub-committee proceedings until this minimum standard has been met. ... Once the mandatory minimum training standard has been established it should be regularly reviewed to ensure that it remains effective and responds to changes and issues that occur in alcohol licensing.

Similarly, their Lordships recommended that the training package for police developed by the National Police Chiefs' Council, the Institute of Licensing, the College of Policing and other interested parties should be implemented as a matter of urgency.[10]

The better trained members and officers are prior to a licensing hearing, the more likely better results will come out at the other end of the process.

If licensing authorities are seen to invariably conduct full and fair hearings presided over by well-trained members, then the arguments for decisions taken at standard review hearings to be applied with immediate effect, in a system that mirrors the case in summary reviews, become very strong indeed. That process will best serve the public interest, and the fast-tracked appeal procedure to a magistrates' court will offer a safeguard to aggrieved licence holders who can challenge a rogue decision.

Gary Grant
Barrister, Francis Taylor Building

7 See further article, 'Speaking time limits: the potential for injustice' by Gary Grant, in (2014) 10 JoL.

8 *R (o/a/o Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31, para 43.

9 https://publications.parliament.uk/pa/ld5803/ldselect/ldliaison/39/39.pdf at paras 60-61.

10 *Ibid* at para 69.

Institute of Licensing

Consultation on the review of the IoL's 'Guidance on determining the suitability of applicants and licensees in the hackney and private hire trades'

The Institute of Licensing (IoL) published the 'Guidance on determining the suitability of applicants and licensees in the hackney and private hire trades' (referred to as the Suitability Guidance) in April 2018. Subsequently in July 2020, the DfT published its 'Statutory Taxi & Private Hire Vehicle Standards' which included an annex on the 'Assessment of Previous Convictions' which closely mirrored the IoL Suitability Guidance.

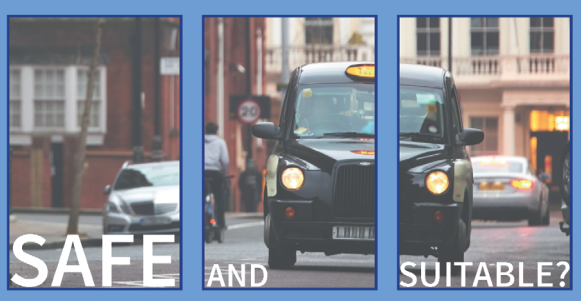
The IoL is now undertaking a review of the Suitability Guidance to ensure that it remains current, and to enable consideration of additional information which may usefully be included. Your help in answering our survey will be essential in assisting an accurate evaluation of the existing guidance.

The survey can be accessed online via the QR code below and responses are requested by 30 November 2022.

Please direct any queries to info@instituteoflicensing.org in the first instance.

Thank you in advance for your help in this important review.

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



April 2018

Institute of Licensing

Produced by the Institute of Licensing in partnership with:

LLG Lawyers in Local Government

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

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April 2018

Produced by the Institute of Licensing in partnership with:

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Institute of Licensing News

Since the July edition of the *Journal of Licensing*, there have been some notable events of historical significance, including of course the extremely sad loss of Her Majesty the Queen. The IoL paid tribute to Queen Elizabeth II when her death was announced, with these words from our Vice Chairman John Garforth:

> *This is a very sad day for the nation and commonwealth. Her Majesty was the longest serving monarch in British history and has been with us all of our lives as a leader, figurehead and inspiration. Her passing will leave a massive void in the nation's lives and hearts, and we pray for her and the Royal Family at this very sad time. We also think of the new King as he takes on his constitutional role. As a mark of respect, all IoL events will be postponed until after the funeral has taken place and national mourning has ceased.*

Closer to (the IoL) home, many of you will know that our Chairman Daniel Davies has been fighting Stage 4 Hodgkin's lymphoma for most of this year. Hodgkin's lymphoma is a type of cancer that affects the lymphatic system, which is part of the body's germ-fighting immune system. Dan was diagnosed in January this year, and I am delighted that he has now been told that the cancer is in full remission.

It is a pleasure to write the IoL pages for the 34th edition of the *Journal of Licensing* knowing that it will be handed out to delegates joining us for the National Training Conference at the Crowne Plaza in Stratford-upon-Avon in November. Dan will be with us, and we are looking forward to seeing him back to full health and playing a key role in the event.

This time last year, we were looking forward to the 25th National Training Conference which made a welcome return to a face-to-face setting after a necessary online version in 2020 as a result of the pandemic. Last year's conference was overwhelmingly familiar and comfortable and such a welcome relief in being able to see everyone once again coming together for three days of sessions covering all areas of licensing law and practice.

We are extraordinarily fortunate in this event. The time, effort and expertise given by so many speakers across three days and over 70 sessions, the commitment and energy provided by our sponsors and the loyalty and engagement of our delegates – it truly is the best of the best when it comes to licensing conferences due to all those factors and we are indebted to everyone for their input. We are always well looked after by the hotel and staff, many of whom we now know very well, having returned to the hotel year on year since 2017, and they make us feel very welcome each time we return.

IoL Training and Events

There is no denying that the world has not entirely returned to its pre-pandemic habits, and the IoL is no exception. An increased use of technology in facilitating remote meetings and online training should be celebrated for its impact on our carbon footprint, and the much more careful consideration of whether travelling many miles to conduct business is essential rather than just desirable. However, it does need to be balanced, as there is much to be said for communicating in person and the need for people to feel properly connected, which is so much harder online.

This is brilliantly illustrated by our IoL regions. In most cases now, the regions are looking to have some meetings online but balancing this with at least one face-to-face meeting to enable members to re-engage and to enjoy a more personable meeting. We owe our regional officers a huge debt of gratitude in sustaining our local networking links and providing regular meeting opportunities for local members – thank you to you all.

For IoL courses, the considerations are similar but different. Accessibility and convenience are key, and we have resisted making training courses hybrid in order to keep everyone on the same footing. Many IoL training courses therefore remain online. There are notable exceptions, and these are courses that we simply couldn't host online – the Zoo Licensing course and others, for example, where there is a practical side to the training delivery or where learners will benefit significantly from group work or workshop-style training.

Conferences by their very nature should normally be face-to-face. With a programme of different speakers covering different areas and presentations rather than training, conferences are designed to bring people together and to engage them in exchanging ideas and case studies. We were delighted to bring the Summer Training Conference to Nottingham in June this year, and to welcome key speakers from Nottingham to talk about licensing-related projects in the area. It was a fantastic event hosted by the East Midlands Region and chaired by David Lucas in his capacity as Regional Chair for the East Midlands Region. Our intention is to move to Wales in 2023, and we are in discussions with potential venues in Cardiff to enable this.

We also enjoyed a trip to Birmingham in October for the second of our 2022 Taxi Licensing conferences. The programme featured a mock hearing, made possible by the enthusiasm and commitment of the "cast", namely:

- Licensing Officer: John Garforth JP (Vice Chair).
- Legal Advisor to the Committee: Stephen Turner (Hull CC).
- Licensing Sub-Committee:
  - Chairman - John Thomas (former Councillor for Vale of Glamorgan).
  - Sub-Commitee Councillor - Yvonne Lewis (City and County of Swansea.
  - Sub-Committee Councillor - Emma Rohomman (Birmingham City Council).
- The licence holder (driver): Mike Smith (Guildford BC).

It was great to also hear from industry representatives on a detailed discussion panel along with the Welsh Government, the Disclosure and Barring Service and the Energy Saving Trust. Grateful thanks to all our speakers including James Button, Nicolas Turner, John Garforth, David Lawrie, Steve McNamara, Steve Wright, Andy Mahoney, Cathy Taylor and Richard Drew. Thanks as well to VIP, Idox, Uber, 4Eyez and Cabguard for supporting the event as sponsors.

Turning to next year (how does 12 months go so fast!?), we are very much looking forward to hosting our Large Events Conference at the AO Arena in Manchester, hopefully in February. We will be hearing from some fantastic speakers about licensing, the Protect Duty and the findings from the Manchester Arena inquiry and lessons learned.

BTEC Level 3 Certificate for Animal Inspectors (SRF)

The IoL launched its BTEC Level 3 Certificate for Animal Inspectors (SRF) in April 2021, enrolling the first five cohort groups. The course is accredited by Pearsons and meets the requirements for the updated animal welfare legislation published in 2018.

In February 2022, DEFRA revised the animal activities statutory guidance for licensing authorities which comprises nine sets of statutory guidance. The revised statutory guidance introduced a requirement that the qualification undertaken by local authority inspectors "must cover the application of the licensing conditions for all licensable activities ***and must contain a practical element***". The original and revised guidance extracts are detailed below:

Original guidance (2018):

Suitably qualified inspectors

16. All inspectors must be suitably qualified. This is defined as:

(a) Any person holding a Level 3 certificate granted by a body, recognised and regulated by the Office of Qualifications and Examinations Regulation which oversees the training and assessment of persons in inspecting and licensing animal activities businesses, confirming the passing of an independent examination. A person is only considered to be qualified to inspect a particular type of activity if their certificate applies to that activity. Or;

(b) Any person holding a formal veterinary qualification, as recognised by the Royal College of Veterinary Surgeons ("RCVS"), together with a relevant RCVS continuing professional development record;

(c) Until October 2021, any person that can show evidence of at least one year of experience in licensing and inspecting animal activities businesses.

Revised guidance (February 2022):

Appoint an inspector

Once a local authority receives an application to grant or renew a licence, it must appoint a suitably qualified inspector to visit the site of the licensable activity. All inspectors must be suitably qualified.

A suitably qualified person can be any of the following - it is a person that:

- *has a Level 3 certificate (or equivalent) granted by a body recognised and regulated by the Office of Qualifications and Examinations Regulation (Ofqual). Their certificate must apply to that particular type of activity to count as qualified. The training must cover the application of the licensing conditions for all licensable activities and must contain a practical element*
- *has a formal veterinary qualification recognised by the Royal College of Veterinary Surgeons (RCVS), together with a relevant RCVS continuing professional development record*
- *can show evidence of at least one year of experience in licensing and inspecting animal activities businesses. This person needs to be enrolled on a course leading to a Level 3 certificate qualification or equivalent to be completed by 1 October 2022*

and granted by a body recognised and regulated by Ofqual.

This was never going to be an issue for the IoL. Our BTEC includes six units and requires learners to complete six practical inspection assignments requiring learners to inspect licensed premises or new premises to demonstrate their pre-inspection preparation, inspection procedures and the results of the inspection including the decision on star rating etc. In addition, open questions for each unit require learners to demonstrate their understanding of the general and specific conditions for each of the different types of licensed premises.

In short, the IoL supported the stricter guidance on qualifications (it is paramount that licensing authority inspectors are trained to inspect licensed premises in practice and not just in theory), but there were concerns that some local authority officers may have attended courses which could not meet the new requirements. We discussed these potential issues with DEFRA informally in July and recommended that the October 2022 deadline be extended to enable those who need it more time to undertake additional training to ensure compliance.

Just before the October deadline, on 28 September 2022, DEFRA updated its statutory guidance for local authorities to remove the October deadline. The latest iteration of the guidance states:

Appoint an inspector

Once a local authority receives an application to grant or renew a licence, it must appoint a suitably qualified inspector to visit the site of the licensable activity. All inspectors must be suitably qualified.

A suitably qualified person can be any of the following - it is a person that:

- *has a Level 3 certificate (or equivalent) granted by a body recognised and regulated by the Office of Qualifications and Examinations Regulation (Ofqual). Their certificate must apply to that particular type of activity to count as qualified. The training must cover the application of the licensing conditions for all licensable activities and must contain a practical element*
- *has a formal veterinary qualification recognised by the Royal College of Veterinary Surgeons (RCVS), together with a relevant RCVS continuing professional development record*
- *can show evidence of at least one year of experience in licensing and inspecting animal activities businesses - this person needs to be enrolled on a course leading to a Level 3 certificate qualification or equivalent and granted by a body recognised and regulated by Ofqual.*

Awards

The Jeremy Allen Award

The 11th Jeremy Allen Award (JAA) will be announced at the Gala Dinner held during the National Training Conference this year. The JAA was originally launched in 2011 as a tribute to the life and professional career of Jeremy Allen, whose dedication to partnership working and best practice in licensing made him one of the most respected and popular figures in the industry. Jeremy sadly passed away shortly after becoming Chair of the Institute of Licensing, and we are pleased and proud to continue to support this award by Poppleston Allen as an ongoing tribute to him.

Chairman's Special Recognition

This year will see the 2nd Chairman's Special Recognition awarded at the Gala Dinner. The Chairman's Award is made at the discretion of the serving Chairman based on nominations from Board members.

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

The Chairman's Special Recognition can be made to individuals or groups. Anyone wishing to suggest a worthy recipient should contact their Regional Director.

Nominations for IoL Awards

Don't forget that in addition to the Jeremy Allen Award and the Chairman's Special Recognition, we also have Fellowship awards intended to recognise individuals who have made a significant contribution to the Institute and 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.

For more information on the requirements for Fellowship

nominations, please visit our website, or email info@instituteoflicensing.org Fellowship requires nomination by two members of the IoL, which can be made at any time, and the decision is made by a delegated committee reporting to the IoL Board of Directors.

Nominations for the Jeremy Allen Award can be made from June to September annually and we will always announce the nominations window along with the award criteria via our licensing flashes each year.

Finally, the Chairman's Special Recognition is open to nomination by Board members at any time, so anyone wishing to suggest a nomination should contact their Regional Chair and / or Director with details of the nominee and supporting information for consideration.

The Team

We are incredibly fortunate at the IoL to have a fantastic team of officers supporting the work of the IoL, our publications including the brilliant *Journal of Licensing* and *LINK* magazines and our busy programme of training, events and regional meetings.

This is a great opportunity to say a big thank you to all our team members including:

Jenna – our Training & Qualifications Manager, who is responsible for the annual programme of training and conferences (including the National Training Conference), as well as playing a big role in the organisation of our BTEC Level 3 Certificate. Jenna's attention to detail is fantastic and her organisation skills are a huge asset to the team.

Caroline – our Financial Controller, who takes care of all things financial including payment of invoices (and wages), financial management of invoicing, chasing payments and keeping the financial records in line with any and all changes to training bookings (date and delegate swaps, cancellations etc). In addition to this, Caroline leads our sponsorship discussions, building some fantastic relationships with our sponsors both regular and new.

Natasha – leads on the production of the *Journal of Licensing*, supporting the rest of the Editorial Team and keeping the *Journal* production on track for publication in March, July and November. Natasha is responsible for compiling the *Journal* and ensuring that it is fully proofed and prepared for printing. In addition, Natasha leads on our technical systems. This is keeping her extremely busy this year as we prepare to move to a new system for our membership and events management, alongside moving the IoL website to a new hosting platform and partner.

Clare – our Training Officer is almost entirely focused on our BTEC Level 3 Certificate for Animal Inspectors. This is the first IoL course to be run in partnership with an Ofqual Awarding Body (Pearsons) and with well over 200 learners, Clare continues to work incredibly hard to ensure that we are on track with assessments and verification of learners' work. In addition, Clare was responsible for setting up our Moodle online learning platform and supporting trainers and learners in the use of the platform. This was entirely self-taught initially, and our External Verifier noted our use of Moodle as "best practice". We have now moved to a supported version of Moodle giving us some much-needed supporting resource, but Clare's work in this area has been fantastic.

Hannah – joined our team initially to provide cover for Jenna's sabbatical in 2020 and has quickly proven to be invaluable to the team. Hannah supports Jenna in organising training and events, including bespoke training requests and regional meetings.

Bernie – originally one of our office-based administrators, Bernie is responsible for our membership applications, renewals and customer support for website logins and changes to named contacts for our Organisation members.

Lauren – our second administrator responsible for training and events, ensuring that bookings requests are supported, joining instructions are sent out ahead of training courses, following up with training surveys and sending out information provided during the training. Lauren ensures that courses are fully administered ready for closing once completed.

Ellie – our newest team member, joining in August as Senior Administrator and Executive Assistant. Ellie will provide a much-needed administrative support for me and others on the team, and crucially, she will get involved in the administration of the various stakeholder groups we organise including the National Licensing Forum, National Taxi and Private Hire Licensing Group, and the Local Alcohol Partnerships Group, as well as our internal groups such as the Taxi Consultation Panel.

None of the IoL work could happen without the team, so a huge thank you to them all. The office was relinquished following extended home working during the pandemic, so Bernie and Lauren have now joined the rest of us as established home workers (everyone now works from home, and most of us have done so since starting our IoL roles).

Louis – a massive thank you also goes to Louis Krog. In addition to his full-time role at Cheltenham Borough

Council (Louis is now Head of Service) and other work, Louis continues in his role as National Communications Officer for the IoL, responsible for keeping the website up to date with the latest news and sending out our the weekly (or more) Licensing Flashes. We have over 5,000 subscribers to our Licensing Flashes, which are essential for keeping members updated with news, jobs and of course our training courses, conferences and regional meetings. In addition, Louis takes care of our social media at major conferences and helps us with other websites including www.licensingweek.org and communications for National Licensing Week annually in June.

There are other key people contributing huge amounts to the work of the IoL, including of course our **Board of Directors**.

Each of the 12 regions of the IoL elects through their local AGM meetings an individual to represent the region on the Board – these Regional Directors are subject to annual election by members of the regions. In addition, other members of the Board are co-opted to the Board within the terms of our governing document (the Memorandum and Articles of Association). All co-options are for a three-year term. The Board then nominates and elects one of its members to chair the organisation, together with two vice chairs. The three positions are each elected for a three-year term with one post reviewed each year on a rolling basis.

The Board are also trustees of the charity, and responsible for ensuring that the IoL conducts itself correctly with appropriate use of IoL funds.

IoL Trainers – We have a pool of fantastic trainers, some of whom also work on developing courses for the IoL. This enables us to grow our training offer and to provide consistency in terms of the training content and delivery. Courses with standardised content include the Councillor Training Responsible Authority Training, Licensing Act Enforcement and others. A huge thank you to everyone involved in developing and delivering IoL training courses, in particular Linda Cannon and Julia Bradburn, who have worked tirelessly with the team to develop, deliver and assess in relation to our BTEC Level 3 Certificate for Animal Inspectors (SRF).

Sponsors – Last but by no means least, our sponsors provide essential support to the IoL when they support our training, conferences, communications and publications. Their support enhances events, providing an inclusive and engaging vibe at conferences as well as helping us to cover costs associated with events and in doing so help us to sustain course and conference charges which are extremely reasonable when compared with external training and conference providers.

Sue Nelson
Executive Officer, Institute of Licensing

Licensing Act Enforcement

9th February 2023

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Unwelcome signs in post-Covid hospitality regulation

Covid's destabilising impact means the on-trade needs a sympathetic regulatory environment but police and local authorities seem unmoved by its plight, as **Sarah Clover** explains

The hospitality industry is reeling in the wake of the Covid pandemic. The experiences of the last two years have exposed aspects of regulation and decision-making in this field that will have ongoing implications for legal practitioners for a long time to come, and are worth examining in more detail.

As the nation began cautiously to contemplate a return to life without Covid restrictions, the Government promised to "set out our long-term strategy for living with Covid-19". It appears that the regulatory landscape changed permanently, and in some unwelcome ways. In assessing the havoc that the pandemic has wrought over the last two years, nobody speaks any more in terms of a return to "normal", as there is a sombre understanding that everything has altered to some degree, and that what lies ahead is uncharted, and in many respects, driven by factors that have nothing to do with the businesses themselves. Even if anyone had assumed, with extreme optimism, that businesses would bounce back robustly from the pandemic, that hope has faded with the critical pressures that loom from the rising costs of living and doing business, over the winter, and beyond.

Many of the Covid measures and restrictions hit the hospitality industry catastrophically, including the periods of inability to trade sustainably, or at all; the specific restrictions on hours of opening, table service or Covid passports; and the chronic staff shortages. As the recovery phase unfolded, entrenched changes in the trading environment presented an ongoing influence that could not have been predicted.

One of the Plan B strictures lifted last year was the requirement to work from home. The enforced absence from workplaces had by then, however, cut a swathe through town and city centre outlets and venues that picked up the lunchtime and after-work market. Even the formidable retail hubs of London were turned into ghost towns with the disappearance of tourists and workers. Businesses scrambled to explore and adapt to takeaway services and home deliveries, with varying degrees of success. As with the video conferencing explosion, however, these new circumstances forced former commuters to try stay-at-home lifestyles that they would not have considered before, and, in significant numbers, they have embraced the novelties into their lives, triggering a culture shift in behaviour and permanent new habits. While many in the workforce could not wait to get back to their offices, many more realised that it was not necessary or even desirable to do so. The focus of work breaks for them has shifted to local outlets or even their kitchens, and the focus of their evening entertainment has moved more often to their living rooms.

For those premises that survived and waited hopefully for the return of their former customer base, the pandemic crisis was far from over, even before the cost of living crisis supplanted it. Academic studies (eg, the University of Sheffield's Department of Economics, 2021) into the long-term impact of Covid-19 have demonstrated that city centres could lose £3 billion thanks to permanent changes caused by the effects of the virus on consumer behaviour, particularly the shifts to home working. One study found that over the course of 2022, the average UK worker will be working from home one day a week more than they were prior to the pandemic, and this is expected to be a permanent shift. Even at that level, there will be huge consequences for the retail and hospitality industries, and the behaviour will not be evenly spread in any predictable pattern. That study estimates that approximately 77,000 hospitality and retail workers could be forced to relocate or lose their jobs completely, which will see amplified impacts on low income workers and exacerbate inequalities between affluent and poverty-afflicted areas.

The study noted that city centres may have to transform themselves in order to remain sustainable, including a transition to more residential usage instead of a retail focus, but this carries difficulties of its own. Many local planning authority policies seek to concentrate retail activity heavily into city centres, to promote every aspect of sustainability, from retail prosperity to cutting car travel and air pollution. Random dilution of the retail offer will have destabilising impacts across the board.

Layered on top of this is the volatility of post-Covid visitor behaviour. In the immediate aftermath of the lockdown

periods, there was a notable impact on consumer reaction to the day-time economy, and even more acutely to the night-time economy, which could be categorised very roughly as those who remained reluctant to go out and those who could not wait. The ones driven by pent-up demand included those with criminal motivations, and the incidences of drug abuse, sexual assault and anti-social behaviour in the night-time hours, including the alarming spiking phenomenon, soared exponentially, to the dismay in particular of the police and other regulators. Whether this settles into a longer-term trend still remains to be seen, but in the short term, it has only served to alienate a significant contingent of law enforcers. It has also served to harden attitudes towards the night-time economy that were formed or exacerbated during the pandemic restrictions: namely, that the hospitality industry presented disproportionate risks and needed fundamentally to be restricted and controlled as opposed to being fostered.

Appeals from ministers for a more balanced approach towards an industry in peril appear to have fallen predominantly on deaf ears. In April 2020, Kit Malthouse, Home Office Minister, wrote a letter to the chairs of licensing committees in local authorities, identifying "key areas where licensing authorities may wish to consider a pragmatic and more flexible approach during this outbreak, while ensuring the licensing objectives are safe-guarded". The letter set out a balanced perspective, acknowledging the undoubted obstacles confronting businesses trying to comply with the strict letter of their licence conditions as they struggled to re-establish their operations in a post-pandemic environment. The letter, to a large extent, failed to hit its mark, leaving many decision makers unmoved.

These businesses face a perfect storm. Just as they find themselves in need of more experienced and competent staff, and additional door security details to handle the challenges of post-lockdown demand, they confront the worst staff shortages in modern memory as a consequence of furloughing and uncertainty causing thousands to leave the industry, with Brexit impacts compounding the effect. While the regulators are clamping down as never before, the industry finds itself in the worst position possible to comply with regulation, and with the least sympathy it has ever been afforded. Defences beginning with "due to Covid", or now, "due to the cost of living crisis", are cutting very little ice in any quarter.

At the same time, ironically, there is an increasing awakening to the vital and fundamental role that hospitality premises play in the operation of healthy urban life. Everyone will be able to think of ways in which they have missed their own preferred leisure time in a hospitality setting. The opportunities offered by food, drink and entertainment venues for sociability and cultural experiences in the lives of communities, as well as the contribution to employment, supply chains and the local economy are critical and indispensable. There is a growing recognition amongst all politicians, local and national, that a heavy handed approach to the industry in the wake of the pandemic, and going into the new financial challenges facing everyone, will prove disastrous in a very wide context: and, in fact, that the disaster has already begun.

A near-extinction event for these businesses leaves a dramatically different look and feel to the places where we live and work, not only at night but also during the day. This disconcerting transformation is being accelerated by a significant new influx of residents taking occupation of their newly built or converted urban centre apartments. The extension of permitted development rights has meant that offices no longer required for the home-based workforce can be readily converted to residential units, driven by a national housing shortage and the imperative to boost unit numbers, almost at any cost. This might be thought to bring a welcome new customer base for the town centre night-time economy in particular, but the irony is that, frequently, the exact opposite is the case. Those that buy their new homes in a flush of metropolitan enthusiasm all too often find that a change of personal life circumstances, perhaps in the form of a birth, a bereavement or a change in shift patterns, means that they suddenly value sleep significantly more than the city slicker lifestyle. Instead of moving away, however, they attempt to complain and bludgeon their environment into quiet submission. This should not be as effective as it commonly transpires to be. The local authority planning officers who granted the residential planning permission, and the licensing officers who granted the premises licences for the noise generating venues, very often did not consult with each other before those exercises, and it appears, with wearing predictability, that neither department discusses the situation with the environmental health colleagues down the corridor, who are under a duty to deal with the noise complaints that typically arise years later, when it is all too late.

It is obvious with hindsight that these urban land-use relationships should have been front loaded with negotiation, at the times of the grants of the respective authorisations. Instead, the competing neighbours are torn apart in acrimonious regulatory battles, that often see the venues creating the noise stripped of their rights to continue, when they were the ones in peaceful, often quiet occupation, and causing no harm in the original status quo. There is increasing push back against this outcome, with savvy licensees who spot the planning notices on lamp posts for new development in their area robustly highlighting the

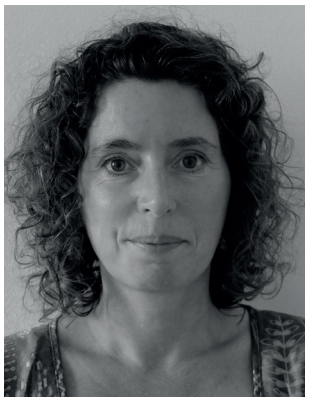
predicted future fall out before the council has even begun to debate their decision. This is the territory of the agent of change principle, which is a policy tool in the National Planning Policy Framework that serves to point out these issues and requires decision makers and developers to take them into account, with a view to protecting and not burdening existing noise sources in the neighbourhood.

These factors combine to form a highly complex, multi-faceted regulatory landscape going forward. The calls for deregulation and also for stronger regulation have gone up simultaneously, and this will be an area to watch closely over the next few years, to see which influences prevail, and how they impact upon decision making. In the meantime, all of these factors have had a seriously damaging effect on the relationships between regulators and the regulated in a legal arena which particularly promotes the benefits of partnership working. At this difficult time, there is too little of this in evidence, and the work of law and policy makers now must surely be to address these imbalances and find more solutions for the common good. This becomes increasingly urgent as the pressures on businesses rise exponentially, and the wake-up call has to happen before it is all too late.

Sarah Clover
Barrister, Kings Chambers

Gun safety

Working with firearms in the dramatic arts is fraught with danger, so it's essential the industry guidelines are followed, says **Julia Sawyer**



An American film production company was recently fined for firearms safety failures during filming, after a cinematographer was accidentally and fatally shot on set with a prop gun. In Santa Fe New Mexico the Occupational Health and Safety Bureau issued the maximum fine possible against Rust Movie Productions of $136,793 (£105,000).

There are standard industry procedures in place to manage and protect against the hazards of using firearms on set, but as with all safety management systems, if the managers of those processes are not encouraged to promote a safe working culture, tragic accidents such as this can occur.

For employers to manage risk effectively, they need to maintain attention on the significant risks and ensure adequate controls are implemented. An employer needs to demonstrate commitment by their actions, they need to ensure consultation with all those under their control, and they also need to challenge unsafe behaviours.

In the UK, the following guidance is used to develop the safe use of firearms in our studios and theatres: the Association of British Technician's *Code of Practice 06 Weapons in Stage Productions*, and the Health and Safety Executive's *Management of firearms and weapons in film and TV productions.*

Definitions:

- **Firearm** includes live weapons, air weapons, blank firing weapons, imitation, replica and deactivated firearms.

- **Weapon** includes any object which is designed for the purpose of inflicting bodily harm such as crossbows, catapults, any sharp-edged instruments used in a fight sequence (swords and knives) or martial arts weapons (such as rice flails) and batons, swords, spears and longbows. This guidance also covers articles such as replica weapons and props which are not designed specifically for the purpose of inflicting bodily harm, but which may pose such a risk when used as a weapon.

- **Armourer** is a person who makes, repairs or sells firearms. This will normally be a registered firearms dealer (RFD), their agent or another properly authorised person. An armourer should be involved in any production where live or blank-firing firearms are to be used.

Risk assessment

The risks from the use of firearms and weapons must be assessed and controlled in the same way as any other risk to the health and safety of those involved in film and broadcasting.

It is the duty of the employer to ensure the hazards are identified and that adequate and appropriate controls are put in place to protect the health and safety of all those working in studios or theatres, as well as the audience. The employer must ensure that a "responsible person" is nominated who has relevant experience and is competent in ensuring the safe use of firearms / weapons. This person could be an armourer, a fight coordinator or the stage manager, as an example. Whatever their role, it is key they understand the hazards and what procedure must be followed to ensure the safety of those working on an event involving firearms.

When carrying out a risk assessment for the use of firearms, the following hazards could be present:

Hazard	**Effect it could have**
Sound of gunfire	Possible damage to hearing
Ejected cases	Hit by hot sharp metal cartridge being ejected at speed from all firearms
Impact damage	Hit by wadding projectile from blank ammunition Hit by small brass splinters, chips and filings from blank ammunition Hit by burning powder from blank ammunition

High pressure	Increase in air pressure can be felt in close proximity to gunfire resulting in slight disorientation
Smoke inhalation	Small amounts of smoke from burning cartridge powder
Hot gun parts	Heat burns to the skin from touching various parts of the gun especially the barrel
Inexperience of users / fatigue	Could result in personal injury
Environment	Use in difficult circumstances, ie, when negotiating a complex set and scenery or when subject to awkward and restrictive movement such as in a confined area
Costumes	May restrict movement or obscure view

The controls that would need to be considered as part of the risk assessment process include the following guidlines:

1. All weapons to be handled only when authorised by the nominated responsible person.
2. When weapons are not in use they must be immediately returned to the responsible person.
3. Cast and crew to be taken through gun fire action carefully and the scene must be thoroughly rehearsed with the responsible person present.
4. Appropriate personal protective equipment to be worn, such as ear plugs or eye protection.
5. Anyone handling the firearm to be familiar with the operation, knowing where the safety catch is and how it works, where to place their finger, etc.
6. Always point firearms in a safe direction and never at anyone. When not in use, shoulder or holster the gun. The person handling the weapon to always be aware of where the gun is pointing.
7. Keep firearms clean, free of dirt, mud and debris. Foreign objects stuck in the barrel are a potential hazard or may cause barrels to fracture.
8. The firearms must always be under supervision of someone, it must never be left somewhere. When no longer required to be handed back to the responsible person.
9. During final checks, a loaded gun will be handed to you by the responsible person. It will be cocked and ready to fire. If there is a hold up, apply the safety catch if there is one. Release when ready. If you are unsure or think something is wrong, do not fire (it's better to miss it or start again than have an accident).
10. Stoppage drills: finger off trigger, safety catch on, keep pointed in a safe direction and continue with your action. Once the scene is over or the rehearsals are stopped, hand back to and inform the responsible person.
11. The gun could still be loaded. Finger off trigger, safety catch on, keep pointed in a safe direction and hand back to the responsible person.
12. A weapon / gun plot document will be produced tracking the movement and position of all weapons throughout a production.
13. Police and any other local authorities to be notified of the use of any blank, replica and deactivated weapons ahead of the production.
14. Notices to be posted throughout the front of house area informing patrons of the use of firearms within the production.
15. All weapons transported within visibility of the public will be hidden from view or screened in a suitable manner.
16. The firearms should be stored in a secure cupboard and only authorised persons should be able to access this. When firearms are moved out for performances, only the authorised persons should be permitted to handle them and they are responsible for the security of that firearm to ensure it remains on stage and is not misused. All weapons should be logged in and out of storage by the responsible person. When not in use, the firearm must be placed back in the secure cupboard.
17. Those authorised to handle and clean the firearms are competent and trained to do so. This should be monitored by the responsible person to ensure safe working practices are followed and to assess if further training required.
18. Use simulated or dummy weapons whenever possible.
19. Treat all guns as if they are loaded and deadly.
20. Never engage in horseplay with any firearms or other weapons. Do not let others handle the gun for any reason.
21. All loading of firearms must be done by the responsible person working under direct supervision.
22. Never point a firearm at anyone, including yourself. Always "cheat the shot" by aiming to the right or left of the target character. If asked to point and

shoot directly at a living target, consult with the responsible person for the prescribed safety procedures.

23. If you are the intended target of a gunshot, make sure that the person firing at you has followed all these safety procedures.
24. If you are required to wear exploding blood squibs, make sure there is a bulletproof vest or other solid protection between you and the blast packet.
25. Use protective shields for all off-stage cast within close proximity to any shots fired.
26. Appropriate ear protection should be offered to the cast members and stage managers.
27. Check the firearm every time you take possession of it. Before each use, make sure the gun has been test-fired off stage and then ask to test fire it yourself.
28. Blanks are extremely dangerous. Even though they do not fire bullets out of the gun barrel, they still have a powerful blast that can maim or kill.
29. Never attempt to adjust, modify or repair a firearm yourself. If a weapon jams or malfunctions, corrections must only be made by a qualified person.
30. Live ammunition must not be brought into the theatre.
31. A document should be provided that details the type of weapon to be used and who and how many performers will handle weapons, and where and when the shots will be fired. It should identify the "responsible person" or "responsible persons" who will manage and maintain the weapons and the process to control their issue, return and safe storage. This document should be shared with all the relevant people so that everyone is clear on the use of the weapon.
32. There is adequate arrangement for emergencies in place.
33. Costumes / garments should fit the individual performer correctly to ensure that the wearer can move around properly and that any weapon / firearm can be used safely. This should include headgear and any footwear. Items worn on the head should not restrict the performer's vision, including their peripheral vision.

The purpose of a risk assessment is to recognise all of the potential hazards and to put in place adequate controls to protect the user and all those working around them. Certain activities have an inherent significant risk if strict appropriate controls are not in place, such as the use of firearms or a weapon, the use of a vehicle in motorsports, working at height, etc. Unless the seriousness of the potential outcome of the use of something that inherently poses a significant risk is recognised by those carrying out or managing the activity, then tragic accidents will always be possible.

Julia Sawyer
Director, JS Consultancy

Cross-border hire – how local authorities can work together to take back control

One of the most thorny and controversial issues in taxi licensing could be resolved if licensing authorities cooperated to establish a new set of guidelines, as **Mike Smith** explains

The previous issue of the *Journal of Licensing* contained a Case Note on cross-border hiring by Gerald Gouriet QC and Leo Charalambides. The article discussed the imposition of licence conditions to prevent a private hire operator in York sub-contracting to their operator licence held with Wolverhampton to prevent the use of drivers who had not met York's standards but had managed to be badged in Wolverhampton. The authors noted at the start of their article that the intention of taxi licensing was meant to be localism. However, for many local authorities, including my own which is inundated by PHVs licensed elsewhere, it certainly doesn't feel this way.

The cross-border problem

Out-of-area working takes place in one of two ways. Either a local authority licences large numbers of drivers / vehicles which then go on to work outside of that area, or an area is inundated with large numbers of licence holders from elsewhere.

This is seen as a problem by both local authorities and the trade in many areas because there are differences in standards, conditions and issues of enforcement, with many local authorities receiving no income and having no powers over huge numbers of drivers and vehicles working in their areas.

The two most recent publications from the Department for Transport concerning standard setting in the sector – the *Statutory Taxi and Private Hire Standards* (July 2021) and *Draft Taxi and Private Hire Vehicle Best Practice Guidance* (March 2022) – both set out in very strong terms that safety is at the heart of the licensing regime.

However, where a taxi or private hire vehicle is being driven predominantly in another district, the local council has no powers to intervene if the driver contravenes any condition of the licence, provides a poor service to the passenger (or worse) or if the vehicle is not maintained to the standard required. Additionally, taxi and private hire drivers act as capable guardians, particularly in the night-time economy, and there have been many examples where the police have needed to trace a particular driver, often where limited details are provided, which is not possible if that driver is licensed away from the area they are working.

While there is now a legal duty to notify the issuing authority under the Taxis and Private Hire Vehicles (Safeguarding and Road Safety) Act 2022, still all that can be done to deal with a driver out of district is to write to the authority that issued the licence, where this is known.

The results of cross-border hire are well established and appear to fly directly in contraction to the Government's position that safety and protection of both taxi users and drivers is the principal consideration of the licensing regime. Out-of-area working is not just a concern for local authorities, it can also be seen as unfair on the trade, as local drivers could face competition from drivers who may have paid cheaper licence fees or undergone less rigorous checks elsewhere. Furthermore, it is probably safe to say that while there few issues where licensing authorities and the trade agree, there does appear to be almost unanimous common ground over the increasing issue of cross-border hire.

So, with wholesale legislative reform looking very unlikely during my professional career, local authorities will have to use the powers at their disposal in order to take back control.

This article therefore seeks to look at potential mechanisms for the control of drivers, vehicles and operators, which hopefully would be considered by all local authorities as well as the Department for Transport as they analyse the responses received to the *Best Practice Guidance* consultation in order for this important matter to be addressed.

Joint authorisation

Much is made of joint authorisation as a way to address vehicles working between areas and it remains a good idea. However, this usually develops between neighbouring

authorities, and does not address the issue of the larger authorities who have vehicles working some distance away where no local arrangements are in place. Even when (or if, considering the speed at which the Government responds to taxi matters) authorities are given "national enforcement" powers against other taxis / PHVs in their area, there remains the problem of the smaller authorities having the staff available to carry out any enforcement work.

If a local authority is responsible for licensing large numbers of drivers / vehicles who then go on to work elsewhere, then this authority must take steps to address the issue. The role of the licensing authority is to protect the public, not to licence as many vehicles or drivers as it can, and authorities which knowingly allow their licence holders to work in other areas need to consider the impact this practice has on other authorities and members of the trade who want to serve their residents.

If a local authority like Guildford, where I work, has large numbers of vehicles / drivers from elsewhere, this reduces our ability to protect our residents as our standards are not upheld and our efforts are undermined by the lack of powers and resource we have to deal with the issue.

Guildford's taxi / PH application numbers have dropped by 40% over the past five years and when we see several hundred licensed vehicles / drivers licensed elsewhere working in our area every day it is clear to see why there has been this reduction. The reduction in numbers has led to a corresponding reduction in licensing officers and the issue is therefore that we do not have the resource any longer to undertake enforcement under a joint authorisation as we only have sufficient resource to respond reactively to complaints, among our many other duties.

It would also be unfair and counterproductive for us to raise our fees from existing licence holders so that we could provide more resource to enforce against those we do not licence with new powers, as this would only serve to drive current licence holders to the cheaper authorities and reduce numbers further.

As such, in addition to joint authorisation arrangements, there absolutely must be a system of those bigger licensing authorities providing a recharge to the smaller local authorities which are impacted by out-of-area working. It is also perhaps worth noting that while joint authorisation was recommended in the statutory standards, Guildford has not had the licensing authority responsible for the hundreds of drivers and vehicles working in our area knocking on our door to authorise us to respond to their licence holders in our borough, and nor has it approached us with an offer for its officers to undertake some enforcement in our area.

The fit and proper private hire operator

While the issue of a driver's "right to roam" was considered in *Knowsley*, how a vehicle proprietor or a private hire operator manages the roaming issue could be considered by authorities in their decision making.

Operators, like licensing authorities as discussed above, have an important role in negating the potential effects of out-of-area working and the fit and proper test noted in the draft *Best Practice Guidance* would be the ideal opportunity to set reasonable expectations of operators.

Guildford, for example, has adopted the following test:

> *Would I be comfortable providing sensitive information such as holiday plans, movements of my family or other information to this person, and feel safe in the knowledge that such information will not be used or passed on for criminal or other unacceptable purposes? Would I also be confident that this person would operate a professional and reliable service, at a time it is needed, and take reasonable steps to safeguard both passengers and the ability of the local licensing authority to protect the public if required?*

If the answer to the question is an unqualified "yes", then the person can be considered to be fit and proper. If there are any doubts in the minds of those who make the decision, then further consideration should be given as to whether a licence should be granted to that person.

As such, the test makes it implicitly clear that operators licensed by the council should utilise vehicles and drivers licensed by that authority so as to ensure that the licensed trade working in the area conforms to the standards set and can be subject of local compliance.

In addition, as part of the council's fit and proper test, it would not expect an operator to obtain a licence in that area simply to make vehicles licensed by another authority available for booking via sub-contracting on a regular basis. As such, any operator acting to deliberately reduce the council's ability for local control would not be meeting the required public safety objectives and standards expected of a professional, licensed, fit and proper private hire operator, and may have its licence to make provision to invite or accept bookings in the area revoked. This test also would add weight by virtue of an adopted policy to the case discussed in July's *Journal* where York imposed a condition on an operator about sub-contracting.

The test also works for those larger authorities which have vehicles working outside that area, as by using large number of vehicles out of district, the operator is placing an additional burden upon the authority through having to respond to complaints which took place some distance away, again reducing control.

Intended use policies

Chapter 6 of the draft *Best Practice Guidance* also included the concept of intended use policies, where hackney drivers are undertaking predominantly pre-booked work in another area, going so far as to suggest that such a policy should be introduced. This formal recognition of such policies in order to try and reduce out-of-area working is welcomed.

Testing stations

As some licensing authorities have expanded into issuing licences on a large scale, the number of testing stations has also expanded, in some cases allowing tests to be completed many miles away from the area issuing the licence.

Most inspections of vehicles on application and during the licence are carried out under provisions at s 50 of the Act which states "the proprietor of any hackney carriage or of any private hire vehicle licensed by a district council shall present such hackney carriage or private hire vehicle for inspection and testing by or on behalf of the council within such period and at such place within the area of the council as they may by notice reasonably require".

Therefore, the Act implies that testing stations should only be located *within the area* of the authority licensing the vehicle, raising potential questions about the practices of those authorities which allow testing outside their area.

Licence conditions

The *Knowsley* case presented additional arguments which included that it *may* be lawful for a council to adopt appropriately worded conditions which promote the principle of localism with regards to private hire licensing.

As such, there is perhaps an argument that all licensed drivers *could* be subject to a condition that they are not to wait to receive bookings outside the council's licensed area. Correspondingly, drivers could travel to any destination to pick up an arranged booking, or receive a booking while they are travelling between destinations, but they could not wait outside of the area to receive bookings.

While the legality of such a condition is untested, if this were universally adopted then it should reduce incidences of drivers waiting for work outside of the area which they are licensed.

Invitation of bookings

Any private hire operator making provision for the invitation or acceptance of bookings in a controlled district needs to hold a private hire operator's licence with that authority. So far so good. There seems to be a consensus in some areas that provided the "triple licensing rule" is in place, the operator is operating legally.

However, the emergence of booking technology far beyond that available in 1976 has tested the boundaries of the concept of licensing. Nowadays a PHV can be booked as quickly as a taxi can be hailed, with that booking going through an operator's technology located some distance away from the area where the customer, driver and vehicle are located.

There are exemptions in the 1976 Act at s 75(1)(a), which says that no requirement of the Act "shall apply to a vehicle used for bringing passengers or goods within a controlled district in pursuance of a contract for the hire of the vehicle made outside the district if the vehicle is not made available for hire within the district", which indicates that the vehicle can come into the district to carry out work (ie, to pick up / drop off) if the contract is made outside the district and the vehicle is not made available for hire in the district.

There is a potential argument that PHVs and drivers presenting themselves (ie, parking up, turning on their booking system confirming that they are available) in areas where they are not licensed, and allowing themselves to be booked via that operator, is tantamount to the operator making provision for inviting bookings in that area, which would require a licence.

Up until now, legal challenges about the appearance of PHVs on app-based technology have centred around whether the vehicle is plying for hire, with the courts having conclusively ruled that this is not the case. However, whether this is "making provision for invitation of bookings" has not been decided and potentially could be an avenue of exploration for an authority where PHVs not licensed in that area are inviting bookings and are available.

This is obviously a daunting task for any local authority to undertake individually, owing to the risks and costs involved. However, if every local authority, potentially in partnership with the trade, were to seek for this area of law to be explained, then this clarification would resolve the question once and for all.

Conclusion

It is clear that cross-border hiring is a focus for both licensing authorities and the trade. It is equally clear that there are

arguments both for an against the practice, and a lack of consensus about a resolution highlighted during the Task and Finish Group discussions.

Certainly, the fragmented approach to regulating the trade across the country, particularly the approach taken by some large-scale issuers of licences as well as the Government's indifference to resolving the issue, means the issue is unlikely to go away unless something changes drastically. It is perhaps only a matter of time before some of the smaller authorities experience considerable difficulties in being able to set standards and regulate the trade locally, which is hardly conducive to the public safety aim intended by the Government of a supposedly local licensing regime.

Mike Smith MIoL
Licensing and Community Safety Lead, Guildford Borough Council & Vice Chair, IoL South East Region

Gambling Review, CIPs and enforcement

Nick Arron casts his eye over the latest gambling developments and suggests CIPs and the Gambling Act are not natural bedfellows

The Gambling Review White Paper was expected to be set before Parliament prior to its summer recess, but as we all know, political events took over. The resignation of Boris Johnson was followed by the departure of many ministers including the then Gambling Minister Chris Philp, who was replaced by Damian Collins. In the days that followed the governmental turmoil, a number of expected publication dates for the White Paper came and went. It may be that common sense prevailed, as it would not have been effective governance to publish the Gambling Review White Paper and then ask the newly appointed minister, who had been in position for a matter of days, to explain the Government's position on the review.

Writing this column in mid-September, it's to be hoped that the paper will have been published in the early autumn and we can debate the proposals therein at the National Training Conference in November.

Cumulative impact policies (CIPs) and gambling

If leaks from the White Paper are accurate, one concept we can expect to debate at Stratford-upon-Avon is the introduction of cumulative impact policies (CIPs) in relation to gambling premises, as proposed by the Local Government Associaton (LGA). CIPs have long been a tool to regulate premises under the Licensing Act 2003 (LA 2003). Although they are not specifically referenced under LA 2003, they are recognised by the guidance issued by the Secretary of State under s 182 of the Act.

With CIPs, licensing authorities can adopt tougher restrictions in areas where unacceptable levels of crime, disorder or public nuisance have been identified, and many local authorities have tackled these issues by adopting such policies. The principle behind them is that the existing disorder and / or public nuisance is so bad that no new premises should be licensed, or additional capacity or later hours allowed. Government figures suggest that throughout England and Wales a total of over 200 CIPs have been put in place.

Since 2017, licensing authorities have been required by law to provide evidence to support any published Cumulative Impact Assessment (CIA). Such assessments must be reviewed at least every three years.

Applicants who have premises or are seeking to buy premises (and make changes to the licence) in these areas will need to address the issues in their operating schedule in order to show that any application, if granted, would not add to the cumulative impact. CIPs can be popular with the police, but many people see these zones as leading to a lack of choice for the consumer in relation to pubs and restaurants, and a reduction in standards in existing establishments. Of course, existing establishments can benefit from the introduction of a CIP, as it prevents competitors opening nearby.

Since the pandemic, some licensing authorities have recognised that with the hospitality sector having effectively shut down for many months, there is not sufficient evidence to support the case for CIPs and have consequently removed them or reduced their numbers. Examples of local authorities which have removed CIPs include Birmingham, Nottingham, Leicester, Liverpool and the London Borough of Hammersmith & Fulham.

CIPs can exist under the LA 2003 as the Act does not dictate how licensing authorities exercise their functions, in the same way as the Gambling Act 2005 does. Under s 153 (Principles to be Applied) the Gambling Act requires local authorities to aim to permit the use of premises for gambling in so far as they think it in accordance with the codes of practice and guidance issued by the Gambling Commission, in accordance with their own statement of principles, and as far as they think any decision is reasonably consistent with the licensing objectives. The licensing objectives of the Gambling Act do not cover public nuisance, this being a significant reason for cumulative impact with LA 2003.

Under LA 2003, licensing authorities can implement CIPs

and can go as far as to state that they will refuse applications in certain circumstances. In my view the existence of the "aim to permit" under the Gambling Act prevents local authorities from taking such a stance when it comes to determining gambling premises applications. Therefore, any introduction of CIPs under the Gambling Act 2005 would require changes to primary legislation which would remove "aim to permit" or in other ways amend or provide exemptions from the requirement to "aim to permit".

In addition to the statutory position there are evidential challenges to justify such impact policies in relation to gambling premises. Areas with large numbers of alcohol licensed venues can suffer enough problems with crime and disorder, nuisance and disturbance to residents and businesses to justify CIPs. This is primarily due to excessive alcohol consumption and circumstances where large numbers of drinkers concentrate in an area, for example after leaving premises at peak times or queuing at fast food outlets or for public transport. Gambling premises simply do not cause the same types of problems. Punters and players have not been drinking in gambling premises, and they do not attend or leave together in big numbers at similar times. The low number of applications for review of gambling premises licences under s 197 of the Gambling Act 2005 supports this view. Gambling premises have not caused enough of the same problems for responsible authorities or residents to warrant a review.

According to the Guidance issued under s 182 of LA 2003, CIA's must be justified by "good evidence" that crime and disorder or nuisance are occurring, and if there is such evidence of such problems occurring, it must then be established whether these problems are caused by the customers of licensed premises or that cumulative impact is imminent. Gambling premises simply do not have the numbers of people attending or cause the same problems as alcohol licensed venues, and there is very little evidence that it is possible to identify particular groups of premises so as to create a cumulative impact in relation to the licensing objectives under the Gambling Act 2005. There will, of course, be exceptions to this, but generally there is not sufficient national evidence of such significant problems with gambling premises to justify the implementation of CIPs under the Gambling Act 2005. There is also an issue of cause and effect. Reference is sometimes made to gambling premises in deprived areas. There is no evidence that those premises in any way cause deprivation.

The Local Government Association is seeking greater powers to control gambling premises. It already has significant powers under the Gambling Act 2005 to effectively manage local gambling premises, including the power to review and subsequently add or amend conditions, restrict hours and revoke licences. These are similar powers to those under LA 2003. But we see very few reviews of gambling premises because there is not the evidence that gambling premises cause the same issues.

That is not to state that problem gambling is not significant consideration for the industry and regulators, but rather that problem gambling is more complicated than too many people having too much to drink in a certain area of a town. Problem gamblers tend to access numerous types of gambling on multiple platforms and are more likely to be gambling online via websites and smartphones, rather than in a particular gambling premise or premises in an area. This assertion is supported, for instance, by the Gambling Commission's enforcement actions against licensees, which are predominantly in relation to failings by online remote operators rather than land-based businesses.

Gambling Commission enforcement

This summer the Gambling Commission issued its largest financial penalty, with Entain required to pay £17 million for social responsibility and anti-money laundering failures at its online and land-based businesses. Entain Group must pay £14 million for failures at its online business LC International, which runs 13 websites including ladbrokes.com, coral.co.uk and foxybingo.com. Significantly it will also pay £3 million for failures at its Ladbrokes Betting & Gaming operation which runs 2,746 gambling premises across Britain.

Furthermore, additional licence conditions will be added to ensure a business board member oversees an improvement plan, and that a third-party audit to review its compliance with the licence conditions and codes of practice takes place within 12 months.

Social responsibility failures in the betting shops included the following instances: one shop customer was not escalated for a safer gambling review by either the shop or support office teams despite staking £29,372 and losing £11,345 in a single month and the local staff or area managers failed to escalate potential concerns with customers sooner; one shop customer was not escalated despite being known to be a delivery driver who had lost £17,000 in a year and another was not escalated despite staking £173,285 and losing £27,753 over the same time period. The shops were criticised for allowing customers to stake large amounts of money without being monitored or scrutinised – one betting shop customer was allowed to stake a total of £168,000 on shop terminals over eight months before the operator carried out due diligence checks.

Nick Arron
Solicitor, Poppleston Allen

Upcoming changes for retailers in Northern Ireland – are you ready?

New legislation means Northern Ireland supermarkets must rethink their alcohol-selling strategies, as **Orla Kennedy** and **Eoin Devlin** explain

The Licensing and Registration of Clubs (Amendment) Act (Northern Ireland) 2021 passed into law on 26 August 2021.

The Act amended both the licensing (Northern Ireland) order 1996 and the registration of clubs (Northern Ireland) order 1996, and represented the most significant reform of licensing laws in Northern Ireland (NI) in over 30 years.

The Act has been gradually introduced in various phases. The final phases are due to be introduced in October 2022 and June 2023. There are significant implications for retailers who trade in the NI market particularly when it comes to alcohol promotions in supermarkets and loyalty point schemes.

Alcohol promotions in supermarkets

On 1 October 2022 s 19 of the Act will come into force, placing restrictions on off-sales drinks promotions in supermarkets.

Essentially this will mean that supermarkets must not carry out alcohol promotions, relating to those licensed premises, on any part of the retail premises other than the part in which alcohol is made available for purchase.

In NI all supermarkets are required to have a distinct licensed area which is separated from the rest of the store by a barrier. From 1 October 2022 retailers will only be permitted to advertise alcohol in this area.

The Act will also prohibit advertising in the area that extends 200m from the boundary of the store. This will in practical terms, in most cases, prevent alcohol promotions being on display in the store car park or on billboards at the entrance to the store.

The definition of alcohol promotion in the legislation is very wide and includes any activity which promotes, or seeks to promote, in relation to those premises specifically the purchase of alcohol. It includes displaying or making available any publication which encourages the purchase of alcohol.

The Act provides a specific exemption for meal deals, which have become popular over the past decade. Where alcohol is part of a meal deal, it can still be advertised as such, but the alcohol must be stored in the licensed area.

Loyalty point schemes

On 6 April 2023 the final section of the Act will come into force and this will place a prohibition on loyalty schemes in relation to the purchase of alcohol.

The legislation will mean that retailers must not operate a scheme which provides awards to a member when they purchase alcohol or entitles the member to redeem the awards, in the amount specified in the scheme, in exchange for the opportunity to purchase alcohol at a reduced price or to receive it free of charge.

Are you ready as a retailer?

The changes to alcohol advertising rules and the prohibition of loyalty point schemes connected to the purchase of alcohol will have a significant impact on retailers who work across the various jurisdictions.

The new rules around alcohol advertising in NI will mean retailers must tailor their advertising campaigns in NI stores appropriately and provide sufficient advice for their store managers in order to comply with the NI legislation.

In relation to loyalty point schemes, most of us also have become very familiar with the various loyalty points schemes that retailers operate. These have become incredibly popular over recent years.

The fact that loyalty points cannot be gained on alcohol products or redeemed against alcohol will likely come a shock to many NI consumers. Retailers should be working with their IT teams to determine how these schemes will work in NI to comply with the legislation post April 2023.

Orla Kennedy
Solicitor, TLT NI LLP

Eoin Devlin
Legal Director, TLT NI LLP

The principle of regularity – some reflections

If the relevant procedural requirements have not been complied with, does that invalidate a public law decision? No, says **Michael Feeney**

The principle of presumptive regularity is an important public law principle that local authorities (in particular) should be familiar with. The well-established principle is that public law decisions are presumed to be lawful and can be relied upon until quashed by a court. In *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] 2 WLR 699, Sir John Donaldson MR encapsulated the principle at 840A-B:

> *I think it is very important that all who are concerned with take-over bids should have well in mind a very special feature of public law decisions, such as those of the panel, namely that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction.*

The principle exists in order to promote legal certainty. It is possible to challenge public decisions on the grounds that a certain procedural requirement has not been followed, but any such challenge must be made in good time, and the court must grant permission for it to proceed. Once the time for a legal challenge has passed, a party is entitled to rely on public acts and decisions that have been made, and the principle operates to presume that the necessary requirements were followed.

The case of *R (Aylesbury Vale DC)* v *Call A Cab Ltd* [2013] EWHC 3765 (Admin) provides a useful illustration of the principle, as well as showing its limitations in the criminal context. A cab company and its director were prosecuted by a local authority under a provision in Part II of the Local Government (Miscellaneous Provisions) Act 1976 for operating a private hire vehicle without a licence in a controlled district. The provisions of Part II of that Act are adoptive, and require a local authority resolution to be in force in that authority's area (s 45). The defence took a point as to whether the local authority had passed the necessary resolution. The mechanism for adoptive resolutions set out in s 45 required the local authority to serve upon each affected parish a notice of its intention to pass a resolution applying the Act to that area (s 45(3)). Minutes were produced showing that the local authority's secretary and solicitor had been authorised to serve the notice, but the defendant obtained minutes from 12 parish councils where no mention of the notice was made.

The first question was whether there was sufficient evidence for the court to reasonably conclude that that the requirements of s 45(3) had not been met. Ouseley J, giving a judgment with which Treacy LJ agreed, held that the local authority could rely on the presumption of regularity to say that the requirements for serving the notice had been met. Based on the evidence before him (in particular the minutes of the parish council meetings), however, the district judge during these *criminal* proceedings had been entitled to conclude that this presumption had been rebutted.

The second question before the court was whether, having found that s 45(3) had not been complied with, the district judge was obliged to dismiss the prosecution. Ouseley J held at [22] that:

the question of whether non-compliance has the effect of invalidating an administrative act is a matter that depends in the first place on the construction of the statute, read as a whole in order to determine the imputed intention of Parliament as to what the consequences of non-compliance with a procedural requirement should be.

Although the language of s 45 was mandatory, Ouseley J concluded that, reading the Act as a whole, if there was substantial compliance and no prejudice to the respondents, then the resolution was not invalid. The matter was remitted back to the district judge to consider whether there had been substantial compliance and whether the resolution was valid.

Two points are illustrated by from *Call A Cab Ltd*.

First, the presumption of regularity means that a public law decision remains valid and in force until successfully challenged by a court of competent jurisdiction. This is subject to the exception that in the criminal courts, where a prosecutor seeks to rely on a public law decision as an element of a criminal offence, it is usually open to a defendant to put the prosecutor to proof, and to seek to rebut the presumption.

Second, even if on a permitted legal challenge in criminal proceedings it can be shown that there was procedural non-compliance in reaching the public law decision, this on its own does not necessarily render that decision invalid. It is necessary to consider the relevant legislation as a whole, whether there was substantial compliance with the formal requirements and whether any procedural non-compliance caused any prejudice. If a minor or inconsequential mistake can be established on a permissible legal challenge, this it is unlikely to render a public law act invalid unless it can be shown that a party suffered substantial prejudice.

Clearly, the best course of action is to comply with relevant procedural requirements. The important point to emphasise, however, is if that does not happen (for whatever reason) then a public law decision that has been made is not automatically null and void as a result. The decision remains in force until quashed by a court of competent jurisdiction.

Even if there is a subsequent legal challenge brought within time (or raised in a criminal case), procedural non-compliance on its own is unlikely to result in the decision being quashed unless prejudice was caused as a result.

Michael Feeney
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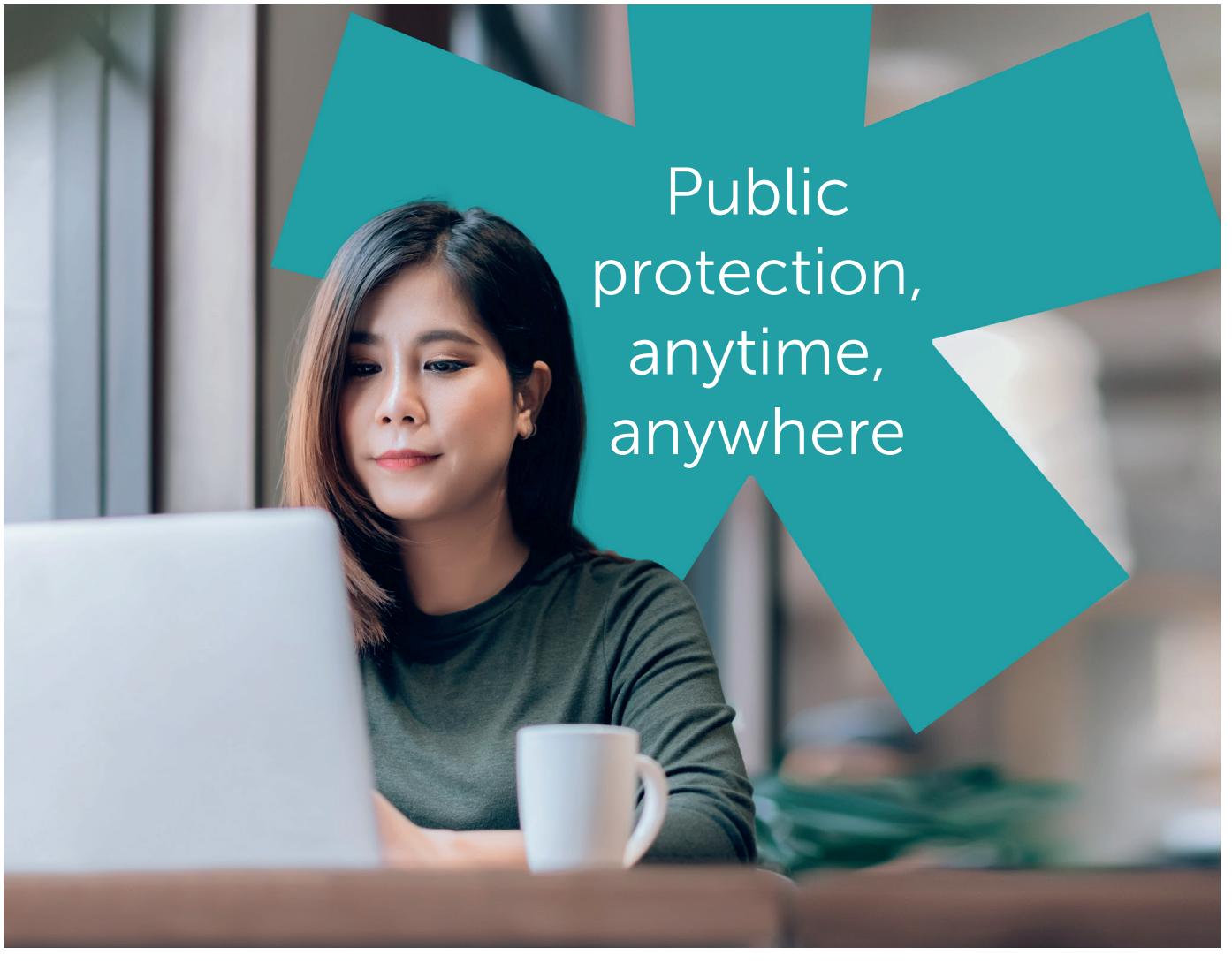

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JOURNAL OF LICENSING - CONTRIBUTOR PROFILES

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

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

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Sarah is one of the leading licensing barristers in the country, acting for a wide range of clients. She has been involved in some of the most important cases in the last decade, and has been successfully involved in challenging the Home Office and Police forces to settle statutory interpretation of the Licensing Act 2003. She is Chair of the West Midlands Region of the Institute of Licensing and sits on the Board of Directors.

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

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Stephen's expertise in licensing law is recognised at the highest levels. He has sat on a number of Scottish Government expert groups including those which oversaw the update to personal licence refresher training, and training for licensing board members. Stephen was appointed to the position of Chairman of the inaugural Scottish region of the Institute of Licensing in October 2016 and has been a member of the IoL since 2010.

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

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

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

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

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Michael was called to the Bar in 2021 and completed pupillage under the supervision of Isabella Tafur, Gregory Jones KC and Craig Howell Williams KC. Michael's recent experience includes appearing as sole counsel on behalf of a local planning authority at an enforcement appeal raising issues relating to the Habitats Regulations and appearing in several reviews and summary reviews of premises licences.

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

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

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Mike has been involved in licensing since 2013 after previously working in environmental health and the licensed trade. He is the vice chair and events coordinator of the IoL South East Region and regular contributor to IoL publications. Mike has been deeply involved with two important cases of taxi law - *Simmonds v the Crown Court* and *Rostron v Guildford* – which both proved successful for the council.

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