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# Journal of Licensing

The Journal of the Institute of Licensing

## In this issue

**Sweeping changes on the way for non-surgical cosmetics licensing**
by *Sarah Clover*

**Curing a breach of the public sector equality duty in the licensing context**
by *Michael Feeney*

**The role of deterrence and sanctions in licensing**
by *Philip Kolvin KC*

**Licensing and disciplinary law - perfect bedfellows?**
by *Jeremy Phillips KC*

**Make yourself known to one and all in all your dealings**
by *Charles Holland*

**New ways of handling sensitive issues in licensing applications**
by *James Rankin*

**The Kink Coalition**
by *Leo Charalambides*

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**Daniel Davies, MIoL**
*Chairman, Institute of Licensing*

The first edition of the *Journal of Licensing* was timetabled to be included in delegate packs for the 2011 National Training Conference (NTC) in Birmingham. The "Conference issue" is therefore my favourite of the triannual editions, as upwards of 300 people receive it in hard copy at the same time.

Despite the necessary reduction in paper-based materials in delegate packs, the *Journal* has, I hope, become a standard and anticipated fixture.

And so, as we prepare to reconvene in Stratford-Upon-Avon between 15-17 November it is my pleasure to introduce the 37th edition of the *Journal* and to commend to you its breadth and depth of subject matter.

Delegates will by now have familiarised themselves with the programme. After shaking off any early morning cobwebs, there are some plenary sessions on the Wednesday morning before the smaller, more specialist programme begins in earnest. Over the next two and a half days, the whole gamut of local authority licensing regimes is covered and I hope there is something for everyone in each session.

As for the *Journal*, our lead article is from Sarah Clover, analysing the "radical change" which is the new licensing regime for non-surgical cosmetics in the Health and Social Care Act 2022, the introduction of which the IoL among others has supported.

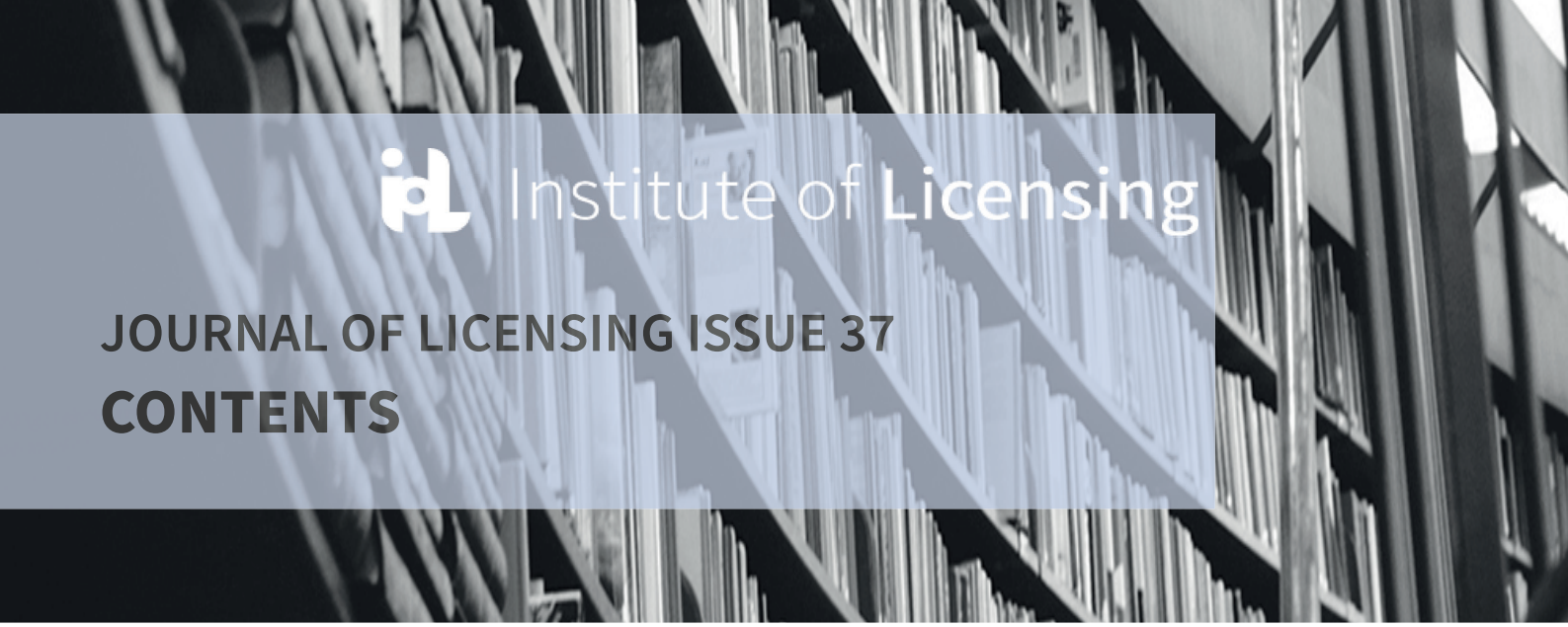
Philip Kolvin KC looks at the role of deterrence and sanctions in alcohol licensing, and we have contributions from James Rankin (sensitive information in licensing applications, SILA) and Jeremy Phillips KC, (the potential cross-over between principles of licensing and other regulatory fields).

James Button continues to fulfil all your taxi licensing needs and wants with another authoritative offering. Stephen McGowan ponders whether the minimum unit pricing experiment in Scotland will survive the forthcoming debate as to whether to activate the sunset clause and bring to an end the minimum unit pricing experiment.

Finally, Charles Holland's article examines how the requirements of company law can impact on (and jeopardise) licensing.

On top of this, we have our regular feature writers: Nick Arron with his gambling update, Julia Sawyer with public safety and event management and Richard Brown with thoughts on the fundamental principles of the Licensing Act 2003.

The NTC is sold out once again, and so there should be plenty of opportunity for mingling and networking as well as learning and consolidating. And of course don't forget the social events, including bingo for those of you lucky enough to arrive on the Tuesday night, a race night on the Wednesday evening and of course the gala dinner on the Thursday when the winner of this year's Jeremy Allen Award will be announced.



Institute of Licensing

# JOURNAL OF LICENSING ISSUE 37

## CONTENTS


**1** Foreword *Daniel Davies*

**3** Editorial *Leo Charalambides*

**4** Sweeping changes on the way for non-surgical cosmetics licensing *Sarah Clover*

**8** Taxi licensing: Remote private hire and hackney carriage activity *James Button*

**14** The public sector equality duty in the licensing context *Michael Feeney*

**17** Gambling licensing: DCMS consultations on gambling regulations *Nick Arron*

**20** The role of deterrence and sanctions in licensing *Philip Kolvin KC*

**25** Licensing and disciplinary law - perfect bedfellows? *Jeremy Phillips KC*

**27** Institute of Licensing News *Sue Nelson*

**30** Make yourself known to one and all in all your dealings *Charles Holland*

**33** The interested party: Just how malleable are the 2003 licensing objectives? *Richard Brown*

**38** Public safety and event management: Hazard-spotting for risk assessments *Julia Sawyer*

**41** New ways of handling sensitive issues in licensing applications *James Rankin*

**43** Scottish law update: Minimum pricing - a fait accompli? *Stephen McGowan*

**46** The Kink Coalition *Leo Charalambides*

**47** Directory

**50** Contributor profiles

**Leo Charalambides, FIoL**
*Editor, Journal of Licensing*

The publication of the November edition of the *Journal of Licensing* happily coincides, as ever, with the Institute of Licensing's National Conference in Stratford-upon-Avon, which provides us with an opportunity to share our collective experience and develop and deepen our understanding of local authority licensing regimes.

In this issue we are challenged by our contributors and the regular articles to think about the purpose of the licensing regimes that we operate and engage with. This is a reminder that the practices we adopt must be rooted in the aims and objects of the respective legislation – this is the well-established *Padfield* principle derived from the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* [1976] AC 997.

Under the Licensing Act 2003 the licensing objectives are clearly stated: the prevention of crime and disorder, public safety, the prevention of public nuisance and the protection of children from harm. Their application to the circumstances of a given premises will inevitably vary according to what "is to be regarded as reasonably acceptable in the particular location" (*R (on the application of Hope & Glory Public House Limited) v City of Westminster Magistrates' Court & Ors* [2011] EWCA Civ 31 [42]). Additionally, the s 182 Guidance invites a nuanced approach wherein it highlights other key aims and purposes which are vitally important (see para 1.5). The application of the aims and objects of a particular licensing regime invite for the consideration of local challenges an engagement with civil society and to some extent a degree of creativity. In the last issue I highlighted the introduction and designation of seven gambling vulnerability zones (GVCs) by Westminster City Council as part of its recently adopted gambling statement under the Gambling Act 2005. While the 2003 and 2005 Acts have clearly stated objectives, the same cannot be said for other statutory regimes. The sex establishment regime, for example, under the Local Government (Miscellaneous Provisions) Act 1982 has no such clearly stated objectives.

In this issue Michael Feeney highlights that the public sector equality duty (PSED) has gained greater prominence in the local government licencing. This is certainly a view I share when it comes to the Licensing Act 2003 and the Gambling Act 2005. The PSED invites and adds yet further nuance to the development of licensing policies and the application of those policies and legislative objects to applications. However, equality issues and in particular accessibility have been an established consideration in the hackney carriage and private hire licensing regime.

In the 1980s Manchester City Council pioneered the introduction of all hackney carriage wheelchair accessible vehicles (WAVs) (see *R v Manchester City Council, ex parte McHugh* [1989] RTR 285). Wirral Borough Council (in common with many other local authorities) maintains a policy that all hackney carriage vehicles must be purpose-built to accommodate disabled passengers in wheelchairs in the rear compartment. An application was made which sought a vehicle licence which was not WAV compatible. The council refused the application and the applicant appealed. On dismissing the appeal the Crown Court stated: "We also find that to approach the WAV policy in isolation would be to err in considering the duty to people with disabilities as a whole. We are persuaded that the WAV policy does not exist in a vacuum and that it is part of the provision of HCVs to those with disabilities generally. However, it is our considered view having heard and received the evidence that the council's policy is an important baseline to guard against any dilution of specification, which would adversely impact upon wheelchair user requiring or choosing to travel in situ." (*Shaun Marnell v Wirral Borough Council*, Liverpool Crown Court, 29th September 2023.) For people with disabilities, inclusivity and accessibility to public transport including taxis and private hire vehicles are a key consideration in the Department for Transport's *Taxi and Private Hire Vehicle Licensing, Best Practice Guidance for Licensing Authorities in England.* (July 2022, consultation version.)

It seems to me that the phrase "accessibility and inclusion" might be beneficially applied to the nuanced application of other licensing regimes. For example, many local authorities highlight in their statements of licensing policy the importance of the PSED but go further to stress the importance of accessibility, inclusivity, and diversity within the night-time economy. There has in recent times been a marked concern, for example, in the use of conditions that *perhaps inadvertently* racially profile venues and events which seek to exclude music and entertainments of black origin. This impacts upon the availability of venues that provide for or cater to people of colour and events associated with people of colour. While we might focus upon broadly and boldly asserted objectives, we must be ever conscious that local decisions impact upon the local area but also upon local communities. Licensing need not be a blunt tool to bludgeon but can be used to refine, enhance, and foster good relations between our vibrant local communities in any given locality.

# Sweeping changes on the way for non-surgical cosmetics licensing

The Government has cross-party support for a radical overhaul of the way the beauty industry operates, as **Sarah Clover** explains

Those who remember the inception of the Licensing Act 2003 will recall the drama of a completely new legal system, sweeping away all that had gone before. In the reign of Henry VII, the 1494 Vagabonds and Beggars Act conferred on justices of the peace the power to control the sale of alcohol. This regime lasted over 500 years, until the Licensing Act 2003 transferred the duty to local authorities. It was a radical change that took seven and a half years from the first announcement of a wholesale reform of licensing law before the Act came fully into force on 24 November 2005. Notwithstanding its long gestation, the regulations and guidance for the officers who were new at administering the radically reformed requirements came very late in the day, and it would hardly be an exaggeration to call the transition into the new regime dramatic.

It was one of the first examples of a modern root and branch overhaul of a regulatory licensing system, conferring new powers and responsibilities upon local authority officers, and since then, we have seen the same process for gambling, scrap metal, marine licences and animal welfare. It is about to happen again.

The latest addition to the panoply of licensing regimes will encompass the non-surgical cosmetic industry, and it will be significant. It will also sweep in rapidly.

The current regime controlling aesthetic and related treatments hails from the 1970s and 1980s, when the world was a very different place. This was before the internet and the onslaught of social media, let alone before the eye-popping catalogue of modern cosmetic treatments. The beauty industry is not only a dynamic and innovative space, it is very lucrative. According to published statistics from the British Beauty Council, the cosmetic and personal care sector supported a total GDP contribution of £24.5 billion and tax contributions of £6.8 billion to HM Treasury in 2022. According to the data, the sector mainly comprises small and medium enterprises, and the majority of business owners in the industry are women.

The introduction of the new licensing scheme into the Health and Social Care Act 2022 was far from inevitable. It represents another example of a legislative vehicle being boarded opportunistically by a successful campaign for a change in the law.[1] The calls for a comprehensive overhaul of this worrying area of the law were amplified in May 2019, when the All-Party Parliamentary Group for Beauty, Aesthetics and Well-being was established. It took evidence and quickly reached robust conclusions reflecting its view that the existing regimes for the control of the aesthetic industry are no longer fit for purpose.

A timely campaign capitalised upon that momentum, spearheaded by the Joint Council for Cosmetic Practitioners, Chartered Institute of Environmental Health and the IoL, and many other organisations which unanimously pressed the Department to do more, and to use the Health and Social Care Bill as the means to achieve sweeping change in this field.

It is fair to say that the Department of Health and Social Care had already got an eye on enhanced controls for certain aesthetic treatments. In 2021, a Private Members' bill was introduced to control the administration of botulinum toxin (Botox) and other substances for cosmetic purposes to persons under eighteen. Private Members' bills are only infrequently successful at reaching the statute books, so this was an indication of the seriousness of the issue, and of how the Department regarded it.

The complexity and inadequacy of the existing legislation speaks for itself. In England, outside London, acupuncture, skin colouring, cosmetic piercing and electrolysis are capable of being regulated by registration under the Local Government (Miscellaneous Provisions) Act 1982, as amended (LGMPA).[2] The legislation is adoptive, and local authorities choose which of the treatments to cover as well as whether to adopt the legislation at all. The authorities can adopt the legislation in principle, requiring registration

1 Another notable example is Lucy's Law, the ban on third-party sales of puppies.

2 Section 120 of the Local Government Act 2003 added semi-permanent skin colouring and cosmetic piercing to the list of treatments.

of practitioners. Authorities also have the option of implementing byelaws in relation to specifics of person and premises, relating to cleanliness and hygiene. The Secretary of State has also issued model byelaws relating specifically to infection control. If a local authority does not choose to pass byelaws then an alternative option is to pass a Local Act. This has been done by a number of local authorities, usually some time ago.

The Greater London (General Powers) Act 1981 gave London boroughs similar powers to the authorities covered under LGMPA 1982 with a licensing scheme to license premises for special treatments. These legal provisions were largely replaced in the London Local Authorities Act 1991 Part II, which is also adoptive. That Act provides a system of licensing for premises offering special treatments which are defined as treatment for persons for massage, manicure, acupuncture, tattooing, cosmetic piercing, chiropody, light electric or other special treatment of a like kind, or vapour sauna or other baths.

In Wales, the Public Health (Wales) Act 2017 applies a licensing requirement to "special procedures", which does not extend the range of treatments outlined in the LGMPA 1982, but provides certain flexibility.

There are other potential ways of penalising harmful practices, ranging from the Health and Safety at Work (etc) Act 1974 offences, to trading standards offences, to regulations controlling hazardous substances, and even prosecution for assault. But the complexity of procedure, and the difficulty in understanding the suitability of the legal options available to regulatory officers means that, too often, good practice is not enforced. The legislative schemes are manifestly confusing, and the wide variation in approach upon a purely geographical basis is deeply unhelpful. Even where adopted, the level of control that local authorities can exert over practice and training under the legislation is low. It would take extensive experience and an abundance of confidence in the knowledge of the plethora of legislation for officers to proceed to active enforcement in many cases, and this is hard to achieve with the state of the law as it is. Furthermore, a large number of troubling cases are unreported in the first place, because the victims did not know where to turn to make their complaint, so malpractice is not even notified to those who could address it.

One of the major problems driving the latest reform is that current legislation does not even touch upon the wider range of treatments and services that the public now access on a regular basis. This is predominantly because these treatments did not exist at the time of the previous legislation. These include treatments such as Botox and dermal fillers, and electrical skin treatments involving high heat and lasers. Legal definitions are too narrow to encompass many of these modern treatments, which are capable of causing significant harm if incorrectly applied. At a time when enforcement and protection need to be at their optimum level, the experience of it by professionals and the public is quite the opposite. The variability of the quality of practitioners in the marketplace is highly concerning. The volume of informal policy and guidance simply makes matters more confusing, not least because much of it is inconsistent or contradictory.

The new law will introduce a licensing regime, as opposed to a scheme of registration or any other kind of regulatory intervention. Licensing regimes are designed by identifying licensable activities on the basis of potential impacts or risk to the public, and identifying licensing objectives that will help to control those impacts.

Licensing regimes all work in roughly the same way. Distinct from the criminal law and the civil law regimes, they represent the interface of the state's intervention in activities that are otherwise legal and even beneficial to society within certain parameters. Outside of those parameters, the same activities can have harmful impacts on members of the public which the licensing regimes seek to limit and control. The subjects of the licensing regimes are entirely different, ranging from taxis to firearms and from music to animals, but the principles are all the same. The same principles are evident in the new reform for the aesthetic industry.

Given the bespoke legislation in Wales, this new regime will only apply to England.

Section 180 of the Health and Social Care Act 2022 provides the skeletal framework of the new licensing scheme. It is a hook upon which the Secretary of State can hang detailed regulations in the near future.

***Licensing of cosmetic procedures***

*(1) The Secretary of State may, for the purposes of reducing the risk of harm to the health or safety of members of the public, make regulations—*

*(a) prohibiting an individual in England from carrying out specified cosmetic procedures in the course of business, unless the person has a personal licence;*

*(b) prohibiting a person from using or permitting the use of premises in England for the carrying out of specified cosmetic procedures in the course of business, unless the person has a premises licence.*

*(2) In this section—*

- *"cosmetic procedure" means a procedure, other than a surgical or dental procedure, that is or may be carried out for cosmetic purposes; and the reference to a procedure includes—*

  *(a) the injection of a substance;*

  *(b) the application of a substance that is capable of penetrating into or through the epidermis;*

  *(c) the insertion of needles into the skin;*

  *(d) the placing of threads under the skin;*

  *(e) the application of light, electricity, cold or heat;*

- *"licensed premises" means premises in respect of which a premises licence is in force;*
- *"personal licence" means a licence, granted by a specified local authority under the regulations, which authorises an individual to carry out a cosmetic procedure of a description specified in the licence;*
- *"premises licence" means a licence, granted by a specified local authority under the regulations, which authorises premises to be used for the carrying out of a cosmetic procedure of a description specified in the licence;*
- *"specified cosmetic procedure" means a cosmetic procedure of a description specified in the regulations."*

Section 180 establishes certain parameters within which the regulations will work. There is one licensing objective: that of reducing the risk of harm to the health or safety of members of the public. There will be a dual licensing scheme of personal and premises licences, dealing with competence of practitioners separately from suitability of salons and other outlets. The premises licence will address cleanliness, hygiene, suitability of equipment and infrastructure. The personal licence will address skills, competence and training.

Five broad licensable activities are identified. They are defined in loose terms that allow for the inclusion of future innovative treatments that fall within the same categories:

a) the injection of a substance;

b) the application of a substance that is capable of penetrating into or through the epidermis;

c) the insertion of needles into the skin;

d) the placing of threads under the skin;

e) the application of light, electricity, cold or heat.

In the event that a new treatment is invented that should be controlled by the new regime but falls outside those five categories, the legislation uses the word "includes" to imply that new categories may be introduced at the behest of the Secretary of State.

It is anticipated that there will be a requirement for practitioners to be a "fit and proper" person.

It is to be noted that by virtue of the definition built into s 180, all the treatments encompassed are "non-surgical" (and non-dental) in nature. The Royal College of Surgeons has responsibility for defining "surgery", which would include, for example, body modifications and breast and buttock augmentation. That will be regulated by the Care Quality Commission (CQC). The Commission will continue to regulate health and social care providers.

One of the challenges in designing the new aesthetic regime will be managing the cross-overs with other health inspection regimes. It is vitally important not to repeat the mistakes of the past, and give rise to overloaded or duplicated regulation.

More detail will undoubtedly be provided in the regulations and the Guidance that will follow. Specific treatments that are "within scope" and "out of scope" will be set out in Guidance, much as they are in the animal licensing regime. Clarity will be essential. One of the features of this licensing regime is that those administering and enforcing it are likely to have limited knowledge or experience in the subject matter being controlled. Licensed subjects such as alcohol, music or taxis give rise to self-evident issues that do not require professional training to understand per se. Cosmetic treatments are more specialised, and it should not be necessary for a licensing officer to know the difference between, for example, intense pulsed light (IPL) therapy and light emitting diode (LED) therapy in order to be able to administer the system. It should be possible for enforcing officers to rely upon the details set out in regulations and guidance to investigate and enforce effectively, and to differentiate between treatments and suitable training, without having to become experts themselves.

It is essential that the terms used are clear. It is also essential that the legislation is future-proofed as much as possible. Regulations are easier to amend than primary

legislation, but in an industry where technical innovations are prolific, it is still best to make the defining terms effective for as long as possible. Guidance is the most flexible of all, and should be used to update regulators and practitioners on standards and expectations.

The Department acknowledges that it will need significant input from stakeholders in order to design the new licensing scheme effectively. It has launched the first public consultation, which was due to end on 28 October 2023. The Department has set out its aspirations that those licensed under the new regime will be suitably knowledgeable, trained and qualified, hold appropriate indemnity cover and operate from premises which meet the necessary standards of hygiene, infection control and cleanliness.

In the first consultation, the Department seeks views on the procedures in scope, restrictions on which practitioners should be permitted to perform procedures and age restrictions for those undergoing such procedures. Further work, including stakeholder engagement and public consultation, will be needed to determine the principles that will underpin the scheme, including education and training standards, infection control and cleanliness, indemnity requirements and licensing fees.

It is to be hoped that IoL members and other regulators will engage vigorously with the consultation. It is very important that the regulators and enforcers are involved in this process, as well as those who operate within the aesthetic industry.

The IoL will undoubtedly engage, and there is likely to be a high degree of consensus amongst members. It is an interesting phenomenon that the regulatory representations will have less to say about the content of the licensable activities, which is largely a matter for the industry. What the regulators are likely to be more interested in is the mechanics of administering the new licensing system, and the powers of enforcement. Officers have a wealth of experience of what happens when a licensing system does not reflect and support the regulatory intentions effectively. At this stage, there is a good opportunity to design out ambiguity and contradictions.

Licensing officers will be concerned to include treatments in scope that they know to be potentially problematic. There is currently a suggestion, for example, that tattooing would not be brought within scope, even though it appears to fit neatly within the five categories of s 180. Officers have much to contribute to the consultation about the experiences that they have had of enforcing the treatments that have been regulated since the 1980s, and whether those treatments should remain controlled or not.

This will also give rise to the conundrum of what to do with the outgoing legislation to the extent that it covers treatments that the new regime will not. Acupuncture and massage, for example, are controlled under the pre-existing regimes, but it would be a strain to describe them as “cosmetic” in nature. The last thing the regulators will want is another layer of control in a new licensing regime that does not effectively repeal the old legislation, and leaves continued duplication of regulation. This is the very point of introducing the new law, and this must be addressed carefully.

The new regime seems entirely suited to national standards and conditions, and is unlikely to be susceptible to localised bespoke conditions in the way that the Licensing Act 2003 is for alcohol and music. The new regime is likely to have more in common with the animal licensing regime in that regard, and is also likely to be appropriate for regular renewals of licences to keep pace with changing standards and training requirements.

It has been made fairly obvious that the Government wishes to bring in this legislation relatively quickly. Questions have been raised as to the potential impact that any change of government would have on the progress of this legislation, as it is unlikely to have reached a conclusion by the time of the next election. It seems unlikely at this stage that a change of government would change the direction of the legislation, although it is possible that it would introduce delay, as new ministers are brought up to speed with current positions. The original drive for the legislation enjoyed broad cross-party support, so it seems unlikely that it would founder, regardless of any changes in the political landscape.

Those interested in this industry from all perspectives should prepare for radical change, and engage themselves in the current process of creation, with a view to reforming the historical confusion, and introducing a new licensing scheme that is the best that it can be.

**Sarah Clover**
*Barrister, Kings Chambers*

# Remote private hire and hackney carriage activity

Public safety is being undermined says **James Button** by allowing vehicles and drivers that have been licensed by authorities with lower standards than those imposed by the authority in the area in which they are active

There is a great deal of concern about private hire vehicles and hackney carriages undertaking work (ie, journeys carrying passengers) in areas in which they are not licensed. This is often referred to as "remote working" and that is the term that I will use in this article.

Private hire vehicles and hackney carriages, together with their drivers and, in the case of private hire the operator, are licensed by local authorities throughout England and Wales and by Transport for London (TfL) in Greater London. Decisions as to the types of vehicle that will be licensed, the suitability of that vehicle and vehicle proprietor, and the fitness and propriety of drivers and private hire are determined by those licensing authorities. It is essentially a licensing regime that is local in character, and that was certainly the original aim of the legislation. The Town Police Clauses Act 1847 was designed for horse-drawn vehicles, which by their very nature would be restricted in the distance that they could travel. The Local Government (Miscellaneous Provisions) Act 1976 built on that foundation by extending the provisions relating to hackney carriages and introducing private hire licensing. As a result of that foundation, the licensing powers remained with local authorities, and in 1976 all local authorities responsible for these licensing functions were district councils in a universal two-tier structure across England and Wales. Those districts were generally reasonably small geographically (but with a huge range: in 1974 the largest geographically was Eden District Council Borough Council at 827 square miles and the smallest being Watford which was, and remains, only just over eight square miles). Since 1986, many of those district councils have become unitary authorities retaining the same boundaries; others have been merged to form larger unitary authorities; some remain as created in 1974. There are now some enormous council areas which comprise the "district" for the purposes of the 1976 Act, which when the Act was passed consisted of between three and nine district council areas (the largest now being North Yorkshire council at 3,102 square miles). During that time the fundamental structure of hackney carriage and private hire licensing under the two principal Acts (1847 and 1976) has not altered. In addition, the reference to the licensing authority as the "district" continues, notwithstanding the various titles and types of authority.

It is 176 years since the 1847 Act was passed, and it is 47 years since the 1976 Act was passed. During that time there has been considerable judicial activity and there are a large number of senior court decisions in relation to the interpretation, impact and use of the legislation.

There has been considerable discussion about the remote use of private hire vehicles and hackney carriages, including a series of articles in *Private Hire and Taxi Monthly.*[1] This article aims to explain why such use is lawful.

Looking first at hackney carriages.

Hackney carriages can stand or ply for hire within the district (or hackney carriage zone if they exist within an authority's area) in which they are licensed.[2] Only hackney carriages can stand or ply for hire, and only within their "home" licensed area. Standing for hire is when the vehicle is stationary, either on a hackney carriage stand (a taxi rank in common parlance) or elsewhere on a street. Plying for hire is when the vehicle is cruising.

However, a hackney carriage can also be used for pre-booked work ("pre-booked hackney carriage" work rather than private hire work; private hire work can only be undertaken by licensed private hire vehicle). That pre-booked journey can be wholly within the "home" authority's

1 March, April May 2022 available at https://www.phtm.co.uk/newspaper/digital-edition.

2 The wording in s 37 Town Police Clauses Act 1847 refers to the "commissioners" and the "prescribed distance". These are now construed as a reference to the district council and the area of the district council or hackney carriage zone. For an explanation of why this is the case, please see paras 2.3 and 8.1 of *Button on Taxis: Licensing Law and Practice* 4th Ed Bloomsbury Professional 2017.

area, or elsewhere. This is permissible because there is an inherent right for hackney carriages to undertake pre-booked work anywhere in England or Wales. This was confirmed in *Stockton-on-Tees Borough Council v Fidler.*[3] That case concerned the question of whether a Stockton-on-Tees licensed private hire operator could dispatch a Berwick-upon-Tweed licence hackney carriage to fulfil a booking. This hinged on whether a hackney carriage lost its status when outside its area, and became an unlicensed vehicle. If it did, the operator would be guilty of operating an unlicensed private hire vehicle. However, if it remained a hackney carriage, that operator was not using an unlicensed vehicle but was merely taking bookings for dispatching a hackney carriage. Mr Fidler had been acquitted at the Magistrate's Court and the matter went to the High Court by way of case stated. The matter was summed up by the judge in this way:[4]

> *56. Put more generally, Mr Rodger [for the appellant, Mr Fidler] submits that a hackney carriage is always a hackney carriage, no matter what it is doing, or where, and that its use, for whatever purpose, can never make it a private hire vehicle in the statutory sense. There are, he says, entirely separate and distinct regimes for the licensing of vehicles as hackney carriages and as private hire vehicles and the regime which regulates private hire vehicles has no application to a vehicle registered as a hackney carriage. The purpose of the 1976 Act (as later, in relation to London, of the 1998 Act) was, he submits, to impose a scheme of licensing on otherwise unlicensed vehicles and their drivers; it was not to impose further regulation on already-regulated hackney carriages. To "operate" within the meaning of the 1976 Act, including for the purposes of sections 46(1)(d) and 46(1)(e), is, he says, as the definition of "operate" in section 80(1) makes clear, an activity that can be carried out only in relation to a private hire vehicle as defined by section 80(1) – and that definition explicitly excludes a hackney carriage; it is not an activity carried out, or capable of being carried out, in relation to a hackney carriage, however or wherever it is being used. The provision of a hackney carriage for hire together with the services of a driver pursuant to an advance booking is not, he submits, a licensable activity. It always has been, and continues to be, he asserts, an activity unregulated under any statute. In short, Mr Rodger prays in aid what in Button is described (page xvi)[5] as "the inherent right of the hackney carriage proprietor to undertake pre-booked hirings anywhere in England or Wales."*
>
> *57. I agree with Mr Rodger and essentially for all the reasons he has given.*

And then:[6]

> *61. Put shortly, the correct analysis, in my judgment, is this: first, and for the reasons given in Gladen,[7] one has to read into the references to "private hire vehicle" in sections 46(1)(d) and 46(1)(e) the definition of "private hire vehicle" in section 80(1), including what I have called the 'hackney carriage exemption'; second, and for the reasons given in Britain, the words "hackney carriage" where they appear in section 80(1) are not confined to a vehicle licensed as a hackney carriage by the local authority which is seeking to enforce within its own area the provisions of the 1976 Act; they extend to any vehicle registered as a hackney carriage anywhere. And the combination of these two matters leads inexorably, as a matter of both logic and law, to the conclusion for which Mr Rodger contends.*

This followed a line of cases. *Hawkins v Edwards*[8] and *Yates v Gates*[9] both held that a hackney carriage, once licensed, was a hackney carriage at all times. A similar conclusion in respect of private hire vehicles was held in *Benson v Boyce.*[10]

The fact that a hackney carriage can be used in this way derived from the definition of private hire vehicle in s 80 of the 1976 Act:

> *"private hire vehicle" means a motor vehicle constructed or adapted to seat fewer than nine passengers, other than a hackney carriage or public service vehicle or a London cab or tramcar, which is provided for hire with the services of a driver for the purpose of carrying passengers;*

As this expressly excludes a hackney carriage from the definition of a private hire vehicle, it was held that it was as a consequence outside the definition of "operate" (also contained in s 80):

> *"operate" means in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle.*

Accordingly, the High Court concluded that, as a vehicle that had been licensed as a hackney carriage by any local

3 [2011] RTR 23 Admin Crt See paras 56 to 68.

4 Per Munby LJ at paras 56 and 57.

5 *Button on Taxis: Licensing Law and Practice* 3rd Ed 2009 Tottel Publishing.

6 Per Munby LJ at para 61.

7 *Brentwood Borough Council v Gladen* [2005] RTR 152 Admin Crt.

8 [1901] 2 KB 169 KBD.

9 [1970] 2 QB 2 QBD.

10 [1997] RTR 226 QBD.

authority, or as a "London cab" by Transport for London (TfL) was always a hackney carriage or London cab, 24 hours a day, seven days a week for the duration of that proprietor's licence, it was exempt from the definition of private hire vehicle, irrespective of where it was geographically undertaking pre-booked activity.

Turning to the question of private hire vehicles undertaking hirings in remote locations, the answer is based on slightly different arguments and is as follows.

Once again, the starting point is the definition of "operate":

> *"operate" means in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle.*

This has been interpreted by the senior courts over the years and the conclusion that has been reached is that "operate" is a term of art and does not have its common meaning. This is the location in which the "provision for the invitation or acceptance of bookings for a private hire vehicle" is made, and it is immaterial where the passenger / hirer is located when that contact with the operator is made, and further it is immaterial where the journey in the private hire vehicle for that hirer / passenger commences, travels, or ends.

This approach was analysed and upheld by the High Court in *Milton Keynes Council v Skyline Taxis and Private Hire Ltd*[11] where the salient points of the previous cases were considered by the judge, Hickinbottom LJ. It is worth quoting this at length[12] because this is the crux of the matter:

> *5. . . . Private hire vehicles can only be hired to transport passengers on a pre-booked basis through an operator licensed by the relevant local authority. Indeed, by virtue of Part 2 of the 1976 Act a vehicle may not work as a private hire vehicle in a controlled district unless there are in existence three licences.*
>
> *An operator's licence issued under section 55. Section 55 provides that a local authority shall, on receipt of an application for the grant of a licence to operate private hire vehicles, grant to that person a licence unless it is satisfied that that person is not a fit and proper person and, if the applicant is an individual, he has not been disqualified from driving. The local authority may attach such conditions to the licence as it considers reasonably necessary (section 55(3)).*
>
> *A vehicle licence issued under section 48, which sets out matters about which the local authority must be satisfied before issuing such a licence, such as the suitability, safety and comfort of the vehicle.*
>
> *A driver's licence issued under section 51, which again sets out matters about which the local authority must be satisfied, such as the fitness of the person to hold such a licence.*
>
> *The underlying purpose of this regulatory regime is "… to provide protection to members of the public who wish to be conveyed as passengers in a motor car provided by a private hire organisation with a driver" (St Albans District Council v Taylor[13]). It is well-established that, to enable coherent regulation and enforcement, in respect of any hiring, all three licences must be issued by the same local authority (Dittah v Birmingham City Council[14]), something which has been called "the trinity of requirements".*
>
> *Again as part of the regulatory and enforcement scheme, section 56 requires the holder of any section 55 operator's licence to keep such records as the local authority "may, by condition attached to the grant of the licence, prescribe and shall enter therein, before the commencement of each journey, such particulars of every booking of a private hire vehicle invited or accepted by him, whether by accepting the same from the hirer or by undertaking it at the request of another operator, as the [local authority] may prescribe" (section 56(2)); as well as particulars of any private hire vehicle he operates (section 56(3)). The licensing authority therefore controls the level and nature of the record keeping of any operator. An operator is required to produce such records on request to any authorised officer of the local authority. A breach of the requirements of section 56 is a criminal offence (section 56(5)).*
>
> *"Operate", for the purposes of section 55, has been considered by this court in a series of cases, including Britain v ABC Cabs15, Windsor and Maidenhead Royal Borough Council v Khan[16], Adur District Council v Fry[17] and Bromsgrove District Council v Powers[18]. These firmly establish that, in this context, "operate" does not have its common meaning. Rather, it is a term of art defined strictly by section 80(1) as meaning "in the course of business to make provision for the invitation*

11 [2018] LLR 73 Admin Crt.

12 Paragraph 5 et seq.

13 [1991] RTR 400 QBD at page 403A-B per Russell LJ.

14 [1993] RTR 356 QBD.

15 [1981] RTR 395 QBD.

16 [1994] RTR 87 QBD.

17 [1997] RTR 257 QBD.

18 (Unreported) (16 July 1998).

*or acceptance of bookings for a private hire vehicle". Therefore, as Dyson J said in Powers:*

*"… [T]he definition of the word 'operate' focuses on the arrangements pursuant to which a private hire vehicle is provided and not the provision of the vehicle itself…. [T]he word 'operate' is not to be equated with, or taken as including, the providing of the vehicle, but refers to the antecedent arrangements."*

*Section 46(1)(e) provides:*

*"[N]o person licensed under the said section 55 shall in a controlled district operate any vehicle as a private hire vehicle (i) if for the vehicle a current licence under section 48 is not in force; or (ii) if the driver does not have a current licence under section 51"; and, if any anyone knowingly contravenes that provision, he is guilty of an offence.*

*However, because of the limited definition of "operate", he only commits an offence if, in the course of business and in a controlled district, he makes provision for the invitation or acceptance of bookings for a private hire vehicle in circumstances in which the vehicle and/or the driver do not have the required licence(s). That too is firmly established by the cases to which I have referred (see, e.g., Britain at page 403). Therefore, for these purposes, it is irrelevant (e.g.) where the customer might be picked up, or where the contract for hire might have been made, or where any particular booking might in fact have been accepted. So, in giving the judgment of the Divisional Court in Khan, McCullough J said (at page 92):*

*"The determining factor is not whether any individual booking was accepted, let alone where it was accepted, but whether the person accused has in the area in question made provision for the invitation or acceptance of bookings in general".*

*Who accepts the booking is, however, important; because, by section 56(1), for the purposes of Part 2 of the 1976 Act, every contract for the hire of a private hire vehicle is deemed to be made with the operator who accepts the booking for that vehicle whether or not he himself provides the vehicle.*

As a consequence of this line of cases (*Britain v ABC Cabs*[19], *Windsor and Maidenhead Royal Borough Council v Khan*[20], *Adur District Council v Fry*[21] and *Bromsgrove District Council v Powers*[22]) "operate" relates to the local authority in whose area the booking office, or address specified on the operator's licence is located. It should be noted that these premises do not have to be an office as such: domestic premises; commercial premises; and other imaginative locations can be an operator's base. The purpose of the legislation is to ensure that there is a clear location at which the operator's records can be inspected by an authorised officer of the local authority that licensed the operator, or to any police constable.[23]

It is therefore clear that the operator can advertise their services outside the district in which they are licensed (*Windsor and Maidenhead Royal Borough Council v Khan*[24]), and that a booked private hire vehicle can pick up a pre-booked passenger at any location within or outside the district in which the trinity of licences was issued and then travel anywhere to complete the journey (*Adur District Council v Fry*[25]).

In addition, a private hire vehicle and private hire driver can park wherever it is lawful to do so, to await the next booking being communicated to that driver. Again, this can be within, or outside the district in which the vehicle and driver are licensed. This is because a stationary private hire vehicle is not standing for hire contrary to s 45 of the 1847 Act. In the 1959 case of *Cogley v Sherwood*[26] a large number of earlier senior court decisions were reviewed, with Lord Parker CJ remarking:[27]*The court has been referred to a number of cases from 1869 down to the present day dealing with hackney carriages and stage carriages. Those decisions are not easy to reconcile, and like the justices, with whom I have great sympathy, I have been unable to extract from them a comprehensive and authoritative definition of "plying for hire".*

The matter was then examined in considerable detail and the court concluded that there were two elements required to be proved for the vehicle and driver to be plying for hire.[28]

19 [1981] RTR 395 QBD.

20 [1994] RTR 87 QBD.

21 [1997] RTR 257 QBD.

22 (Unreported) (16 July 1998).

23 Section 56(2) Local Government (Miscellaneous Provisions) Act 1976.

24 [1994] RTR 87 QBD.

25 [1997] RTR 257 QBD.

26 [1959] 2 QB 311 QBD.

27 At pages 323 and 324.

28 It should be noted that the offence referred to in Cogley v Sherwood is of "plying for hire". The London legislation does not make a distinction between "standing for hire" and "plying for hire". However it is quite clear that outside London there is such a distinction as detailed above - standing is when the vehicle is stationary to hackney carriage stand or elsewhere on the street; plying is when it is cruising. For details of that distinction please see para 8.8 of *Button on Taxis: Licensing Law and Practice* 4th Ed Bloomsbury Professional 2017.

They were, firstly that the vehicle itself was "exhibited" to the prospective passenger. The passenger / hirer must be able to see the actual vehicle that is available for hire. Secondly, the vehicle must be available for immediate hire by contracting directly with the driver, without any necessity for involving any third party.

That approach has held good for over half a century. There have been decisions along the way that come to slightly different conclusions, as a result of the particular facts of the case, but the principle has not been overturned. Indeed that principle was fully upheld in *Reading BC v Ali.*[29] This case concerned modern booking methods, namely a mobile phone app and a licensed private hire vehicle located outside the district in which that licence was issued (it was a TfL licensed private hire vehicle located within the district of Reading Borough Council – in other words a vehicle licensed under the Private Hire Vehicles (London) Act 1998 but physically located in an area where private high licensing was controlled by the 1976 Act). Following a prosecution where the driver was acquitted of standing for hire contrary to s 45 of the 1847 Act, Reading Borough Council appeal to the High Court and the appeal failed. Judgment was handed down by Flaux J with the relevant paragraphs being as follows:[30]

> *33. In my judgment, there was no unlawful plying for hire in this case for a number of reasons. First, the mere depiction of the respondent's vehicle on the Uber App, without either the vehicle or the driver being specifically identified or the customer using the App being able to select that vehicle, is insufficient to establish exhibition of the vehicle in the sense in which that phrase is used by Lord Parker CJ in formulating the two stage test for plying for hire in Cogley v Sherwood and Rose v Welbeck . That requires not just exhibition of the vehicle but its exhibition expressly or implicitly soliciting custom, inviting members of the public to hire the vehicle.*
>
> *34. It seems to me that depiction of the vehicle on the App does not involve any exhibition of that kind, but is for the assistance of the Uber customer using the App, who can see that there are vehicles in the vicinity of the type he or she wishes to hire. I agree with Mr Kolvin QC that the App is simply the use of modern technology to effect a similar transaction to those which have been carried out by PHV operators over the telephone for many years. If I ring a minicab firm and ask for a car to come to my house within five minutes and the operator says "I've got five cars round the corner from you. One of them will be with you in five minutes," there is nothing in that transaction which amounts to plying for hire. As a matter of principle, I do not consider that the position should be different because the use of internet technology avoids the need for the phone call.*
>
> *35. Second, . . . the customer has to confirm the booking after he or she is given the fare estimate and the driver in turn has to accept the booking before either of them knows the identity of the other and before the car actually comes to the pick-up point.*
>
> *36. . . .*
>
> *37. Whatever the correct contractual analysis, in my judgment it has no impact on the question we have to decide. On any view, there is a pre-booking by the customer, which is recorded by Uber as PHV operator, before the specific vehicle which will perform the job is identified. This is all in accordance with the transaction being PHV business, not unlawful plying for hire. There was no soliciting by the respondent without some prior booking, as he only proceeded to the pick-up point after the customer had confirmed the booking and the respondent as driver had accepted the job. Whenever any contract was concluded, I have little doubt that this was not plying for hire, because on the facts found in this case, the customer could not use the respondent's car without making a prior booking through the App. As with the charabanc in Sales v Lake, the customer would make a booking to be picked up at a pre-arranged point. On the evidence in this case, all the Uber App did was to facilitate that booking.*
>
> *38. This leads on to the third reason why this was not plying for hire, which is the character of the waiting. The respondent was waiting in his vehicle until a customer confirmed a booking on the Uber App and he accepted that booking. There was no question of his soliciting custom during the period of waiting. His vehicle did not advertise itself as available for hire nor did he do anything which would have suggested to the public that he was available for hire. Indeed, as the Chief Magistrate found, if a member of the public had approached the vehicle and sought a ride, the respondent would have refused to take such a passenger off the street without a prior booking through the Uber App.*
>
> *39. The waiting here was of a completely different character to that in* Rose v Welbeck*. Unlike in that case, the respondent was not waiting to solicit custom from passing members of the public, but he was waiting for a private hire booking via the Uber App. Putting the example given by Lord Parker CJ in* Cogley

29 [2019] 1 WLR 2635 Admin Crt.

30 Paragraphs 33 to 39.

> v Sherwood *of what would not be plying for hire into the context of the Uber App, if approached in the street, the respondent would have been saying: 'You cannot have my vehicle, but if you register for the Uber App and make a booking on it, you will be able to get a vehicle, not necessarily mine.*

This judgment reinforces the view that a private hire vehicle can park lawfully awaiting a future booking and was summarised in the following way by Bean LJ in the later Court of Appeal decision in *R (app United Trade Action Group Ltd) v Transport for London:*[31]

> *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.*

The Court of Appeal also approved the approach to standing for hire in *Cogley v Sherwood:*[32]

> *Lord Parker's conclusion [in* Cogley v Sherwood*] 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.*

The Court of Appeal went further and fully considered the question of the use of mobile phone apps to book private hire vehicles and concluded that *Reading Borough Council v Ali*[33] was correctly decided.

## Conclusions

The law as it currently stands does not prohibit a hackney carriage undertaking pre-booked work anywhere in England or Wales . It also does not prohibit a private hire vehicle undertaking pre-booked hirings anywhere in England or Wales . It does not prohibit an un-booked private hire vehicle from parking / waiting wherever that is lawful until the next booking is communicated to the driver. As a consequence of that, it is also possible for more than one private hire vehicle to park / wait in the same location without creating any form of "illegal rank".

These conclusions are not only inconvenient to the authorities and local trade in the remote areas in which these vehicles undertake their activity, but they also undermine public safety by allowing vehicles and drivers that have been licensed by authorities with lower standards than those imposed by the authority in the area in which they are active. The most notable and important difference is the absence of CCTV within a vehicle which is being used in the area where the local authority has determined that CCTV in hackney carriages and private hire vehicles is necessary for public safety.

In July 2020 the DfT published *Statutory Taxi & Private Hire Vehicle Standards,*[34] and in the accompanying email explained that no action would be taken in relation to remote work, justifying it as follows:[35]

> *The Statutory Standards are an important first step in reforming the way the taxi and private hire vehicle sector is regulated and should ensure consistent standards between licensing authorities. Government fully expects licensing authorities to implement these measures as soon as possible. Given this, and following engagement with the sector, the Government will not, at this time, take forward out-of-area restrictions.*

Three years later, it is demonstrably clear that this approach of trying to control the situation by Guidance is a failure.

It is essential that statutory standards for vehicles and drivers are introduced without delay to prevent "licence shopping" and to protect the public. The Government has admitted that they will not be introduced until after the next election,[36] but public safety should not be compromised by political inaction.

It is also essential that some action is taken to prevent the seemingly limitless activity of hackney carriages and private high vehicles undertaking remote activity.

**James Button**
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31 [2023] 1 W.L.R. 367 CA at para 28

32 Supra at para 48

33 Supra.

34 Available at https://www.gov.uk/government/publications/statutory-taxi-and-private-hire-vehicle-standards.

35 DfT email 20 July 2023.

36 This was stated by Transport Minister Mark Hooper at a meeting on 5 March 2023 with the author, John Garforth and Sue Nelson, all representing the Institute of Licensing.

# Curing a breach of the public sector equality duty in the licensing context

With the PSED growing in importance, it is important for licensing authorities to take note of numerous non-licensing cases if they are to avoid breaching the equality duty, as **Michael Feeney** explains

The public sector equality duty (PSED) has recently become much more prominent in licensing. There have been two High Court challenges to decisions relating to sexual entertainment venues on the basis that the local authority breached the PSED, and the PSED is being cited and referred to more frequently before licensing sub-committees.[1] The question therefore arises: what should a licensing authority do if it is faced with an allegation that it has not discharged the PSED and has acted unlawfully?

## The *Bracking* position and subsequent case law

The PSED is contained within s 149 of the Equality Act 2010, which requires that a public authority must, in the exercise of its functions, have due regard to the need to:

- Eliminate discrimination, harassment, victimisation, and any other conduct that is prohibited by or under this Act.
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

In *Bracking v SSWP* [2013] EWCA Civ 1345, McCombe LJ at [25] provided a summary of the relevant principles that apply. *Bracking* is cited with regularity before the courts, and it is a convenient starting point for understanding the main principles that apply to the PSED. However, the following main principle as enunciated in *Bracking* at [25(4)] should be treated with extreme caution:

> *Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) at [23 – 24].*

The case cited by McCombe LJ in support of this proposition was *Kaur & Shah. Kaur & Shah* was subsequently considered in *Prichard v SSWP* [2020] EWHC 1495 (Admin), in which Laing J held that *Kaur & Shah* was of "dubious authority" and "clearly wrong". The main reasons for this were that in *Kaur & Shah* the defendant had conceded the point without argument and also *Kaur & Shah* was concerned with legislation that pre-dated the Equality Act. Laing J specifically held as well that the *Bracking* principle which relied on *Kaur & Shah* also therefore had to be treated with caution.[2]

The question of whether a breach of the PSED can be remedied or "cured" afterwards was further considered in *Metropolitan Housing Trust Ltd v TM* [2021] EWCA Civ 1890. The appellant was an adult with schizo-affective disorder and treatment-resistant paranoid schizophrenia, and the respondent had been in breach of the PSED by not reassessing whether to continue with possession proceedings on receipt of an up-to-date psychiatrist's report. The trial judge found that the respondent had remedied this breach in the course of giving evidence at trial by saying that if he were making the decision at the time of the trial he would not have pursued the possession proceedings but would have sought an alternative approach. The Court of Appeal on the facts of the case quashed the decision because the PSED was a duty to carry out a proper process and could not have been

1 *R (CDE) v Bournemouth, Christchurch & Poole Council* [2023] EWHC 194 (Admin) and *Kaagobot Ltd and Ors v City of Edinburgh Council* [2023] CSOH 10. See also the article by Josef Cannon and Ruchi Parkeh, 'Two public law errors do not new SEV rules make' in the *Journal of Licensing*, July 2023. For an example of the PSED being cited in argument before a sub-committee see Leo Charalambides, 'Whose adult entertainment is it anyway?' in the *Journal of Licensing*, November 2022.

2 [87]-[88], [120].

remedied by what was said in the witness box. On the general principle, however, Nugee LJ at [43] noted that the *Kaur & Shah* line of case law concerned one-off decisions rather than ongoing proceedings and that in possession proceedings he was "not persuaded that there is anything wrong in referring to late compliance with the PSED as remedying or curing the breach".

This reasoning is not confined to possession proceedings, and it has also been applied in the planning context. In *SSCLG v West Berkshire DC* [2016] EWCA Civ 441 the claimant challenged the lawfulness of a written ministerial statement altering national policy in respect of planning obligations for affordable housing on the basis (inter alia) that the Secretary of State had breached the PSED. It was accepted that the considerations in s 149 of the Equality Act had not been addressed prior to the making of the written ministerial statement. However, a formal equality statement produced after the decision had been made demonstrated a consideration of the potential for adverse impacts on protected groups.

At first instance Holgate J quashed the decision, but the Court of Appeal at [87] disagreed with this remedy, noting:

> *Nothing we say should be thought to diminish the importance of proper and timely compliance with the PSED. But we have strong reservations about the proposition that the court should necessarily exercise its discretion to quash a decision as a form of disciplinary measure… The court's approach should not ordinarily be that of a disciplinarian, punishing for the sake of it, in these circumstances. The focus should be on the adequacy and good faith of the later Assessment, although the court is entitled to look at the overall circumstances in which that Assessment was carried out… We do not think… that an order quashing the decision must follow.*

Finally, a relatively extreme example of action taken after a decision is provided by *R (oao Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 (Admin). The claimant applied for judicial review of the failure by the defendant to provide British sign language interpreters for the Government's Coronavirus data briefings on 21 September and 12 October 2020. One of the grounds was that the defendant had breached the PSED. The PSED assessment in question was provided not just after the relevant decisions but at 6:30pm one working day prior to the deadline for the claimant's skeleton argument for the substantive hearing.

The claimant's (unsurprising) submission was that the PSED assessment was a "last-minute job", produced in response to judicial review proceedings and as a "rear-guard action". Fordham J rejected this submission at [43], stating:

> *It is obvious that the PSED assessment has been produced in the context of the judicial review proceedings, and 'at the door of the Court'. Nothing is more likely to focus the judicial mind. But the standards of scrutiny remain the same. I do not accept that the PSED assessment is a rear-guard shield. No evidence before me suggests that it was produced with an 'agenda', or that the writer was reasoning backwards from a chosen policy position being defended before a Court… The Court has been presented with the PSED assessment as an objective and open-minded consideration of the issues. In my judgment, and on that basis, the PSED assessment is a rigorous evaluation which recognises the features of the statutory duty and which cannot, in any material respect, be said to be a failure of 'due regard'. The defendant was not therefore in present or continuing breach of the PSED.*

Although there is in the caselaw a slight terminological difference as to whether action taken after a decision "cures" the breach of the PSED (such that the breach no longer exists) or whether the court accepts the breach but exercises its discretion not to quash, the practical effect is the same. A breach of the PSED at the time that the decision was taken will not inevitably lead to the decision in question being quashed.

## Lessons for licensing

The cases above do not relate directly to licensing, but given the growing prominence and importance of the PSED they do contain important lessons for licensing authorities which may increasingly be faced with arguments that they have acted in breach of the PSED.

First, despite the case law cited above, clearly if possible it is much better to discharge the PSED before a decision is taken. Even if the decision is not ultimately quashed, it can be uncomfortable for a public authority to rely on steps taken afterwards and to be placed in the position of admitting that the equality considerations were not taken into account until after the decision had already been taken. Discharging the duty before a decision is taken also places the authority on a stronger footing to argue that the factors set out in s 149 of the Equality Act were conscientiously considered.

Second, there is a distinction between "one-off" decisions and decisions involving more of an iterative process. This distinction was noted by Nugee LJ in *Metropolitan Housing Trust v TM*. As the PSED is a continuing duty, it will be easier for a public authority to address the equality considerations

as part of an iterative process and in response to consultation responses when, for example, adopting a statement of licensing policy. It will be more difficult to adopt this approach when there is a one-off decision, for example, on an individual application.

Third, even if there has been a breach of the PSED, that does not necessarily mean that the decision cannot be defended. Depending on the circumstances (and even in the face of impending court proceedings), a rigorous, open-minded and conscientious equality impact assessment (EIA) can effectively remedy the breach. This is true of judicial review proceedings (as per *R (oao) Rowley v Minister for the Cabinet Office* above), and it is likely to be true of Magistrates' Court proceedings as well. If, on appeal, there is an allegation that the licensing authority's decision was wrong because of a failure to discharge the PSED then a licensing authority may be able to strengthen its position by providing an EIA to show that there is no continuing breach.

Finally, for anyone wishing to challenge a decision taken by a licensing authority, it is vital to consider what the ultimate remedy will likely be. In terms of evidence, although the onus is on the public authority to show that they have discharged the PSED, any prospective claimant will likely have to show that the breach of the PSED mattered in a practical sense. Otherwise, the court will exercise its discretion not to quash on the basis that it is highly likely that (even if the equality considerations had been taken into account) the decision would not have been substantially different (s 31(2A) of the Senior Courts Act 1981). For example, a decision to grant an sexual entertainment venue (SEV) licence obviously raises equality concerns, and a failure to consider the PSED could hardly be described as a technicality. On the other hand, a decision to grant a premises licence for a restaurant is much less likely to raise significant equality concerns. The important point for a would-be challenger is that it is unlikely that a decision will be quashed on a pure technicality.

**Michael Feeney**
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# DCMS is aiming to iron out inconsistencies and update gambling regulations soon

Land-based gambling regulation looks set for a series of important changes, as **Nick Arron** explains

It has been a summer swimming in consultations, with significant documents published by both the Gambling Commission (Proposed changes to Licence Conditions and Codes of Practice, Remote Gambling and Software Technical Standards) and the DCMS with its detailed proposals following on from the long-awaited White Paper (Land-based gambling sector regulation and possible changes to the sector; and the Online maximum stake limit). This article focuses on the DCMS consultation on land-based gambling regulation.

The consultation, which was published on 26 July 2023, contained five topics:

Chapter 1: Casino measures

Chapter 2: Machine allowance for arcades and bingo halls

Chapter 3: Cashless payments on gaming machines

Chapter 4: Introduction of an age limit on cash-out Category D slot-style machines

Chapter 5: Review of licensing authority fees

## Chapter 1: Casino measures

One of the key tenets of this consultation is proposed changes to correct inconsistencies in the different types of casino licences operating in the market. Since the Gambling Act 2005 was introduced, casinos have operated under two licence regimes, the previous 1968 Act (currently classed as "converted" casinos) and the 2005 Act, with different requirements in terms of the types and number of gaming products that can be offered.

The current regime has differing restrictions dependent on the type of licence held, with limits on the maximum number of Category B machines permitted and different machine-to-table ratios.

The Government acknowledges that greater consistency is needed between both regimes and is looking at measures to enable 1968 Act casinos, which meet the minimum gambling space requirements of small casinos, to be eligible for the same gaming machine allowance.

### *Gaming machines in casinos*

1968 Act casinos are currently permitted a maximum of 20 Category B gaming machines. The proposal is to increase this to up to 80 to provide a consistent approach for permissions, subject to meeting other requirements, such as a minimum total gambling area, the provision of non-gambling areas and strict machine-to-table ratios.

1968 Act casinos that have a minimum gambling area smaller than 500 sqm may be permitted a smaller increase in machine allocation on a sliding scale up to 80 machines which is proportionate to the overall size of the premises and non-gambling areas.

1968 Act venues that wish to increase their machine allocation under new proposals would be subject to the small casino licensing regime and the associated increase in operating licence annual fees.

### *Gaming machine-to-table ratios*

Currently small casinos apply a machine-to-table ratio of 2:1 and large casinos benefit from a ratio of 5:1. The consultation proposes to offer a single ratio to all casinos of five machines to every one gaming table (except those 1968 Act casinos with gaming areas smaller than 280 sqm or those choosing to remain with the old regime). Currently, there is no machine-to-table ratio for 1968 Act venues.

### *1968 Act Casino – size requirements governing gambling areas including table gaming and non-gambling*

The consultation considers the following options:

1. Maximum gambling area of 1,500 sqm like that of small 2005 Act casinos.

2. Maximum gambling area of 1,500 sqm, but with an exemption for 1968 Act casinos that are currently open and have a gambling area of 1,500 sqm or more, as set out in their premises licence plan on the date that the consultation was published. The exemption could be conditional and cease to apply if, for example, the operator attempts to increase the size of its gambling area or if the casino moves premises.

3. No maximum gambling area.

The consultation is clear that alternative proposals will be considered.

For the purpose of the size limits mentioned above, the Government intends to keep the same requirements for calculating non-gambling areas for both 2005 Act and 1968 Act premises.

These proposals do not apply for Scotland as it is for Scottish ministers to consider whether they want to amend the relevant regulations to permit these changes.

### *Sportsbook betting*

Sportsbook betting in casinos, which is only currently permitted in seven of the 122 operational casino venues in Great Britain, is also under consideration. The consultation proposes to allow all casinos to operate Sportsbook betting.

The DCMS proposes that casinos will be permitted up to 40 self-service betting terminals, dependent on their total gambling area, reducing on a sliding scale to 16.

If casinos wish to offer betting services, a non-remote betting operating licence would be required plus a remote betting operating licence for self-service betting terminals (SSBTs).

Again, this will not be changed in Scotland, unless Scottish ministers decide to do so having considered it independently.

## Chapter 2: Machine allowance for arcades and bingo halls

Adult gaming centres (AGCs) and licensed bingo premises are permitted to provide category D, C, B3 and B4 gaming machines within their venues.

Current legislation provides that 80% of all gaming machines within these venues must be category C or D gaming machines, with 20% in category B3 or B4. This is often referred to as the 80:20 rule. Premises licences granted before 13 July 2011 do benefit from a variation to the standard 80:20 rule, known as legacy rights, but these rights are not subject to change under current proposals, with operators being able to choose between legacy permissions and any revised entitlements that may be introduced. The legacy permissions allow AGCs to provide up to four B4 / B3 machines and bingo up to eight B4 / B3 machines.

The Government's White Paper considered developments in consumer demand, the declining relative value of stakes and prizes permitted on gaming machines and new player safety controls, which are now available in modern category B3 Gaming machines. The White Paper determined to amend the 80:20 rule and replace it with a 50:50 machine ratio between category B machines and C and / or D.

The current consultation proposes three implementation options:

1. Introduce the 50:50 rule while maintaining all current requirements provided by the Gambling Commission in relation to when gaming machine is "available for use".

2. Introduce the 50:50 with an additional requirement that any gaming machine device types offered in individual premises (whether cabinets, fixed or hand-held tablets in in-fill) comprise a minimum of 50% category C and D machines. Also, Category C and D gaming machine devices made available for use must be of similar size and scale to Category B.

3. Remove the 80:20 rule entirely, applying no requirements on set gaming ratios.

The proposals are significant for the industry, which is suffering from the increased cost of energy and staffing. Energy costs can be reduced by reducing the number of older, less energy-efficient C and D machines.

## Chapter 3: Cashless payments on gaming machines

Current rules mean that the use of debit cards for direct payments to gaming machines (including contactless payments via any payment apps) and any use of a credit cards for gaming machines are prohibited. The consultation makes

it clear that there will not be any change to the prohibition on the use of credit cards – as players using money that is not theirs increases the risk of harm.

We are, however, an increasingly cashless society, which has been expedited by the effects of Covid, and there is a recognition that there is a rationale for change in respect of debit card payments. The changes being considered are against the backdrop of ensuring that the protections for players are robust and effective.

The consultation on cashless payments has a focus on:

- Account verification measures, such as chip and pin or face ID on mobile payment systems.Spend thresholds.Maximum transaction and deposit limits. Minimum transactions times to slow the speed of the transaction itself.Player centric controls such as setting of voluntary time and spend limits and cooling off periods once a threshold has been reached.The provision of additional safer gambling messaging for cashless play.

- A possible requirement for the display of session times and net player position.

It is suggested that should cashless payments become permitted by way of amendments to secondary legislation, there will be a number of safeguards attached to the payment method in order to facilitate player protection.

## Chapter 4: Introduction of age limit on cash-out Category D slot-style machines

Category D gaming machines are the only category of machine that can be played by under 18s. They are low stakes and prizes machines which are commonly seen in seaside arcades and family entertainment centres (both licensed and unlicensed) and tend to be machines such as crane grabs, coin pushes and cash-out AMP slot-style machines.

It is the cash-out, slot- style AWP category D machines that are being looked at under this consultation, owing to concerns that they are similar in style and presentation to higher stake machines that can only be played by over 18s. Members of the Bacta trade association took voluntary action to ban under-16s from playing cash-out slot-style machines in 2021.

The consultation looks to move this voluntary approach into legislation. It would be an offence for a person to invite, cause or permit a child or young person to use cash-out Category D slot-style games.

A point of interest is that there is no proposal for the cash -out Category D slot-style machines to be required to be moved into an age-restricted area within premises. This would mean that operators will need to ensure that they have supervision, age verification and monitoring processes in place to ensure under 18s do not use these types of machines. Careful consideration will also need to be given to where such machines are sited in venues to which under-18s have access: near to a staffed cash or prize desk would be sensible.

## Chapter 5: Licensing authority fees review

The final chapter in the consultation relates to making changes to the fees that local licensing authorities can charge operators which hold gambling premises licences, both on application and through annual fees.

The fees charged are designed to cover the cost of administration of local authorities' gambling duties and gambling enforcement. This activity may include inspecting gambling premises to ensure that they are complying with their licence or dealing with complaints from residents or neighbours. Figures suggest that not all licensing authorities are inspecting gambling premises.

The maximum fees that licensing authorities can charge have not been updated since 2007.

DCMS is now proposing to increase these fees to allow local authorities to cover the costs of enforcement and administration of their gambling duties. The three proposed options are an increase to maximum fees of either 10%, 20% or 30%. The proposed increase will not provide local authorities with an automatic right to increase their fees, as they must be able to demonstrate the increase is necessary to undertake their licensing and regulatory functions.

The consultation closed on 4 October 2023.

**Nick Arron**
*Solicitor, Poppleston Allen*

# The role of deterrence and sanctions in licensing

There is no express reference to deterrence in the Licensing Act but that does not, argues **Philip Kolvin KC**, mean that it has no role to play

A licensing sub-committee considering an application for review of a premises licence under the Licensing Act 2003 is given a wide discretion, from taking no action to revoking the licence. As is well known, in exercising its discretion it must take the steps which it considers appropriate for the promotion of the licensing objectives. The question for consideration in this article is whether and, if so the extent to which, it may use its powers to impose a sanction or take into consideration a need for deterrence.

The discussion below covers the permissible limits of deterrent disposals as contemplated by the s 182 Guidance and applicable case law. It also considers the old case of *Regina v Knightsbridge Crown Court, Ex parte International Sporting Club* [1982] QB 304, and deals with whether its teachings remain relevant in a modern licensing environment.

## The nature of review proceedings

Although it is not a prerequisite for a review that there has been a past breach of a licence condition or harm to the licensing objectives, this will be so in almost all cases. In that sense, the licensing sub-committee will be considering what has happened in the past in order to decide what steps are appropriate in the future.

This is inherent in the statutory scheme itself. Section 4(1) of the Licensing Act 2003 imposes a duty on the authority to exercise its functions "with a view to promoting the licensing objectives" while each of the licensing objectives themselves is framed in terms of prevention or protection. In other words, the overriding duty of the authority is to promote the prevention of harm. It is not, for example, to punish anyone.

This essential approach, of looking backward at what the problem was in order to look forward to the appropriate remedial measures, was well-expressed in the Scottish case of *Lidl UK GmbH v City of Glasgow Licensing Board* [2013] CSIH 25 in which Lord MacKay, considering the similarly worded Licensing (Scotland) Act 2005, stated:

> *35. At a review hearing held in terms of section 38 of the 2005 Act a licensing board is required, in light of the terms of section 39 of that Act, to consider whether a ground for review of the premises licence in question has been established and, if a ground is established, whether it is necessary or appropriate for the purposes of any of the licensing objectives to take one or more of the steps listed in section 39(2). While a licensing board necessarily has to consider the earlier factual allegations upon which the application or proposal for review is made, the process of review is essentially forward looking. It involves examining whether the continuance of the particular premises licence in issue, without taking any of the steps listed in section 39(2), would be inconsistent with endeavouring to achieve the licensing objective in question. The process of review is therefore not directed to imposing a penalty in respect of some past event which is not likely to recur to an extent liable to jeopardise the licensing objective.*

The same notion – having an eye to the past in governing for the future – is also reflected in the s 182 Guidance regarding reviews:

> *11.20 In deciding which of these powers to invoke, it is expected that licensing authorities should so far as possible seek to establish the cause or causes of the concerns that the representations identify. The remedial action taken should generally be directed at these causes and should always be no more than an appropriate and proportionate response to address the causes of concern that instigated the review.*

## The role of deterrence

The Licensing Act assigns no express role to deterrence in the licensing system. This might be contrasted with criminal sentencing functions, in which the reduction of crime, including by deterrence, is one of the five statutory purposes of sentencing adults: s 57(2) Sentencing Act 2020.

However, the absence of express reference to deterrence in the Licensing Act does not mean that it has no role to play. It is not hard to imagine a licensing sub-committee reaching a conclusion that by imposing deterrent measures on a licensee, it may help to fix the gravity of the situation in the licensee's mind, so dissuading the licensee from a repeat

performance, thus promoting the licensing objectives in the future.

Indeed, while the Act does not refer to deterrence, the Guidance does, and of course the licensing authority is to have regard to the Guidance in exercising its functions: s 4(3). However, the reference in the Guidance to deterrence is unhelpfully fleeting. Amongst a number of different considerations, para 11.23 includes this sentence: "So, for instance, a licence could be suspended for a weekend as a means of deterring the holder from allowing the problems that gave rise to the review to happen again."

However, even this single reference is sufficient to highlight that remediation is not the only purpose of measures imposed following a review: deterrence might also have a role to play.

The role of deterrence has been considered in two cases under the Licensing Act 2003, which bear some consideration here.

In *R (Bassetlaw DC) v Worksop Magistrates' Court* [2008] EWHC 3530 (Admin) a licensee had failed a test purchase operation, twice serving alcohol to 14 year olds. The authority suspended the licence for a month. On appeal, the district judge overturned the suspension, stating that it was not his job to administer punishment. The council successfully appealed to the High Court.

Slade J was impressed by what is now para 11.26 of the Guidance, which states that where premises have been used for criminal purposes, the job of the authority is to take action in the interest of the wider community and not that of the licensee. This, she thought, supported the notion of a deterrent measure. She said:

> *32 Accordingly, in my judgment, the district judge misdirected himself by confining his consideration of the case to the test which would be appropriate where no criminal activity was concerned. Where criminal activity is applicable, as here, wider considerations come into play and the furtherance of the licensing objective engaged includes the prevention of crime. In those circumstances, deterrence, in my judgment, is an appropriate objective and one contemplated by the guidance issued by the Secretary of State.*
>
> *33 The district judge held that the provisions are not to be used and cannot be used for punishment. That may strictly speaking be correct. However, in my judgment deterrence is an appropriate consideration when the paragraphs specifically directed to dealing with reviews where there has been activity in connection with crime are applicable. Therefore, when the district judge confined himself, as in my judgment he did, to the considerations of remedying, …. he erred in law. In my judgment, that error is sufficient to undermine the basis of his decision.*

The decision is undoubtedly correct. Reviews do not provide an opportunity to punish the licensee for their sins. And where crime is involved, deterrence may be part of the equation.

However, it may be asked whether the decision goes far enough. Does there have to be a crime to underpin a deterrent measure? What of a licensee who had made a decision to play fast and loose with safeguarding, or public safety? It is certainly arguable that the learned judge placed undue emphasis on the interests of the wider community just in criminal cases. The general idea that licensing is an exercise carried out for the benefit of the public and not the licensee is neither novel nor even exclusive to the Licensing Act. For example see, *Leeds City Council v Hussain* [2002] EWHC 1145 (Admin), a private hire case, in which Silber J held that since the purpose of the power to suspend or revoke private hire licences was public protection, the personal circumstances of the driver are irrelevant except, very rarely, to explain or excuse their conduct: paras 25-26.

It is not clear, therefore, why deterrence is an appropriate approach where there has been a crime and not in other cases. In any case, it is a crime contrary to s 136 of the Licensing Act 2003 to breach a licence condition, and so there is on any view a low bar for the application of deterrent measures.

The height of the bar fell for consideration again in *East Lindsey DC v Hanif* [2016] EWHC 1265 (Admin), 2016 in which the authority had revoked a licence where the licensee had employed illegal workers but the district judge had overturned the decision, including because there had been no conviction. In turn, his decision was overturned by the High Court. Jay J stated:

> *13…. In my view the district judge clearly erred. The question was not whether the respondent had been found guilty of criminal offences before a relevant tribunal, but whether revocation of his licence was appropriate and proportionate in the light of the salient licensing objectives, namely the prevention of crime and disorder. This requires a much broader approach to the issue than the mere identification of criminal convictions. It is in part retrospective, in as much as antecedent facts will usually impact on the statutory*

> *question, but importantly the prevention of crime and disorder requires a prospective consideration of what is warranted in the public interest, having regard to the twin considerations of prevention and deterrence. The district judge's erroneous analysis of the law precluded any proper consideration of that issue. In any event, I agree with Mr Kolvin that criminal convictions are not required.*

In other words, not only is the jurisdiction forward-looking, but deterrence provides an appropriate basis for the imposition of measures.

If commission of a crime is not the critical factor, is deliberate misconduct? Again, that would be to impose too narrow a rule. There will be cases where a licensee has simply not paid enough attention to the licensing objectives, or was slipshod in its management. It is hard to see, in such a case, why deterrence should not form part of the consideration of the licensing authority, to bring it home to a licensee that negligent mismanagement is not tolerable.

In summary, deterrence can be part of the authority's armoury in all cases and can be pressed into action when the case calls for deterrent measures: there are no artificial exclusions.

The unresolved question, however, concerns the impact of taking a deterrent approach. As stated above, the Guidance seems to suggest it can be used to impose a short sharp shock, eg, suspension for a weekend. It would be fair to say that it is unlikely that a condition could be used as a deterrent measure because a condition is either appropriate or it isn't. If it isn't, it could not be added anyway as a deterrent. It also seems very unlikely that revocation could ever be imposed as a deterrent measure. A licensee who is put out of business is not deterred but prevented. Nor, in my view, could a measure be imposed to deter others: premises licensing is focused on the management of the instant premises by the instant licensee.

Therefore, in practice, while I argue that deterrence has a wider potential role than is contemplated by the Guidance and case law, by deduction it is probably only material in fixing the length of any suspension imposed. Even then, this is counterbalanced, as the Guidance states, by the requirements of proportionality.

## Sanctions

It goes without saying that sanctions are widely employed in the field of regulation. But are they apposite under the Licensing Act?

Starting with an example close to home, s 121 gives the Gambling Commission express power to impose a penalty where there has been breach of a condition of the licence. The Commission's *Statement of Principles for Determining Financial Penalties* states, at para 2.6, that there are two elements in a financial penalty, namely a) an amount to reflect the detriment suffered by consumers and/or to remove any financial gain made by the licensee, and b) an amount that reflects the seriousness of the contravention or failure, the impact on the licensing objectives and the need for deterrence.

In *Daub Alderney Limited v The Gambling Commission* [2022] UKFTT 00429 (GRC) Findlay J, upholding a penalty of £5,850,000 imposed by the Commission's Regulatory Panel on a non-compliant operator, strongly endorsed a deterrent approach, stating:

> *82. The Panel rightly considered the need for a deterrence uplift to the penal element, having regard to the principle that non-compliance should be more costly than compliance and that enforcement should deliver strong deterrence against future non-compliance.*

From this, we can safely conclude that where the statute confers an express power to impose a sanction, the regulator may take a conventional sentencing approach in fixing the sanction, including deterrence.

Outside the field of licensing, the courts have been prepared to uphold stiff sanctions for non-compliance. In one leading case, *Bolton v Law Society* [1994] 2 All ER 486, Lord Bingham MR said:

> *Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors' Disciplinary Tribunal…. There is in some of these orders a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment… The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied readmission … A profession's most valuable asset is its collective reputation and the*

> *confidence which that inspires… The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.While Lord Bingham was speaking of solicitors, what he had to say applies to professions across the board, whether legal, medical or financial. The concepts underpinning schemes for professional registration share some of the language concerning fitness and propriety and the need to maintain confidence in the professional register: see for example, Harris v The Registrar of Approved Driving Instructors [2010] EWCA Civ 808 at para [30].*

However, while professional regulation and the Licensing Act 2003 are both regulatory schemes involving evaluative judgements about what the public interest requires, the considerations at play are different. A deviant professional harms the standing of their profession, reduces hard-won public confidence in the profession and weakens the trust between members of the profession and their clients, so the penalty is imposed to maintain or restore public confidence. A licensing review is focused on making the premises safer for the public to visit. In short, the functions of disciplinary tribunals are penal; the functions of licensing authorities are not. While some of their considerations cross over – for example, deterrence – they are nevertheless engaged in altogether different exercises. Therefore, it is extremely difficult to envisage a draconian penalty imposed on a licensee to improve public confidence in the licensing system surviving the scrutiny of the High Court.

## *Regina v Knightsbridge Crown Court, Ex parte International Sporting Club (London) Ltd*

The *Sporting Club* case is one of some antiquity, concerning long-repealed legislation, and is not found in any modern licensing textbooks. Nevertheless, in law antiquity can confer authority – precedents do not have shelf-lives. Conversely, the absence of a case from a book is no warrant of irrelevance. *Sporting Club* has enjoyed a comeback in some recent hearings, so it is necessary to consider if this presages a second coming or an echo from beyond the grave.

In *Sporting Club*, casino operators had been guilty of serious breaches of the Gaming Act 1968 extending over a period of years. The licensing justices cancelled their licences on the ground that they were not fit and proper to hold them. The operators accepted that they had not been fit and proper at the time of that determination. But they had an ace up their sleeve. By the time their appeal had reached the Crown Court, they had sold their shareholding to completely new operators, who contended that they were fit and so the licences should not be cancelled. The Crown Court was not interested in this late turn of events and upheld the cancellation. The High Court, however, held that the Crown Court should have taken into account the position at the time of the appeal, and so had been wrong to exclude consideration of the corporate turnaround.

However, said the High Court, that is not to say that a completely new management structure is necessarily a trump card. Just because the licensee is fit at the point of appeal does not guarantee the resuscitation of their licence. Griffiths LJ said:

> *We have no hesitation in saying that past misconduct by the licence holder will in every case be a relevant consideration to take into account when considering whether to cancel a licence. The weight to be accorded to it will vary according to the circumstances of the case. There may well be cases in which the wrongdoing of the company licence holder has been so flagrant and so well publicised that no amount of restructuring can restore confidence in it as a fit and proper person to hold a licence; it will stand condemned in the public mind as a person unfit to hold a licence and public confidence in the licensing justices would be gravely shaken by allowing it to continue to run the casino. Other less serious breaches may be capable of being cured by restructuring.*
>
> *It is also right that the licensing justices or the Crown Court on an appeal should have regard to the fact that it is in the public interest that the sanction of the cancellation of a licence should not be devalued. It is obvious that the possibility of the loss of the licence must be a powerful incentive to casino operators to observe the gaming laws and to run their premises properly. If persons carrying on gaming through a limited company can run their establishment disgracefully, make a great deal of money and then when the licence is cancelled sell the company to someone who because he is a fit and proper person must be entitled to continue to hold the licence through the company, it will seriously devalue the sanction of cancellation… [I]f because of the restructuring the court considered that the company was now a fit and proper person, but it also found that in the past the company had used the premises for an unlawful purpose, it would certainly be open to the court in the exercise of its discretion to cancel the licence. A licensing authority is fully entitled to use the sanction of cancellation in the public interest to encourage other operators or would-be operators of gaming establishments to observe the law in the area of their jurisdiction.*

It is right to say that that dictum remains relevant in cases

where the regulatory body is imposing a sanction, in that particular case the sanction of cancellation. Indeed, the language and concepts used are redolent of the approach of Lord Bingham in *Bolton.* But, in my view, it is equally true to say that the dictum has no application to bodies which are not charged with the function of imposing sanctions. A licensing authority has no power to impose a sanction of cancellation. Its role is to impose measures to protect the licensing objectives in the future. Therefore, the ideas propagated in *Sporting Club*, including whether the licensee will "stand condemned" in the public mind, and whether "public confidence" in the licensing system would be affected by a failure to cancel the licence, have passed into history. They have no place in the modern licensing system.

That conclusion might be tested. Imagine a publican who had committed some egregious breach, for example dealing drugs on the premises. By the time the review is heard he has sold the pub on to a perfectly respectable national operator. If *Sporting Club* is applied literally, it will be open to the sub-committee to revoke the licence because of the depredations of a party who has long since quit the scene. The sub-committee might wish to revoke the licence to make a point. However, even in this stark case, once it accepts that the new operator will run the premises lawfully, I believe it would be wrong to do so. That is because the licensing objectives do not require that the premises licence be revoked. The criminal justice system will deal with the publican for his past sins. The licensing system will ensure that the premises are run properly in the future.

## Conclusion

This article has shown that there is some commonality between systems of licensing, wider regulation and sentencing. That throws up some common approaches too. In the case of the Licensing Act, there is some room for a deterrent approach, and probably in a wider set of circumstances than remarked upon in the case law and guidance, although the scope for actually applying strongly deterrent measures remains limited.

On the other hand, there is clear blue water between the remedial approach of a licensing authority and the approach to sanctions and punishment practised by disciplinary and sentencing bodies. The licensing authority under the Licensing Act 2003 does not apply sanctions, and should not be concerned with public confidence in itself, in the licensee or in the system more widely. Its job is to take measures appropriate to promote the licensing objectives, no more and no less.

The case of Sporting Club was correct on its facts. But it has nothing to tell a modern licensing authority acting under the Licensing Act 2003. It should be allowed to rest in peace.

**Philip Kolvin KC**
*Barrister, 11 KBW*

# Licensing and disciplinary law – perfect bedfellows?

Licensing practitioners looking for fresh fields to explore might well consider branching out into professional and sporting regulation. There's a fascinating world out there, just waiting for those willing to accept the challenge, says one who has done just that. **Jeremy Phillips KC** puts the case

In this brief essay, I hope to persuade a few of my licensing colleagues, at least, that it may be worthwhile giving the field of disciplinary law more than a second glance.

First, what do I mean by "disciplinary law"? Well, for the purpose of this article I am using the phrase to encompass the law as it embraces the widest possible range of regulated individuals in both the professional and sporting arenas.

In the former camp, we have (to name but a very few): solicitors (Solicitors Disciplinary Tribunal), barristers (Bar Tribunal & Adjudication Service) and chartered & certified accountants (Institute of Chartered Accountants in England and Association of Chartered Certified Accountants), as well as a host of healthcare regulators, including doctors (General Medical Council) and nurses (Nursing and Midwifery Council) – the latter categories all coming under the supervisory umbrella of the Professional Standards Authority for Health and Social Care.[1] There are, of course, dozens more…

The sporting field is similarly well served: from the specialist disciplinary panels or tribunals of the Football Association (FA), the Rugby Football Union (RFU) and the English Cricket Board (ECB) to those of the British Horseracing Authority and the Lawn Tennis Association. Again, every major sport (and most minor ones) will have its own rules and regulations, the breach of which can lead to fines, restrictions, or even a lengthy ban.

On a personal note, since I ventured into the disciplinary space, the number of occupations I have experienced vicariously has expanded enormously. In addition to my historic specialities in the fields of pub, casino, and taxi law, I have come to learn all about the fascinating discipline of the international archer, the necessary obsessions of a race horse owner and the (frankly exhausting) life of the busy inner-city midwife!

Sometimes, indeed, it has all made the life of an everyday knockabout barrister seem even a little, er … dull?

In what way, then, can the fields of sporting and professional regulation be said to be similar to those which control the licensing of premises and individuals to operate bars, nightclubs, casinos, taxis and sex establishments (again, to name but a few of the many categories of businesses falling within the purview of both *Paterson's* and the *Journal of Licensing*)?

First and foremost, I suggest that the primary aim of both regimes is to ensure that services provided (in the broadest sense) are made available in a manner that accords with the law, as well as publicly accepted standards of decency, honesty and propriety. In this context there is considerable crossover. For example, in the gambling[2] dispute of *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67 the Supreme Court held that where dishonesty was in question, the fact-finding tribunal had to ascertain (1) the *actual* state of the individual's *knowledge or belief* as to the facts before proceeding to consider whether (2) the conduct was honest or dishonest by *the objective standards of ordinary decent people*. Although only handed down in 2017 *Ivey* has since been applied in over 250 decisions of the Administrative, Divisional and Chancery divisions of the High Court, as well as the Court of Appeal. Within that total some 24 challenges originated from decisions of the Solicitors Disciplinary Tribunal and fifteen from the General Medical Council. Other disciplinary decisions turning on "honesty" related to those arrived at by the Bar Standards Board, the Financial Conduct Authority, the Police Appeals Tribunal and the General Dental Council. And these are just the cases that have reached the senior courts; it is certain that *Ivey* will have been considered and applied in many thousands of cases decided by regulatory tribunals within the intervening years.

1 The PSA, previously known as The Council for Healthcare Regulatory Excellence, scrutinises and oversees the work of nine health and care regulators.

2 I accept, of course, that *Ivey* emanated from a contractual dispute rather than a licensing issue. However, a fundamental element of the case was the concept of cheating within s 42 of the Gambling Act 2005 which, it was argued connoted dishonesty as previously defined in *R v Ghosh* [1982] QB 1053.

So here we find a gambling case underpinning the concept of honesty sitting at the very core of so many disciplinary proceedings concerning individuals working within the professions, as well, of course, as those employed in for example, the gambling industry,[3] taxis & PHVs, nightclubs and the security industry, to name but a few.

Whilst the predecessors to the Licensing Act 2003 and the Gambling Act 2005 of course afforded the decision makers a far wider discretion[4] when assessing the fitness and propriety of applicants, all licensing practitioners will accept that those issues remain at the heart of many cases purporting to consider whether the actions of individuals have led to a breach of the licensing objectives.

Secondly, in both regimes the outcome of cases can fundamentally alter the course of the subject's life. The owner of a casino, nightclub or hackney cab may well be ruined if they are found to have acted contrary to conditions on their licence, or some statutory provision. Similarly, a solicitor, doctor or racehorse owner will often be looking disaster in the face if found to be in breach of the rules which underpin their occupation.

To succeed in either instance the lawyer requires a range of skills:

- The ability to understand the particular complexities and subtleties of the regime concerned, whether it involves gambling, clubbing, taxis, legal or medical practice, horseracing or the life of a professional footballer.
- It is true to say that many lawyers (of which I am certainly one) are fascinated by the challenge – and privilege - of journeying into such unknown territories.
- Once that detail is mastered, the lawyer needs to understand what has gone wrong? How has their client fallen foul of their regulator?
- Next, what can be said in mitigation of past events. Will it be sufficient to avoid revocation of the relevant licence, or striking off?
- After that, even if a plausible explanation can be advanced for past events, to what extent is there evidence of genuine insight on behalf of the licensee or registrant? In disciplinary law the latter very often forms a specific procedural hurdle to be overcome; in licensing cases it is more usually just one issue raised in the overall consideration of the case.
- That, however, is far from being the end of the matter, for the greatest challenge in both regimes lies in presenting all such practical and occupational issues, together with any relevant law on the issue, to the decision-maker in a manner that is both attractive and persuasive.
- The very evident demand that exists for the leading practitioners is cogent evidence, I suggest, of the fact that few lawyers indeed excel in each respect.

Moving on, the tribunals determining cases in both disciplinary and licensing cases tend to include lay members (often, in the case of the former, a person with practical experience of the particular regime), supported by a legal adviser. In some disciplinary regimes (eg, the LTA and British Equestrian Foundation) the lawyer will actually chair the panel, whilst retaining an equal vote on all substantive issues with their fellow panellists. Otherwise, broadly the same considerations will generally apply to issues such as hearsay evidence (*Westminster City Council v Zestfair Ltd* (1989) Times, 23 June), ostensible bias (eg, *Locabail (UK) Ltd v. Bayfield Properties Ltd and another* [2000] IRLR 96), standard of proof (civil: balance of probabilities), the role of policy and delegation (*R (on the application of Springhall) v Richmond upon Thames London Borough Council* [2006] EWCA Civ 19) and guidance (*R (on the application of the British Beer and Pub Association) v Canterbury City Council* [2005] EWHC 1318 (Admin)), natural justice & procedural fairness (eg, *R (on the application of Cleary) v Highbury Corner Magistrates' Court* [2006] EWHC 1869 (Admin)), respect to be accorded to the first instance decision on appeal (eg, *Ghosh v GMC* [2001] UKPC 29) and so on.

In conclusion, whilst both disciplinary and licensing cases can give rise to issues of the utmost importance to those who are their object, invariably they do not involve matters of life and death (such as arise in coronial law, for example), the break-up of families, or the incarceration of prisoners. As a consequence, I have found that those who practise in both fields have a certain indefinable commonality and corps d'esprit which is understandably not always evident in those fields of jurisprudence dwelling on the darker side of humanity.

**Jeremy Phillips KC**
*Barrister, Francis Taylor Building*

3 Noting, of course, that the licensing objectives include preventing gambling from being a source of crime or disorder, being associated with crime or disorder, or being used to support crime and ensuring that gambling is conducted in a fair and open way.

4 See, for example, the famous dicta of Lord Halsbury in *Sharp v Wakefield* [1891] AC 173: ''An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* 5 Rep 100a; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: *Wilson v Rastall* 4 TR at p 757.''

# Institute of Licensing News

2023 marks the 20th year since the official creation of the Institute of Licensing. The original organisation, the Local Government Licensing Forum (LGLF), was founded in 1996, but the move to transform it to the Institute of Licensing followed member consultation and a conscious decision to embrace and encourage a broad membership bringing together all parties within the various licensing fields.

The last 20 years have seen a huge amount of change both in society and within licensing law and practice, with each year bringing challenges, celebrations, frustrations and never a dull moment!

## News from the Board and Team

### *The Board*

**David Chambers**

We were incredibly sorry to hear that David passed away peacefully on Saturday 2 September. He was under palliative care and had been battling with cancer since before Easter. He was being well looked after and was surrounded by his close friends.

David had been a steady presence on the Board of the IoL, since the merger with the Society of Licensing Practitioners in 2005 – a merger that David helped to facilitate. He served as a trustee and director of the IoL for many years, but in the last few years had opted to serve as an advisor. In addition, David worked with the London Region Executive Committee acting as Returning Officer for most AGM meetings, in addition to providing support and advice throughout this time.

In both capacities David was a steady hand with a measured response, and was our "go to" in the event of queries about the regional constitution, memorandum and articles, AGM procedures etc. He taught us a huge amount, was always incredibly helpful, supportive and generally just a wonderful person.

We will all miss David very much. We have a tribute in our LINK magazine and will always remember David with fondest memories, feelings which I know are shared by many IoL members.

As some of you will already be aware, our Vice Chairman John Garforth JP resigned from the IoL Board and North West Regional Committee in July 2023. We are sincerely grateful to John for his hard work and commitment during his term as Vice Chairman, and as Director for the North West Region and respect his decision to step down in order to focus on his increased responsibilities at Oldham Council and his work as a Justice of the Peace.

Following John's decision to step back, it was a pleasure to welcome Tracy Brzozowski on her return to the Board as Director for the North West region. Tracy was previously North West Regional Director in 2015 and was re-instated in September. Tracy will ensure that the North West region continues to be strongly represented at Board level.

### *The Team*

We have missed Hannah this year as she has taken time off to add to her family (her beautiful baby girl was born in June) and we are looking forward to having her back on the team early next year.

In the meantime, we are delighted to say that Stephen Lonnia will join the team as Membership and Events Coordinator in November. Many of you will know Steve as he is a long-standing member of the IoL and has worked at Sheffield City Council for many years, and we are very much looking forward to welcoming him to the team.

### *A new system*

Work continues on our new IT platform and website, and we hope to start testing the system shortly. As a result of the ongoing work, all membership renewals for 2023/24 have been processed manually this year. If anyone is unsure whether their membership has been renewed, needs help or has any queries on membership, please email membership@instituteoflicensing.org

The new IT system and website will provide a better, more interactive and intuitive online user experience for our members as well as providing all the functionality of the current system.

If you haven't heard from the team regarding your membership, please get in touch by emailing **membership@instituteoflicensing.org.**

## IoL Training and Events

### *11 September: Gambling Conference (London)*

We had a fantastic Gambling Conference in September at the Hippodrome in London. A brilliant programme of speakers resulted in an interactive and informative day for everyone, and we were very well looked after by the Hippodrome

team, with the venue providing the perfect setting for a day of gambling discussions. We are very grateful to all those involved, and for our sponsors who supported the event.

### *3 October: Taxi Conference (Northampton)*

Thanks are also owed to our speakers and sponsors for supporting our Taxi Conference in Northampton. Another full programme including a mock hearing which was very well received, alongside other brilliant speakers, an operator panel discussion and a chance to discuss the latest cases impacting on taxi and private hire licensing. We were thrilled to see more industry members present and the feedback has been extremely complimentary. A big thank you to all concerned.

### *15 - 17 November: The National Training Conference (Stratford-upon-Avon)*

This issue of the *Journa*l will of course be issued to coincide with the 2023 National Training Conference (NTC). The NTC is our biggest event annually, with over 70 speaking sessions involving nearly 100 speakers and panelists, covering all areas of licensing law and practice.

This event is an absolute pleasure to organise and we are always grateful to be back year on year, supported by a growing number of sponsors, speakers and delegates. It's wonderful to welcome back those of you who have attended previous NTCs and equally, those of you who are attending for the first time. We are very much looking forward to spending three licensing-filled days of networking, learning, discussion and professional development!

A huge thank you to everyone for making this event possible. Our sponsors provide a unique vibe and buzz throughout, our speakers deliver an unequalled programme, and our delegates bring the event to life. A huge thank you to the team as well for working together to organise the sessions, evening activities, sponsorship and of course the Gala Dinner and Awards presentations.

## Awards

### *The Jeremy Allen Award*

The 12th 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 3rd 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. The award is open to nomination from Board members and every nomination is thoroughly 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 who have 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 – 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.

## Engagement

We are proud to continue to support and organise key stakeholder groups to enable and promote dialogue in all areas, including the National Licensing Forum (NLF), the Local Alcohol Partnerships Group (LAPG) and the National Taxi and Private Hire Licensing Working Group (NTPHLWG).

The groups all meet regularly, mainly through virtual meeting arrangements, and in doing so bring together stakeholders from industry, national and local government, police and other relevant bodies to discuss current and emerging issues together with practical solutions where possible. They play a vital role in communication, fostering mutual understanding and supporting partnership approaches.

## Thank you

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

A huge thank you to all the team for their hard work and support again this year. We have had the additional challenges of an outgoing IT system and website and its incoming replacement to contend with this year, but we are very much looking forward to the new system and the efficiency savings we hope will be forthcoming as a result.

There are other key people contributing huge amounts to the work of the IoL, including of course our Board of Directors, regional officers, trainers, speakers and sponsors. The development of the IoL since its formation as the LGLF in 1996, has been made possible by the contributions of so many people in so many ways. Thank you to all those who have been part of the journey so far!

**Sue Nelson**
*Executive Officer, Institute of Licensing*

# Join your region!

If you would like to get involved in your region or find out more about who your Regional Officers are visit our website **www.instituteoflicensing.org** or email us via **info@instituteoflicensing.org**.

- EASTERN
- EAST MIDLANDS
- HOME COUNTIES
- LONDON
- NORTHERN IRELAND
- NORTH EAST
- NORTH WEST
- SCOTLAND
- SOUTH EAST
- SOUTH WEST
- WALES
- WEST MIDLANDS

# Make yourself known to one and all in all your dealings

Company law imposes certain requirements on individuals and businesses to fully identify themselves on their letterheads their emails, their premises and in their licence applications, as **Charles Holland** explains

In most licensing regimes, there is nothing to prevent companies, partnerships or limited liability partnerships (LLPs) from applying for and holding licences.

Where an Act says that a "person" may apply for a licence, unless the contrary intention appears, a "person" includes a body of persons corporate or unincorporate: s 5 and schedule 1 of the Interpretation Act 1978. An authority which has a policy of only accepting applications from individuals for, say, a private hire vehicle operator's licence, is (certainly in my view) not acting lawfully.

Where an Act requires something to be done by a human (a natural person), it will usually use the term "individual" – a designated premises supervisor, for instance, must be an individual: s 15 Licensing Act 2003.

It is of course very common for commercial activity to be conducted by companies. partnerships, and now LLPs, and there is – of course – nothing inherently wrong in this.

However, as these non-human persons are less easy to identify than human individuals, the law requires specific trading disclosures to be made.

For companies, many of these requirements are contained in the less-than-snappily titled Company, Limited Liability Partnership Business (Names and Trading Disclosures) Regulations 2015 (CLLPBR), as well as provisions in primary legislation at ss 82 – 85 Companies Act 2006.

The regime for general partnerships (which will include informal "Mom and Pop" operations) are (confusingly) contained in ss 1200 - 1206 of the Companies Act 2006 (which also imposes obligations on sole trading individuals).

LLPs are made subject to a modified CLLPBR regime by Part 3, Chapter 4 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations.

Overseas companies are subject to a mirror regime in the Overseas Companies Regulations 2009.[1]

In practice, all these statutory trading disclosure requirements are frequently honoured more in the breach than in compliance. This is less than optimal for several reasons.

Both regulators and the public need to know who they are dealing with. This is not just a "nice" thing for the entity to do – it may have **civil consequences**. If, for instance a limited company cannot show that persons were put on notice that they were dealing with it, then its shareholders may be deprived of the benefit of limited liability if a claim is brought by that person, undermining the whole point of incorporating in the first place. Entities may find claims they bring dismissed if breach of disclosure requirements caused prejudice to a defendant: see eg, ss 83 and 1206 Companies Act 2006.

Furthermore, breach of the disclosure requirements without reasonable excuse is of itself a **criminal offence** on the part of both the company and every one of its officers who are in default (including shadow directors) – see reg 28. This can assume an importance in licensing cases where there are allegations of fronting.

The full remit of disclosures is outside the scope of this article, and any entity – be it a company, general partnership, LLP, or an individual whether acting on their own part or for a "non-entity", such as an unincorporated association – needs to take specific legal advice.

The examples below may help to show the sort of requirements imposed, and may indeed ring alarm bells for some readers. I will use CLLPBR as an example but the requirements on LLPs are materially identical. More limited disclosure requirements are imposed on general partnerships and individuals.

1 Overseas companies which have some form of physical presence in the UK must register as such, and now those which own freehold or leasehold property are subject to a regime of compulsory registration (see Part 1 of the Economic Crime (Transparency and Enforcement) Act 2022).

## Licence applications

Regulation 24(1)(f) CLLPBR requires every company to disclose its registered name on its applications for licences to carry on a trade or activity.

In many licensing regimes, there is nothing to stop a company applying for, and holding, a licence in the name of an agent. But where it does so then if the application or licence is – *in reality* – made by the company, then it should disclose its name.

## Business letters and websites

The effect of regs 24(1) and (2) and 25(1) and (2) CLLPBR is, amongst other things, to require every company to disclose the following on all its business letters and websites:

- its registered name;
- the part of the UK in which it is registered;
- its registered number; and
- the address of its registered office.

This means that every email a company sends to a third party should have a footer with this information on. The typical format would be along the lines of "ABC Limited, registered in England and Wales, CRN 1234567890, Registered Office: 1 Acacia Avenue, Abingdon OX14 1AB". It is a matter of (unresolved) debate as to whether a link to a website displaying this information would suffice.

In CLLPBR a "website" "includes a reference to any part of a website relating to that company which that company has caused or authorised to appear": reg 29(d). In my view a "website" includes an app.

Some companies seem to make the requisite disclosure *en passant* and inadvertently in terms and conditions or privacy policies buried in websites. In my view it is far preferable (and safer) for the disclosure to be easily spotted at the footer of a website.

Where (like The Institute of Licensing) a company is exempt from the obligation to use the word "limited" as part of its registered name under s 60 of the Companies Act 2006, the disclosure must also include the fact that it is a limited company. The same obligation applies to a community interest company.

## Notices and other official publications

The same disclosure requirements apply to "notices and other official publications". This may be thought to cover statutory advertisements of licensing applications, and policies, procedures, records and books required to be kept to comply with licensing conditions.

## Premises displays

Regulation 22(2) CLLPBR requires a company to display its registered any at any location at which it carries on in business. The display must be in characters that can be read with the naked eye: regulation 20.

In my experience, company emails and websites (including those sent and maintained by major plcs, global entities and – shock horror – firms of solicitors) very frequently fail to comply with these requirements. An interesting question is the extent to which professionals who act for non-compliant entities are under a duty to point out such defects!

Where traders deal with consumers remotely by websites and apps (as most private hire vehicle operators do) they must in addition (subject to some exceptions) comply with the information provision requirements of Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. These requirements are highly prescriptive and require a careful examination of the process of the given website or app.

Section 27 of the Licensing Act 2003 makes provision for the automatic lapsing of a premises licence if the holder of the licence becomes insolvent or is dissolved. If an application to reinstate the licence is not made within 28 days of the licence, and the license lapses, there is no prospect of reinstatement under s 50. This means it is a bad idea for a licence to be held by a general partnership with no partnership agreement excluding s 33(1) of the Partnership Act 1890, which automictically dissolves a partnership on the death or bankruptcy of any partner.

Furthermore, companies can and do go insolvent or get dissolved (a failure to file accounts on time will do). One option I have seen used in practice is the formation of a specific limited company which holds the licence but it is otherwise "dormant" within the meaning of s 1169 Companies Act 2006 (so that within any given accounting period it has no significant accounting transaction). So long as such a company makes the necessary annual filings with Companies House, it can never go insolvent nor be dissolved – thus completely removing the risk of a s 27 lapsing. Whether such a company "carries on, or proposes to carry on a business which involves the use of premises for licensable activities" within the requirements of an applicant for a premises licence in s 16(1) of the 2003 Act is a matter for debate.

The 2003 Act admittedly casts a wide net as to the qualification for a licence, including those who simply want the insurance policy of a "shadow" licence (see *R (Extreme Oyster)* v. *Guildford BC* [2013] EWHC 2174). It has long been established in alcohol licensing that agents can derive authority from their principal's licence (*Williamson* v. *Norris* [1899] 1 QB 7) and vice versa (*Mellor* v. *Lydiate* [1914] 3 KB 1141).

In the recent cases of *Uber London Ltd v Transport for London* [2022] 1 WLR 2043 and *Uber Britannia Ltd v Sefton MBC* [2023] EWHC 1975 (KB) the courts held that a private hire vehicle operator's licence could not be used as such by agents – this is a question which may crop up if and when the latter case reaches the Court of Appeal.

The use of corporate vehicles such as single-purpose dormant licence-holders makes compliance with CLLPBR, and transparency in general, all the more vital.

It is hard to see how a regulator can properly regulate those who fail to comply with the minimum legal requirements of trading disclosures, and in my experience non-compliance is an immediate "red flag" in a review situation. Non-compliance may not cause an issue in 99.9% of companies for 99.9% of the time, but given the civil and criminal consequences of what are easy to satisfy requirements, why not comply?

**Charles Holland**
*Barrister, Francis Taylor Building and Trinity Chambers*

# Just how malleable are the 2003 licensing objectives?

The recent *Porky Pint* judgment has caused **Richard Brown** to ponder on the surprisingly nebulous status of the licensing objectives

"The creatures outside looked from pig to man, and from man to pig, and from pig to man again; but already it was impossible to say which was which." George Orwell, *Animal Farm*

We were treated by Philip Kolvin KC to a succinct account in *Journal of Licensing 36* of the unusual circumstances of the case of *The Porky Pint*.[1] Reading the judgment itself seems like a peering through a window into a strange and foreign world, of tiers and masks, bubbles and the "rule of six", of scotch eggs and eating out to help out. As LP Hartley wrote in *The Go-Between*, "The past is a foreign country; they do things differently there." My intention is to dig a little deeper into some talking points arising from the case. The judgment of Fordham J has poked the bear of some fundamental basics of licensing such as the extent, scope, status and malleability of the licensing objectives, and how they interact with other factors – s 182 Guidance, policy, case law, legislation – to which a licensing sub-committee must have due regard.

The facts of *The Porky Pint* are this. In essence, the landlord of the Porky Pint, Paul Henderson, had taken great exception to pandemic restrictions and indeed the very notion of a pandemic, and resolved to operate his bar outside of the pesky strictures of the legislation passed in response to the pandemic. Following a licence review application instigated by the police as a responsible authority, Stockton-on-Tees Borough Council's licensing sub-committee revoked the premises licence. On appeal by Mr Henderson, Teesside Magistrates' Court agreed with the borough council. Mr Henderson asked the district judge to state a case for the opinion of the High Court.

Three questions were put to the High Court, of which two are relevant to this article:

*Was the district judge right to consider matters of public health when considering the four licensing objectives?*

*Was the district judge right to take into account behaviour which did not result in a criminal prosecution for the purposes of determining the appeal?*

Perhaps inevitably, in the circumstances, the answer to both questions was a firm "yes". Fordham J's judgment serves as a useful reminder of some fundamental but sometimes overlooked aspects of licensing decision-making.

The questions related to the scope and extent of the licensing objectives. Are they airtight silos which admit nothing outside of strictly defined parameters? Or are they porous and malleable – not exactly a free-for-all, but capable of absorbing other concepts while retaining their intrinsic strength? Although termed "licensing" objectives, can they be engaged by events which are not themselves related to licensable activities or where such a link is more tenuous?

A further question arises. What is the status of the licensing objectives, bearing in mind the legislative scheme, the s 182 Guidance, statements of licensing policy, case law (ie, the interpretation of the statutory provisions) and other legislation to which local authorities must have due regard? If matters which do not fall strictly within the definition of, as in *The Porky Pint*, public safety, or if allegations involving matters which were not criminal offences when the legislation was enacted can nevertheless be relevant, can entirely separate matters such as financial benefits, properly be a consideration for licensing sub-committees?

## Scope and extent of the licensing objectives - no smoke without fire

### *The licensing objective of "crime and (/or) disorder"*

*The Porky Pint* is not the first time a point of principle (to put it neutrally) has led to a publican becoming embroiled in a legal battle. It is also not the first time the interpretation of the licensing objectives has been put to the test.

The ban on smoking in public places in Part 1 of the Health

1 *The Porky Pint Ltd v Stockton On Tees Borough Council* [2023] EWHC 128 (Admin).

Act 2006 has previously been in the crosshairs. At the fag end of 2008 Hamish Howitt, the owner of a Blackpool bar, rolled up to the High Court having continued to permit his customers to smoke indoors in contravention of the then new legislation, not in force when LA03 was enacted. It was therefore not a criminal offence to allow people to smoke indoors at the time LA03 came into force.

The bar was called Delboy's, which was apt because the owner's actions were the trigger for a licence review instigated by a responsible authority on the grounds of "prevention of crime and disorder". There is perhaps some irony that one can trace a thread from a bar named after a pig product to unravel 15 years earlier at a bar named after a Trotter.

The police did not make a representation in support of the review (nor did they appear as a witness or party in the Magistrates' Court appeal). The licence was duly revoked, the licensing sub-committee determining that the licensing objective of "prevention of crime and disorder" was engaged notwithstanding that there was no disorder. The Magistrates' Court disagreed, the deputy district judge determining that:

> *... smoking is a Public Health issue, which is not a licensing objective for the purposes of the Act. I was therefore of the opinion that the issue of unlawful smoking was not relevant to the objectives of promoting the prevention of crime and disorder.*[2]

That is, "crime and disorder" should be read conjunctively, not disjunctively. In other words, for the objective to be engaged there had to be evidence of both crime and disorder, not either one or the other.

Although Denyer J in *Howitt* seemed to be somewhat more sympathetic to Mr Howitt's personal position than did Fordham J to Mr Henderson's, he nevertheless disagreed, saying that although the offence created by s 8 Health Act 2006 is neither disorder, nor a crime of disorder, nor on any interpretation of a similar degree of magnitude to other criminal activity which may rise in connection with licensed premises, it is by simple definition a "crime". The words of the relevant licensing objective should be interpreted disjunctively and so Mr Howitt's actions (or, rather, inactions) clearly fell within the licensing objective.

So "crime and disorder" should be read disjunctively, not conjunctively. In other words, for the objective to be engaged there had to be evidence of either crime and / or disorder, but there was no requirement for both crime and disorder.

The argument advanced by Mr Howitt – that smoking was a public health issue, and public health not being a licensing objective was not apt to be the reason for a licence review, still less a revocation –was not specifically addressed in the judgment, although clearly Denyer J was not troubled by a matter relating to public health being subsumed into crime and disorder.

The theme would be picked up in *The Porky Pint* which provides some helpful and timely commentary. As Fordham J would subsequently say in *The Porky Pint*, the fact that "public health" is not present as a licensing objective does not "strip out" anything which could be said to be "public health" from what properly falls within crime and disorder.

In short, a broad interpretation is favoured whether it relates to the parameters of a licensing objective or to matters which can properly be taken into account. The following principles can be adumbrated:

- The licensing objectives are what they say they are, and the words have their ordinary and natural meaning (para 20).
- Although "public safety" is not analogous with "public health", nor does it exclude "public health" where there is a proper overlap with "public safety" (para 18).
- This is despite the Government specifically declining to include "public health" as a licensing objective both when LA03 was enacted and more recently (para 13).
- There can be overlap between, say, public safety and crime and disorder (para 18).
- A licensing objective can include something which is relevant to that licensing objective even though it is also related to or even primarily something which is not itself a licensing objective.
- The licensing objectives are not restricted to alcohol-related matters (para 17).[3]

As regards the latter, if it were otherwise then the hands of, particularly, the police and enforcement officers would be stymied in relation to matters connected with a licensed premises but not necessarily linked to specific licensable activities.

2 *R (on the application of Blackpool Council) v Howitt* [2008] EWHC 3300 (Admin), para 7.

3 Nor, it follows, to late-night refreshment-related or regulated entertainment-related matters.

An important facet of *Howitt* (explicitly) and *The Porky Pint* (implicitly) is the concept of the statute "always speaking": ie, it may be applied in circumstances which were not contemplated when it was enacted (an "ambulatory" meaning). As Denyer J said in *Howitt*, "Times move on; times change; legislative changes are introduced and technology and science may advance, all of which may impinge upon the interpretation of a statute" before quoting approvingly Lord Bingham who put it this way:[4]

> *If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now.*

A contemporaneous example of the statue "always speaking" might be found in the context of the recent ban on single-use plastics. The Environmental Protection (Plastic Plates etc. and Polystyrene Containers etc.) (England) Regulations 2023 create a criminal offence of supply of single-use plastic plates, trays or bowls to an end user, of supply of single-use plastic balloon sticks and cutlery, and of supply of single-use polystyrene containers and cups.[5] Para 8 of Schedule 1 Part 1 creates a further offence of failing to comply with a fixed penalty notice.

These offences were not contemplated when LA03 came into force. They can nevertheless, in appropriate circumstances, fall within the scope of the "prevention of crime and disorder" licensing objective. A concerned citizen could bring a licence review against a premises on the basis of prevention of crime and disorder, without the licence holder being charged, still less convicted, of a crime.

There have been calls[6] for shisha smoking to be licensed but using the principles established in *Howitt* and *The Porky Pint* it is perfectly possible to initiate a licence review based on, say, the public health dangers to smokers (public health overlapping with the licensing objective of "public safety"), or based on the public health dangers to residents living nearby who are victims of passive smoking (public health overlapping with the licensing objective of "prevention of public nuisance").

## Nexus with licensable activities

Equally unsurprising was Fordham J's conclusion in *The Porky Pint* that the licensing objectives "are not restricted to 'alcohol-related' matters", citing the cases of *Sharanjeet Lalli v The Commissioner of Police for the Metropolis and Another* [2015] EWHC 14 (Admin) (an alleged serious assault by the publican) and *East Lindsey District Council v Hanif* [2016] EWHC 1265 (Admin) (illegal workers), and the s 182 Guidance at para 11.24:

> *A number of reviews may arise in connection with crime that is not directly connected with licensable activities. For example, reviews may arise because of drugs problems at the premises, money laundering by criminal gangs, the sale of contraband or stolen goods, the sale of firearms, or the sexual exploitation of children. Licensing authorities do not have the power to judge the criminality or otherwise of any issue. This is a matter for the courts. The licensing authority's role when determining such a review is not therefore to establish the guilt or innocence of any individual but to ensure the promotion of the crime prevention objective.*

It follows that conditions can and frequently are agreed, proposed, or imposed on premises licences regarding matters which are not themselves "licensable activities", for example to control numbers of smokers allowed outside at any one time after 10pm, or waste collection timings. In the case of the former, there is a clear nexus with the licensable activities. With the latter, the nexus is more distant but still, it is submitted, present on the basis that the premises is licensed; waste is accrued as a result of the premises operating as a licensed premises; removal of waste at unsocial hours can cause a nuisance; a condition can therefore be added to promote the licensing objective of "prevention of public nuisance".

## The status of the licensing objectives

The above leads inexorably to the further question of whether and to what extent matters which are not related to the licensing objectives at all can be properly taken into account by a licensing sub-committee. For instance, it is not uncommon for financial considerations to be advanced on behalf of an applicant. This is particularly so during and post-Covid, for obvious reasons, but has also been a feature since the 2008 financial crisis.

As observed by Sir Michael Fordham in *Porky* Pint, the legally correct interpretation of the licensing objectives *is a question of law for the Courts, to be derived from the words used by Parliament* ***and the discernible statutory purpose****…* (my emphasis).

There has always been a tension at the heart of the legislative regime as to whether the licensing objectives are the beginning and end of relevant considerations for a licensing authority.

4 *Howitt,* para 15.

5 Regulations 3, 4 and 5 respectively.

6 'Is tougher regulation of shisha premises on the cards?' *Richard Brown and Charles Holland,* see JoL 33, July 2022.

This finds expression most famously in the comments of Lord Justice Toulson in the well-known Court of Appeal decision in *Hope and Glory* (my emphasis):[7]

> *Licensing decisions often involve weighing a variety of competing considerations:* ***the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand****, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on.*

Far be it for me, a lowly third sector hack, to question such a noble personage as Toulson LJ, but the words do invite perhaps more scrutiny than they receive.

The extent to which para 42 of *Hope and Glory* sits well, or at all, with the primary legislation is debatable. In truth, this is a topic which would require a separate article to do it justice, but perhaps for now I can précis.

It is certainly worth remembering what the primary legislation actually says (my emphasis):[8]

> *A licensing authority must carry out its functions under this Act ("licensing functions")* ***with a view to promoting*** *the licensing objectives.*
>
> *In carrying out its licensing functions, a licensing authority must also have regard to—*
>
> *(a) its licensing statement published under section 5, and*
> *(b) any guidance issued by the Secretary of State under section 182.*[9]
>
> *This has not received even a fraction of the debate that, for instance, the "aim to permit" provision at s 153 Gambling Act 2005 has received.*
>
> *The explanatory notes to LA03 provide that (my emphasis):*[10]
>
> *s4 General duties of licensing authorities*
>
> *35. This section sets out the licensing objectives* ***that must be promoted*** *by the licensing authority in carrying out its duties. These are:*
>
> - *the prevention of crime and disorder.*
> - *public safety.*
> - *the prevention of public nuisance.*
> - *the protection of children from harm.*

A representation from a responsible authority or other person must be "relevant". To be "relevant", a representation must be about the likely effect of the grant of the premises licence on the promotion of the licensing objectives – *s 18(6)(a).* If it is not, it is not "relevant" and cannot be taken into account.

If, as is suggested in *Hope and Glory,* the "demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand" is part of the balancing exercise, where does this evidence come from?

Plainly, "demand" and "economic benefit to the proprietor" are not and could not conceivably be shoehorned into any of the licensing objectives. Indeed, the s 182 Guidance (with the necessary caveat that it is only guidance and can be departed from) equates "demand" in this context with "need" (my emphasis):

> *"Need" concerns the commercial demand for another pub or restaurant or hotel and is a matter for the planning authority and for the market. This* ***is not a matter for a licensing authority in discharging its licensing functions*** *or for its statement of licensing policy.*

Does the s 182 Guidance in general provide any clarity? No, it does not.

Nowhere is this seen better than para 9.44 (my emphasis):

> *Determination of whether an action or step is appropriate for the promotion of the licensing objectives requires an assessment of what action or step would be suitable to achieve that end. While this does not therefore require a licensing authority to decide that no lesser step will achieve the aim, the authority* ***should aim to consider*** *the potential burden that any condition would impose on the premises licence holder* ***(such as the financial burden due to restrictions on licensable activities) as well as the potential benefit in terms of the promotion of the licensing objectives.***

However, para 9.44 goes on to say:

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

8 Section 4(2) LA03.

9 Section 4 LA03.

10 https://www.legislation.gov.uk/ukpga/2003/17/notes/division/4/2/3.

*However, it is imperative that the authority ensures that the factors which form the basis of its determination are limited to consideration of the promotion of the objectives* ***and nothing outside those parameters.***

## Conclusion

The extent and scope of the licensing objectives is settled law, and *The Porky Pint* is the sort of timely reminder of some fundamentals which is of benefit to all practitioners. However, the precise status of the licensing objectives is something which is less certain, even approaching 20 years of LA03 coming into force.

This will be elucidated in a future article (consider that a threat or a promise as you will) but suffice to say for now that a licensing authority clearly must consider other factors in exercising its functions (eg, s 17 Crime and Disorder Act 1998 and the Public Sector Equality Duty under s 149 Equality Act 2010), which both require a local authority to have "due regard" to the various factors therein.

However, LA03, separate legislation, regulations, s 182 Guidance and case law are not easy to reconcile. In reality, whether or not a matter such as financial considerations can lawfully be a factor in determining an application or not, it may on a human level sway members of a licensing sub-committee to shape the licensing objectives around the decision they wish to make. As we have seen, the licensing objectives have the malleability to form the prism through which effect can be given to the will of a licensing sub-committee.

A "function" of the licensing authority can be the macro (formulation of a statement of licensing policy and related strategies) or the micro (determination of an individual application having regard to the various factors). It may be that "the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand" are perfectly proper and indeed necessary matters for wider local authority strategy, but perhaps more properly matters for the macro than the micro.

**Richard Brown**
*Solicitor, Licensing Advice Project, Westminster CAB*

# Hazard-spotting and practical tools for risk assessments

Writing a risk assessment of workplace hazards is essential to safeguarding employers and members of the public. **Julia Sawyer** explains how to go about this essential but sometimes complicated process

As an employer, you're required by law to protect your employees, and others, from harm.

Under the Management of Health and Safety at Work Regulations 1999, the minimum you must do is: identify what could cause injury or illness in your business (hazards); decide how likely it is that someone could be harmed and how seriously (the risk); and take action to eliminate the hazard, or if this isn't possible, control the risk.

Assessing risk is just one part of the overall process used to control risks in your workplace.

It can be very daunting when first writing a risk assessment and there may be concerns that not all hazards will be identified, but there are many tools available to assist and build confidence in ensuring you have a resilient risk assessment process in place. Various sources will give information for writing a risk assessment, such as speaking with and watching people carrying out the work activity, speaking with people who have experience in carrying out the work, union and employee safety representatives, manufacturers' guidance notes and specifications, trade organisations, professional bodies, enforcement officers and the Health and Safety Executive (HSE) website.

There are templates on the HSE website that can help you carry out a risk assessment and examples given. In the hospitality industry the four biggest causes of accidents are: slips, trips and falls; knives; musculoskeletal disorder; and dermatitis.

This article looks at slips, trips and falls and musculoskeletal disorders to detail what tools there are available to assist you in carrying out your risk assessment.

## Slips, trips and falls

Slips and trips are the single most common cause of major injury in UK workplaces.

The risk from slips and trips must be assessed and there are a variety of hazards that need to be considered, eg: food spillages; water overflow or leakage; condition of floor; trip hazards; cleaning; obstructed view; and footwear.

The HSE website will help you identify slip and trip hazards in your workplace and decide what action to take. It is of benefit to anyone who assesses and manages slips and trips at work.

The site's checklist provides examples of hazards that can be found in and around workplaces and suggests actions that you can take to resolve them. The list tries to cover as many slip and trip hazards as possible. Some may not apply to you, while you may come across others not mentioned, but which you will need to consider. There is space on the checklist for you to add any hazards that are specific to your workplace and there is a risk-mapping tool that can be used in conjunction with the checklist.

Here are some suggested control measures in relation to slips and trips:

***Flooring:*** One way that you can prevent slips in the workplace is to introduce slip-resistant flooring, which is particularly effective in environments where spillages are likely. There are many different ways to test how slippery a floor is. HSE recommends the use of the pendulum test, which is a friction test that measures the slip-resistance of a floor surface by replicating the interaction between a moving pedestrian heel and static surface.

The Rz Surface Roughness test measures the surface roughness and should be taken in support of a pendulum assessment as it can provide additional information about a floor surface and its ability to cope with contaminants. The

combination of the tests is recognised as providing the most accurate measure of pedestrian slip resistance of a surface in-situ.

Results showing a Pendulum Test Value of 36+ are considered to have a low slip potential; moderate slip potential scores range from 25-35 and high slip potential scores are between 0 and 24.

Once these measurements are obtained, this information along with elements from the Slip Potential Model and the HSE's SAT assessment tool can be used to understand the factors contributing to slip risk.

***Cleaning:*** Well-planned floor cleaning removes contamination and reduces the risk of slips because it means that floors are free from hazards. Poorly-planned cleaning can increase the risk of slipping and tripping by leaving smooth floors wet after cleaning or by introducing trailing cables and other obstacles to the work environment. All organisations should consider how well-planned and managed their cleaning system is so that floors are regularly being swept and cleaned to ensure they are safe to walk on. Any spillages should be reported immediately, and employees should know what the control measures are for wet floors, so that hazards can be highlighted.

***Footwear:*** One thing that can increase the likelihood of slipping is unsuitable footwear, so it is important to understand the work environment and the correct type of footwear that offers adequate slip-resistance to prevent slips and trips.

Where footwear has been tested, coefficient of friction (CoF) test values must be available. CoF data can be requested from the supplier. The higher the CoF, the better the slip-resistance.

Your risk assessment may conclude that safety footwear is required due to the hazards in your work environment. Safety features of safety footwear, including slip-resistance, are tested according to a set of European test standards written into EN ISO 20345:2022. Footwear which has passed this EN test will have met the standard for slip-resistance.

Your assessment may also conclude that the footwear needs to provide additional protection, not just-slip resistance, and therefore additional parameters would need to be set.

***Maintenance:*** Where possible, trip hazards should be removed or repaired so that they no longer present a risk. An important step in preventing slips and trips in the workplace is ensuring that you have effective maintenance procedures in place that mean hazards are quickly reported and dealt with. Employees should all know who to report hazards to when repairs are needed, and employers need to make sure that these repairs can be carried out by a professional as soon as possible. You also need to have safety measures in place that stop hazards from causing slips and trips while repairs are in progress, such as signage systems and internal reporting that lets other employees know about any areas they need to avoid.

## Musculoskeletal disorder

The term "musculoskeletal disorders" includes injuries and conditions that can cause pain to the back, joints and limbs. Manual handling is one of the main musculoskeletal disorders, particularly back pain. Heavy manual labour, repetitive handling, awkward postures and previous or existing injuries or conditions are all factors for developing musculoskeletal disorders.

Regulation 4(1) of the Manual Handling Operations Regulations 1992 requires you to make a suitable and sufficient assessment of all manual handling operations and take appropriate steps to reduce the risk of injury associated with manual handling.

Manual handling means transporting or supporting a load by hand or bodily force. It includes lifting, lowering, pushing, pulling, moving or carrying a load. A load is a moveable object, such as a box or package, a person or an animal, or something being pushed or pulled, such as a roll cage or pallet truck.

HSE provides a tool to assist in carrying out manual handling activities – the Manual Handling Assessment (MAC) tool. Manual handling also encompasses an assessment of risk from repetitive tasks, and HSE's Assessment of Repetitive Tasks (ART) tool can assist you in carrying out this assessment. These tools ensure that a person's posture is looked at in detail as well as incorporating additional factors such as breaks and duration.

Repetitive tasks are made up of a sequence of upper limb actions, of fairly short duration, which are repeated over and over again, and are almost always the same. ART is most suited for tasks that: involve actions of the upper limbs; repeat every few minutes, or even more frequently; and occur for at least one to two hours per day or shift. ART is not intended for display screen equipment (DSE) assessments.

## Summary

Every day, we all make dynamic assessments of what we are going to do and how we are going to do it. Sometimes

more thought is put into one action than another, but we make those decisions to protect ourselves. As an employer we have the responsibility to demonstrate that we have considered the risk of a work activity by carrying out a risk assessment that is suitable and sufficient and reduces the risk to as low a level as is reasonably practicable to safeguard our employees.

If you have more than five employees you need to be able to show the written record of your assessment. There is no excuse for not having carried out an adequate assessment as there are so many tools available to assist you and so much information that can easily be found to help you come to the conclusions you have in your risk assessment. The tools available also assist you in considering all aspects when assessing the risk.

As with all checklists and tools, they have to be used in a meaningful way. Understanding your team, communicating with your team and listening to an individual's needs is part of the process of carrying out a suitable and sufficient assessment.

There may be times that an enforcement officer will serve a notice which goes against the manufacturers' guidance, which you have followed and incorporated as part of your overall assessment. The requirement of the notice may add an additional hazard to your work activity, which the enforcement officer has not realised. Manufacturers have clear guidance that they must follow (part of that is the risk assessment process) to correctly discharge their own safety obligations, but employers have their own obligations to fulfil. If as an employer you have used all of the tools available to you to carry out a suitable and sufficient assessment and believe that you have reduced the risk to as low as is reasonably practicable, then that should be shared with the enforcement officer to ensure the end result is the most practical and safest solution for all.

**Julia Sawyer**
*Director, JS Consultancy*

# New ways of handling sensitive issues in licensing applications

The Government intends to align the Sensitive Information in Licensing Applications (SILA) protocol with the system already in place in planning legislation. **James Rankin** reviews the proposal

For some time now there have been security concerns about terrorists accessing licensing plans for large public premises in order to carry out attacks. One can well understand why this should be so. As these attacks become increasingly more sophisticated, there is a fear that terrorists will use every means at their disposal when planning their atrocities. The Terrorism (Protection of Premises) draft Bill – "Martyn's Law" - published 2 May 2023 seeks to address these concerns.

Currently, under s 8(3) of the Licensing Act 2003 (LA2003) information contained in the register must be made available for inspection by the public during office hours, free of charge. There is no requirement for the public to provide even a name and address in order to inspect the register.

This is what the Home Secretary, Suella Braverman, had to say on 19 December last year in the run up to the draft bill:

I intend to introduce the Sensitive Information in Licensing Applications (SILA) protocol (by way of an amendment to the Licensing Act 2003 (LA2003)) to align to the similar system already in place within planning legislation (Sensitive Information in Planning Applications (SIPA)), to reduce the risk of misuse of sensitive information in the public domain.

Since 2007, the planning regime has had restrictions in place which allow local authorities to withhold sensitive information from the public relating to plans. There is clear logic in this: buildings which house secret Government operations should not be compromised by having the details of their plans open to all and sundry. The same may be said of some buildings to which the general public has access.

There is no equivalent power under the licensing regime.

There are compelling reasons why an arena, for example, may not wish to have details of its plans made public. The location of CCTV; the siting of exits and entrances; and the location of accessible store cupboards and electrical and fire safety equipment are all examples of information which may be useful to a terrorist who is planning an attack.

Clause 38 and schedule 3 of the draft Bill propose to introduce a new s 8(A) into LA 2003. The procedure is designed to be "light touch" (where have we heard that before?).

Under the Bill, if a "relevant person" (applicant or premises licence holder) has given the local licensing authority a "terrorism protection statement" in relation to the premises, the authority must not make the plan available for inspection or supply any person with a copy of the plan.

For reasons which I confess I do not understand, there is a different burden on the licensing authority for plans before 26 March 2013. In that case, the licensing authority "is not required to make the plan available for inspection". It seems to me that this is an unnecessary distinction without a difference.

A terrorism protection statement is a statement that says, in the opinion of an "appropriate security adviser" (see below), the premises are at heightened risk of being a target of terrorist activity. (Schedule 3(3)(3).)

This does not prevent the licensing authority from making plans available to a responsible authority, or in connection with legal proceedings, or for purposes of obtaining legal advice. (Schedule 3(7).)

The terrorism protection statement must be withdrawn if the premises are no longer at heightened risk.

The security advisor must take into consideration any guidance by the Secretary of State before advising that the premises are no longer at risk

The term "appropriate security advisor" has yet to be defined and will be prescribed by regulations. I envisage that a number of licensing consultants will fall over themselves in the race to set themselves up as security advisors just as soon as these regulations are published.

There are similar provisions proposed for club premises certificates.

Martyn's Law has come under criticism by the Home Affairs Committee which published its report on 27 July this year. The HAC reserved most of its fire for criticism of other matters contained in the draft Bill: for example, what was the rationale in setting an arbitrary capacity figure of 100-800?; why not have it on a risk basis?; and why does it not apply to open spaces?

Clause 38 does not contain any such strictures. It would appear that the proposal to introduce SILA is not dependent on the size of the premises or whether it is sited in an open space.

However, I foresee difficulties if, for example, there is an application made for a large music festival which attracts a large number of residential objectors. In those cases the plan of the premises is a key document. How will the licensing authority restrict local residents' access to the plans?

As always, the devil is in the detail. Who knows? It may never reach the statute books…

**James Rankin**
*Barrister, Francis Taylor Building*

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# Minimum pricing - a fait accompli?

Policy-based evidence making looks set to win the day in the Scottish Government's review of its minimum pricing policy, as **Stephen McGowan** explains

The grand experiment is almost at an end.

After years of hue and cry, the Scottish Parliament will finally have a debate to decide whether the so-called "sunset clause" will be triggered, and minimum pricing will cease; or whether the status quo will prevail, and law will remain part of the suite of mandatory conditions attaching to premises and occasional licences under the Licensing (Scotland) Act 2005. So which way will it go? Well, it would take a Herculean effort to persuade any sensible commentator that the Government would do anything other than back its own policy.

Minimum pricing was originally proposed in the debates on the Licensing Bill, which became the 2005 Act. It was considered a potential alternative to what became the condition related to "irresponsible" promotions, but was ultimately rejected. At that time, the (Labour) Government of day said in the Stage 1 Report:

> *It is felt that minimum pricing is a fairly invasive approach, as it requires individual licensing boards to set prices for a tariff of drinks, which would lead to a lot of variation throughout the country. It was felt that non-differential pricing avoided that, was less invasive and could be applied across the board. It would be difficult to impose minimum pricing in members clubs, for example.*

This happened around the same time that an attempt by Aberdeen Licensing Board to introduce minimum pricing locally, under the previous legislation, was torpedoed by the courts (*Mitchells & Butlers Retail Ltd v Aberdeen City Licensing Board* [2005] 30 SLLP 35). Such commentary suffers when gazed at from the present position; how times have changed.

Minimum unit pricing, described as a "world leading" policy, was introduced by the Scottish Government in May 2018, following a significant legal challenge from *some parts* of the alcohol industry. It is important to note, even now, that "Big Alcohol" (if such a thing exists) did not oppose MUP; in fact, the trade was very much split on this point. Significant names such as Tennents, Greene King and the Scottish Licensed Trade Association all publicly supported it. Whatever side you came down on at the time, most would now agree that the proposal has clutched the title of the most famous (or infamous) licensing law, certainly of Scotland and perhaps of the UK.

The legal challenge (*Scotch Whisky Association and others v Lord Advocate and another* [2017] UKSC 76) surrounding the adoption of MUP led to significant media coverage over many years and the existential concept of the measure has been challenged on a continual basis and debated amongst academics and commentators. It was legislated for under the Alcohol (Minimum Pricing) (Scotland) Act 2012 and it is this 2012 Act which also sets down the rules for the analysis of the measure and the production of a report following five years of the policy being in play.

That is the precipice on which we now totter; for the report required under the 2012 Act was published on 20 September 2023, and features an analysis of a large number of discrete studies which have been conducted over the last five years, the concomitance of which is presented in one over-arching report by the Government, and which unambiguously declares:

> *Scottish Ministers have considered all the information presented in this report and conclude that there is sufficient evidence that Minimum Unit Pricing has achieved its policy aim.*

However, this is not the whole story. When announcements were made, the Scottish Government said that the policy had "saved lives", this notwithstanding that the number of alcohol related deaths had actually risen. In fact, the claim of saving lives emanates from just one study and this was by comparison to a counterfactual. The argument was that the policy had theoretically stopped *more* deaths from happening. However, this was not an analysis of reality, but of a theorised world where the rate and rise in England and Wales was used as a barometer. "But for" minimum pricing, it was argued, the rates would have been a lot worse.

The Scottish Government was later forced to amend this

wording around "saving lives" following an intervention from the UK Statistics Authority; such hypotheses were merely that: ie, speculation, not material fact.

In addition to that, *The Sunday Times* uncovered in August 2023 interference from Holyrood civil servants to amend some of the wording in the public health reports in order to create a more favourable impression of the reported outcomes. For example, where a report had claimed the evidence that minimum pricing had achieved a reduction in consumption was "consistent", civil servants instructed this to be amended to read "strong and consistent", and that is the wording which was used in the final report.

There are 18 key studies which form part of the most important outcomes and areas of assessment in the overall report. In my view it would take a very bold case to suggest that minimum pricing has been a success when you take a moment to examine these. The final report (27 June 2023) can be accessed here: https://publichealthscotland.scot/media/20366/evaluating-the-impact-of-minimum-unit-pricing-for-alcohol-in-scotland-final-report.pdf

Here is a summary of the key discrete reports:

- *Wyper et al* (2023): This is the "counterfactual" study I refer to above and is the only one of all the studies in which it is claimed the policy had a success, here arguing that the policy led to a 13.4% reduction in deaths and a 4.1% reduction in hospital admissions. But these figures do not reflect the real world, where deaths and admissions have increased. These numbers are in fact modelling, not material fact.

- *Manca et al* (2022a): This study looked at the impact on ambulance callouts and found "no evidence of impact".

- *Manca et all* (2023): This study looked at impact on alcohol dependence and found "no evidence of impact".

- *So et al* (2021): This study looked at attendances at A&E and found "no evidence of impact".

- *So et al* (2021): This study also looked at prevalence of illicit drug use and found "no evidence of impact".

- *Iconic Consultation* (2020): This study looked at the impact on children and young persons drinking behaviours and found "MUP was not perceived to impact on the alcohol-related behaviour of participants either positively or negatively".

- *Ford et al* (2020): This study looked at harms from others to children and young persons and found "no specific examples were provided by those working with families affected by alcohol use of positive or negative impacts from MUP".

- *Holmes et al* (2022): This study looked at the impact on harmful drinkers and said "there was no clear evidence found of any change in severity of dependence".

- *Kopasker et al* (2022) and *Leckcivilize et al* (2022): these studies looked at impacts on expenditure on food and found "no evidence of effects on the quantity of food purchased, energy density or diet quality."

- *Krzemieniewska-Nandwani et al* (2021): This study examined impact on crime and disorder and found "limited evidence of beneficial or detrimental impacts on crime".

- *Dimova et al* (2022) and *Emslie et al* (2023): these two studies looked at homelessness and street drinking and found "there were some reports of increases in illicit drug use among those already using drugs to supplement alcohol consumption but there were conflicting views on whether this was attributable to MUP. Minimal changes were perceived in terms of theft or begging to acquire alcohol".

- *Francesconi and James* (2022); *Manca et al* (2022b); and *Vandoros and Kawachi* (2022) all looked at road traffic accidents and the results were inconsistent to say the least. "One paper found no evidence of impact, another paper reported evidence of an increase and a third paper reported evidence of a decrease."

- *Frontier Economics 2019*; and *Frontier Economics* 2023: these studies looked at the impact on the drinks industry and found "no evidence that MUP had significantly impacted the performance of the alcoholic drinks industry in Scotland in terms of the key metrics".

- There are also a clutch of studies (*Frontier Economics* 2019; *Paterson et al* (2022); *Paterson et al* (2023), *Griffith et al* (2022) and *Holmes et al* (2022)) which looked at cross border purchasing trends but none of these has any dramatic results: "…no evidence of a substantial impact on profitability, turnover or employment of retailers in Scotland close to the

border"; "…some evidence of cross-border trade, but only on a small scale".

It remains to be seen how the Scottish Government will deal with the multiple studies above confirming that minimum pricing had no impact, and whether its reliance on a single study based on counterfactual modelling to laud minimum pricing as a "success" is at all efficacious. I expect these points to be raised by the opposition in the final Parliamentary debate, but the Government has the votes to pass the policy.

We do not, at the time of writing, have a date for that debate, but by my reckoning it will have to be by May 2024. Meanwhile, the Scottish Government has grasped the nettle by also launching a new, discrete public consultation on the level of the set price. The consultation explores a number of options but settles on proposing a level of 65p per unit, a rise of 15p. The consultation closes on 22 November 2023 and can be accessed here: https://www.gov.scot/publications/alcohol-minimum-unit-pricing-mup-continuation-future-pricing-consultation/pages/1/.

It seems likely then that within the next few months the Scottish Parliament will move to adopt minimum pricing on a permanent basis; and in doing so will up the rate.

**Stephen McGowan**
*Partner, TLT Solicitors (Scotland)*

# The Kink Coalition

A new grouping of promoters, operators and businesses has formed to promote understanding of the kink scene and assist with the way it operates, including associated licensing matters. **Leo Charalambides** sets out the Kink Coalition's goals

It is a fact acknowledged *sotto voce* that within our leisure and night-time geographies there are venues and spaces within venues dedicated to facilitating and providing for sexual activities between consenting adults attending those venues for such a purpose. This summer a group of (initially) London-based venue owners and event promoters met to form the "Kink Coalition". The initial steering included Facility x (London), Joy Ride (London), Klub Verboten, One Night (London), Pinky Promise, Recon, and Trough.

In its draft mission statement, the Kink Coalition describes itself as a body of promoters, operators, and businesses – initially based in London – that work within the 'kink space' industry. It core objectives are:

- To promote wider engagement and understanding of the kink space scene.
- To promote risk assessed based operations.To develop suitable codes of conduct for events and venues; and
- To promote safeguarding standards and practices.

## Defining "Kink Spaces" and "Kink Events"

It is suggested that "Kink Spaces" are venues (typically, but not exclusively, in premises licensed under the Licensing Act 2003) that predominately operate within the night-time economy that provide dedicated space for nudity and sexual activities and expression between consenting adults, who attend for the purposes of sexual expression and activities with other like-minded adults. Such dedicated spaces are also found as separate parts within a premises or festival.

It is suggested that "Kink Events" are events and activities that take place between consenting adults within a dedicated space that might include nudity and activities of sexual expression. It can include, for example, anything from a dark room or play area within a bar, venue or festival site to dedicated spaces such as swingers' venues, saunas. Venues and premises can be operated as so-called sex clubs that provide for organised sex parties (ie, venues that cater almost exclusively for the provision of sexual activities and expression between consenting adults).

This is a suggested draft being used as a working definition. It is accepted that "kink" means different things to different groups. For example, not all swinger venues, saunas and sex clubs will identify themselves with the "kink" label. The "kink" label is used by the Kink Coalition as an umbrella invitation to those that might share common interests.

Ultimately it will be a matter for operators of venues and events to determine as part of their risk assessment whether their venue or event is a kink space; the circumstances of each operation will need to be determined on a case-by-case basis.

## Risk assessment

It is the aim of the Kink Coalition for its members to agree that there shall be a written risk assessment of a venue and events to be used as a Kink Space. The written assessment shall be kept under review and, where appropriate, made available upon demand to an authorised officer of the local authority or the local police.

The risk assessment shall as a minimum make provision for:

- Proof of age procedures.
- External advertising.
- Arrival and dispersal.
- Changing areas.
- Health and safety (including well-being).
- Safeguarding and security (including clear CCTV polices, clear consent policies and dedicated safeguarding staff).
- Diversity and inclusion (including clear dress codes and entry requirements).
- Staff and security training.
- Codes of conduct for patrons and staff (including

use of mobile phones).

- VIP & members' areas.

## Engagement with local authorities and the police

It is the aim of the Kink Coalition to provide a forum for respectful, adult and mature conversations between venue operators, event promoters, academics, local authorities and the police so that broader issues such as definitions, language, regulatory approaches and concerns can be addressed, debated and where possible agreed.

There have been two such preliminary seminars that were well attended and contributed to the proposals that have been suggested by the Kink Coalition. There seems to be a valuable and viable opportunity for openness and understanding that speaks to the modern partnership-based approach of local regulation and licensing that the leisure and night-time economies thrive under. I welcome, encourage and look froward to the conversation being promoted by the Kink Coalition.

**Leo Charalambides**
*Barrister, Kings Chambers*

Share your trip → Driver profile → 24/7 customer support → Driving hour limits → Speed limit alerts → Phone number anonymization → Safety toolkit → DBS background check → PIN verification → Real time driver ID check → Driver face covering verification → Door to door safety standard → Covid-19 checklist →
**Safety never stops**

Uber



# JOURNAL OF LICENSING - ARTICLE CONTRIBUTORS

## LEO CHARALAMBIDES

*Barrister, FTB & Kings Chambers*

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.

## SARAH CLOVER

*Barrister, Kings Chambers*

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.

## MICHAEL FEENEY

*Barrister, Francis Taylor Building*

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.

## CHARLES HOLLAND

*Barrister, Trinity Chambers & FTB*

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

## PHILIP KOLVIN KC

*Barrister, 11 KBW*

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

## JEREMY PHILLIPS KC

*Barrister, Francis Taylor Building*

As a leading solicitor / partner in two international law firms, turned barrister / King's Counsel in FTB, Inner Temple, Jeremy represents companies, government departments, councils, regulators & residents across a unique range of legaldisciplines. He sits on a number of disciplinary bodies. He is also Editor in Chief of Paterson's Licensing Acts, General Editor of Smith & Monkcom - Law of Gambling and a Fellow of the Institute of Licensing.

## JAMES RANKIN

*Barrister, Francis Taylor Building*

James has over thirty years' experience as a barrister specialising in licensing and regulatory work. He works nationally on behalf of applicants, and objectors and appellants from local authority decisions. He also represents the police and local authorities on reviews of licences and on appeals. James is ranked by Chambers and Partners Directory as a starred licensing junior. He is also named in the Chambers 100 UK Bar list of the top juniors.

# JOURNAL OF LICENSING - CONTRIBUTOR PROFILES

## JOURNAL OF LICENSING - EDITORIAL TEAM

### LEO CHARALAMBIDES

*Editor*

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.

### ANDREW PRING

*Deputy Editor*

Andrew has been a freelance business editor and writer since 2009, working with a range of national publications and businesses. Prior to that, he edited weekly business magazines including Morning Advertiser, Accountancy Age, Insurance Times and Contract Journal.

### RICHARD BROWN

*Deputy Editor*

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.

### CHARLES HOLLAND

*Deputy Editor*

Charles is a barrister in independent practice working out of Francis Taylor Building in London and Trinity Chambers in Newcastle upon Tyne. His work covers Chancery / commercial litigation, property issues and licensing. He works across a range of areas, and presently spends a lot of time thinking about taxis.

### NATASHA ROBERTS

*Editorial Assistant*

Natasha joined the Institute of Licensing in January 2011, and played a major role in the team which launched the *Journal of Licensing* in November that year. She continues to oversee the Journal's production, progress and development. Natasha also assists with all aspects of events and is involved with the majority of the IoL publications along with managing the IoL's website and back-office systems.

## JOURNAL OF LICENSING - REGULAR FEATURE WRITERS

### NICK ARRON

*Partner, Poppleston Allen Solicitors*

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.

### RICHARD BROWN

*Solicitor, Westminster CAB*

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.

### JAMES BUTTON

*Principal, James Button & Co*

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*.

### DANIEL DAVIES

*Chairman, Institute of Licensing*

Daniel Davies is the CEO of Rockpoint Leisure, and the former CEO and founder of CPL Training Group. Following the sale of CPL Online in early 2018 and CPL Training in May 2019, Davies has embarked on a new business venture 'Rockpoint Leisure'. It is through this vehicle that he is breathing new life into his local coastal community in New Brighton, Wirral through a private sector-led, regeneration scheme. In February 2015 Daniel was appointed Chairman of the IoL. He also sits on the Council and House Committees of UKHospitality.

### STEPHEN MCGOWAN

*Partner, TLT Solicitors*

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.

### JULIA SAWYER

*Director, JS Consultancy*

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

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