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General Editor
Leo Charalambides, FIoL
Barrister, Inner Temple

Deputy Editors
Richard Brown
Charles Holland
Andrew Pring

Editorial Assistant
Natasha Roberts

Email: journal@instituteoflicensing.org
Visit: www.instituteoflicensing.org

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Registered Address: Institute of Licensing
Ridgeway
Upper Milton
Wells
Somerset
BA5 3AH

Email: news@instituteoflicensing.org
Visit: www.instituteoflicensing.org

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Daniel Davies MIoL
Chairman

Welcome to the Autumn 2020 edition of the IoL's Journal of Licensing. The autumn edition is usually distributed to many members via the delegate packs provided to those who attend the annual National Training Conference (NTC), where the content would provide the basis for lively discussion during tea and coffee breaks. This year unfortunately this will not be the case, as sadly we have had no option but to cancel the NTC this year, for obvious reasons. Rest assured however that the Journal will be distributed to members via post and the 2020 NTC will take place, just not as you know it.

Hopefully, many of you will by now be very familiar with using remote meeting platforms such as Zoom (other remote meeting platforms are available!) and may have "attended" seminars and courses in this way. Although nothing can replace the networking and information and best-practice sharing opportunities of the NTC, the Events Team has worked very hard to curate a stellar roster of speakers for the virtual Conference. Now more than ever, the benefit and indeed necessity of having access to the most up-to-date information and opinion from leading practitioners is vital.

I hope that members have been making use of the resources available on the IoL website. We have worked assiduously to keep members up to date with developments in this ever-changing environment, as the industry, local authorities and other stakeholders do their best to maintain the integrity and efficacy of the licensing processes.

The importance of taxi licensing has been to the fore recently, both the micro (the *Uber* litigation with Transport for London) and the macro (the importance of taxi drivers - and, by extension, taxi licensing - to social cohesion during a pandemic). The lead article from Philip Kolvin QC is therefore extremely timely, providing thought-provoking ideas and promoting regulation and innovation, rather than litigation.

As might be expected, the impact of Covid-19 features in this edition. In particular, we are grateful to Charles Holland for a thorough exposition of the law regarding sale of alcohol for consumption off the premises, including of course the changes brought into effect by Business and Planning Act 2020.

This time last year, the prospect of an article entitled "Contact Tracing" would have been unthinkable, yet Matt Lewin's feature builds on his important analysis of CCTV requirements in the previous edition of the *Journal* to provide a necessary update on this most knotty of issues for operators who are charged with complying with what must seem like moving goalposts of Regulations after Regulation.

Likewise, it is with regret that a detailed survey of the impact of insolvency on premises licences is necessary, but we must grasp the nettle of the reality that this topic is one in which practitioners may need to be well-versed. Hence, Ben William's article can serve as a handy reference point should it unfortunately be needed.

Prior to Covid-19, the prospect of Brexit uncertainty hovered over licensing. It is important to remember that although Covid-19 may have pushed Brexit out of the headlines, practitioners need to remain aware of the myriad legislation which can affect licensed operators and local authorities. Constanze Bell provides a vital reminder that the focus of practitioners cannot be solely on Covid-19, with an assessment of the impact of Brexit on the employment of immigrant workers.

As ever, this foreword does not provide space to recognise all contributors. We also have our regular feature articles from James Button, Nick Arron, Julia Sawyer and Richard Brown.

I look forward to seeing as many of you as possible via Zoom during the NTC webinars. It won't be the same, but the IoL is nothing if not able to adapt to members' needs in trying circumstances. Until then, all the best.

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Leo Charalambides FIoL
Editor, Journal of Licensing

In this time of Covid-19 we are increasingly asked to consider the relationship between the various and sundry Coronavirus Health Protection Regulations made under Part 2A of the Public Health (Control of Disease) Act 1984 and the Licensing Act 2003: the key question being whether the review and, in particular, the summary review procedures, are an appropriate and / or lawful approach to allegations of Coronavirus-related breaches by or in licensed premises.

With increasing frequency police authorities are issuing applications for summary review (s 51A Licensing Act 2003), contending that the risk of spreading infections is deemed a common law offence of "public nuisance" which is deemed to be a serious crime.

Having seen a number of these applications, from a number of police authorities, I believe the police are adopting and replicating a common template. For authority they rely on a gobbet from the case of *R v Rimmington; R v Goldstein* [2005] UKHL 63 [45] adopting the definition in *Archbold, Criminal Pleading, Evidence and Practice 2005* which states:

> *A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all her Majesty's subjects.*

Typically, the summary review application also states that public nuisance is a common law offence which carries an offence of life imprisonment – and it is this fact that is relied upon to meet the test of serious crime for the purpose of the summary review certification. Serious crime for the purposes of the summary review procedure has the same meaning as s 83(3) of the Regulation of Investigatory Powers Act 2000 which prescribes that a serious crime is:

> *an offence for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more.*

However, the gobbet relied upon in the *Covid Summary Review* template fails to set out the full legal principles and is only a partial statement of the law in *Rimmington* which includes the following key statement by Lord Bingham [30]:

> *Where Parliament has defined the ingredients of an offence … good practice and respect for the primacy of statue do require … that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.*

The Coronavirus Regulations provide for a detailed framework of enforcement with specific powers given to the police for doing so. Contraventions of Coronavirus restrictions and requirements may be prosecuted as a summary-only offence punishable by a fine.

The reliance on the common law offence of public nuisance seems contrived and artificial given that Parliament has legislated for specific measures, including summary-only offences, to prevent the spread of Coronavirus. It beggars belief that in light of the summary-only offences of the Coronarvirus restrictions it can be "reasonably expected" that any person of previous good character could expect to receive a three-year custodial sentence.

There are a number of legal challenges in the early stages against this use of summary review procedures by police authorities. I am grateful to colleagues who have shared with me their preliminary submissions and look forward to hearing of future developments.

An appropriate response to Coronavirus legislative breaches is of paramount importance to public health and well-being but the circumstances and use of the summary review option in respect of *Coronavirus concerns* remind us once again of the dangers of expecting the Licensing Act 2003 to provide a panacea for all local ills and maladies. This is not what the Licensing Act 2003 intends nor sustains; we await the outcome of the legal challenges with interest.

Furthermore, the s 182 Guidance reminds us at para 9.12 that the police – quite rightly – are the primary source of information on the objective of crime and disorder and we must give careful attention to their representations. Equally we are reminded that the representations of responsible authorities must be able to withstand the scrutiny to which they ought to be subjected. This is good advice for the police, responsible authorities and legal representatives in licensing review hearings.

Beyond regulation: controlling app-based private hire operators

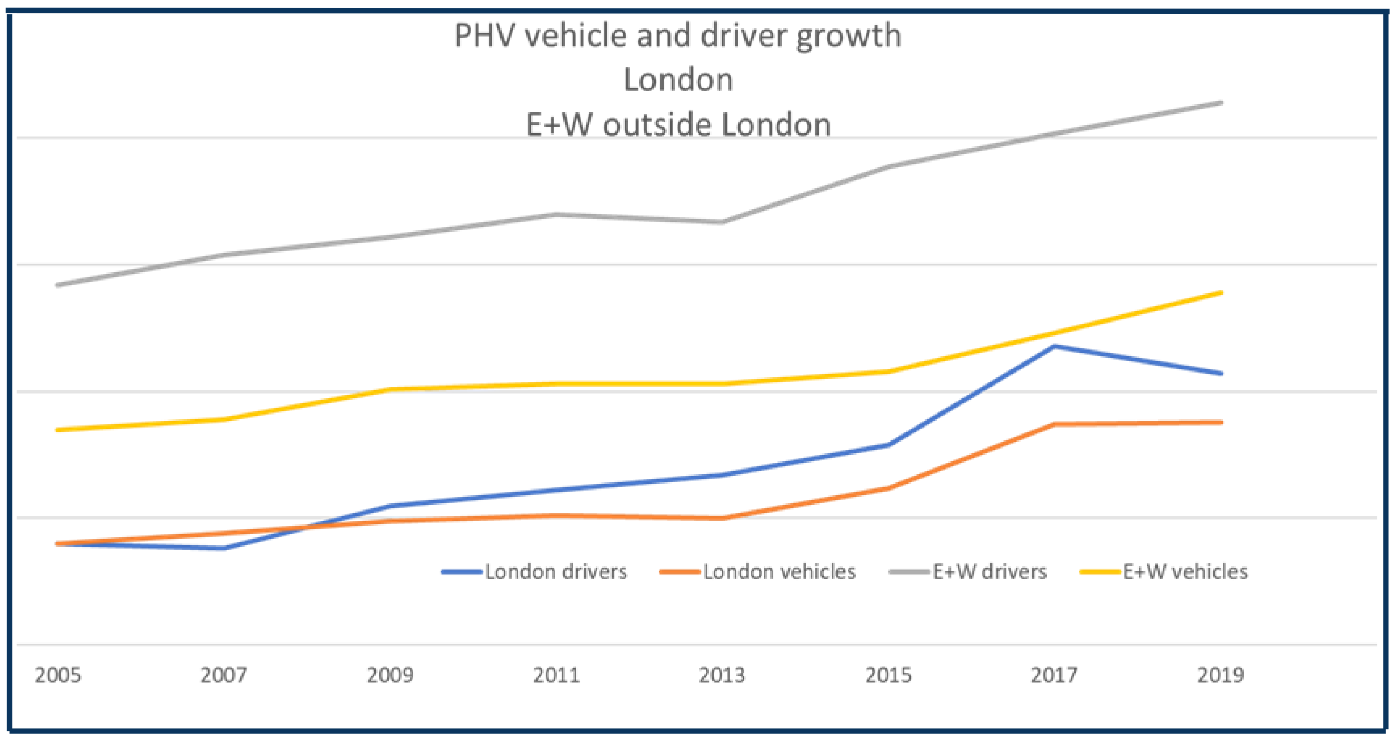
Local authorities could do more to manage the number of Uber and other app-based drivers in their area, and insist they contribute to public infrastructure argues **Philip Kolvin QC**

In former times, if you wanted to build a business empire, you needed bricks, mortar and time. It took twenty years for Marks & Spencer to move from its first covered market in Leeds to its first shop. No more. You can run the world's largest holiday lettings company without owning a hotel, or the largest book retailer in the world without a bookshop, and you can revolutionise the global taxi industry without owning a car. And it all happens at a dizzying pace. The question arises whether these commercial leviathans can be regulated and if so how.

The UK private hire industry has been revolutionised by app-based providers. The reasons for this are not hard to discern. The use of apps extends the reach of the service to a wide base of customers, supported by global branding. Engaging self-employed labour greatly reduces costs. And the right to roam granted by outdated PHV legislation enables operators to cherry-pick where they are licensed. All of this has fuelled a huge growth in both PHVs and drivers.

Such growth is unsustainable without a corresponding growth in customer demand. And there is no question but that app-based services are very popular, for good reasons: ease of booking, familiarity, lower wait times, cost and transparency of charging being just a few. Also, app-based vehicles are perceptibly safer because journeys can be tracked by friends or loved ones, drivers are identified and rated and the passenger is riding with a largely trusted brand.

Nonetheless, app-based operators still provoke a welter of concerns such as: tax avoidance; forum shopping (where operators seek licences in low standard areas and then provide services in high standard ones); unstaffed offices or no offices; failure to report complaints or breaches; cross-bordering (driving outside the area in which the driver is licensed); road congestion; plying for hire; driver status; pay and conditions linked to driver hours; driver exhausation; and lack of language skills. And the story of app-based growth has barely begun. Operators do not disguise but trumpet their desire to run driverless PHV networks, dispensing with their "partner drivers" at the first opportunity, and competing for custom with public transport systems.



On the whole, as we shall see, past attempts to tame the beast with litigation have generally failed, although regulatory efforts have been more successful. I will set out various further avenues which authorities may consider to regulate this burgeoning sector, if they wish to. I shall end with wider considerations, beyond regulation, by which these operations may be made to conduce to the public good.

Regulatory responses

In recent years, the public and third sectors have geared up their efforts to improve regulation of the PHV industry, driven principally by the appalling abuses uncovered in Rotherham and other places. The Local Government Association's *Taxi and PHV Licensing Handbook for Councillors* is an indispensable tool. The Institute of Licensing's publication *Safe and Suitable* has achieved national recognition for its guidance on assessing the suitability of applicants. The Local Government Association's National Register (NR3) has made a signal contribution in preventing miscreant driver and operators sliding under the radar by moving across borders. And, of course, the long awaited *Statutory Taxi and Private Hire Standards* represent a key intervention by elevating safeguarding to its rightful role at the heart of regulation.

Authorities have also taken more or less effective steps to ensure proper conduct by drivers operating outside the district which licensed them, by permitting their own officers to conduct compliance functions extra-territorially, delegating functions to officers in other districts and imposing reporting obligations on operators. All this represents a proportionate response to the challenges of operations conducted untethered from their licensed home.

On the whole, though, litigious attempts to control the industry have been markedly less successful. In *Reading BC v Ali* (2018), a council's allegation that an Uber driver was plying for hire by dint of the display of a marker of his location on a passenger app was dismissed by the High Court, with an audacious private prosecution to similar effect by the trade body the Licensed Taxi Drivers Association euthanased by the Director of Public Prosecutions. An authority's attempt to control cross-bordering by requiring drivers to pledge to drive "predominantly" in the borough came to a sticky end when its policy was quashed by the High Court in *R (Delta and Uber) v Knowsley MBC* (2018), while another attack on the app-based industry foundered when the High Court ruled that an operator could sub-contract to itself across borders in *Milton Keynes Council v Skyline* (2017). And in *Uber v Brighton and Hove CC* (2018) a District Judge held that an authority could not exact as the price of an operator's licence a condition that the operator would not allow its drivers to cross-border into the district.

If these cases have reinforced the sense that authorities are powerless to check the unconstrained growth of the industry, they shouldn't, as I shall demonstrate. Well-targeted action by authorities has forced the industry into social responsibility measures for the good of passengers and the public alike. To take one example, in 2018, Uber London Limited, in an attempt to recover its licence following TFL's refusal to renew it, submitted to a raft of licence conditions which were the basis of its successful appeal before the Chief Magistrate.[1] In 2020, history repeated itself, again on the basis of a list of conditions.[2] These included conditions dealing with:

- Corporate governance, placing responsibility for compliance squarely with the board.
- Independent assurance procedures to validate the effectiveness of Uber's systems, policies, procedures and oversight mechanisms for promoting compliance with its obligations as a licensed operator, and provision of copies of audits to the licensing authority.
- Notification to TFL of material changes to operating model, systems or processes including data handling and bookings systems.
- Reporting data breaches to TFL.
- Reporting criminal allegations to the police.

But for TFL's actions, it is at least doubtful that these conditions would have been proffered, but all serve the ends of public protection. At the same time, Uber agreed to regionalise its operation, so that drivers could not take bookings outside their "home" region. While some regions are very large indeed, it represents an improvement over the former position.

Further controls

For authorities which wish to exert greater control over the app-based industry, there is a raft of unexplored controls available to them. These are briefly described here.

i. The absent operator

The app-based provider may well seek to minimise their local administrative presence, eg, by having no office, or few if any staff in it, and no server accepting bookings. These throw focus on what it is to "operate" because it is only operators who require licences. It is right to say that PHV legislation

1 http://content.tfl.gov.uk/uber-licensing-appeal-final-judgment.pdf.

2 http://www.judiciary.uk/wp-content/uploads/2020/09/Uber-v-TFL-conditions-1.pdf.

outside London does not require an actual operating centre. All that is required is that a person "makes provision" for the invitation or acceptance of bookings.[3] Two matters flow from this.

First, if an authority believes for proper regulatory reasons that an operator should have an office in the district, it can require it by condition. For example, it might consider that there needs to be a place for customers to retrieve lost property or for drivers to be trained, or for the operator to meet their regulator.

Second, if it is right that bricks and mortar are not required by the Act, then what of the driver sitting in his / her cab who in fact accepts bookings? It is difficult to see why, by turning on the app, inviting bookings by displaying an (albeit anonymised) presence on the customer's device and accepting the customer's booking request, s / he is not in fact operating, so requiring a licence. Not all app-based drivers in fact accept bookings: in some cases bookings are accepted by the operator and allocated to the drivers. But where they do accept bookings there is a strong argument that they are operators.

ii. The wandering driver

What of the driver who is licensed in Area A but plies their trade in Area B? This has caused some authorities deep concern. There are two arguable solutions.

First, in *Knowsley* (above), Mr Justice Kerr floated the idea that a condition could be attached to a driver's licence curtailing the right to roam. Fair to say, s 51 of the Local Government (Miscellaneous Provisions) Act 1976 confers a wide discretion to add conditions, and case law colours this in by allowing authorities to exercise their powers for purposes relevant to the objects of the legislation. It is strongly arguable that one such object is to strengthen local control. That being so, a condition could be added. The condition should not be to drive predominantly in the licensed district, since that would create uncertainties of measurement. But it could require the driver to be based there, which could be considered by reference to where the vehicle is kept and where it starts and finishes its days.

Second, as is stated above, where drivers are themselves accepting bookings, it may well be that they are operating. Where they have no licence to do so, it follows that they would be acting unlawfully. This would need to be tested, but appears to raise valid arguments. The legislative system was designed for bookings to be accepted in offices: whether it permits them to be accepted in peripatetic vehicle remains to be seen.

iii. The national app

One of the defining features of modern apps is that they are disengaged from the areas in which vehicles are operated. Authorities complain that they exercise no licensing control, because the operators and their drivers are licensed elsewhere. A solution may present itself.

In *Blue Line v Newcastle City Council* (2012) an operator already licensed elsewhere sought a licence in Newcastle. The council, wanting it to be a discrete, local business, imposed a condition that the operator maintain a dedicated, exclusive telephone line. The operator breached the condition, the council revoked the licence and the whole argument ended up in the High Court. The operator cried interference with its commercial freedom, to no avail. According to the High Court, the hallmark of the scheme is localism, and in imposing the condition the council was pursuing a legitimate aim.

Law proceeds by analogy, principle and degrees. That being so, it is more than arguable that a local licensing authority could lawfully set its face against licensing a national app. It could rationally impose a condition that the customer should book through an app dedicated to the local operation. As it is, the customer asks for a driver and is allocated a driver who could be licensed anywhere. There is nothing local about it. If the argument is correct, authorities could stamp that out at a stroke.

iv. Period of operating licence

The default licence period is five years, according to s 55 of the 1976 Act. A shorter period may be granted if the authority thinks it appropriate. In what is a fast-moving and developing sector, an authority may well regard it appropriate to grant shorter licences, to enable more frequent reviews of the business.

v. Licence fees

It has been a regrettable feature of the PHV system that risks, be they data breaches, driver misconduct or systems changes, have come to the attention of licensing authorities later than they might have done. It is often as though stretched authorities have focused their attention at street level when they might have directed it at the control centre. There is no reason why authorities should not utilise their powers under s 70 of the Act to set fees to enable them to take a much more proactive role in supervising those they licence. Once these are divided into the millions of journeys conducted as a result of the licence, the cost per passenger is

3 Section 80 Local Government (Miscellaneous Provisions) Act 1976.

minuscule. It is a small price for public protection.

vi. Conditions

It is in the field of conditions that authorities have the greatest potential to direct operators along the path of control and public protection. Some authorities have grasped this: none has scraped the barrel. An excellent comparator is the gambling industry upon which the Gambling Commission has placed far-reaching requirements to ensure that player protection and other legitimate objectives are pursued at both a systems and granular level.

First, corporate systems. Public protection should rest with the board. Cascading from the board should be high level risk assessments, for example concerning safeguarding, ride-sharing and driver hours and exhaustion, with documented control measures and periodic reviews of effectiveness. There should be requirements for compliance teams with defined roles, and independent audits of compliance supplied to the regulator. There should be systems for recording of complaints and reporting to the police and / or the licensing authority which licenses the driver and in whose area the conduct arose. There should be a requirement to report key events as defined, eg, systems changes or faults, offences, suspensions, data breaches and investigations by other operators. In short, much of the job done by regulators conducting spot checks can be performed at its own expense by the operator, utilising its own highly evolved data systems.

Second, standardisation. It remains a mystery why authorities sub-regionally or even regionally impose different sets of conditions. Standardisation produces a level playing field, prevents forum shopping and equalises consumer protection. Certainly, there is a strong argument for standardised conditions imposed on the larger operators which are best-placed, when needing licences, to alight on the authorities with the most relaxed approach to conditions.

Thirdly, detailed licensing controls. These might go beyond simply customer safety. They might also go to other legitimate aims such as congestion and air pollution. A small sample of examples may include:

- Wheelchair accessibility
- 24 hour emergency phone lines
- Office in district
- Local booking systems
- Prohibition of "national" booking system: see *Blue Line*
- Supply of trip, geographic and hotspot data to regulator
- Clean air plans
- Restriction of driver hours
- Risk assessment of drivers, eg, as to whether they are simultaneously working in other jobs
- Supply of data on driver hourly / weekly earnings
- Ability for passengers to register concerns about those with whom they have ride-shared
- Setting apps to prevent drivers rat-running along residential streets
- As technology develops, driver verification: biometric or face-recognition log-on technology

In all of these ways, authorities can work to redress what some see as a fairly obvious imbalance between business and regulator.

Beyond regulation

The rise of app-based providers has raised stark questions going well beyond licensing, concerning employment practices, taxation, urban governance and use of public space.

As to the first, litigation both in the UK and around the world has underlined the dependence of providers on the gig economy and their ability to capitalise on the precariousness of labour. At the time of writing, a judgment of the Supreme Court on the topic is awaited. But all of this simply falls away when it is appreciated that the end-game for providers is no drivers at all. As to the second, and linked, is the ability of providers to undercut local rivals by treating themselves as data companies based elsewhere altogether rather than employers and transport providers based in the UK, so avoiding tax within the jurisdiction. As to the third, it is problematic that PHV licensing authorities have no control whatsoever about how many PHVs are driving locally, competing not only with local businesses but with public transport networks which rely on custom to continue with the service they provide.

As to the fourth, the business of app-based providers is deriving profit from the use of local roads paid for with public money. Detractors would say that this adds to harmful emissions (as much from tyres as engines), reduces road safety and competes for space which could be put to better uses, particularly as focus turns to creating improved passageways for pedestrians and cyclists. It is also incontestable that the prevalence of sat navs has greatly

increased traffic on secondary, mostly residential, roads, which app-based providers use to generate global profit, usually untaxed here.

Good arguments may be made why they should be permitted to, or even have the right, to do all of this. However, there is a democratic question: who decides?

In this article, I have studiously avoided the question of legislative intervention, not least because Parliament's radar will be directed at other issues for years to come. There is, however, one matter, beyond licensing regulation, which is worthy of consideration.

Local authorities should be able to decide for themselves how many PHVs drive on their roads, according to local need, environmental considerations and achievement of the correct balance between public transport and commercial hire. They, and through them local people, should benefit from the profits earned from private use of public space. Accordingly, authorities at local, sub-regional or regional level should be able to tender the right to operate a set number of PHVs to one, two or as many companies as they see fit, with bids evaluated based on economic benefit and other criteria such as social responsibility. In this way, local authorities will regain control while deriving economic profit from permitting public space to be used for private gain.

A counter-argument might run that local authorities don't have power to decide how many delivery drivers or private vehicles use their roads either. However, a clear difference is that app-operators claim to be part of the transport network serving urban spaces, and compete with financially stretched public transport systems, but do not pay for the privilege. This creates an economic imbalance and an environmental challenge, which could be redressed at a stroke of a legislative pen.

Conclusion

In this article, I have shown how licensing authorities have a wide range of powers to exert over private hire app-based operators, should they wish to. They should also have the power to limit numbers and tender the right to operate PHVs locally, in the same manner as the Government tenders rail franchises. The control of numbers and the sharing of profit will ensure that providers continue to serve the public good as their business and its underlying technology continues to evolve.

Philip Kolvin QC
Barrister, 11 KBW Chambers

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It will all end in tiers

The Government's attempts to help hospitality, and local authorities' interpretation of the resulting legislative amendments, have vested more powers in officialdom while weakening the rights of local residents, as Richard Brown explains

I am tempted to eschew the traditional table and chair and write this article standing up. Not, you understand, because my home office arrangements are sub-optimal. Indeed, I spend rather less time standing up nowadays, as memories of the jostle for space on the fictitious 8.16 from Norbiton to Waterloo and the increasingly life-imitating-art Reggie Perrin-esque excuses of rail companies recede into the distance rather quicker than did the suburban sprawl. Rather, in a sentiment which I suspect is shared by a number of practitioners, I have had quite enough of "tables and chairs" for one lifetime.

I refer of course to the Business and Planning Act 2020 which came into force on 22 July 2020.[1] Some form of Government-mandated flexibility for the hospitality industry had been trailed for some time prior to the 2020 Act coming into force, and the necessity of giving a helping hand to the hospitality industry had become obvious. On 20 March, the Government had asked licensed premises to close. On 21 March, The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020[2] had come into force, meaning that businesses selling food and drink for consumption on the premises had to close. On 26 March the The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020[3] came into force, revoking the earlier Regulations and replacing them with wider measures.

The unprecedented shutdown of the hospitality industry has of course caused great difficulties for operators big and small, and it was right that the Government should look at ways of helping. That it did not do so with more alacrity is perhaps a source of regret.

The first reading of the Planning and Licensing Bill in the House of Commons took place on 25 June. The Government announced on 29 June that licensed premises would be allowed to reopen on 4 July. The 26 March Regulations were revoked on 4 July, and replaced with The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020.[4]

It will not have escaped attention that by the time the Bill became law on 22 July, precisely 18 days had passed since so-called Super Saturday when licensed premises were permitted to open again to the public for consumption of food and drink on the premises.

Some local authorities – perhaps reluctant to wait until the wheels of the legislature had cranked into action – had put in place their own measures. For instance, in June, Westminster City Council published proposals to close some streets and widen pavements in some areas of the city in readiness for the reopening of licensed premises on 4 July.[5] The proposals also introduced a fast-track tables and chairs application process. The plan had broad and wide-ranging support, and the scheme was in place in time for the 4 July reopening.

There was a significant degree of support amongst local residents' groups for the City Council's proposals. The two amenity societies covering much of the West End (the Soho Society and the Covent Garden Community Association) were supportive, recognising the (temporary) need to enable licensed premises to open and survive, notwithstanding the strictures of social distancing and the shifting sands of Government guidance.

However, there was a considerable degree of consternation amongst some local authorities and groups, including West End resident stakeholders, when the Bill was published. The pavement licence regime outlined in clauses 1-10 of the 2020 Act seemed sensible albeit in need of tweaking, but clause 11 appeared to constitute a near-blanket authorisation for off sales of alcohol and for drinks to be sold to takeaway in open containers throughout the entire hours of operation. Thoughts turned to the numerous premises with 1am, 2am, 3am or later licences for on sales only, or off sales with restrictions that would be neutralised by the provisions of

1 https://www.legislation.gov.uk/ukpga/2020/16/contents/enacted.

2 SI 2020/327.

3 SI 2020/350.

4 SI 2020/684.

5 https://www.westminster.gov.uk/sites/default/files/hospitality_businesses_recovery_plan_brochure.pdf.

the Bill. Leaving aside the impact on the licensing objectives, surely it was inimical to social distancing for unregulated crowds to gather on the narrow streets of the West End to drink until the early hours?

In any event, what has come out in the wash is a sensible temporary solution, albeit at the time of writing undermined by further measures such as the 10pm curfew and so-called Rule of Six, not to mention the new tier system announced by the Government on 12 October. Sections 1-10 of the 2020 Act provide for a new regime of pavement licences. Section 11 inserted a new s 172F-L into the Licensing Act 2003 to provide authorisation for off sales of alcohol but in a more limited way than first proposed. The provisions of ss 1-11 will remain in force until 30 September 2021, although there is a power for the measures to be extended if "the Secretary of State considers it reasonable to do so to mitigate an effect of coronavirus".[6]

The pavement licence regime in ss 1-10 of the 2020 Act leaves a significant discretion in the hands of the local authority, and provides local residents with the opportunity to comment (albeit they will need to move quickly in order to do so). It also allows local authorities to add conditions to a licence, whether standard conditions, which they can publish, and / or tailored conditions. Lest a local authority be slothful in putting in place the necessary processes, the pavement licence will be deemed granted should it not have been determined within seven days of the end of the consultation period.[7]

The off sales deregulation at s 172F of the 2003 Act (as amended by s 11 of the 2020 Act) is a light touch regime. This is obviously crucial to the efficacy of the Government's intention to provide licensed premises with a lifeline when socialising indoors was (and at the time of writing is to an even greater extent) problematic, and the all-to-brief British summer was fast waning away. Off sales in open containers are automatically permitted, subject to limited "disqualifying events", and any contradictory conditions were suspended. A disqualifying event is, if in the three-year period prior to the rather portentous-sounding "day X":[8]

(a) the relevant licensing authority refused to grant a premises licence in respect of the licensed premises authorising off-sales,

(b) the relevant licensing authority refused to vary the premises licence so as to authorise off-sales, or

(c) the premises licence was varied or modified so as to exclude off-sales from the scope of the licence.[9]

What constitutes a refusal is perhaps a topic for another time.[10]

Section 172F(12) adds a further, rather odd exclusion regarding outdoor areas which could penalise an operator which had agreed to restrict outside drinking in "an outdoor area of the licensed premises", but not an operator which had agreed such a restriction for off sales:

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

Although a (very) light touch regime, there is a summary off-sales review power,[11] which permits a responsible authority (ie, not just the police, as with s 53A summary reviews in the 2003 Act) to apply to the licensing authority for a summary off-sales review, based on any or all of the four licensing objectives (ie, not just "prevention of crime and disorder", as with s 53A summary reviews).

It is right to observe without judgment that rights of local residents seem to have been diminished. The authorisation in s 172F is automatic. There appears to have been a no doubt deliberate diminution of the ability of local residents to exercise their right to review a premises licence under s 51 of the 2003 Act in respect of the authorisations in s 172F.

An "other person" may apply to the licensing authority for a review of a premises licence "where a premises licence has effect".[12] On the face of it, then, there is nothing to prevent local residents applying to the licensing authority for a review based partly or solely on harm to the licensing objectives caused by the authorisation in s 172F. However, s 172F(7) would seem to render any such success for residents entirely pyrrhic (my emphasis):

(7) The references in subsections (3) and (6) to an

6 Section 11(10) of the 2020 Act.

7 Sections 3(9) and (10) of the 2020 Act.

8 That is, the day in which the Act came into force.

9 Section 172F(8) of the 2020 Act.

10 See *Matthew Taylor v (1) Manchester City Council (2) TCG Bars Limited* [2012] EWHC 3467 (Admin) regarding power to amend an application.

11 Section 172G-K of the 2020 Act.

12 Section 51(1) of the 2003 Act.

> *authorisation or condition having effect include the authorisation or condition* ***as subsequently varied or modified*** *in so far as it has effect in relation to the relevant period.*

This would suggest that, for instance, if a condition on a premises licence was suspended under s 172F(6), any subsequent amendment of that condition would not take effect until after the relevant period (ie, 30 September 2021).[13]

It is fair to say the measures in s 172F have been and will be utilised more than previous Government forays into licensing legislation.[14] Whether or not it will be enough is a moot point, as matters have of course moved on apace recently and change week by week at the moment and the evidential basis for some of the changes appears to be somewhat opaque. The very latest measure (at the time of writing) is the three-tier system, or Local Covid Alert Levels. For those operators in Tier 3 areas (no mixing of households indoors and outdoors, including in private gardens; pubs and bars to close; restaurants, and pubs that can operate as restaurants, allowed to stay open), the heady days of 4 July must have receded into the distance too.

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

13 There is no similar discretion for the licensing authority as exists in s 177A(3) and (4) of the 2003 Act regarding the authorisation for / suspension of conditions relating to live and recorded music.

14 For example, community and ancillary sellers notices.

Online Delivery

The course will be provided via an online platform. Let us know if your Councillors need this training and we can get a date booked in.

We recently added our virtual Councillor Training Day to our list of online courses. A must for all councillors who are part of the licensing decision making process, providing an introduction for those who are new to the role and a refresher for more experienced councillors.

This training course is aimed at all councillors who are involved in the decision making process of licensing applications. The course will cover the general principles of licensing, including hearings under the Licensing Act 2003 and committee decisions relating to the hackney carriage and private hire regime.

UK Immigration from 2021: what consequences for licensing?

The post-Brexit system for employing immigrants will mostly mirror the existing system but employers will nevertheless be under greater pressure to ensure their workers all have lawful status, writes **Constanze Bell**

"Taking control of immigration" was one of the key themes of the Leave Campaign in 2016. The cornerstone of the argument was that control of immigration had been relinquished to the European Union. As uncertainty persists over whether a no-deal Brexit will be the outcome of negotiations, what is the future of immigration to the UK and what does this mean for licensed premises?

One of the many intricacies of the UK immigration system is that it is, in effect, two systems running in parallel. The first system derives from EU free movement principles. The Free Movement Directive was implemented in the UK, for the first time, through the Immigration (European Economic Area) Regulations 2006, which came into force on 30 April 2006. The second system, the Immigration Rules made under the Immigration Act 1971, governs how non-EU citizens can enter and remain in the UK. The rules can be changed by the laying of a Statement of Changes before Parliament, and are in fact changed frequently. The Immigration Rules and EU free movement rights are realised in the context of international law protecting refugees and protected persons.

Ireland, strictly speaking, exists outside the "two-systems" analysis set out above. Under reciprocal arrangements since Ireland's independence, British and Irish citizens have enjoyed associated rights in each other's state. These include the right to work and study, access to healthcare and social and welfare benefits, and voting rights in local and Parliamentary elections. This status also supports the provisions of the Belfast Agreement, specifically the birth right of the people of Northern Ireland to identify themselves and be accepted as Irish, British or both and to have the right to hold both British and Irish citizenship. The UK Government and the Government of Ireland signed a Memorandum of Understanding on 8 May 2019 which reaffirmed both Governments' commitment to the Common Travel Area and to maintaining the associated rights and privileges of Irish and British citizens under this long-standing reciprocal arrangement. A consequence of the right to hold both British and Irish citizenship is that Irish citizens can avail themselves of free movement rights under EU law or they can elect to rely on the British Immigration rules, as British citizens.

On Monday 7 September 2020 the *Financial Times* led with an article warning that the UK is planning new legislation that will override key parts of the Brexit withdrawal agreement, thus risking the collapse of trade talks in Brussels. There are concerns that the internal market Bill could undermine the agreement to avoid a hard border in Northern Ireland. The Government's official Operation Yellowhammer report (which sets out predictions for a no-deal Brexit in a worst-case scenario), formally published in September 2019 after being leaked to the *Sunday Times* the previous month, confirms that the UK would aim to "avoid an immediate risk of a return to a hard border on the UK side".

The second reading of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21 took place on 22 July 2020. This Bill makes provision to end rights to free movement of persons under retained EU law and to repeal other retained EU law relating to immigration. In short, the Bill ends free movement rights and unites the parallel immigration system described above to create one UK-based system.

However, it is important to note that the EU (Withdrawal Agreement) Act 2020, which incorporates the Withdrawal Agreement, the EEA EFTA Separation Agreement, and the Swiss Citizens' Rights Agreement into domestic law, provide all EU, EEA or Swiss citizens who have made the UK their home the continued right to live and remain in the UK.

If there is a no-deal Brexit, EU citizens who were resident in the UK before the UK leaves the EU will have until at least 31 December 2020 to apply to the EU Settlement Scheme in the event that the UK leaves the EU without a deal. Until then, they can continue to take up employment and rent property by showing their passport or national identity card. Their rights to claim benefits and access services in the UK will remain unchanged. Successful applicants to the EU Settlement Scheme will be granted settled or pre-settled status. The scheme is free of charge. Applicants need to

complete three key steps: prove their identity, show they live in the UK, and declare any criminal convictions.

It is vital that EU nationals living in the UK and relying on free movement rights secure their ability to remain in the UK by applying under the EU Settlement Scheme. Employers must communicate this to their staff to avoid staffing problems or, more seriously, to avoid committing immigration offences by employing workers without lawful status. The curry industry is one sector which has consistently warned of staffing shortages post-Brexit.

On 6 September 2019, the Home Secretary commissioned the Migration Advisory Committee to consider a new points-based immigration system for introduction from January 2021. On 13 July 2020, the Government set out further details on the UK's new points-based system. From January 2021, a job offer under the new points-based immigration system will need to be at a required skill level of RQF3 or above (equivalent to A level). The applicant will need to be able to speak English and must be paid the relevant salary threshold: this will either be the general salary threshold of £25,600 or the going rate for the job, whichever is higher. A salary of less than this - but no less than £20,480 - may still qualify in certain circumstances, for example, if you have a job offer in a shortage. These new arrangements will take effect from 1 January 2021, once freedom of movement with the European Union (EU) has ended. Free movement rules will continue until the end of the Implementation Period of 31 December 2020 under the EU Withdrawal Agreement.

Employers, landlords and other third parties will not be required to distinguish between EU citizens who moved to the UK before or after Brexit until the new points-based immigration system is introduced from January 2021.

Neither the current points-based system nor the new system permits migrants to enter the UK for low- skilled work below RQF3 (ie, work below A-level qualification level). Given the salary thresholds, very few candidates at RQF3 level will qualify for a visa under the new system. A significant concern for the construction, care, hospitality, tourism, food processing, manufacturing and retail sectors, all of which already face skills shortages, is and remains a "cliff edge" scenario in which there is sudden dramatic absence of workers. No temporary route is proposed to ease the process and allow for phased recruitment.

Against this backdrop, it is likely that instances of illegal working may arise. The law on preventing illegal working is set out in s 15 to s 25 of the Immigration, Asylum and Nationality Act 2006, s 24B of the Immigration Act 1971, and Schedule 6 of the Immigration Act 2016. Under s 15 of the 2006 Act, an employer may be liable for a civil penalty if they employ someone who does not have the right to undertake the work in question if that person commenced employment on or after 29 Feb 2008. Section 21 of the 2006 Act, as amended by s 35 of the Immigration Act 2016, creates a criminal offence "if you know or have reasonable cause to believe that you are employing an illegal worker". If checks are conducted as set out in the employer right to work guidance and the code of practice, this may establish a statutory excuse against liability for a civil penalty. The 2016 Act (Section 38 and Schedule 6) introduced illegal working closure notice and compliance order provisions to provide a power to deal with those employers who have continued to flout the UK's laws by using illegal labour where previous civil and / or criminal sanctions have not curbed their non-compliant behaviour.

The s182 Guidance Licensing Act 2003 (para 2.6) confirms that "Licence conditions that are considered appropriate for the prevention of illegal working in licensed premises might include requiring a premises licence holder to undertake right to work checks on all staff employed at the licensed premises or requiring that a copy of any document checked as part of a right to work check are retained at the licensed premises."

It seems clear that performing adequate checks will become more challenging for employers in the immediate, as transitional provisions operate, and it is necessary to become familiar with the new points-based system and new-style permits and visas.

In the opinion of the author, there will be a surge in applications for companies to obtain sponsorship licences, as the recruitment of EU staff post-Brexit will no longer be possible under free movement principles. The Government has stated an intention to speed up and simplify this process, which will undoubtedly be welcomed by many employers.

The author's view is that what is proposed under the new points-based immigration system is an amendment to the status quo rather than a complete overhaul. Most routes into the UK remain unchanged. One change that is significant, however, is the removal of the resident labour market test and suspension on the annual cap on entrants. The resident labour market test required an employer to show that no settled worker is suitable for the role. Precisely how these two changes align with the motivations of those who voted for Brexit is an interesting political question, outside the scope of this paper.

On 4 September 2019, Home Secretary Priti Patel announced that if there is a no-deal Brexit, free movement

will end. EU citizens will still be able to come to the UK to visit, work or study for a temporary period, but those who move to the UK after Brexit and wish to stay beyond 2020 will need to apply for a UK immigration status granting them permission to stay. The Home Office will open a new immigration scheme – the European Temporary Leave to Remain (Euro TLR) Scheme – to provide a route to apply for this new immigration status. Successful applicants to the Euro TLR scheme will be granted a period of 36 months' leave to remain in the UK, running from the date the leave is granted. EU citizens and their family members moving to the UK after a no-deal Brexit will be subject to the UK conduct and criminality test rather than the EU public policy test.

The UK conduct and criminality test will also apply to the post-exit conduct of EU citizens and their family members living here before a no-deal Brexit, or who have EU Settlement Scheme status, and to their pre-exit conduct where their post-exit conduct results in a sentence of imprisonment. It is therefore the case that while free movement rights are removed, EU nationals will still enjoy the option of applying for status under the new UK-only immigration system to enter and remain in the UK.

The emerging picture is of a system which will largely mirror the existing system but will place additional pressures on employers to ensure that their workers all have lawful status, perhaps by becoming sponsors under the rules. Alternatively, employers will flout the rules and suffer the financial and reputational consequences of enabling illegal working.

Constanze Bell
Barrister, Kings Chambers

New taxi Guidance has much to recommend it

The Department for Transport's long-awaited final Guidance on taxi hire is significantly different from the draft, and the IoL's suggestions have been taken on board, as **James Button** explains

In July the Department of Transport (DfT) finally published *Statutory Taxi and Private Hire Vehicle Standards*, which is the long-awaited Guidance issued under s 177 Policing & Crime Act 2017.[1] That section gives the Secretary of State power to issue guidance to licensing authorities in relation to the exercise of "their licensing functions under taxi and private hire vehicle legislation . . . so as to protect children, and vulnerable individuals who are 18 or over, from harm."[2]

That enabling section came into force on 1 February 2017 and despite the apparent urgency, and a plea in the report by the Task and Finish Group in September 2018 that "The Department for Transport must as a matter of urgency press ahead with consultation on a draft of its Statutory Guidance to local licensing authorities,"[3] the draft was not issued until February 2019. Consultation took place until April 2019 and then a further 15 months elapsed before publication of the final document.

In the light of that delay, it is gratifying to see that the final Guidance is significantly different from the draft, and suggestions made by the Institute of Licensing as part of its consultation response have been taken on board and in large part incorporated into the final Guidance.

This Guidance applies in both England and Wales, notwithstanding the fact that taxi licensing is now a devolved function for Wales. As and when the Welsh Assembly Government introduces new or revised taxi law,[4] it may need to introduce different guidance.

Throughout this article (apart from headings), any words in bold type are in that form in the original document; the new Guidance uses that format extensively as a means of adding emphasis.

Overview

One important point to note at the beginning: this is Statutory Guidance, not Statutory Standards! The Government has committed to introducing statutory minimum standards for drivers, vehicles and operators, but this does not satisfy that promise. This is effectively updated *Fitness & Propriety Guidance*, which revises parts of the 2010 *Best Practice Guidance*.[5] The effect of the new Guidance is explained at Para 1.7:

> *The standards in this document replace relevant sections of the Best Practice Guidance issued by the Department in 2010, where there is a conflict between the Statutory Taxi and Private Hire Vehicle Standards and the Best Practice Guidance the Department issue on taxi and private hire vehicle licensing, the standards*

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

2 Policing & Crime Act 2017 s 177(1).

3 *Taxi and Private Hire Vehicle Licensing: steps towards a safer and more robust system*, September 2018 - Recommendation 16 Para 4.5. Available at https://www.gov.uk/government/publications/taxi-and-private-hire-vehicle-licensing-recommendations-for-a-safer-and-more-robust-system.

4 The new Guidance refers to "taxis" as meaning hackney carriages. The terminology is explained on page 6 as follows:

> *Taxis are referred to in legislation, regulation and common language as 'hackney carriages', 'black cabs' and 'cabs'. The term '**taxi**' is used throughout this document and refers to all such vehicles. Taxis can be hired immediately by hailing on the street or at a rank.*
>
> *Private hire vehicles include a range of vehicles including minicabs, executive cars, chauffeur services, limousines and some school and day centre transport services. All private hire vehicle journeys must be pre-booked via a licensed private hire vehicle operator and are subject to a 'triple licensing lock', ie, the operator fulfilling the booking must use vehicles and drivers licensed by the same authority as that which granted its licence. The term 'private hire vehicle' is used throughout this document to refer to all such vehicles.*

While this has been the DfT's and government's approach for many years, it does lead to confusion, as the public regard both types of vehicle as "taxis".

5 *Taxi and private hire vehicle licensing: best practice*, DfT 2010. Available at https://www.gov.uk/government/publications/taxi-and-private-hire-vehicle-licensing-best-practice-guidance.

in this document take precedence.

Unfortunately, there is no clear explanation in the new Guidance as to what has been replaced, but the DfT has supplied this:

- CCTV (in the personal security section) – expanded and updated links to ICO/SCC guidance and limited to passenger safety.
- CRB - Now DBS.
- NOS - no longer applicable.
- Immigration checks - updated to Right to Work checks.
- Language proficiency - wider scope and linked to safety, eg, understanding and applying safeguarding training.
- Other training - should include safeguarding training.
- Record keeping - expanded to include more information, eg, those involved in the booking.

Introduction (Chapter 1)

The DfT makes it very clear that local authorities (and Transport for London) as licensing authorities with responsibility for hackney carriage and private hire licensing must follow this Guidance:

> *Whilst the focus of the Statutory Taxi and Private Hire Vehicle Standards is on protecting children and vulnerable adults, all passengers will benefit from the recommendations contained in it. There is consensus that common core minimum standards are required to regulate better the taxi and private hire vehicle sector, and the recommendations in this document are the result of detailed discussion with the trade, regulators and safety campaign groups.* ***The Department therefore expects these recommendations to be implemented unless there is a compelling local reason not to.***[6]

Consideration of the Statutory Taxi and Private Hire Vehicle Standards (Chapter 2)

This chapter details the impact of the new Guidance, and all local authorities with taxi licensing functions in England and Wales (including TfL) **"must have regard"** to the Guidance. A very robust stance is taken in the Guidance:

> *"Having regard" to these standards requires public authorities, in formulating a policy, to give considerations the weight which is proportionate in the circumstances.* ***Given that the standards have been set directly to address the safeguarding of the public and the potential impact of failings in this area, the importance of thoroughly considering these standards cannot be overstated.*** *It is not a question of box ticking; the standards must be considered rigorously and with an open mind.*[7]

The new Guidance takes the usual (and correct) approach that licensing authorities are responsible for their own decisions, but makes the point that failure to implement standards:

> *might be drawn upon in any legal challenge to an authority's practice, and that any failure to adhere to the standards without sufficient justification could be detrimental to the authority's defence.* ***In the interest of transparency, all licensing authorities should publish their consideration of the measures contained in Statutory Taxi and Private Hire Vehicle Standards, and the policies and delivery plans that stem from these.***

and the DfT will monitor the effectiveness of the standards.

This must be addressed by licensing authorities as a matter of urgency. In its email introducing the new Guidance the DfT said this:

> *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.*[8]

and it continued:

> *In the interests of transparency, all licensing authorities should publish their consideration of the measures contained in the Standards and the policies and delivery plans that stem from these. The Secretary of State is asking all licensing authorities to provide an update to the Department of their consideration of the Standards six months after their publication, so by the end of January 2021. However, the Department is aware of the challenges caused by the current coronavirus pandemic and is mindful of this.*

This was reinforced by Grant Shapps, Secretary of State for Transport, who said:

6 *Statutory Taxi and Private Hire Vehicle Standards*, para 1.3.

7 *Statutory Taxi and Private Hire Vehicle Standards*, para 2.7.

8 DfT email to licensing authorities, 21 July 2020.

> *We expect all licensing authorities to implement the standards and won't hesitate to introduce legislation if they don't fulfil their responsibilities to keep the public safe.*

To reinforce the point, DfT publicly in its press release commented:

> *Licensing authorities will be expected to fully implement these measures as soon as possible. The department will closely monitor progress, work with authorities not meeting their responsibilities and look to introduce legislation if licensing authorities fail to adopt the standards and update their operations.*[9]

Administering the licensing regime (Chapter 3)

To incorporate these "standards" licensing authorities will have to revise their policies. The new Guidance makes it clear there should be:

> *a cohesive policy document that brings together all their procedures on taxi and private hire vehicle licensing. This should include but not be limited to policies on convictions, a 'fit and proper' person test, licence conditions and vehicle standards.*[10]

This must be reviewed at least every five years (or more frequently) and licensing authorities should asses their performance annually.[11] No indication is given as to how this assessment should be carried out. I suggest that a starting point would be how many times the authority departed from its policy to grant, or allow a licensee to retain, a licence. If, as a percentage, this is above a very small amount, questions must be asked (and answered) as to why that has occurred. That is only one element that will need to be considered.

Where authorities already have policies that incorporate all the elements of the new Guidance, there is no need to immediately revise their policy. Also, in revising a policy, the authority can introduce more stringent requirements. This is important as while the new guidance does largely replicate the Institute of Licensing's Guidelines on previous convictions,[12] there are some discrepancies (see below).

The new Guidance reminds licensing authorities that the maximum duration of licence is three years for drivers[13] and five years for operators,[14] and in both cases a shorter licence can be issued if that is "appropriate in the circumstances of the case". Thankfully the point is made that licences should "not be issued on a 'probationary' basis"[15] : a person is either fit and proper, or they are not; there can be no halfway measures.

The new Guidance makes it very clear that all licensing authorities have systems in place to enable concerns about taxi licensing decisions to be raised, without fear, both by officers and members.

> ***Licensing authorities should have effective internal procedures in place for staff to raise concerns and for any concerns to be dealt with openly and fairly***.[16]

And:

> *It is hoped that all licensing authorities will have learnt from these mistakes [South Ribble] but to prevent a repeat,* ***local authorities should ensure they have an effective 'whistleblowing' policy and that all staff are aware of it****. If a worker is aware of, and has access to, effective internal procedures for raising concerns then 'whistleblowing' is unlikely to be needed.*[17]

Where a policy needs to be altered to align with the new Guidance, consultation on the proposals must take place. The DfT suggests that should be with:[18]

- Taxi and private hire vehicle trades.
- Customers, including groups representing disabled people.
- Chambers of Commerce.
- Organisations with a wider transport interest (eg, the Campaign for Better Transport and other transport providers).
- Women's groups.
- Local traders.
- Multi-agency safeguarding arrangements (MASH).
- Night-time economy groups (such as Pubwatch) if the trade is an important element of dispersal from the local night-time economy's activities.

But that is not an exhaustive list and the following are also

9 DfT press release, 21 July 2020, available at https://www.gov.uk/government/news/new-standards-to-improve-safety-for-taxi-and-private-hire-vehicle-passengers.

10 *Statutory Taxi and Private Hire Vehicle Standards*, para 3.1.

11 *Statutory Taxi and Private Hire Vehicle Standards*, para 3.5.

12 *Guidance on the suitability of applicants and licensees in the hackney and private hire trade*s, Institute of Licensing 2018, available at www.instituteoflicensing.org

13 Section 53 Local Government (Miscellaneous Provisions) Act 1976.

14 Section 55 Local Government (Miscellaneous Provisions) Act 1976.

15 *Statutory Taxi and Private Hire Vehicle Standards*, para 3.7.

16 *Statutory Taxi and Private Hire Vehicle Standards*, para 3.8.

17 *Statutory Taxi and Private Hire Vehicle Standards*, para 3.10.

18 *Statutory Taxi and Private Hire Vehicle Standards* para 3.12.

suggested for inclusion:

- Schools, colleges and universities.
- Local employers.
- Residents and neighbourhood watch groups.
- Hospitals and care homes.
- Hotels, guest houses and B&Bs.
- Youth groups (Scouts, Guides, football, rugby and other sports clubs).
- The general public.

There should also be discussion and consideration of the approach being taken by other authorities:

> *Any decision taken to alter the licensing regime is likely to have an impact on the operation of the taxi and private hire vehicle sector in neighbouring areas; and* ***licensing authorities should engage with these areas to identify any concerns and issues that might arise from a proposed change****. Many areas convene regional officer consultation groups or, more formally, councillor liaison meetings; this should be adopted by all authorities.*[19]

If the policy is altered as a result of the new Guidance, existing licences should be reviewed in the light of the new standards:[20]

> ***Any changes in licensing requirements should be followed by a review of the licences already issued.***[21]

It is possible to take action if the new policy means that a licence would not be granted to that applicant if it was a new application. The fact that they have held a licence previously is a relevant factor that the authority must take into account, but it is not an overriding or determining factor.

Gathering and sharing information (Chapter 4)

Chapter 4 provides useful general information about the DBS and the Update Service,[22] but licensing authorities should be cautious of the requirement to get drivers to sign up to the DBS update service. This is fine for private hire drivers because conditions can be attached to their drivers' licences, but it does not work for hackney carriage drivers. Conditions cannot be attached to those licences.[23] There are two possible solutions to this. Firstly, the use of dual or combined licences. This is a licence that covers both hackney carriage and private hire drivers. As it is a private hire driver's licence, conditions can be attached. And secondly, granting six month licences to hackney carriage drivers who do not sign up to the DBS update service, requiring a fresh DBS each time. The new Guidance makes it clear that a licensing authority cannot require an applicant to make its own DPA request to the police and provide the information received to the authority. The only mechanism of accessing police records is through the DBS.[24]

The new Guidance makes great play of the importance of Common Law Police Disclosure, which although good in principle, is widely regarded by local authorities as being almost useless, with many constabularies failing to provide information in relation to taxi drivers in a timely fashion, or even at all. However, the Guidance does not address this failing and merely says:

> *Common Law Police Disclosure ensures that where there is a public protection risk, the police will pass information to the employer or regulatory body to allow them to act swiftly to mitigate any danger.*[25]

And:

> *This procedure provides robust safeguarding arrangements while ensuring only relevant information is passed on to employers or regulatory bodies.* ***Licensing authorities should maintain close links with the police to ensure effective and efficient information sharing procedures and protocols are in place and are being used.***[26]

The Guidance does reinforce the fact that it is vital to have a partnership between local authorities and police, and suggests that it is important to feed results back to police ("**action taken by the licensing authority as a result of information received should be fed-back to the police**"[27]) as this will lead to increased awareness of the issues by the police. In addition, the police should be told of all refusals and revocations on public safety grounds.[28]

The Guidance states that:

> *Licence holders should be required to notify the issuing*

19 *Statutory Taxi and Private Hire Vehicle Standards*, para 3.13.

20 There is no concept of "review" of a hackney carriage or private hire licence (in contrast to a premises licence under the Licensing Act 2003), but authorities can revoke a licence at any time for "any other reasonable cause" – see ss 60, 61 & 62 Local Government (Miscellaneous Provisions) Act 1976.

21 *Statutory Taxi and Private Hire Vehicle Standards*, para 3.14.

22 *Statutory Taxi and Private Hire Vehicle Standards,* paras 4.1 to 4.8.

23 See *Wathan v Neath Port Talbot County Borough Council* [2002] LLR 749, Admin Ct.

24 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.4.

25 *Statutory Taxi and Private Hire Vehicle Standards*, para 4.9.

26 *Statutory Taxi and Private Hire Vehicle Standards*, para 4.11.

27 *Statutory Taxi and Private Hire Vehicle Standards*, para 4.17.

28 *Statutory Taxi and Private Hire Vehicle Standards*, paras 4.17 to 4.19.

authority within 48 hours of an arrest and release, charge or conviction of any sexual offence, any offence involving dishonesty or violence and any motoring offence.[29]

Any failure on the part of a driver to comply with this requirements may lead to questions over their continuing fitness and propriety.[30]

Again, this is problematic for authorities that grant separate hackney carriage and private hire drivers licences (see above).

Paragraphs 4.14 to 4.16 of the new Guidance provide a useful resume of the ability of an LA to report matters to the DBS, and in particular:

> ***A decision to refuse or revoke a licence as the individual is thought to present a risk of harm to a child or vulnerable adult, should be referred to the DBS.***[31]
>
> *The Department recommends that licensing authorities should make a referral to the DBS when it is thought that:*
>
> - an individual has harmed or poses a risk of harm to a child or vulnerable adult;
> - an individual has satisfied the 'harm test'; or
> - received a caution or conviction for a relevant offence and;
> - the person they are referring is, has or might in future be working in regulated activity;
>
> *if the above conditions are satisfied, the DBS may consider it appropriate for the person to be added to a barred list.*[32]

The Guidance acknowledges that liaison between neighbouring authorities can be difficult, but states that:

> ***Applicants and licensees should be required to disclose if they hold or have previously held a licence with another authority. An applicant should also be required to disclose if they have had an application for a licence refused, or a licence revoked or suspended by any other licensing authority.*** *Licensing authorities should explicitly advise on their application forms that making a false statement or omitting to provide the information requested may be a criminal offence.*[33]

In addition:

> ***Tools such as NR3 should be used by licensing authorities to share information on a more consistent basis to mitigate the risk of non-disclosure of relevant information by applicants.***[34]

and any failures to disclose information should lead to questions over the applicants fitness and propriety.[35]

Licensing authorities must operate or emulate a Multi-Agency Safeguarding Hub (MASH).[36]

In relation to complaints against licensees,

> ***All licensing authorities should have a robust system for recording complaints, including analysing trends across all licensees as well as complaints against individual licensees.***[37]

If there are numerous complaints, the authority should raise its concerns with the driver and / or operator, and the methods of complaining should be displayed in hackney carriages and private hire vehicles and on the authority's website. CCTV can assist in this.[38]

In relation to obtaining information about overseas convictions, the new Guidance acknowledges that the DBS does not work, and suggests that Certificates of Good Character are provided for any "extended period" abroad over the age of 18, and if an applicant has any conviction abroad equivalent to those in the annex they should seek legal advice.[39]

Decision making (Chapter 5)

The new Guidance states taxi and private hire licensing is a non-executive function of local authorities, but that is incorrect as some functions lie with the Executive where an authority runs executive arrangements.[40]

It is very clear that "individuals" (which must include members and their committees) who determine grant or refusal must be "adequately resourced to allow them to discharge the function effectively and correctly",[41] and also trained, with a record made of that. The Guidance states:

29 *Statutory Taxi and Private Hire Vehicle Standards,* paras 4.12.
30 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.13.
31 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.14.
32 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.15.
33 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.20.
34 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.21.
35 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.25.
36 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.26 to 4.28.
37 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.29.
38 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.31 to 4.33.
39 *Statutory Taxi and Private Hire Vehicle Standards,* para 4.34 and 4.36.
40 *Statutory Taxi and Private Hire Vehicle Standards,* para 5.1.
41 *Statutory Taxi and Private Hire Vehicle Standards,* para 5.2.

> ***All individuals that determine whether a licence is issued should be required to undertake sufficient training.***[42]

The day to day decision making of "less contentious matters" should be delegated to officers, but the new Guidance does not recommend all matters delegated to officers: "This approach is not recommended and caution should be exercised."[43] It goes on to make a strange statement:

> *It is rare for the same councillors to be involved in frequent hearings – therefore the councillors involved in the decision making process will have less knowledge of previous decisions and therefore are less likely to be influenced by them.*[44]

This may not be the experience of many councils, where only a few members of a larger committee are regularly involved in sub-committee meetings.

It goes on to say:

> *Regardless of which approach is adopted,* ***all licensing authorities should consider arrangements for dealing with serious matters that may require the immediate revocation of a licence****. It is recommended that this role is delegated to a senior officer / manager with responsibility for the licensing service.*[45]

And I have always suggested that the role should be delegated to an officer in consultation with the chair or deputy of the committee.

The Guidance finally offers a fit and proper test, but it does only refer to drivers:

> ***Without any prejudice, and based on the information before you, would you allow a person for whom you care, regardless of their condition, to travel alone in a vehicle driven by this person at any time of day or night?***[46]

This is very similar to the test used for many years by local authorities:

> *Would you (as a member of the licensing committee or other person charged with the ability to grant a hackney carriage driver's licence) allow your son or daughter, spouse or partner, mother or father, grandson or granddaughter or any other person for whom you care, to get into a vehicle with this person alone?*[47]

The new Guidance also makes it very clear that "an applicant or licensee should not be 'given the benefit of doubt'".[48]

The new Guidance states that every licensing authority must have a clear policy for the consideration of previous convictions, and that there can be offences which mean a person will never be considered fit and proper unless there are "truly exceptional circumstances".[49] Annex A to the new Guidance is broadly similar to the IoL's *Guidance on the suitability of applicants and licensees in the hackney and private hire trades*[50] but is missing a crucial part:

> *Generally, where a person has more than one conviction, this will raise serious questions about their safety and suitability. The licensing authority is looking for safe and suitable individuals, and once a pattern or trend of repeated offending is apparent, a licence will not be granted or renewed.*[51]

Generally, the IoL Guidance on Determination and the Annex to the new Guidance make the same recommendations, and they are the same as follows (the minimum period which must elapse following either conviction for an offence or completion of the sentence, whichever is later):

- Crimes resulting in death - never.
- Exploitation - never.
- Sex and indecency offences - never.
- Offences involving violence – ten years.
- Possession of a weapon – seven years.
- Dishonesty – seven years.
- Drugs (possession) – five years.
- Drugs (supply) – ten years.
- Discrimination – seven years.
- Drink driving / driving under the influence of drugs – seven years.

42 *Statutory Taxi and Private Hire Vehicle Standards,* para 5.3.

43 *Statutory Taxi and Private Hire Vehicle Standards,* para 5.10.

44 *Statutory Taxi and Private Hire Vehicle Standards,* para 5.7.

45 *Statutory Taxi and Private Hire Vehicle Standards,* para 5.11.

46 *Statutory Taxi and Private Hire Vehicle Standards,* para 5.12.

47 *Button on Taxis: Licensing Law and Practice 4th* Edition, Bloomsbury Professional 2017, para 10.21.

48 *Statutory Taxi and Private Hire Vehicle Standards*, paras 5.12 to 5.14.

49 *Statutory Taxi and Private Hire Vehicle Standards*, paras 5.15 to 5.17.

50 *Guidance on the suitability of applicants and licensees in the hackney and private hire trade,* Institute of Licensing 2018 available at www.instituteoflicensing.org.

51 *Guidance on the suitability of applicants and licensees in the hackney and private hire trade,* para 4.22.

- Using a hand-held telephone or hand-held device whilst driving – five years.

However, the new Guidance takes a different approach to motoring convictions. The IoL Guidance suggests:

- Minor motoring offences – five years where seven or more DVLA points.
- Major motoring offences – seven years.
- Hackney carriage and private hire offences – seven years.
- Vehicle use offences – seven years.

But the new Guidance says this:

> *Hackney carriage and private hire drivers are professional drivers charged with the responsibility of carrying the public. It is accepted that offences can be committed unintentionally, and a single occurrence of a minor traffic offence would not prohibit the granting of a licence. However, applicants with multiple motoring convictions may indicate that an applicant does not exhibit the behaviours of a safe road user and one that is suitable to drive professionally.*[52]

And this:

> *Any motoring conviction while a licensed driver demonstrates that the licensee may not take their professional responsibilities seriously. However, it is accepted that offences can be committed unintentionally, and a single occurrence of a minor traffic offence may not necessitate the revocation of a taxi or private hire vehicle driver licence providing the authority considers that the licensee remains a fit and proper person to retain a licence.*[53]

Driver licensing (Chapter 6)

The new Guidance provides clear guidance on the approach to criminality checks which must be undertaken by licensing authorities for hackney carriage and private hire drivers. Authorities must obtain an Enhanced DBS + Check of both adult and child barred lists.[54] They must then consider whether an applicant or licensee presents a risk to public safety:

> ***In the interests of public safety, licensing authorities should not, as part of their policies, issue a licence to any individual that appears on either barred list.*** *Should a licensing authority consider there to be exceptional circumstances which means that, based on the balance of probabilities they consider an individual named on a barred list to be 'fit and proper', the reasons for reaching this conclusion should be recorded.*[55]

Of course, full and detailed reasons for all decisions should be given and recorded.[56] Training should be provided, and made mandatory, for drivers in relation to the wide concept of safeguarding, which includes child sexual exploitation and county lines awareness, as well as an understanding of vulnerability.[57]

> *All licensing authorities should provide safeguarding advice and guidance to the trade and should require taxi and private hire vehicle drivers to undertake safeguarding training.*[58]

Finally, drivers must be proficient in both oral and written English:

> *A lack of language proficiency could impact on a driver's ability to understand written documents, such as policies and guidance, relating to the protection of children and vulnerable adults and applying this to identify and act on signs of exploitation. Oral proficiency will be of relevance in the identification of potential exploitation through communicating with passengers and their interaction with others.*[59]

Vehicle licensing (Chapter 7)

The DfT has recognised the responsible role of vehicle proprietors in relation to safety and public protection. The Guidance states:

> *As with driver licensing, the objective of vehicle licensing is to protect the public, who trust that the vehicles dispatched are above all else safe. It is important therefore that licensing authorities are assured that those granted a vehicle licence also pose no threat to the public and have no links to serious criminal activity. Although vehicle proprietors may not have direct contact with passengers, they are still entrusted to ensure that the vehicles and drivers used to carry passengers are appropriately licensed and so maintain*

52 *Statutory Taxi and Private Hire Vehicle Standards,* Previous Convictions Policy Annex.

53 *Statutory Taxi and Private Hire Vehicle Standards,* Previous Convictions Policy Annex.

54 *Statutory Taxi and Private Hire Vehicle Standards,* Para 6.2.

55 *Statutory Taxi and Private Hire Vehicle Standards,* Para 6.3.

56 See *R (app Hope and Glory Public House Ltd) v Westminster City Magistrates' Court* [2011] 3 All ER 579, CA.

57 *Statutory Taxi and Private Hire Vehicle Standards*, paras 6.5 to 6.14.

58 *Statutory Taxi and Private Hire Vehicle Standards*, para 6.6.

59 *Statutory Taxi and Private Hire Vehicle Standards*, para 6.14.

> *the safety benefits of the licensing regime.*[60]

And:

> ***Licensing authorities should require a basic disclosure from the DBS and that a check is undertaken annually. . .*** *Licensing authorities should consider whether an applicant or licence holder with a conviction for offences provided in the annex to this document . . . other than those relating to driving, meet the 'fit and proper' threshold.*[61]

However, that will not be necessary if that person is already licensed as a driver.[62] The new Guidance does not offer a test for hackney carriage and private hire vehicle proprietors, but it is just as necessary as a test for drivers. I would suggest the following, which also considers the responsibility of the proprietor to maintain the vehicle:

> *Would I be comfortable allowing this person to have control of a licensed vehicle that can travel anywhere, at any time of the day or night without arousing suspicion, and be satisfied that they would not allow it to be used for criminal or other unacceptable purposes, and be confident that they would maintain it to an acceptable standard throughout the period of the licence?*[63]

The same tests should be required for directors and secretaries of limited companies, which is possible using the powers contained in s 57(1) Local Government (Miscellaneous Provisions) Act 1976.[64] The loss of a driver's licence does not automatically affect the vehicle licence, but licensing authorities must consider the matter carefully.[65]

The new Guidance supports the fitting and the use of CCTV but does not make it mandatory. Any decision to require CCTV in vehicle must be based on assessments of risk and be a proportionate response to local issues. The DfT feels that audio as well as visual recording is useful, but makes it clear that to comply with the Information Commissioners requires an activation switch.[66]

There is more detail in the CCTV Annex,[67] which is really just references rather than Guidance, but is a useful resumé nonetheless. It suggests that the council will be the data controller, reinforces the need for robust security measures and emphasises that there must be not only signage on vehicles alerting passengers to the presence of CCTV, but that this should also be on the operator's website.

There is some information on the licensing of stretched limousines, but this is almost identical to the *Best Practice Guidance*[68] but omitting some parts (paras 41, 42 and 44). Overall the message is the same: vehicles carrying under nine passengers should be licensed as PHV, while those carrying more than eight passengers are the Traffic Commissioner's responsibility. In particular, licensing authorities should not refuse to licence as this can lead to illegal use.[69]

Private hire vehicle operator licensing (Chapter 8)

The DfT has recognised the responsible role of vehicle operators and their staff in relation to safety and public protection.

As with driver licensing, the objective in licensing private hire vehicle operators is to protect the public, who may be using operators' premises and trusting that the drivers and vehicles dispatched are above all else safe. It is important therefore that licensing authorities are assured that those that are granted a private hire vehicle operator also pose no threat to the public and have no links to serious criminal activity. Although private hire vehicle operators may not have direct contact with passengers, they are still entrusted to ensure that the vehicles and drivers used to carry passengers are appropriately licensed and so maintain the safety benefits of the driver licensing regime.[70]

And:

> ***Licensing authorities should require a basic disclosure from the DBS and that a check is undertaken annually. . .*** *Licensing authorities should consider whether an applicant or licence holder with a conviction for offences provided in the annex to this document . . . other than those relating to driving, meet the 'fit and proper' threshold.*[71]

However, this will not be necessary if that person is already licensed as a driver.[72] The new Guidance does not offer a test for private hire operators, but it is just as necessary as a test for drivers and proprietors. I would suggest the following:

60 *Statutory Taxi and Private Hire Vehicle Standards*, para 7.1.
61 *Statutory Taxi and Private Hire Vehicle Standards*, para 7.2.
62 *Statutory Taxi and Private Hire Vehicle Standards,* para 7.3.
63 *Button on Taxis: Licensing Law and Practice* 4th Edition, Bloomsbury Professional 2017, para 8.98.
64 *Statutory Taxi and Private Hire Vehicle Standards,* para 7.5.
65 *Statutory Taxi and Private Hire Vehicle Standards,* para 7.4
66 *Statutory Taxi and Private Hire Vehicle Standards,* paras 7.7 to 7.14.
67 *Statutory Taxi and Private Hire Vehicle Standards,* CCTV Annex.
68 *Taxi and private hire vehicle licensing: best practice,* DfT 2010. Available at https://www.gov.uk/government/publications/taxi-and-private-hire-vehicle-licensing-best-practice-guidance.
69 *Statutory Taxi and Private Hire Vehicle Standards,* paras 7.14 and 7.15.
70 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.1.
71 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.1.
72 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.2.

Would I be comfortable providing sensitive information such as holiday plans, movements of my family or other information to this person, and feel safe in the knowledge that such information will not be used or passed on for criminal or unacceptable purposes?[73]

The same tests should be required for directors and secretaries of limited companies, which is possible using the powers contained in s 57(2)(c) Local Government (Miscellaneous Provisions) Act 1976:[74]

The loss of drivers licence does not automatically affect the operators licence, but licensing authorities must consider the matter carefully.[75]

In addition the new guidance recognises Booking and Dispatch staff will have access to information.[76]

Licensing authorities should be satisfied that private hire vehicle operators can demonstrate that all staff that have contact with the public and/or oversee the dispatching of vehicles do not pose a risk to the public. ***Licensing authorities should, as a condition of granting an operator licence, require a register of all staff that will take bookings or dispatch vehicles is kept.***[77]

Operators must see basic DBS for staff and require them to report convictions[78] and should maintain a "living document" of the information, to be kept for as long as booking records and be capable of cross-referencing staff to bookings and dispatches.[79] Operators must have a policy for the employment of ex-offenders, ideally based on the Previous Convictions Annex.[80] In addition, the new Guidance makes it clear that while an operator can outsource booking processes to another person or body, they remain responsible for all safeguarding.[81] The requirement for record keeping leads the Guidance to suggest the following records that should be kept:[82]

- The name of the passenger.
- The time of the request.
- The pick-up point.
- The destination.
- The name of the driver.
- The driver's licence number.
- The vehicle registration number of the vehicle.
- The name of any individual that responded to the booking request.
- The name of any individual that dispatched the vehicle.

While this is a marked improvement on the suggestion in the *Best Practice Guidance,*[83] it still reveals a worrying lack of understanding on the part of the DfT in the principal purpose of these records. That is to provide a defence to any allegation of illegal standing for hire by a private hire driver, and as a result, the time the vehicle is required is vital. This omission from the new Guidance is concerning.

The new Guidance suggests all operator records should be kept for at least six months,[84] and reminds operators they must be registered with the Information Commissioner.[85]

There is a section in the new Guidance relating to the use of passenger carrying vehicles (PCV) by a private hire operator. The DfT makes the point that when a customer books a vehicle through a private hire operator, they expect a private hire vehicle and a properly vetted private hire driver.

The use of a driver who holds a PCV licence and the use of a public service vehicle (PSV) such as a minibus to undertake a private hire vehicle booking should not be permitted as a condition of the private hire vehicle operator's licence without the informed consent of the booker.[86]

If larger vehicle (over eight passenger seats) is required by the customer, the operator must explain that the driver has not been checked in the same way as a private hire driver.[87]

Enforcing the licensing regime (Chapter 9)

Implementing an effective framework for licensing authorities to ensure that as full a range of information made available to suitably trained decision makers that are supported by well-resourced officials is essential to a well-functioning taxi and private hire vehicle sector. These steps will help prevent the

73 *Button on Taxis: Licensing Law and Practice,* 4th Edition, Bloomsbury Professional 2017. Para 12.35.

74 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.5.

75 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.4.

76 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.7.

77 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.8.

78 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.9.

79 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.10.

80 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.12.

81 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.11.

82 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.13.

83 *Taxi and private hire vehicle licensing: best practice,* DfT 2010. Available at https://www.gov.uk/government/publications/taxi-and-private-hire-vehicle-licensing-best-practice-guidance.

84 *Statutory Taxi and Private Hire Vehicle Standards*, para 8.14.

85 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.15.

86 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.16.

87 *Statutory Taxi and Private Hire Vehicle Standards,* para 8.17.

licensing of those that are not deemed 'fit and proper' but does not ensure that those already licensed continue to display the behaviours and standards expected.[88]

The new Guidance advises that joint authorisation of enforcement officers by more than one local authority should be undertaken "where the need arises" and suggests the mechanism detailed in the *LGA Councillors Handbook*.[89]

The new Guidance also states that licensing authorities should make clear what their expectations are in relation to behaviour by licensees, and how those will be monitored. They should make sure drivers (it doesn't mention operators or proprietors, but it must also apply to those as well):

> *are aware of the policies that they must adhere and are properly informed of what is expected of them and the repercussions for failing to do so.*[90]

It also recommends using a penalty points scheme:

> *This has the benefit of consistency in enforcement and makes better use of the licensing committee's time.*[91]

The earlier suggestion of making clear how customers can complain (see above) is also reinforced:

> *The provision of a clear, simple and well-publicised process for the public to make complaints about drivers and operators will enable authorities to target compliance and enforcement activity.*[92]

There is information on taking action against licences. It states that there should be immediate revocation if a driver has received an immigration penalty or has been convicted of immigration offence,[93] and although it is not made particularly clear in relation to the immigration issues, it goes on to state that in all situations, the driver must be given a chance to put their case before the decision is made. It also makes the point that an authority cannot suspend and then revoke the licence on the same facts.[94] It also makes it clear that if new information comes to light, a new licence can be granted in the future.[95]

There is a short paragraph on appeals against licensing authority decisions. It states that new evidence may be adduced at appeal. There is also this statement:

> *An appeal may be settled by agreement between the licensing authority and the driver on terms which, in the light of new evidence, becomes the appropriate course.*[96]

This is not correct. Once an appeal has been lodged, only the court can determine it, unless the appeal is withdrawn, in which case the original decision would stand. There is nothing to prevent the parties to the appeal making a joint submission, inviting a particular decision by the court, but the local authority cannot settle an appeal.

Finally, the new Guidance makes it clear that a licence can be suspended until the licensee completes any required training.[97]

Conclusions

This Guidance is welcomed, but it must be seen as a stop-gap measure pending the revised *Best Practice Guidance*, the legislative changes that have been promised (national minimum standards, cross-border enforcement powers and a national database of licensees), and new primary taxi legislation.

The DfT has said that it will be consulting on revisions to the *Best Practice Guidance* this year, which is also to be welcomed, if it happens. I would make a plea to the DfT that when that revision takes place, it incorporates this Guidance so there is one cohesive set of taxi guidance for licensing authorities.

This Guidance gives licensing authorities a lot of work, at a very difficult time, but does finally place the correct emphasis on public safety, rather than business opportunity. Licensing authorities can move forward confident of the support of the DfT in improving overall standards in the taxi industry, which can only be welcomed by the vast majority of hard working, legitimate people in the hackney carriage and private hire trades.

James Button
Principal, James Button & Co Solicitors

88 *Statutory Taxi and Private Hire Vehicle Standards*, para 9.1.
89 *Statutory Taxi and Private Hire Vehicle Standards,* para 9.2 referring to the *Taxi and PHV licensing Councillors' handbook (England and Wales),* Local Government Association, August 2017. Available at https://www.local.gov.uk/councillor-handbook-taxi-and-phv-licensing.
90 *Statutory Taxi and Private Hire Vehicle Standards,* para 9.3.
91 *Statutory Taxi and Private Hire Vehicle Standards*, para 9.3
92 *Statutory Taxi and Private Hire Vehicle Standards*, para 9.4 referring to the decisions in *R (on the application of Singh) v Cardiff City Council* (Admin) [2013] LLR 108 and *Reigate & Banstead Borough Council v Pawlowski* [2018] RTR 10.
93 *Statutory Taxi and Private Hire Vehicle Standards,* para 9.6.
94 *Statutory Taxi and Private Hire Vehicle Standards,* para 9.7.
95 *Statutory Taxi and Private Hire Vehicle Standards*, para 9.8.
96 *Statutory Taxi and Private Hire Vehicle Standards*, para 9.9 based on the decision in *R (on the application of Singh) v Cardiff City Council* (Admin) [2013] LLR 108.
97 *Statutory Taxi and Private Hire Vehicle Standards,* para 9.10.

Contact tracing: licensing is on the data protection front line

Entertainment venues have a duty to ensure any customer-tracing information they collect is handled according to the Information Commissioner's guidelines, says **Matt Lewin**

Around the time the July edition of the *Journal* – which included my article, "Why it's time for a re-think on CCTV in licensed premises" – was going to press, the Prime Minister announced plans for "Super Saturday", a grand re-opening of pubs, cafes and restaurants in England which had been forced to close for three months. Licensing practitioners will have noted that the Scottish and Welsh governments subsequently chose a Monday as the most appropriate day for releasing all of that pent-up demand for their places of refreshment.

The announcement was made in the House of Commons on 23 June 2020, just twelve days before re-opening day on 4 July. Among the details given by the Prime Minister was a brief mention of a requirement for businesses to "help NHS Test and Trace respond to any local outbreaks by collecting contact details from customers".

As with many aspects of the government's handling of the pandemic, this particular requirement does not appear to have been the subject of much, perhaps any, prior consultation. Even the Information Commissioner's Office appears to have been taken by surprise, quickly rushing out a statement that they were "assessing the potential data protection implications of this proposed scheme and monitoring developments". The privacy campaigning group, Big Brother Watch, issued a much starker warning: "Asking pubs and restaurants to become data controllers overnight is unfair – and could see personal data hoarded, lost or misused – whether for marketing or unwanted personal contact."

To make matters worse, although the requirement was trailed with a little under two weeks' notice, the Government did not actually publish guidance for businesses in England until 3 July, less than 24 hours before Super Saturday. Unsurprisingly, it was reported that a number of businesses chose to delay their re-openings, as they were simply not ready to do so on 4 July. In contrast, the Welsh Government published its guidance on 10 July 2020 ahead of (indoor) re-opening on 3 August.

However, by the end of summer, it became clear that the UK was entering the feared "second wave" of infections – and, unlike during the first wave, the rate of infection was particularly pronounced among younger people, which many (rightly or wrongly) attributed to a reckless resumption of their social lives. For a few weeks at the height of summer, the media had breathlessly reported on "illegal raves" breaking out across the country and politicians lined up to condemn people for having fun. In fact, more recent polling suggests that 18-25 year olds are almost as diligent about personal hygiene and social distancing as their elders.

On 9 September 2020, the Government announced a tightening of restrictions. As well as the so-called "rule of six", the collection of customer information was made mandatory whereas before it had been voluntary. Under the Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) (England) Regulations 2020, which came into force on 18 September 2020, a failure to comply became a criminal offence.

With that background in mind, I thought it might be helpful to look at some of the underlying principles involved in the collection of customer data.

The Regulations

When the requirement was first introduced, it was done via non-statutory Guidance. As ministers (including the Prime Minister) have discovered to their peril during recent media appearances, there is an important distinction between legislation (which is legally enforceable) and Guidance (which is not). Unfortunately the distinction between the two is not always obvious to the person on the street – or even the minister responsible for issuing them.

In my own experience of visiting licensed premises during the early part of the summer, businesses adopted very different approaches to collecting customer data. On a visit to my local Wetherspoons, a stack of paper forms and a box of pens was left unattended (and largely unused during my observations) at the entrance. In contrast, at a visit to a different pub, I was personally welcomed by a member of staff, escorted to my table, instructed to "check in" to the

premises online and, of course, to sanitise my hands.

If this pattern was replicated across the country, then inevitably incomplete and insufficient data were being captured by premises. Without complete data showing who may have been exposed to infection, clearly contact tracing was going to be less effective. Now, the Regulations have put this requirement on a legal footing and so, at least in theory, should improve levels of compliance.

The Regulations apply to anyone operating or occupying a "relevant premises". A relevant premises includes restaurants, cafes, bars and pubs as well as a long list of other businesses in the leisure, tourism and beauty sectors.

How should data be collected?

The Regulations provide two methods of obtaining customer data. The first and most straightforward method is by use of an official QR code.

All premises must generate a unique QR code on gov.uk (which looks a little like a scrambled barcode) which they should display in their venue (Regulation 6). Anyone visiting the premises with a smartphone and who has downloaded the official NHS COVID-19 app can scan the QR code on entry which will automatically register their visit for contact tracing purposes.

For anyone who does not wish to or cannot use the app, premises must manually collect contact details (Regulation 7).

Collection of customer data = processing personal data

As will hopefully be obvious to all readers, the collection of contact details from customers constitutes the "processing" of personal data and is therefore regulated by data protection law. A business which collects, stores and shares that information is a "controller" of that personal data and therefore subject to a number of specific legal obligations: secure storage, publication of a privacy notice, dealing with subject access requests and adhering to retention schedules, among other things.

Thankfully this regulatory burden is almost eliminated by encouraging people seeking entry to use the app. An individual using the app to check in to the premises does not actually provide any data to the premises. The information is stored on the individual's phone and is automatically deleted after 21 days. In this scenario, the premises does not process any personal data and therefore is not subject to data protection law.

Note that the Regulations describe use of the app as an "aim" rather than a duty and that the Guidance explicitly states that venues should not make use of the QR code a condition of entry.

However, in principle, venues are free to set the terms on which they allow members of the public access to their property. Following the first weekend after the app's launch, the media reported that some punters had been turned away because they did not have the app. While this is lawful according to general principles of property law, it seems plausible that adopting a blanket ban in these circumstances could give rise to the potential for unlawful discrimination under the Equality Act 2010 and is therefore probably best avoided.

What data needs to be collected?

The following applies only to those who have not scanned the premises' QR code using the NHS app.

With certain limited exceptions (such as visits by delivery and emergency personnel), the contact details of anyone seeking to enter the premises must be captured (Regulation 7(1)). If a group seeks to enter, the premises has the option of seeking the details of every member of the group or just one member (Regulation 8).

Regulation 10 sets out the details that need to be collected:

a. the individual's name

b. their phone number

c. their email address (if unable to provide a phone number)

d. a postal address (if unable to provide an email address)

e. the date and time of entry

f. if part of a group, the number in the group.

If the individual or group is "likely to come into contact with only one member of staff, volunteer, or other person" then the name of that staff member (etc) must also be recorded (Regulation 11). The example given in the accompanying guidance is of a hairdresser but this requirement would arguably also apply to a waiter assigned to a specific table.

Note that contact details must be collected for staff as well. In practice, as the Guidance suggests, this can be done by maintaining a record of all staff working on the premises each day, including the times of their shift.

No additional data should be collected beyond what is prescribed in Regulation 10. This is important. One of the foundational principles of data protection law is "data minimisation": controllers should only collect the personal data they need in order to fulfil their purpose – and no more. So, in the case of contact tracing, that is limited to the categories of information specified in the Guidance; no more is required by NHS contact tracing services.

Limiting the amount of data collected to the minimum necessary for contact tracing provides an important safeguard against misuse. For instance, in New Zealand, it was reported that a Subway customer had been harassed online by an employee who had stolen her contact details from his workplace's contact tracing register.

What happens to the data?

If information is manually collected by the premises, then it must be securely retained for 21 days (Regulation 13(a)), provided on request to the NHS contact tracing service (Regulation 14) and then securely deleted (Regulation 13(b)).

What happens if an individual refuses?

When the requirement was first introduced, buried within the Guidance was an acknowledgement that individuals could not be compelled to provide their details and that, in reality, the process was voluntary.

That is no longer the case.

Now, if an individual or group refuses to provide contact details, or provides incomplete or inaccurate information, the premises "must take all reasonable steps to prevent entry" to the venue (Regulation 16). Clearly for some premises, who have never previously required a "door policy", this will represent a significant change in how they manage their venues.

The Guidance advises that premises are not obliged to verify the accuracy of information provided to them and recommends against it, unless the venue has "a reasonable suspicion" that the individual is seeking to mislead them.

Transparency and accountability

One of the most important innovations of the GDPR was that it expressly enacted principles of transparency and accountability. Being transparent and accountable is (at least in theory) second nature for public authorities, perhaps less so in the private sector. The accountability principle, in particular, requires controllers to not only comply with the law but to positively demonstrate that they are doing so.

Transparency and accountability have particular importance at the moment, at a time when the success of the contact tracing endeavour depends on customer trust: do I have confidence in how this business will look after my personal data?

An essential aspect of transparency and accountability is telling data subjects what personal data you are collecting, why and what you will do with it.

As a minimum, this requires publishing a "privacy notice", on the premises and online. Annex B of the Guidance includes a sample privacy notice and the NHS Test and Trace toolkit also contains suggested wording for staff and customer messaging online and within the premises. The Information Commissioner's website also has a lot of useful resources for preparing an appropriate privacy notice.

Secure storage

It goes without saying that secure storage of customer personal data is really important. Data breaches not only undermine customer confidence but expose the controller to potential enforcement action by the Information Commissioner's Office.

At least one company has developed a contact tracing app marketed at pubs, relying not only on the convenience of a digital process but also (so the company claims) its security compared to a pen-and-paper method. However, this is a fallacy: digital records are no more secure than physical records, especially in the hands of an inexperienced controller.

For instance, the company referred to above provides no privacy information on its website in relation to the data collected from users (both customers and venues) of its app. Its "privacy policy" provides nothing like the detail required by law and appears to have been automatically generated. Bizarrely, the only legislation to which it refers is the California Consumer Protection Act, despite being an app targeted exclusively at users in the UK. In short, there is simply no way of verifying even basic aspects of the company's data protection compliance, such as where the data is stored, exactly who it might be shared with or for how long it might be retained.

While the app may well have been developed with good intentions, the obvious shortcomings in this company's compliance illustrate the potential data protection pitfalls to which a naïve and over-stretched pub landlord is vulnerable. I would expect that with the launch of the official NHS app, unscrupulous or inexperienced app developers will be forced out of the market.

The best advice here is to keep it as simple as possible. Don't leave completed paper forms unattended; make sure that any digital devices used for contact tracing are properly password protected and encrypted; and take a moment to think about the first digital "solution" that's put under your nose.

Contact tracing only

When looking through the above-mentioned company's pitch to venues, I couldn't help but raise an eyebrow over its suggestion that venues could use the contact tracing database provided by the app for marketing communications. The Information Commissioner's guidance could not be clearer: "You cannot use the personal information that you collect for contact tracing for other purposes, such as direct marketing, profiling or data analytics."

This is the "purpose limitation" principle at work: tell people why you are collecting their personal data and only use that data for that specified purpose. Contact tracing and marketing are obviously incompatible purposes and therefore it would clearly be unlawful to simply start spamming customers with marketing messages when they had given their details for contact tracing.

Even a little checkbox asking for "consent" to receive marketing messages would be of dubious validity in this context. To be valid under the more stringent GDPR rules, consent needs to be specific and freely given. It is doubtful that the conditions for a valid consent could be satisfied by a controller where it is dealing with a customer who is required to provide their contact details, for contact tracing purposes, effectively as a condition of entry to the premises.

Again, the best advice here is simple: don't do it.

Conclusion

Since GDPR, data protection has been enjoying greater and greater public awareness. Its impact is spreading throughout our society and the licensed trade is no exception. As I've written and spoken about previously for the Institute of Licensing, data protection has the potential to shake up some long-established business practices in licensing. Now, with an obligation to contribute to national contact tracing efforts, licensing finds itself on the data protection front line. Just as we have learned during the pandemic to keep one another safe from the virus, I hope that this experience will help to improve our knowledge, understanding and appreciation of the importance of protecting one another's privacy.

Matt Lewin
Barrister, Cornerstone Barristers

Professional Licensing Practitioners Qualification

Various dates - please see website for more details

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

The training will be delivered on the legislation outside of London. Each of the four days will finish with an online exam or the delegates can just attend the training each day.

For more information and to book your place(s) visit the IoL's website.

Institute of Licensing News

Publication of the November issue of the *Journal of Licensing* has always been carefully timed to coincide with our annual National Training Conference. That way, delegates arriving at the conference receive the *Journal* as part of the delegate pack handed out when they register their attendance, while at the same time, copies arrive by post across the country.

This year, of course, things are very different. It is hard to think of any area of everyday business or personal life which has not been impacted by the Covid-19 pandemic.

The National Training Conference

The NTC this year will be held online, and we are delighted to bring you a five-day webinar, featuring a fantastic programme of speakers across the breadth of licensing subjects. The programme is exceptional, and we are grateful to all our speakers and our sponsors for their continuing support for this event and the IoL generally.

With current and topical issues, including of course Covid-19 restrictions and the impact on various aspects of licensing, there is plenty to discuss and debate.

Naturally, we very much hope to be able to return to the Crowne Plaza in Stratford-upon-Avon for the National Training Conference in 2021, but in the meantime we will enjoy seeing many of you online at the NTC webinars and other IoL training courses and meetings.

2020

What a year 2020 has been. Business and personal lives have been changed almost beyond recognition, first with the initial lockdown, then the cautious relaxation of restrictions followed by local restrictions across England, and more stringent measures across Scotland, Wales and Northern Ireland.

At the time of writing, we have a 3-tier alert system in England and potentially a 5-tier alert system in Scotland. Wales is currently part-way through a 2-week “fire break”.

IoL members have raced to keep up with the changing position across the UK, and the accompanying Regulations and guidance, while businesses are struggling in all areas, and in a relatively rare move, a pre-action protocol for judicial review has been served to challenge the Government’s decision to implement a national curfew of 10pm on hospitality premises. IoL Chair of West Midlands Region and Board Member Sarah Clover and Leo Charalambides, Vice-Chair of the London Region and editor of the *Journal*, are leading on the case, and we hope to have an update during the NTC webinars. We will also keep members updated via our news updates.

There is no doubt of the impact the restrictions have had and continue to have on the hospitality industry. Recent reports from CGA, for example, suggest that the new 3-tier alert system in England is having a significant effect across the hospitality industry, with trade down between 22% to 62% compared to last year, depending on the alert level as follows:

- Very High: down 60 to 62%
- High: down 46% to 54%
- Medium: down 22% to 28%

The above figures related to daily sales comparisons year on year measured between 15-17 October.

Meanwhile, taxi and private hire businesses are feeling the pressure with continued home working and government advice on avoiding unnecessary travel in High and Very High alert levels leading to reduced user demand, combined with the pressure of drivers being among the highest risk of front-line workers (identified by the Office of National Statistics).

Elsewhere, DEFRA has been contacted by the Association of Dog Boarders as a result of the impact of Covid-19 on the industry. In response, DEFRA issued confirmation that any decision to extend home boarder licences is a local decision of licensing authorities, saying:

> *This is a decision for licensing authorities to make in relation to their own local circumstances and in relation to the licence holders concerned. Licensing authorities must get the licence holder’s consent to do so (either because the extension was asked for by the licence holder, or by asking for written consent from the licence holder once the LA has decided that they’d be happy to extend it on their own initiative) and the licence cannot be extended beyond the maximum three years permitted.*

The pressure on licensing practitioners across the country has been evident right from the beginning, and local authorities have proven their ability to adapt and overcome challenges, with some having to move quickly from heavily paper-based licensing procedures, often involving face to face apointments, training and inspections, to a remote, online process in all areas, including hearings.

There are still challenges to be overcome in some areas, and

we continue to have reports that in some areas at least, new applications for taxi and private hire drivers are at a standstill due to the difficulties posed by the virus and its restrictions. We will continue to try to identify potential solutions to those difficulties to assist our members wherever possible.

Communication and information in the form of timely and detailed updates together with considered, authored material has been a significant part of the IoL response to Covid-19, in recognition of the need for clarity, discussion and dissemination of information. We have been extremely fortunate in the generosity of our key expert contacts, many of whom will be speaking at the NTC webinars. They have worked tirelessly to provide timely and excellent articles and generously allowed the IoL to publish and disseminate them. We are delighted to be part of the NexStart group and able to contribute to and share the information arising from that group.

The pandemic forced an immediate shift from face to face meetings, training, and events to an entirely online presence. This shift has been welcomed by most as it has allowed us to continue to run our training course, with a couple of exceptions such as the zoo licensing courses (which really do work better when held on location in a working zoo), and courses which would entail a significant amount of group work. Feedback from some delegates is that the benefits of online training are accessibility, and savings on time and travel expenses which would be incurred in the case of venue-based courses.

In addition to the NTC webinars, there are now (and have been since early April) a significant number of IoL courses available online which can be booked via the website. This includes our popular PLPQ courses (with daily exams online), and our regional meetings (many thanks to our regional committees).

Along with everyone else, we look forward to 'the other side' of the pandemic, and it will be a joy to be able to return to venue-based training, meetings and events. In the meantime we are grateful that technology allows us to continue to meet, discuss and share information. There will always be a place for online communications and training, but it will be good to be able to chat to you all in the queue for coffee, or at registration desks again when it is safe to do so.

Consultations

Wales Government consultation on Animal licensing (third party sales)

On 26 June, we reported online that the Welsh Government was consulting on proposals to introduce a ban on third party sales of puppies and kittens. This was a follow on from the consultation previously undertaken between 19 February – 17 May 2019 and received 458 responses, the majority of which supported a ban. The consultation highlighted other issues which needed further investigation such as enforcement and breeding.

The IoL submitted its response to the consultation (detailed below) and subsequently, on 5 October, Lesley Griffiths, Welsh Minister for Environment, Energy and Rural Affairs, issued a written statement confirming that a ban on commercial third party sales will be introduced in Wales "by the end of this Senedd."

Consultation Questions and IoL response:

The Institute of Licensing has now submitted its response to the Wales Government's consultation, and the questions and response are shown below:

We propose introducing a ban on the commercial third party sales of puppies and kittens. By "commercial third party sales" we mean those who are licenced pet sellers; in Wales who hold a licence under the Pet Animals Act 1951. Our definition of "puppies" and "kittens" are dogs and cats up to 6 months old.

Do you agree with a ban on the commercial third party sales of puppies and kittens in Wales?

Yes. A ban on commercial third party sales would amount to a legal requirement that only licensed breeders would be able to sell puppies / kittens in the course of a business.

Lucy's Law came into effect in England in April 2020, enacted through amendments to the Animal Welfare (Licensing of Activities Involving Animals) (England) (Amendment) Regulations 2019. A ban in Wales will raise standards and increase the geographical extent of further protection for the welfare of puppies and kittens. It is an important step to improving standards in breeding establishments, and will:

- Incentivise welfare improvements in high volume commercial dog breeding establishments by ensuring transparency, accountability and appropriate remuneration for breeders.

- Assist purchasers in making informed choices based on seeing a puppy or kitten with its mother, and encourage responsible buying decisions.

- Reduce the sale of puppies and kittens which have not been bred to recognised standards of welfare in England.

The main areas of concern in relation to the breeding and selling of dogs / puppies concerns sales through commercial third party dealers which both sustains and is dependent upon the existence of "puppy farms", where puppies are bred for maximum profit and with minimal regard for animal welfare. Although very few high street pet shops sell puppies these days, the third party trade remains significant with dealers operating from a diverse array of premises including private homes and puppy superstores. Some commercial dog breeders are also selling bought-in puppies alongside those they have bred on site.

These issues have been addressed in England but equally apply in Wales. Consistency across the country will significantly assist in ensuring that the practice of third party sales is disrupted and, importantly, that the public are aware and know what to look for when buying a puppy or kitten. Scotland has also indicated the intention to bring forward a similar ban in due course.

Do you think that a ban should apply to any other animals sold in pet shops?

Having consulted Institute of Licensing members, suggestions are that the priority should be puppies and kittens, but that consideration could be given to all animal sales as welfare and transportation issues will apply to all animals, while separation issues are more keenly linked to puppies. In Scotland, the consultation on animal licensing included rabbits, although this was not strictly in the context of third party sales.

Are there any measures which could be introduced, other than a ban, which could address the welfare problems associated with commercial third party sellers?

No. Public awareness is critical in providing an intelligence source for unlicensed activities and a ban on third party sales is easily understood, with few grey areas. In any arrangement where some third party sales are licensed and legitimate and some are not, the participating members of the public are very unlikely to "whistle blow" – because they would not be in a position to understand the licensing regime, even if they thought to ask to see a licence, and would be easily deterred by a fake document, and highly motivated to complete the sale, even if only to "save" the puppy.

Sanctuaries and rehoming centres are not legally defined but we will refer to them as animal welfare establishments for the purpose of this consultation. They charge a fee for the rehoming of animals in their care (but are exempt from current pet shop licencing because they are not commercial in nature). There is no legal requirement for checks to be undertaken and generally speaking, routine checks are not carried out by Local Authorities at these establishments.

Further, we have concerns that this may leave a loophole in the legislation to avoid a possible ban. Do you think there should be closer scrutiny of animal welfare establishments in Wales?

Queries have been raised on whether third party sellers could potentially masquerade as animal welfare establishments. On the face of it, a 'business test' similar to that used in England should catch any such activity. Closer scrutiny would also assist in ensuring that animal welfare establishments are genuine.

Do you think sanctuaries/rehoming/rescue centres should be classed as a commercial third party seller in Wales and be licenced?

Some consider that the risk remains that traders may set themselves up as rescue and rehoming centres to continue to trade and that these establishments should be licensed to avoid this. It is understood that DEFRA is giving this area more consideration in England at present.

If you have any related issues which we have not asked or have any comments please use this space to report them.

English law still allows for the importation of puppies from outside of England as a result of international trade agreements to which the UK is still bound. These imported puppies can be sold by those with pet sales licences, which bypasses some key controls associated with English breeders' licences as set out in the regulations which enacted Lucy's Law.

This means that it is currently legal for a breeder to import puppies and then sell them under a pet sales licence which requires the holder to make "reasonable efforts to ensure that they will be transported in a suitable manner". Such importations still have the potential to undermine the licensing controls implemented by Lucy's Law, creating an enforcement minefield for local authorities tasked with regulating dog breeding. The exploitative importation of young puppies for sale in England still gives rise to premature separation from the mother, and the trauma and health issues that can be associated with transportation.

We would urge that any forthcoming Regulations in Wales do not give rise to a similar loophole.

Safety Advisory Groups - their role and how to form one

With one Safety Advisory Group at the heart of the coronavirus crisis, **Julia Sawyer** looks at their wider role and suggests how they should operate

A Safety Advisory Group (SAG) should be formed if there is a significant risk to public safety. If there is not significant risk, such as a lower risk event like a village fete, it would not normally require a SAG to be formed.

SAGs are usually co-ordinated by a local authority (LA) and made up of representatives from the LA, the event organiser (if an event), the police, the fire and rescue services, the health provider and other relevant invited guests. The reason for a SAG is to provide a forum for discussing and advising on public safety.

SAGs aim to help organisers with the planning and management of an event or a significant issue and to encourage co-operation and co-ordination between all relevant agencies. They are non-statutory bodies so do not have legal powers or responsibilities, and are not empowered to approve or prohibit events from taking place.

Event organisers and others involved in the running of an event retain the principal legal duties for ensuring public safety. Consideration must be given to the relevant organisations being involved in the group's processes to ensure a suitable and sufficient review of an event's proposals takes place. Communication is key to providing a safe event and SAGs are an effective forum (if run properly) to enable communication between all the relevant parties involved.

Depending on the type and scale of the event the invited members may include, but not be limited to:

- Other local authority representatives as deemed appropriate – such as events team, emergency planning, building control, highways, health and safety, communication/media and legal services.
- Event promoters.
- Venue owners.
- Stewarding representative.
- Security representative.
- Traffic planners / transport providers / British Transport Police.
- Maritime and Coastguard Agency.
- Resident / community representation.
- The Highways Agency.
- Crowd safety / public safety advisor.

The lack of regulation and legislation on SAGs means there are no limitations as to what events or issues a SAG should be formed to deal with. It is not restrained by: venue (public or private); the arrangements (ticketed or un-ticketed); free or for payment; annual, monthly or exceptional; or voluntary or charitable.

From the original concept of a SAG (Lord Justice Taylor's report in 1990 following the Hillsborough Stadium disaster) various bodies have formed to assist them in their work through communication, consultation and co-operation.

One example is the Safety Advisory Group Entertainment, which is made up of qualified safety practitioners and specialists within the entertainment and events industry. It aspires to be a think tank, and acts as a centre of information within the entertainment industry providing solutions for entertainment and related organisations, offers guidance, advice and a sense of community, serves as a forum to debate legal provision and intent and, where appropriate, lobbies for change and improvement.

Another example, dealing with public health issues, is the Scientific Advisory Group for Emergencies (SAGE), which is the currently very high-profile emergency group for science. While it does not make decisions, as we have seen recently, the current coronavirus picture is informed by what comes out of SAGE.

SAGE brings together expertise from across the scientific spectrum, including epidemiologists, clinical and vaccine experts, forecasting and modellers who feed their research and data into SAGE.

Its role is to provide consensus recommendations on all the key issues, based on this body of scientific evidence presented by its members. This includes everything from how a potential Covid-19 vaccine is progressing, to school closures, face masks and compliance. These informed recommendations are then passed on to government ministers and decision makers to help guide the response to Covid-19.

SAGs are groups of people working together to improve public safety, each with a similar purpose and, depending on the extent of the event or the subject matter, should have the relevant people involved. The key principle of a SAG is to ensure the roles and responsibilities of those involved are clear. Each SAG should have its terms of reference, which set out clearly the roles and responsibilities attaching to it, the membership, and the policies that may underpin how it is to function.

It should be the policy of the SAG to offer advice to ensure the highest possible standards of public safety and to encourage the wellbeing of those who could be affected. In this context, the "public" includes not only those attending an event, but also those in the surrounding areas who may be affected by it, or those who are visiting an affected country or area.

Members of the SAG must declare any material conflict of interest in relation to any matters put before the group prior to any discussion on that matter. Should this conflict of interest be considered prejudicial, that person should consider withdrawing, and be replaced by an appropriate party agreed with the group.

The SAG should have arrangements to ensure that appropriate records of procedures and meetings are maintained. The SAG must have a process to avoid the unnecessary sharing of information outside the SAG that is commercially sensitive to the companies who own it. Some protection in this regard comes in relation to the Freedom of Information Act 2000 and the Data Protection Act 2018. Any emails, plans or other similar documentation provided to the SAG and held by its members should be marked appropriately by the authors or requested to be treated as commercially sensitive or confidential.

When managed and formed with the correct people SAGs are extremely effective in assessing the risk to public safety and agreeing on reasonable, appropriate control measures to advise the decision maker on ensuring people stay safe.

A-Z of the qualities SAGs should have:

A *Advisory*

B *Bureaucracy free*

C *Consistent*

D *Dedication*

E *Experience*

F *Fair*

G *Group*

H *Help organisers*

I *Inclusive*

J *Joint approach*

K *Knowledge*

L *Logged*

M *Measured*

N *Non-statutory body*

O *Open*

P *Public safety*

Q *Qualified and competent*

R *Resolution*

S *Safety*

T *Terms of reference*

U *Understanding of SAG process*

V *Vehement*

W *Well-defined*

X *Xenophobe free*

Y *Yokefellow*

Z *Zeal*

Julia Sawyer
Director of JS Safety Consultancy

Covid-19 and the sale and supply of alcohol

Charles Holland takes a look at how the concept of off-sales has assumed an increasing importance in the time of Covid-19

To date, the Covid-19 pandemic has not seen any legislative restriction imposed on authorisations to carry on the licensable activity of the sale of alcohol by retail made under the Licensing Act 2003, whether under the ambit of a premises licence granted under the Act or pursuant to a temporary event notice. Likewise, the carrying on of the qualifying club activities relating to the supply and sale of alcohol under the auspices of a club premises certificate has remained unaffected.

Instead, the Government's approach in England and Wales has been to focus on premises-focused "closure" of business types, with a series of regulations made under the Public Health (Control of Disease) Act 1984 requiring persons responsible for carrying on of certain specified businesses or for the provision of certain specified services to cease to carry on or provide the same from certain places during the emergency period. The first such regulations in time were The Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020 (SI 2020 No. 326) and The Health Protection (Coronavirus, Business Closure (England) Regulations 2020 (SI 2020 No. 327), both made on 21 March 2020. A veritable blizzard of further superseding and amending regulation has followed, the regime in England at the time of writing being the "3 Tier" system. How long this will last is anyone's guess.

The various emergency regulations have had no effect on the underlying licensing regime. Authorisations under the 2003 Act remain in force, and indeed the application, variation and review systems have remained operational throughout the pandemic.

For alcohol-led premises, the effect of the closure regulations placed an immediate focus on off-sales, as the regulations (in all their iterations) did not prohibit the sale of food or drink for consumption off the premises. The initial interest was on off-sales for consumption away from the immediate vicinity of the premises (either via sales by collection or delivery). As the lockdown eased, the sale of alcohol for immediate consumption off the premises assumed an increasing importance, given encouragement in Government guidance to the utilisation of outdoor spaces for service wherever possible.

The Business and Planning Act 2020, which came into force on 22 July 2020, has now made specific intervention in the Licensing Act 2003 with the insertion of new ss.172F-172K making automatic modifications to off-sales for a limited period. Rather than being restrictive provisions, the modifications have the effect of expanding regulatory consent found in certain licences.

In order to understand the import of these new provisions, it is necessary to consider what the existing law is.

How are off-sales relevant to licensing?

The concept of off-sales is long-established in licensing legislation, pre-dating the Licensing Act 2003, and carried forward in it. From it derives the off-licence, a familiar sign on Britain's high streets for many decades.

Under s 1(1) of the 2003 Act, licensable activities include: (a) the sale by retail of alcohol, and (b) the supply of alcohol by or on behalf of a club, or to the order of, a member the club.

"Sale by retail" is subject to a specific definition in s 192 which covers all sales of alcohol save for certain exempted trade sales for consumption off the premises.

By virtue of s 2, a licensable activity may be carried on

(1) under and in accordance with a premises licence; or

(2) in circumstances where the activity is a permitted temporary activity by virtue of a temporary event notice, or

(3) (if the licensable activity is a qualifying club activity) under and in accordance with a club premises certificate.

Focusing on the first species of authorisation, a premises licence is a licence granted under Part 3 of the Act, in respect of any premises, which authorises the premises to be used for one or more licensable activities: s 11. "Premises" means

"any place and includes a vehicle, vessel or moveable structure": s 193.

Premises licences come into existence by way of a grant following a compliant application: s 18(1). An application for a premises licence must be accompanied by an operating schedule and a plan (in the prescribed form) of the premises to which the application relates: s 17(a) and (b).

The relevant regulation prescribing the form of the application plan is regulation 23 of the Licensing Act 2003 (Premises licences and club premises certificates) Regulations 2005. Regulation 23(3)(a) provides that the plan shall show, amongst other things, "the extent of the boundary of the building, if relevant, and any external and internal walls of the building and, if different, the perimeter of the premises". In a case where the premises is to be used for more than one licensable activity, the plan shall show the area within the premises used for each activity: regulation 23(3)(d). In practice, most application plans demark the premises to be licensed by a red line on the plan (a hangover from guidance relating to the previous regime). Usually, the application plan (modified if necessary to account for a s 18(3)(b) determination) then forms part of the prescribed form of licence: s 24(1) and regulation 33 of and Part A of Schedule 12 to the 2005 regulations. The licence plan defines the premises to which the licence relates: s 24(2)(b).

The operating schedule must include a statement of specified matters including "where the relevant licensable activities include the supply of alcohol, whether the supplies are proposed to be for consumption on the premises or off the premises or both": s 17(4)(f). "Supply of alcohol" in this context means: (a) the sale by retail of alcohol, or (b) the supply of alcohol by or on behalf of a club to, or to the order of, a member of the club: s 14.

Regulation 10 and Schedule 2 of the 2005 Regulations prescribe a form of application which includes within the operating schedule to be completed by the applicant, box M relating to the "supply of alcohol" with options for supply on the premises, off the premises or both. The prescribed form of application also includes in guidance note 1:

> *Describe the premises. For example the type of premises, its general situation and layout and any other information which could be relevant to the licensing objectives. Where your application includes off-supplies of alcohol and you intend to provide a place for consumption of these off-supplies you must include a description of where the place will be and its proximity to the premises.*

The form of licence prescribed (by regulation 33 and Part A of Schedule 12 to the 2005 regulations) includes within "Part 1 - Premises details" the information "Where the licence authorises the supply of alcohol whether these are on and / or off supplies".

What can be done under the authority of an off-licence?

The specification of "on", "off" or "on and off" thus goes to the root of the authorisation under the premises licence.

Where a premises licence only authorises the "supply" (ie, the sale by retail) of alcohol for consumption on the premises, the practical effect (in terms of management so to stay within the authorisation) is that all alcohol must be handed to customers on the premises, namely the area delineated as the premises on the plan, and they should not be allowed to take it outside that area. As will be discussed below, the vast majority of on-sales-only licences have now been temporarily modified to allow off-sales to take place.

Where a premises licence only authorises the "supply" (ie, the sale by retail) of alcohol for consumption off the premises, the practical effect is that customers should not be permitted to consume alcohol within the area delineated as the premises on the plan. Earlier legislation made it an offence for the holder of an off-licence to sell spirits or wine in an open vessel (s 164(4)) Licensing Act 1964 as amended), and Licensing Act 2003 premises licences that came into existence by conversion from existing licences may contain conditions that preserved the effect of restrictions imposed on the use of the premises under those licences, including conditions preventing sales in open containers.

Where a premises licence authorises both on- and off-sales, then subject to any conditions to the contrary, the practical effect is that, in addition to traditional on-sales activities, many elements of an alcohol-related transaction can happen entirely off the premises: orders can be solicited and taken, alcohol supplied, consumed, and payment for it be demanded and made. The customer need not set foot on the premises. The only thing that must happen on the premises is that the alcohol must be "appropriated to the contract" within the premises. Appropriation to the contract is now an important concept in establishing the scope of what can lawfully be done outside the premises where off-sales are permitted, and I deal with it in the next section.

Appropriation to the contract

Appropriation to the contract assumes its importance because of s 190 of the 2003 Act, which provides under the heading "Location of sales":

> *(1) This section applies where the place where a contract for the sale of alcohol is made is different from the place where the alcohol is appropriated to the contract.*
>
> *(2) For the purposes of this Act the sale of alcohol is to be treated as taking place where the alcohol is appropriated to the contract.*

"Place" is not defined in the Act, but (as has already been observed) "premises" "means any place and includes a vehicle, vessel or moveable structure". It appears to be generally accepted that a licensed premises can be one place and an adjacent area (such as a beer garden or a pavement café) another. So where the contract for the sale of alcohol is made in an unlicensed beer garden or pavement café, and the alcohol is appropriated to the contract elsewhere, that other place is the place where the sale takes place. If that other place is licensed, then the sale is (all other things being equal) lawful, because it is made on or from premises which are licensed for that activity.

Appropriation to the contract is a technical concept.

"Sale" is not defined in the 2003 Act. Assistance can be found in the Sale of Goods Act 1979, s 2 of which has the effect of requiring a transfer of goods from seller to buyer for a "sale" to take place. Where there is a contract for the sale of unascertained goods (which encompasses nearly all contracts for the sale of alcohol: *R (on the application of Valpak) v Environment Agency* [2002] Env LR 36 at [33]), s 16 of the 1979 Act provides that no property is transferred until the goods are ascertained. A presumption found in s 18 of the 1979 Act, Rule 5(1), provides that in a contract of the sale of unascertained goods by description, property passes to the buyer when the goods of that description in a deliverable state are unconditionally appropriated to the contract. In the common or garden case of a sale of alcohol, unconditional appropriation takes place when the product is unconditionally selected for the contract in question, so by a bottle being taken off a shelf (*Valpak)* or similar unconditional acts, such as a pint being poured into a glass.

As contracts are bargains, there is scope for the parties to one to agree something different than the statutory presumption by means of terms and conditions (although I am not aware of any operator who has attempted this in practice). There is, further, the potential for contracts for the sale of alcohol where the goods are not unascertained (so, for example, where there is one bottle of particular vintage on a wine list).

However, in all but a negligible proportion of cases, appropriation will take place when the alcohol in question moves from its stored state (a bottle on a shelf, beer in a cask) to a deliverable state for the customer in question (bottle on a tray, beer dispensed into a glass). These are the activities (and the only activities) that *must* take place on the premises where the premises licence permits the supply of alcohol for consumption off the premises.

Support for this analysis can found in the April 2018 amendment to the s 182 guidance which introduced, within the "Plans" section on the Guidance on applying for premises licences, a sub-section on "Beer gardens or other outdoor spaces" as follows:

> 8.35 *Applicants will want to consider whether they might want to use a garden or other outdoor space as a location from which alcohol will be consumed. The sale of alcohol is to be treated as taking place where the alcohol is appropriated to the contract. In scenarios where drink orders are taken by a member of staff in the garden or outdoor space and the member of staff then collects the drinks from the licensed premises and returns to deliver them to the customer this would be treated as an off-sale and any conditions that relate to off-sales would apply.*
>
> 8.36 *In such cases it will be not necessary to include the garden or other outdoor space on the plan as part of the area covered by the premises licence. However, it will be necessary for the applicant to include the garden or other outdoor space on the plan as part of the area covered by the premises licence if the intention is to provide a service whereby drinks are available for sale and consumption directly from that area (i.e. the provision of on-sales). This would apply in the case of an outdoor bar or a service whereby a member of staff who is in the garden or outdoor space carries with them drinks that are available for sale (without the need for the staff member to return to the licensed premises to collect them).*
>
> 8.37 *If the beer garden or other outdoor area is to be used for the consumption of off-sales only, there is no requirement to show it on the plan of the premises, but the prescribed application form requires the applicant to provide a description of where the place is and its proximity to the premises.*

This helpful confirmation is consistent with longer-established passages of the s 182 Guidance dealing with

mobile, remote, internet and other delivery sales (paras 3.8-3.10) which makes clear that it is not the call centre which receives the order which requires a licence (which may or may not be the place where a contract is concluded) but the warehouse "where the alcohol is stored and specifically selected for, and despatched to, the purchaser" that needs to be licensed. It is the specific selection that is the appropriation to the contract. In my view, neither storage nor despatch triggers a "sale".

Temporary bars and dispense

As follows on from this analysis and is now set out in paragraph 8.36 of the s 182 Guidance, the provision of a *bar* in an outdoor area requires that area to be within the premises as defined on the premises licence plan. This is because the operation of a bar will ordinarily involve the appropriation of alcohol to the contract. The same applies to roving dispense, as found in festivals or "party" venues.

Alcohol delivery services

The fundamental point, as already established, is that all can happen off the premises *save for* the appropriation of the alcohol to the contract. In essence, for an alcohol delivery service to be lawful, each order has to be bagged or boxed up or otherwise labelled for the customer within the licensed premises.

It is not lawful to send a van full of product taken from licensed premises and then to take and satisfy orders from that van on an *ad-hoc* basis. In these circumstances the appropriation is happening within or from the van, not within the licensed premises.

Licensing the van is not a practical option because although a vehicle can be "premises" for the purposes of a premises licence (s 193), it must not be moving when sales occur (s 156(1)), and, if not permanently parked in one place, each place it parks at is treated as separate premises (s 182(4)), which the s 182 Guidance suggests (paragraph 3.8) requires a separate premises licence.

What if the aggregate of several orders is taken from the licensed premises and placed in the van *en masse*, with individual orders being satisfied from this aggregate? In my view this is not lawful because the unconditional appropriation to individual contracts takes place in the van and not in the licensed premises.

Supply distinguished from sale

Some licensable activities consist of supply rather than sale. The provision of late-night refreshment occurs where a person *supplies* the same (s 1 and paragraph 1(1) of Schedule to the Act). A qualifying club activity is the *supply* of alcohol by or on behalf of club to, or to the order of a member of a club.

Supply is not the same as sale. Supply is the handing over of the thing. So, the s 182 Guidance says at paragraph 3.13 in relation to late-night refreshment "supply takes place when the hot food or hot drink is given to the customer and not when payment is made".

Confusingly, s 14 of the Act bundles up for the purposes of its Part 3 (premises licence) "supply of alcohol" as meaning: (a) the sale by retail of alcohol or (b) the supply of alcohol by or on behalf of a club to, or to the order of, a member of the club. We have already seen how this translates into a premises licence application form using the language of "supply" when the activity sought to be licensed is sale by retail.

However, the limited ambit of s 14 means that a club premises certificate which authorises the supply of alcohol for consumption off the premises would not permit the sale of alcohol to a member off those premises even where the alcohol was appropriated on the premises.

Modifications of premises licences to authorise off-sales for a limited period

Section 11 of the Business and Planning Act 2020, which came into force on 22 July 2020, inserted ss 172F-L into the Licensing Act 2003.

As now appears to be *de rigueur* for any legislative step, the new provisions come complete with guidance[1] (updated 3 August 2020) which in answer to the rhetorical question "What is the purpose of this temporary off-sales extension?" states:

> *Businesses such as pubs, bars and restaurants have been hit hard by Covid-19. Many have been closed for an extended period and as they re-open, social distancing guidance will significantly affect their capacity to accommodate customers. This measure forms part of a package designed to make it easier for businesses to make use of outdoor space for dining and the sale of alcohol, helping the hospitality sector get back on its feet again through the busy summer months.*
>
> *The provisions in the Act temporarily modify the Licensing Act 2003 to provide an automatic extension to the terms of most premises licences which only permit the sale of alcohol for consumption on the*

1 https://www.gov.uk/government/publications/guidance-for-temporary-alcohol-licensing-provisions-in-the-business-and-planning-bill/alcohol-licensing-guidance-on-new-temporary-off-sales-permissions.

premises to allow the sale of alcohol for consumption off the premises. This will make it easier for licensed premises to sell alcohol to customers for consumption off the premises in England and Wales, which will allow businesses to trade and maintain social distancing.

Section 127F makes automatic modifications to two species of premises licence for a period beginning with the coming into force of the Act and ending on 30 September 2021 (earlier if the licence is revoked or expires by virtue of the effluxion of time).

The two species of premises licences affected are:

(1) (Section 127F(1)) - a licence which immediately before 22 July 2020 was an "on-sales-only licence" (being a premises licence which authorises the sale by retail of alcohol for consumption on the premises but which does not authorise off-sales;

(2) (Section 127F(4)) - a licence which immediately before 22 July 2020 authorised on-sales and off-sales and was subject to one or more of the following:

   (a) one or more conditions relating to the time when an off-sale may be made that would prevent an off-sale being made at a time before 11.00 pm when the premises were open for the purposes of on-sales;

   (b) one or more conditions that would prevent an off-sale being made before 11pm where the alcohol was sold in an open container;

   (c) one or more conditions that would prevent an off-sale being made before 11pm where it is a sale for delivery.

Modifications: on-sales only licences

In relation to on-sales only licences, the licence to be treated as if, at the beginning of 22 July 2020, it is varied so that it authorises off-sales until 30 September 2021, subject to the condition that every off-sale must be made before 11pm when the premises are open for the purposes of selling alcohol for consumption on the premises: s 172F(2).

Any conditions on an on-sales only licence that are inconsistent with this automatic variation are suspended for so long as the variation has effect: s 172F(3).

Modifications: dual licences

In relation to what the Guidance calls a "dual" premises licence falling within s 172F(4), the licence is to be treated as if, at the beginning of 22 July 2020, it is varied so that there is a condition that has the opposite effect of the qualifying condition (s 172F(5)) and also (one might have thought this was enough) the qualifying condition suspended: s 172F(6). Adding the new condition seems something of overkill: it would have been enough to suspend the qualifying condition, and - further and in any event - the new condition cannot constitute an authorisation. The authorisation flows from the premises licence itself (s 11) not conditions (which can only restrict an authorisation). In the circumstances, the new condition is probably otiose.

Modifications: disqualifying events

If in the period of 3 years ending with 22 July 2020 a "disqualifying event" has occurred, then no automatic modification takes place (s 172F(1)(c)). The disqualifying events are if:

(a) the relevant licensing authority refused to grant a premises licence in respect of the licensed premises authorising off-sales;

(b) the relevant licensing authority refused to vary the premises licence so as to authorise off-sales; or

(c) the premises licence was varied or modified so as to exclude off-sales from the scope of the licence.

Modifications: adoption of time limits for outdoor areas within the premises

Further to an amendment tabled by the House of Lords, s 172F(12) provides:

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

The language of this sub-section is rather impenetrable. The explanatory note when the amendment was tabled is in clearer language:

This amendment would ensure that the new

permissions for off-sales do not apply to times when the premises licence does not allow sales of alcohol for consumption in outdoor areas of the premises.

Working through (and attempting to translate into plain English) the sub-section:

Where a premises licence authorises the sale by retail of alcohol for consumption in an outdoor area of the licensed premises	Where there is a beer garden etc. within the red line
at some, but not all, of the times when it authorises the sale by retail of alcohol for consumption elsewhere on the premises	and the beer garden has shorter hours than the rest of on-sales on the premises
times when the premises are not open for the purposes of selling alcohol for consumption in the outdoor area of the premises	then the times when the beer garden are shut
are to be regarded for the purposes of this section as times when the premises are not "open for the purposes of selling alcohol for consumption on the premises".	are to be treated as times when the whole premises are shut for on-sales. Which has the effect that: (a) if the premises has no-off sales, the modification of the addition of off-sales by virtue of s.172(F) is subject to a condition that it can't be used during the times when the beer garden is shut; (b) if the premises has off-sales with a condition preventing off-sales being made at a time when the licensed premises are open for the purposes of on-sales, then the suspension of that condition under s.172F(5) doesn't work at times when the beer garden is shut.

Modifications: time limits on outdoor areas not within the premises

What if the beer garden etc is outside the red line (and so is used by people consuming alcohol sold for consumption on the premises), the use of which is time-limited by virtue of condition? It is lawful to condition the use of an outside unlicensed area where to do so legitimately promotes the licensing objectives: *R (on the application of Developing Retail Ltd) v East Hampshire Magistrates' Court* [2011] LLR 319.

If the time limitation arises from "one or more conditions relating to the time when an off-sale may be made that would prevent an off-sale … being made at a pre-cut off time [ie, before 11.00 pm] when the licensed premises are open for the purposes of selling alcohol for consumption on the premises", then these conditions are suspended.

The Lords amendment has no effect (because it only relates to areas within the red line).

But what if the time limitation arises from a condition preventing the use of the area (so "The beer garden will be cleared of customers after 9pm")? This condition (arguably) does not prevent an off-sale for consumption off the premises; it merely people going into the beer garden. It is therefore not suspended (as it doesn't fall within s 172F(5)).

Modifications: summary off-sales reviews

Sections 172G-K contain a procedure for summary review of a modification brought about by s 172F.

Modifications: Club premises certificates

Club premises certificates are unaffected by the automatic modifications provided for in s 172F.

Modifications: relation to pavement licences

Pavement licences granted to premises in England under the procedure in ss 1-10 of the 2020 Act only authorise the placing of temporary furniture on the highway (for highways purposes) and the furniture's use for planning and in connection with street trading purposes. They do not give rise to any entitlement to sell alcohol for consumption in the pavement café area: such entitlement may be pre-existing, may arise by virtue of a modification under s 127F, or may have to be sought by a variation application.

Modifications: Notification to licensing authority

The 172F modification is automatic, and no notification to or permission from the licensing authority is required. However, the non-statutory guidance states at paragraph 8:

However, you should notify your licensing authority

if you intend to start making off-sales under the new permission, so that they are aware of all the ways you are providing licensable activities. As above, your licensing authority can also clarify whether or not you are eligible to benefit from this permission. The licensing authority will not be able to issue a counter-notice to prevent you from making off-sales authorised under the new permission.

This is guidance: there is no statutory requirement to make any notification.

Conclusion

Although off-sales are a long-established concept, the 2003 Act's importation of the contractual principle of appropriation to the contract can produce some counter-intuitive results. Whilst contract law provide some presumptions as to where appropriation take place, they are no more than presumptions as to what contracting parties bargain for, and maybe the day will come when an enterprising operator makes express contractual provision deeming appropriation to be on licensed premises when the "reality" is that it happens far away. The concept does, however, give the trade flexibility as to what can happen "off" the premises - so long as the red line is around the stored alcohol, pretty much anything else can happen outside that line. The provisions of the Business and Planning Act 2020 have put the spotlight on one of the conceptually trickier areas of licensing, and it is an area that repays attention in the drafting of applications (red lines round cellars please!) and the operation of venues.

Charles Holland
Barrister, Francis Taylor Building and Trinity Chambers

2020 / 2021
IoL Membership Renewals

Don't forget
Membership Renewals are now overdue

This is a reminder that if you have not already done so, please renew your membership with the Institute of Licensing as soon as possible.

Many thanks to those of you who have already renewed

Not sure? Check your membership by logging in to the website and using the 'Manage Account' link or by emailing the team via membership@instituteoflicensing.org

All members should now have received a direct email invitation to renew. In the case of organisation members, this email will be directed to the main contact.

Insolvency and the Licensing Act 2003

What happens to a pub's premises licence if the pub goes under? **Ben Williams** takes us through the various options and the potential pitfalls for the unwary

These are plainly uncertain times for the trade and I suspect the most difficult times may yet lie ahead. The company that owns my local public house has already been placed into administration and I am well aware of the hoops it had to jump through to get the hours it wanted the last time round. I started thinking about the next time it opens and whether it will be able to make use of the existing licence or start afresh. The premises are too popular to remain closed and I know that a number of other publicans are circling ready to capitalise on what is a prime location with its loyal following.

So what of the licence now that the licence holder (the company) has been placed into administration? Insolvency can be a daunting area of law in which to trespass and often difficult to navigate. There are various stages and various ways in which a company or individual may become insolvent.

I had this very problem last year in an appeal hearing for a local authority that I represented. The premises in question had been subject to a summary review following some serious food safety offending. To put the severity of that offending into context, the sentencing judge had remarked that "the only thing missing (was) a dead body". The licence holder was Company A and at the ensuing review, the council resolved to revoke the premises licence. Company A appealed. Shortly before the review, however, it had become known that the company had been dissolved.

What then of the licence in such circumstances? Section 27 of the Licensing Act 2003 deals with the impact of death, incapacity and insolvency. It provides that the licence lapses upon a company being dissolved or becoming insolvent. They are not one and the same of course.

Insolvency through s 27 applies to either an individual person or a company. An individual becomes insolvent in three ways: firstly, where he / she proposes a voluntary arrangement which is approved; secondly, by being adjudged bankrupt or having his / her estate sequestrated; and thirdly, entering into a trust deed for his / her creditors. A company becomes insolvent in one of four ways: firstly, by approval of a voluntary arrangement proposed by its directors; secondly, by the appointment of an administrator in respect of the company; thirdly, by appointment of an administrative receiver in respect of the company; and finally, by going into liquidation. All of these paths lead to the lapse of the licence.

With dissolution (liquidation's last stage), s 27(1)(d) also causes the licence to lapse immediately. In basic terms, the licensee no longer has permission to carry on any licensable activities from that moment on.

There are a couple of ways in which the licensee may act to protect the licence in the wake of insolvency. The licence can be reinstated through s 47. Pursuant to that section, provided there has been no application for transfer of the licence, the insolvency practitioner may give an "interim authority notice" to the licensing authority within 28 days (not working days) of the approval of the relevant voluntary arrangement or of the relevant appointment. The effect of that interim notice is to reinstate the licence from the time the authority receives the notice and the holder is the person that served it. Because notice must be given to the chief officer of police there is the potential for cancellation of the interim notice if the chief officer or secretary of state satisfies the local authority that the exceptional circumstances of the case are such that a failure to cancel the interim authority notice would undermine the crime prevention objective or would be prejudicial to the prevention of illegal working in licensed premises. The serving of an interim notice does not prevent a transfer application from also being made.

Returning to my case example, Company A had dissolved involuntarily as a result of non-compliance with Companies House. It had failed to file annual accounts, albeit non-compliance can also include a failure to file annual returns and by not having a director appointment in place. There had been no ability to rely on an interim authority notice and no attempt to transfer the licence.

Why then did the local authority continue with the review hearing? If the licence immediately lapsed then there was no licence left to review? The reason comes in the form of the

decision of the court in the case of *Beauchamp Pizza Ltd v Coventry City Council* [2010] EWHC 926 (Ch).

In that case, the claimant was a limited company which had the benefit of a premises licence to operate a night club in Coventry. The case concerned what happens to a premises licence if the company which holds it is struck off the register and dissolved, but is subsequently restored to the register through the "administrative restoration" procedure provided for through the Companies Act 2006.

The case was heard by HHJ Cooke, one of the then designated Chancery Judges for Birmingham. The claimant had been apparently unaware of the dissolution as the letters had not been passed on to the directors from the accountants. It therefore took no steps to rectify the matter until the local authority brought matters to its attention. The company took immediate action through its solicitors and made an application for administrative restoration pursuant to s 1024 of the CA 2006. The local authority argued that such restoration did not in fact resurrect the premises licence and, as such, the club was operating unlawfully. The police had themselves sought a closure order having adopted that same position. A decision to prosecute the club manager had been delayed pending the outcome of the present claim.

The Judge ruled that the effect of the administrative restoration was to bring the licence back into operation, s 1028 of the CA 2006 providing that "the company shall be deemed to have continued in existence as if its name had not been struck off." He continued: "Consequences which followed from the company having been struck off or dissolved must be retrospectively reassessed on the footing that these events are deemed not to have happened."

In the Judge's view, there was no conflict between the LA 2003 provisions and those contained within the CA 2006. In his view, the dissolved status was a reversible condition and he felt that Parliament must have taken notice of this when enacting the LA 2003. He felt it important that the LA 2003 did not therefore expressly exclude the revival of a licence by operation of law on restoration of the company.

Once more then, returning to my case example, it was entirely permissible for Company A to file its accounts late and then rely on the *Beauchamp Pizza* authority to restore the licence as if it had never lapsed. The premises were not operating during the time spent renovating and it was for this reason that the local authority was forced to continue with the review decision and thereafter defend the consequent appeal. At any stage there could have been an administrative restoration. Quite unlike *Beauchamp Pizza*, the company in my case was well aware of the dissolution from the time it happened and the local authority continued to point this out in defending the appeal. HHJ Cooke in *Beauchamp Pizza* had addressed the problem of the local authority being effectively paralysed from taking action in a case where the premises was operating and the administrative restoration was not being dealt with promptly. In his view, the local authority would take the first step of bringing matters to the attention of the company concerned to ascertain what was happening with any such application. After that first step, he felt that the threat of prosecution for carrying on unlicensed activities or the obtaining of a civil injunction to prevent the future carrying on of such activities unless and until the company is restored to the register, was sufficient. The later course is extremely costly of course and hardly the first port of call for a local authority at the best of times.

Naturally in my case example, the local authority could not simply wait around for the persons concerned to "see sense". Local authorities need to be wary of simply "doing away" with a review where a company has dissolved. Such a hearing could be delayed pending the outcome of any administrative restoration of course; however, the authority may wish to make its decision in anticipation of the same. In my case example, I believe that it was tactically right to hear the review and thereafter defend the appeal as it did, rather than adjourn or abandon the review completely.

When the court finally heard the matter at a preliminary hearing, the district judge had no difficulty in concluding that there was no licence and therefore no "live" appeal for him to hear. I suspect he would have had little difficulty in dealing with the appeal had there been no dissolution given his first words, post introductions, were to remind the appellants that he was the sentencing judge in respect of the regulatory matters.

Ben Williams
Barrister, Kings Chambers

Covid-19 and its impact on the UK gambling industry

Adjusting to Covid-19 and immersive and addictive technologies are the subjects considered by **Nick Arron** in his latest survey of the always-changing gambling scene

As we adjust to Covid-19 and the "new normality" in our working and personal lives, we are beginning to see changes in the way people engage with entertainment and gambling.

Throughout the past few months the Gambling Commission has been collecting data on these changes from operators and consumer research.

In a July 2020 report the Commission stated that the earlier part of the lockdown period did not appear to have attracted many new consumers to gambling and that the numbers of consumers switching from land-based to online gambling appeared relatively low.

The latest data at the time of writing was published on 17 September 2020 and included research and data from licensed betting operators. This information looks at how the easing of the Covid-19 lockdown has impacted gambling behaviour in Great Britain. It covers the months of March to July 2020 and looks at both online and in-person gambling.

In its summary, the Gambling Commission says that July showed a small month-on-month decline in the amount spent on online gambling (which included online slots), and that the amount spent remained higher than pre-lockdown levels which were driven by the demand for sports betting on popular events.

As some high street gambling offerings re-open (subject to regulations in force at the time), the Gambling Commission advises that it will be monitoring this area to try to understand the levels of engagement with retail gambling as people start to return to the high street.

Operators and local authorities have had to adapt to the new landscape that has been carved out by the pandemic. It is important to keep in mind the expectations that land-based operators are expected to meet as well as some practical considerations for venues.

Operators must still continue to meet the requirements of the Gambling Act 2005 as well as the licence conditions, and codes of practice and local authority requirements will also remain the same.

Operators should have reviewed their risk assessments to account for social distancing and be aware that social distancing rules do not mean that customer interactions must stop. Operators must make sure that their staff undertake customer interactions which are meaningful and effective.

One challenge has been the age verification (AV) test, as this remains a requirement. Government guidance states that customers can be asked to remove their masks for AV checks. If customers refuse, then staff should follow operator guidance on refusing service.

There will have been a number of practical considerations regarding the layout of premises in light of social distancing requirements. Operators need to make sure that however they have chosen to socially distance customers, they must still be able to adequately supervise the premises, monitor customer behaviour and ensure compliance with any age restrictions. Where venues may have had to amend machine locations, and the licensing plans stipulate specific areas for machines, then it is sensible for operators to contact the licensing authority for advice before moving the machines if they are unsure if they will still comply with the licence plan.

Lastly, operator must not forget their obligations under the NHS Track and Trace requirements. Notably for premises located in England, the Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 came into force on 18 September. The regulations relating to the requirement for QR codes came into effect on 24 September.

The regulations apply to hospitality businesses, tourism and leisure, including, amusement arcades, betting and bingo halls and casinos. The relevant person who operates or occupies the premises has the responsibility for obtaining the required details. The GOV.UK website provides the details

regarding the requirements and the nature of the data he or she is expected to collate.

At the time of writing this article, a 10pm to 5am curfew has been introduced for gambling premises and there have been increased local lockdowns due to a rise in infection rates. It is likely that there will be further action taken by the Government to try and reduce the spread of Covid-19 and we await clarification as to the extent of the measures being considered and what this will mean for the gambling industry in the near future.

The Department of Culture, Media and Sport has issued a call for evidence to assess the impact of loot boxes

Following the DCMS Select Committee's inquiry into immersive and addictive technologies last year, the Government has launched its anticipated consultation on loot boxes in video games.

In video games, a loot box is a virtual item which can be redeemed to receive a randomised selection of further virtual items, or loot, ranging from simple customisation options for a player's avatar or character, to improved game equipment such as weapons and armour. Generally, players either buy the boxes directly or receive the boxes during play and later buy keys with which to open them.

The DCMS Select Committee previously recommended that loot boxes should be regulated and a consultation has now been launched to help the Government understand the experience of video game players, the functioning and potential harm of loot boxes and in-game purchase, and the impact of current voluntary and statutory protections. The outcome of this consultation will be considered as part of the forthcoming review of the Gambling Act 2005.

The DCMS is calling for evidence from the following two groups, with distinct questions for each group:

1. Video games players and adults responsible for children and young people who play video games.

2. Video games businesses, and researchers and organisations interested in video games and loot boxes.

Full details on the consultation and how to respond are included in the Loot Box Call for Evidence document accessible on the Government website. The deadline for responses is 23:59 on 22 November 2020.

Upcoming changes to the Licence Conditions and Code of Practice

Global pandemic or not, things never stand still for long in the UK gambling industry and we are set to see a number of further updates to the Licence Conditions and Code of Practice (LCCP).

In early 2020, the Gambling Commission consulted on proposals to change parts of the LCCP that set out the information which licensees are required to provide to them. Also included within the consultation were proposals regarding the improvement of regulatory returns data collection and official statistics publications.

The specific aim set out in the consultation was to ensure the information requirements placed on licence holders are proportionate and effective to inform the regulation of the gambling industry. This included proposals to:

- Improve data quality and the efficiency of regulation
- Reflect the continued focus on customers and social responsibility by the Gambling Commission
- Streamline existing requirements; and
- Reduce regulatory burden

The changes being made to the LCCP are being split into two parts. For the purpose of this article, we will be focusing on those detailed under Part 1 which affect all licensees, both those with operating licences and, to a lesser extent, personal licence holders. These changes will come into force on 31 October 2020.

Certain other changes under Part II, such as changes to the eServices system, regulatory returns and the Commission's official statistics, will take place at other specific times set out by the Gambling Commission in their timetable.

Part I: changes to information reporting requirements within the LCCP

These updates relate to reporting suspicious activity, events that have a significant impact on the nature or structure of a licensee's business ("Key events"), other reportable events, social responsibility reporting and other matters. The revisions are primarily deletions or rewording of requirements, but there are also several additional requirements being introduced.

The updates are too extensive to list in great detail here, and as such I will highlight what I believe to be the most significant changes contained within Part 1. The full summary of the changes being implemented and the timetable can be

found on the Gambling Commission website.

- New condition 15.1.3 has been added and this requires all non-remote casino, non-remote bingo, general betting, adult gaming centre, family entertainment centre and remote betting intermediary (trading rooms only) licensees to report any systematic or organised money lending to the Commission. This introduces a formal mechanism for reporting such instances.

- Condition 15.2.1 (relating to reporting key events) is amended so that the scope of key events now extends to shareholders (holding 3% or more of the issued share capital of the licensee or its holding company).

- Conditions 15.2.1 (5), (7) and (9) will be removed so operators no longer need to notify the Commission of: any investment in a licensee which is not by way of subscription for shares; the entering into an arrangement whereby a third party provides services to the licensee other than for full value; or any change to the structure or organisation of the licensee's business which affects a "key position" or the responsibilities of its holder.

- Condition 15.2.1 (25a) will be updated to enhance the Commission's requirements for the reporting of information security incidents.

- New condition 15.2.3 requiring all non-remote and remote casino licensees to report any actual or potential breaches of provisions of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on Player) Regulations 2017. Licensees will also be required to notify the Commission within 14 days of any appointments of officers responsible for compliance with the Regulations.

- Condition 15.2.2 is being amended to replace licence conditions which concern the conclusion of disputes referred to an ADR entity and reporting of outcomes adverse to the licensee, respectively, with key events moved into this section. There is also a new requirement at (1d) to enable the Commission to better manage money laundering and terrorist financing risks.

Nick Arron
Solicitor, Poppleston Allen

Toilets in takeaways - a matter for discretion

If the main use of a premises is for takeaway sales but a few seats for customers are nevertheless provided, must the owner ensure that the premises offers toilet facilities? **David Lucas** examines the case law

As the son of a plumber, it is appropriate that I should have been asked to provide an article concerning the provision of sanitary facilities in licensed premises.

The subject was recently considered by a NEXSTART group of which I am a member, together with the editor of the *Journal.*

NEXSTART is a coalition of interested parties working together on a comprehensive national strategy for the licensed hospitality and entertainment industries to exit lockdown and restart their businesses safely and successfully.

Following on from a note produced by the group in relation to off-sales, a further issue was identified in relation to premises that were providing off-sales. This was at the time when pubs had yet to re-open, and the question was whether premises only selling alcohol for consumption off their premises were permitted to allow their customers to use their toilets.

Basically speaking, the group advised that there did not appear to be anything that prevented customers from being allowed to use the toilet facilities.[1]Following on from that note, it was felt that it would be helpful to consider the position relating to the provision of toilet facilities in licensed premises in more detail.

Statutory provisions

The forerunner of the current statutory scheme is s 87(1) of the Public Health Act 1936 which provided that a local authority:

…may by notice require the owner or occupier of any inn, public-house, beer-house, refreshment-house or place of public entertainment to provide and maintain in a suitable position such number of sanitary conveniences for the use of persons frequenting the premises as may be reasonable.

The current requirements can be found in s 20 of the Local Government (Miscellaneous Provisions) Act 1976, which provides that a local authority (other than a county council in England and the Greater London Council) may serve a notice on an owner or occupier of a "relevant place" requiring the provision of specified sanitary appliances.

"Sanitary appliances" are defined as water closets, other closets, urinals and wash basins.

Failure to comply with such a notice, without reasonable excuse, is an offence punishable by a fine. If the offence continues, a further offence is committed which carries a fine for each day on which it continues.

There are statutory defences available if the person served with a notice was neither an owner nor occupier of the relevant place nor the place in question was closed.

A person served with a notice may appeal to the County Court on the grounds that the requirement of the notice is unreasonable and that it would have been fairer to serve the notice on another person who is an owner or occupier of the relevant place in question.

A "relevant place" is defined in s 20 as:

(a) a place which is normally used or is proposed to be normally used for any of the following purposes, namely—

i. the holding of any entertainment, exhibition or sporting event to which members of the public are admitted either as spectators or otherwise,

ii. the sale of food or drink to members of the public for consumption at the place;

(b) a place which is used on some occasion or occasions or is proposed to be used on some occasion or occasions for any of the purposes aforesaid; and

(c) a betting office.

1 https://www.nexstart.co.uk/wp-content/uploads/2020/07/version-3-toilets-final.pdf.

Case law

Prior to 2016, there was only one County Court decision known to have been made on an appeal against a notice under s 20. The appeal was brought by the owner of Millar's, a sandwich bar in Newcastle. There is no transcript of the decision available but there was an unapproved note of HHJ Crawford which was taken when judgment was given on 21 March 1997.

According to the note, Millar's had seven stalls for sitting and eating and drinking, beneath benches in the front window. The premises were inspected during a lunch time when they were busy and only two people were seen to be seated. The Judge said that s 20 would not apply were the proprietor to remove the seats because a "relevant place" is one where the sale of food or drink is for consumption in the place.

The Judge visited the sandwich bar and said that it could be seen that it provided facilities to office workers nearby. He declared himself unsatisfied that it was normally used for the sale of food or drink for consumption on the premises as the great majority of the customers did not eat there. He said that the council had not satisfied him on the point, and that the premises were normally used for the purchase of food to be eaten elsewhere. The person who eats at the premises was, he thought, the exception rather than the rule.

The Judge decided that the premises did not fall within s 20. He referred to the reasonableness of the notice and said that it seemed to him that Millar's was an establishment at which it would be unreasonable to require the proprietor to provide any toilets, as to provide even one would destroy the business given the small size of the premises. The Judge therefore allowed the Millar's appeal.

The next time that s 20 came under judicial scrutiny was by the High Court in the case of *Kingston upon Hull City Council v Newcastle upon Tyne City Council and Greggs plc*.[2] In 2011, Newcastle City Council was nominated by the Secretary of State as the primary authority for Greggs, to exercise health and safety functions including the function conferred by s 20. In its capacity as the primary authority to Greggs, the council gave the following advice: "

The majority of Greggs shop premises operate within the A1 retail sales definition of the Town & Country Planning (Use Classes) Order 2005. If the main use of the shop is determined to be takeaway sales and if no more than 10 seats are provided for occasional customer use, the requirement to provide customer toilets under the provisions of section 20 of the Local Government (Miscellaneous Provisions) Act 1976, would not be applicable as the premises should not be classed as a relevant place."

The definition of a "relevant place" was determined in Newcastle following an appeal against an improvement notice under the Local Government (Miscellaneous Provisions) Act 1976 and a ruling by HHJ Crawford stating that a premises would not be a "relevant place" if the nature of the business was predominantly take-away. He said: "Greggs operates a number of café-style operations with A3 planning permission, these premises will be provided with customer toilets."

Following that advice, there was a dispute between officers from Hull City Council and Greggs in relation to two Greggs outlets in Hull which the officers required to be provided with toilets and wash basins for the use of customers who sat at tables and chairs to eat food and drink purchased there.

As a consequence, two notices were served under s 20 requiring the provision of a toilet and wash basin in each of the two premises. Greggs did not comply and relied upon the following advice received from Newcastle City Council:

> *The main use of Greggs shops is determined to be takeaway sales. If no more than 10 seats are provided for occasional customer use, required to provide customer toilets under the provisions of s 20 of the Local Government (Miscellaneous Provisions) Act 1976, would not be applicable as the premises should not be classed as a 'relevant place'.*

The definition of a "relevant place" was determined in Newcastle following an appeal against an improvement notice under the Local Government (Miscellaneous Provisions) Act 1976 and a ruling by HHJ Crawford stating that premises would not be a "relevant place" if the nature of the business was predominantly take-away. He said: "Legal advice on this matter has shown that, although not binding, the judgment should be regarded as a position that a reasonable tribunal would take."

Newcastle City Council then issued a direction to Hull City Council not to proceed further with any enforcement action against Greggs.

Under the statutory scheme applicable to primary authorities, Hull City Council made an application to the Better Regulation Delivery Office (the Secretary of State's executive agency) seeking revocation of the direction by Newcastle City Council.

2 *R (on the application of Kingston upon Hull City Council) v Secretary of State for Business, Innovation and Skills and the Council of the City of Newcastle upon Tyne and Greggs Plc (2016)* EWHC 1064 (Admin).

The Better Regulation Delivery Office decided that the advice given by Newcastle City Council was correct and it was that decision that was challenged by Hull City Council by way of a judicial review.

In his decision, Kerr J said:

> *In my judgement, the construction adopted by Newcastle was completely unsustainable. It is obvious that if a person sits down in a Greggs outlet at the seats provided and proceeds to eat a pasty and fizzy drink just purchased at the counter for that purpose, that is a normal use of the premises. The fact that most customers take away their purchases and those who stay do not normally stay long, does not change that.*
> *The construction which looks to the predominant type of trade (sit-down or take-away) is obviously wrong. It would mean that a café with, say, 25 tables, which also does a roaring take-away trade, doing more business for off-site than on-site consumption, could not be required to install toilets for those brave enough to sit down for a drink. That would be a very surprising result and I do not think it is even a tenable interpretation, let alone the right one.*

Ultimately, the Judge decided that the Better Regulation Delivery Office had erred in law in upholding the advice of Newcastle City Council as correct.

It is important to emphasise that the case did not establish the principle that all premises with no more than 10 seats must provide toilet facilities. As the Judge said: "The discretionary functions under the 1976 Act remain with the authority for the area concerned". In the exercise of those discretionary powers, relevant factors "may include matters such as the number of seats and the proportions of take-away and sit-down customers".

Policy and Guidance

To assist them in the exercise of the discretionary power under s 20, local authorities can, and do, formulate policies dealing with the provision of sanitary appliances in food and drink premises.

In addition, the British Standards Institution (BSI) has provided relevant guidance.

The BSI is the official standards body for the United Kingdom. The role of the BSI is to help improve the quality and safety of products, services and systems by enabling the creation of standards and encouraging their use.

According to the BSI, a standard is an agreed way of doing something and is produced by people with expertise in their subject matter. They are designed for voluntary use.

The starting point is BS 6465-1:2006+Amendment 1:2009 Sanitary installations. Code of practice for the design of sanitary facilities and scales of provision of sanitary and associated appliances. BS 6465-1 gives recommendations on the design of sanitary facilities. It covers the recommended scale of provision of sanitary and associated appliances in new buildings and buildings undergoing major refurbishment.

The recommendations contained in BS 6465-1 can be summarised as follows:

Restaurants and other areas where seating is provided for eating and drinking

Minimum provision of sanitary appliances where seating is provided for eating and drinking. See figure 1.

Pubs, bars and nightclubs

Minimum provision of sanitary appliances for licensed pubs, bars and nightclubs. See figure 2.

Whenever licensed premises such as a pub or restaurant are being designed, consideration will be given to the recommendations contained in BS 6465-1. Those recommendations may also be considered in connection with alterations to such premises.

Because the British Standard is not mandatory, it will always be necessary to consult the relevant council to ascertain their requirements in connection with the provision of sanitary appliances for pubs and other licensed premises.

David Lucas
Licensing Solicitor

Sanitary appliance	Male customers	Female customers
WC	2 for up to 150 males; plus 1 for every additional 250 males or part thereof 2 for up to 50 males if urinals are not provided	2 for up to 30 females; plus 1 for every additional 30 females up to 120, plus 1 for every additional 60 females or part thereof
Urinal	1 per 60 males or part thereof up to 120 males; plus 1 for every additional 100 males or part thereof	N/A
Washbasin	1 per WC, plus 1 per 5 urinals or part thereof	1 per WC

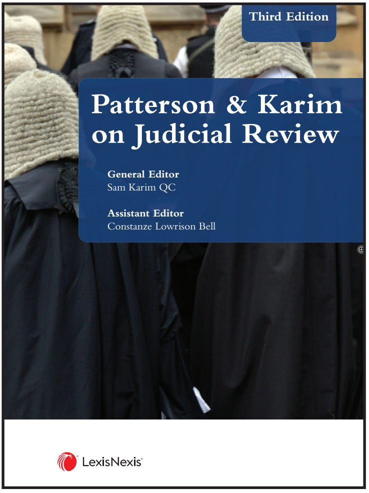
Figure 1. Minimum provision of sanitary appliances where seating is provided for eating and drinking.

Sanitary appliance	Male customers	Female customers
WC	2 for up to 150 males; plus 1 for every additional 200 males or part thereof 2 for up to 40 males if urinals are not provided	2 for up to 25 females; plus 1 for every additional 25 females or part thereof up to 200 females; plus 1 for every additional 35 females or part thereof
Urinal	1 for every 50 males up to 200 males; plus 1 for every additional 70 males or part thereof	N/A
Washbasin	1 per WC, plus 1 per 5 urinals or part thereof	1 plus 1 per 2 WCs or part thereof

Figure 2. Minimum provision of sanitary appliances for licensed pubs, bars and nightclubs.

Book review

Patterson & Karim on Judicial Review, Third Edition (2019)



Authors: Sam Karim QC and Constanze Bell

Publisher: LexisNexis

Price: £179.99

Reviewed by **Leo Charalambides**, *Barrister, Frances Taylor Building*

The first addition of *Judicial Review: law and practice* (as it was then titled) sought to address a lacuna within the available library of judicial review and administrative law textbooks. The aim was to provide a book that included both a comprehensive introduction to the law and practice of judicial review proceedings together with an in-depth analysis of areas where judicial review is used as a means of seeking redress including town and country planning, community care and social welfare, immigration, housing, mental health, education and, last but not least, licensing.

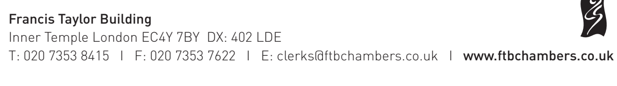
The third edition (2019) is now published by LexisNexis and has been re-titled *Paterson & Karim on Judicial Review*. This edition continues to abide by its aim of providing a comprehensive introduction to the law and practice of judicial review together with an in- depth analysis of those areas where judicial review is commonly sought as a means of redress. Our readers and members of the Institute of Licensing will have a particular interest in "Licensing and Professional Regulation" (Chapter 11) and "Local / Central Government" (Chapter 12).

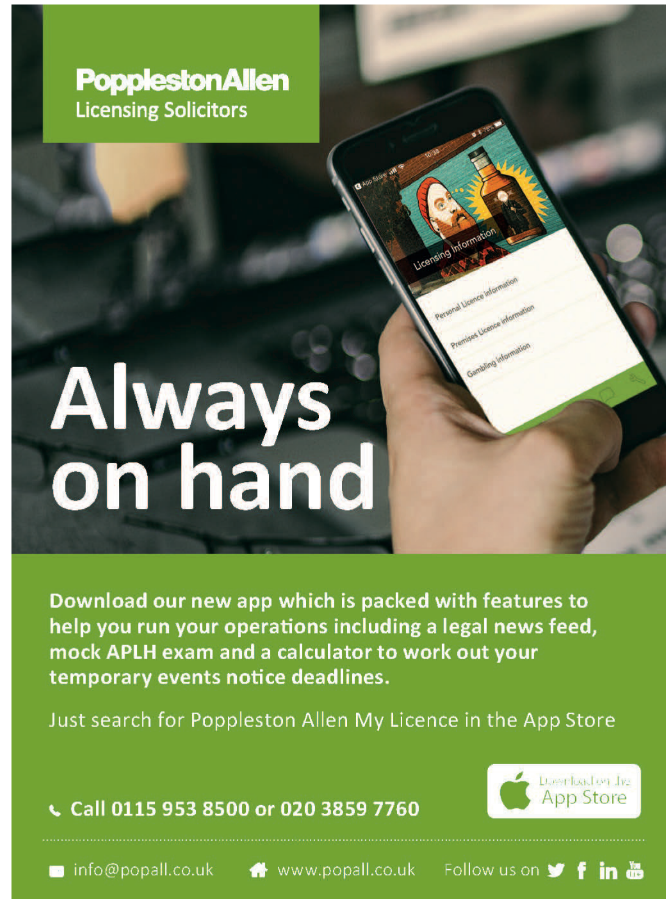
Chapter 11 introduces and sets out key public law considerations that arise in the licensing context, ie: the status of a licence; responsibility for licensing regulation; the decision-making process; the distinction between a permission and an authorisation; the question of whether a licence is a possession or property for the purpose of human rights consideration; the purported quasi-judicial role of the local decision-making body; and the role of local decision-making by local people based on local knowledge with the allied role of local policies and central, sometimes, statutory Guidance. Finally, the chapter also touches upon the conduct of hearings, the evidential burden and the appeals process. For my part I would have appreciated this third edition to have also contained some commentary on the Public Sector Equality Duty and its relationship to licensing, as this is an area of development.

This approach to licensing, wherein the familiar principles of local licensing regimes are viewed through the less familiar lens of public law principles, provides a useful avenue which enriches and expands our understanding of the licensing regime.

The value of this book has further proven itself during the current Covid-19 emergency period where licensing professionals are confronted with novel challenges in the form of operating the licensing regime within lockdown and other restrictions, rapidly changing legislation, and a mountain of Guidance. In this context Chapter 3 provides a comprehensive overview of the key grounds for judicial review and a foundation for approaching and understanding the novel challenges of the emergency period.

Given its combination of basic judicial review principles and the licensing focus, this book is an indispensable resource for those of us working within local authority licensing regimes.





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NICK ARRON

Solicitor, 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.

CONSTANZE BELL

Barrister, Kings Chambers

Constanze has a varied public law, planning and environmental law practice. She is "up and coming" in the field of planning law (Chambers & Partners 2020) and a "leading junior" in regulatory and licensing law (Legal 500 2020). Constanze is one of the "Highest Rated Planning Juniors under 35" (2020 & 2019 Planning Resource Planning Law survey) and is the Assistant Editor of the third edition of Patterson and Karim on Judicial Review.

RICHARD BROWN

Solicitor, Licensing Advice Centre, 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*.

LEO CHARALAMBIDES

Barrister, Francis Taylor Building & 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.

DANIEL DAVIES

Chairman, Institute of Licensing

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

CHARLES HOLLAND

Barrister, Trinity Chambers & Francis Taylor Building

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 QC

Barrister, 11KBW Chambers

Philip Kolvin QC is a leading Barrister at 11KBW and a Patron of the Institute of Licensing. Specialising in all aspects of licensing, he acts across the board for licensees, local authorities and national regulators. He is a top-ranked QC in both Legal 500 and Chambers Directories.

MATT LEWIN

Barrister, Cornerstone Barristers

Matt is a barrister at Cornerstone Barristers and practises in all areas of licensing, with a particular focus on premises and taxi licensing. His clients include licensing authorities, music festival promoters, nightclubs and the police. Matt also acts as legal adviser to licensing committees and provides training for councillors and officers. He is a regular speaker at IoL events and contributor to the *Journal of Licensing*, recently co-authoring an article on multi-agency safety testing.

DAVID LUCAS

Licensing Consultant

David is a specialist in gambling, alcohol and entertainment licensing and has recently become a consultant. He has previously represented operators of alcohol, entertainment and gambling premises in Great Britain. David is a member of the Board of the Institute of Licensing and Chairman of the East Midlands Region.

SUE NELSON

Executive Officer, Institute of Licensing

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

JULIA SAWYER

Director, JS Consultancy

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

BEN WILLIAMS

Barrister, Kings Chambers

Ben's practice has a strong emphasis on Regulatory Law and procedure. Increasingly Ben is asked to advise at an early stage of investigation as well as deliver specialist advice on best practice within varied regulatory fields. He regularly prosecutes and defends health & safety and trading standards matters throughout the country, and is experienced in abatement notices including statutory appeals against such notices. He advises a large number of local authorities on policy implementation and enforcement.

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