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# Journal of Licensing

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## In this issue



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# Journal of Licensing



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

Welcome to the Spring 2020 edition of the IoL's *Journal of Licensing* - a new decade, with plenty of exciting things on the licensing horizon. Some of these are showcased in this edition, and we are starting the decade as we mean to go on with articles bursting with ideas, opinion and analysis. Before I briefly outline some highlights, a busy few months call for a quick recap.

First and foremost, another National Training Conference (NTC) passed off successfully as we returned once more to the Crowne Plaza in Stratford-upon-Avon. The venue seems popular, and the programme provided a range of topics and speakers which meant there was truly something for everyone. The 1920s theme of the black-tie gala dinner certainly stimulated the creative juices of many delegates, as did the post-dinner karaoke. Finally, I'm sure you would all like to join me in congratulating David Lucas, formerly of Fraser Brown Solicitors, on winning the prestigious *Jeremy Allen Award* 2019. I'm sure many of you know David from the sterling and almost indefatigable work he does for the IoL – he is a familiar face around the regions and at the NTC. The Award is richly deserved.

The Events Team have not been resting on their laurels and bookings are already open for the NTC 2020, at the same venue. Details of speakers and topics are in the early stages, but it will certainly be another diverse and varied agenda. Those who wish to take advantage of the "early bird" booking offer can be assured that another top-notch programme will welcome them on 11-13 November.

Another date for the diary is *National Licensing Week* 15-19 June 2020. More information about this will be available in due course, but I hope that the Week continues to raise the profile of the way in which all forms of licensing touch the everyday lives of ordinary people. Finally, the *Summer Training Conference* will take place on 17 June in Crewe.

Thank you to those who responded to the IoL's surveys seeking views on the Gambling Commission Consultation on Society Lottery reform and the Commission on Alcohol Harm call for evidence about the effects of alcohol on society. The more thoroughly we can reflect the views of our membership, the greater our influence in policy-shaping.

And so to this edition of the *Journal*. Not only a new decade, but also the edition which takes us past the quarter-century mark. The lead article is a comprehensive analysis of the TENs legislation and procedure from Paul Henocq. The current and future legal status of cannabis and cannabis-related products is becoming more and more prominent in the media. Licensing may of course have a role to play in this in the future and the IoL stands as an important voice in the debate. The arguments are complex and nuanced, and have wider implications for society. Of great interest therefore will be the articles by two names which will be very familiar to readers, Gary Grant and Leo Charalambides, who draw on their varied licensing experience to provide their analyses. I am sure that these will not be the only articles we see on this topic, and the *Journal* can hopefully pull together a narrative strand which covers the full panoply of facts, opinions and views, and which can be a useful starting point for a serious-minded debate.

Other articles of note include Charles Holland's look at the application of the principles of "Open Justice" to licensing; and we also have a valuable perspective on the night-time economy from industry operator, Julie Tippins.

We also have our regular feature articles from James Button, Nick Arron, Julia Sawyer, Michael McDougall and Richard Brown.

I hope that you enjoy this edition. As ever, feedback is welcome.

Institute of Licensing

# JOURNAL OF LICENSING ISSUE 26

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

Our readers and members are familiar with the pros and cons in respect of alcohol, legal highs, recreational use and abuse of drugs and their association to licensed premises. It is in my view fitting that this edition of the *Journal* contains two articles on cannabis and cannabinoids and the arguments over their potential legalisation and regulation at some future date.

On 6 February this year Islington's licensing sub-committee considered a review application made by its licensing officer relating to a local store which was said to be "intentionally selling products targeted at persons with serious substance addictions" including a large selections of Class A drugs paraphernalia. The review was supported by local police, trading standards and members of the local community.

The store was also stocking products aimed at Class B (cannabis) drug users, which were stocked next to children's confectionery (sweets, chocolates, and soft drinks). The cannabis-related products included lollipops, cookies and brownies. The cannabis paraphernalia included multiple models of cannabis grinders, some based on models of women's breasts. Bongs and hookah pipes were being sold next to crisps, and other smoking-related materials were being stocked by the tills.

Also, next to the sweets and chewing gum were displays of amyl nitrate (commonly known as poppers) advertised as room odorizers with what the review papers described as "unusual air freshener brands" such as "Throb Hard", "Squirt", "Hard Core" and "Dogs Bollocks".

In some respects this comes as no surprise. One of the consequences of the Licensing Act 2003 is that the vast majority if not all of those stores that once might have been identified as the sweet shops of yester-year are now sweets shops with mini (sometimes) substantial off-sales. These sweet shops are typically located in areas with a high footfall of children and young persons. The stocking and sale of alcohol, some of it high strength, near to products targeted at children is common and mostly unremarked upon.

This drift towards the normalisation and association of alcohol with children's products and premises most likely to attract children has arisen despite the broad definition of the licensing objective protecting children from harm which includes:

> *the protection of children from moral, psychological and physical harm. This includes not only protecting children from the harms associated directly with alcohol consumption but also wider harms such as exposure to strong language and sexual expletives.*[1]

It seems to me that the bar is set very low. After all, if the example of child protection is that of exposure to strong language and sexual expletives, how much more relevant is the consideration of the exposure to strong alcohol, "legal" highs, purportedly lawful cannabis-derivative products and drug paraphernalia? The s 182 Guidance further advises that:

> *conditions relating to the access of children where alcohol is sold and which are appropriate to protect them from harm should be carefully considered.*[2]

Hereto, such conditions are exceptionally rare. In fact, given the demise of the traditional sweet shop and the unintended normalisation of alcohol sales in sweet shops it would seem that such consideration has been lacking. It seems to me that the review in Islington is a rearguard action addressing the consequences of liberalisation and de-regulation. It also illustrates a tendency for safeguarding to be considered after the event rather than as an integral part of the initial licensing process.

Given these unintended consequences of Licensing Act 2003 it seems to me that as we embark on a debate around the legalisation and regulation of cannabis great care needs to be had in respect of consequences, risks and safeguarding the most vulnerable in our communities and wider society.

1 Section 182 Guidance, para. 2.22.

2 Section 182 Guidance, para 2.23.

# The A - Z of TENs: what happens if you only go from A - B?

Everything you ever wanted to know about temporary event notices, and whether the Government has any changes in mind, by **Paul Henocq**

*"If you're not invited to the party, throw your own".*
Diahann Carroll

If you do throw your own party (with licensable activities), you will need to ensure that you have secured its "permitted temporary activity" status within s 98 of the Licensing Act 2003, which states that a licensable activity can become a *permitted temporary activity* if:

*(a) it is carried out in accordance with:-*

*i. a notice given in accordance with Section 100, and*
*ii. any conditions imposed under Section 106A, and*

*(b) the following conditions are satisfied:-*

*1. The first condition is of the requirements of Section 102 (acknowledgement of notice) are met in relation to the notice.*
*2. The second condition is that the notice has not been withdrawn under this part.*
*3. The third condition is that no Counter-Notice has been given under this part in respect of the Notice.*

Temporary event notices are "given"[1] by a person who intends to carry out licensable activities at a premises. There is no "applying" or "granting" of these notices, although these are common phrases that are used when we talk about a TEN (temporary event notice).

The "A - Z" of giving the notice and the legislative framework is set out in s 100 - s 110 of the Licensing Act 2003. Contained within those sections are time limits, restrictions, rights of objection, entry and appeal, in addition to duties upon both the giver and the receiver of the TEN.

But what happens when the TEN's legal "alphabet" is not followed? What if it transpires the *party* is not *permitted*? Which legal entity is at greatest risk of a successful prosecution under s 136 Licensing act 2003?

## The A - Z

As you will be aware, TENs were developed as a *light touch system* for regulating temporary events with fewer than 500 people (including staff) held by individuals, organisations or businesses where licensable activities were to take place.

It would appear from data collated[2] that there is an increase in their use. Discussion of the history of TENs reveals that one of their original purposes was to retain flexibility within the Licensing Act 2003 for a semi-commercial operator such as private members' clubs.

Under the old Licensing Act 1964 regime there had been the "Little Ships Club"[3] rule.[4] This had allowed private members' clubs to pass changes to their constitutional rules, enabling them to hire out parts of their premises to non-members on an occasional basis despite not having a conventional premises licence to do so. The rule had been given its name from the case of *City of London Police Commissioners v Little Ships Club Ltd* (1964),[5] which had provided that such a club could enact a rule without offending the principle of "good faith" required of private members' clubs. This was, however, subject to the court's right of veto in any case, not covered by the then s 49(4) Licensing Act 1964.

The introduction of the Licensing Act 2003 and the TEN's framework detailed within s 100 – 110, it would seem, was "part devised"[6] to preserve the flexibility afforded to those small private members' clubs. The use of TENs remains a system which is not without its criticism given a difficult balance in some areas of their use between community and commercial purposes.

The giving of the notice (despite many local authority websites and forms declaring it a form of application) can

1 Wording of s 100 (1) Licensing Act 2003.

2 Home Office, *Alcohol and late night refreshment licensing England and Wales* (31 March 2016): https://www.gov.uk/government/statistics/alcohol-and-late-night-refreshment-licensing-england-and-wales-31-march-2016-data-tables [accessed 10 March 2017] Source; evidence to the House of Lords Select Committee. published 4 April 2017 - HL Paper 146.

3 Section 49 Licensing Act 1964 (repealed).

4 *City of London Police Commissioners v Little Ships Club Ltd* (1964) Brewing and Trade Review 702.

5 Brewing and Trade Review 702.

6 Select Committee on the Licensing Act 2003; The Licensing Act 2003: post-legislative scrutiny; Report of Session 2016-17 - published 4 April 2017 - HL Paper 146.

arise when either a particular premises: has no licence granted in relation to it to permit licensable activities; or the existing licence does not cover the activities proposed or is restricted by conditions or by authorised hours for certain activities.

The application of TENs to a previously unusable area to almost "turbocharge" a currently licensed area has become an important commercial tool for some businesses.

This commercial use of TENs has far outgrown those small communities and "Little Ships Clubs" toward which TENs were originally weighted. Criticism has been levied against the current system for not adapting to its now principal users and the effect this is perceived to have on the wider communities. Councillor Page of the Local Government Association, when giving evidence to the House of Lords Select Committee, said:

*Things such as temporary event notices are a real bain. Some of us object to the principle of them because they are no longer for voluntary organisations, they are abused regularly by pubs and clubs and for £21 they in no way cover the costs of the local authority administrating, let alone enforcing… The original intention was for this to be used by local voluntary groups and we could still see the regulations more tightly drawn to deliver that …. I can give the example of Reading where we have the annual Rock Festival. We get floods of TENs from pubs and clubs that are looking to ride the wave of local business and dispense with all the hours and conditions that they would normally have to comply with. This was not the intention of the original TENs provision.*[7]

## TEN's contents

Under s 100 (4) – (5) of the Licensing Act 2003 the standard TEN procedure must be in a prescribed form[8] and incorporate the duration of the event, the licensable activities to take place, the maximum number of persons proposed to be on the premises (while the event is taking place) and whether the alcohol sales are on or off those same premises and such other matters as may be prescribed. A TEN must comply with the requirements of s 100(5),[9] namely:

*(a) the licensable activities to which the proposal mentioned in subsection (1) relates ("the relevant licensable activities");*

*(b) the period (not exceeding 168 hours) during which it is proposed to use the premises for those activities ("the event period");*

*(c) the times during the event period when the premises user proposes that those licensable activities shall take place;*

*(d) the maximum number of persons (being a number less than 500) which the premises user proposes should, during those times, be allowed on the premises at the same time;*

*(e) where the relevant licensable activities include the supply of alcohol, whether supplies are proposed to be for consumption on the premises or off the premises, or both; and*

*(f) such other matters as may be prescribed.*

Those completing the form of notice will sometimes view it with great mistrust, seeking to avoid a *War and Peace*-like tome and declaring that "less is more". However, some of those giving notice, spend an inordinate amount of time having to re-engage with authorities over the information provided. Succinct and carefully constructed information allows all parties in this process to be clear that the licensing objectives will be upheld. A better relationship with the authorities can be constructed if a realistic view is taken by those giving notice when completing it.

## Standard TENs and Late TENs

When TENs were first introduced, their usability was limited, particularly given the tendency of our great British weather intervening to ruin an outside community event. Prior to the introduction of Late TENs,[10] should an event have been called off (due to inclement weather) it was impossible to resubmit a TEN in time for a period of better weather in the following week.

Addressing that previously rigid system of standard TENs seemed the underlying reasoning behind the introduction of Late TENs. Certainly a dim view is taken by a number of authorities when applicants seek to use the giving of a Late TENs for events that have been cemented in the diary for many months (such as televised fights from Las Vegas broadcast at 4.00 am GMT). Certainly, those wishing to give notice late (in the day) are almost always required to provide an explanation as to their reasons, with particular reference to upholding the crime and disorder licensing objective. Simply giving a Late TEN, (because you have noticed that all the other bars in the area are opening until 07.00 am to show the boxing match) does not speak well for your powers of event management and planning.

The format of TENs incorporates limitations in respect of the use and number of Late TENs per calendar year for premises,[11] as well as setting out how TENs can become void[12]

7 Q 21 - Councillor Tony Page, Deputy Leader, Reading Borough Council and Licensing Champion, Local Government Association. Select Committee on the Licensing Act 2003; The Licensing Act 2003: post-legislative scrutiny; Report of Session 2016-17 - published 4 April 2017 - HL Paper 146.

8 Licensing Act 2003 (Permitted Temporary Activities) (Notices) Regulations 2005 (SI 2005 2918).

9 Licensing Act 2003, s 100.

10 Police Reform and Social Responsibility Act 2011.

11 Licensing Act 2003, s 107.

12 A TEN will become void if the event period specified starts or ends within 24 hours of the period specified in another TEN given by the same premises user for the same premises – s 101 Licensing Act 2003.

or how the premises user can withdraw them to save on the use of that calendar year's allocation.[13] You will be aware of the limits to TENs in duration (168 hours) and amount of days (21) and time between event periods (24 hours).

As with any limitations imposed, there are tales of notice givers using the full flexibility and interpretation of the legislation as drafted. The spirit of the TENs system certainly grew from the desire to assist small community-based projects, events, clubs and ventures, but has become a key commercial benefit for certain large-scale operators.

We regularly see large sporting events (such as golf tournaments) giving notice of a TEN (rather than use the golf club's restrictive club premises certificate or applying for a premises licence), resulting in the placement of a beer tent under separate TENs at, say, the 1st, 7th, 10th, and 15th holes to permit the licensable activities to no more than 499 people at any one time (including the staff) through a security operative counting at the entrance.

The current system allows this manner of event to be permitted at minimal cost despite maybe 30,000 attendees. This is arguably not in the spirit of the legislation (or *Little Ships*), but is nevertheless legal. The definition of "premises" is problematic: there are instances of large nightclubs applying for TENs to extend operating hours at different bars upon different levels within the same nightclub complex. Again, quite legal within the current system, but it could be viewed as towards the sharper end of the legislation.

## Already-licensed premises

A number of licensees still retain within their premises licence operating schedule conditions allowing them to give notification of extended hours for major overseas sporting events broadcast from different time zones as well as events of national / international importance.

Once notification has been given, albeit that usually the police have the power to veto under the crime and disorder objective, a premises can then preserve its TENs allocation for that calendar year. This promotes good and timely event management from the notice giver. A client once requested an extension under this condition as their local football team had drawn a Premiership team away in the FA Cup: although important to them and their customers, it was stretching the boundaries to call this fixture an event of national or international sporting importance and significance. They were directed to and successfully obtained a TEN instead.)

What is staggering is the number of premises licence holders and designated premises supervisors (DPSs) who are unaware of these quasi-TENs conditions on their own licences. On many occasions this ability to save some TENs has to be pointed out to them, sometimes after they have already given notification for one. Being commercially aware of the scope of your licence is vitally important in order to maximise your business.

Increasingly, TENs are used by venues to test the water in respect of prospective licence variation applications or new licences themselves. If a number of TENs can be successfully operated without incident, then future arguments are strengthened with applications before licensing sub-committees. Once again, this is a useful tool commercially to present as a "proof is in the pudding" argument on any objections to a more permanent licence variation or application.

## Paying the fee and calculating notice

Authorities are increasingly stretched, and cuts to administration have meant that even paying for notifications can be difficult. Ensure that you retain an appropriate reference number from an online / automated payment system, or persist in finding someone to pay on the day you make notification: this is important in any subsequent argument about receipt with the authority.

The days of confidence in a postal application arriving on time at the right individual (with the cheque attached) are long gone, and the onus is on the giver of the notice to make sure they are satisfied they have fulfilled their obligations for notice. Some authorities will refuse receipt (and hence the start of calculation of your TEN days) until appropriate payment has been completed and documented.

This TENs system promotes good event management as the key to avoid falling foul of the law.

Care must be taken to ensure that the appropriate number of working days is clear before the event begins.[14] This, of course, applies to both standard TENs (10 working days prior to the event)[15] and Late TENs (five clear working days prior to the event).[16]

A number of applications fell foul of this during last autumn's Rugby World Cup. These premises took the decision (some with their head instead of their hearts) before England's semi-final against New Zealand to wait to see the result of the game (as they may not have needed to open

13 The premises user can withdraw a TEN by giving the licensing authority notice of the same up to 24 hours before the beginning of the event period specified on the TEN - s 103 Licensing Act 2003.

14 Licensing Act 2003, s 100A (2)-(3).

15 Licensing Act 2003, s 100A (2).

16 Licensing Act 2003, s 100A (3).

early with a TEN the following Saturday for the Rugby World Cup final, should England have lost).

England, of course, did overcome the odds and win the semi-final but premises were then advised on the following Monday morning they were unable to apply for a Late TEN as there were not enough working days to give notice.

Those more commercially aware of the TENs procedure had already applied for the final with the fall back that they could cancel 24hrs before the event under s 103[17] had England not got through.

## Counter-notice

Both parties in the process must consider the limitations on TENs within the calendar year as detailed in the legislation. It is up to the authority to serve a counter-notice and this can occur when:

1. The premises has reached its full quota of 15 TENs for the calendar year.[18]
2. The full quota of days (21) has been exhausted or will be exhausted if the event takes place.[19]
3. Where the premises user giving notice has exhausted their personal entitlement (this includes notices given by their "associate"[20] or "business colleague").[21]
4. Where an objection notice has been given regarding a late TEN.[22]
5. Where an objection notice is given regarding a standard TEN, and following a hearing the licensing authority issued a counter notice to uphold a licensing objective.[23]

If the authority decides a counter-notice is required, it must be served in the prescribed format[24] at least 24 hours before the beginning of the proposed event period[25] upon the user of the premises[26] and each relevant person within the Act.[27]

This is a substantial amount of administration for both the giver of the notices and the authorities and has prompted comments upon the inadequacy of the statutory fee to be paid (£21).

In evidence given to the House of Lords Select Committee, Birmingham City Council suggested that when the amount of officer time and other factors are considered, the true costs are estimated at around £400, about 19 times the statutory fee. "Birmingham City Council is asked to subsidise the costs of the licensing service, which should be self-financing and paid for by the licence holders."[28] Birmingham Council's opinion on the TENs fee is shared by a number of authorities. And given that a hearing can subsequently take place upon objections from the *relevant persons*, the actual cost can be substantially more. This might well support the argument that the system has now veered towards a heavy commercial use which was not envisaged at its inception.

## Objections

The relevant persons under the 2003 Licensing Act, the police and environmental health authorities, can object to the giving of the notice. This must be done by the third working day following the day on which they have been given the notice.[29]

Those relevant persons can object if they believe that permitting the activities upon those premises would undermine one of the licensing objectives.[30] The ability of the authorities to consider all four licensing objectives can sometimes lead to unnecessary arguments before the licensing sub-committees as the authority must hold such a hearing upon receipt of a valid objection. Should the authority feel, having listened to the parties at the hearing, that the licensing objectives will be undermined if the event is permitted then a counter-notice is served which effectively refuses the event.

This again points to the importance to the notice giver of setting out the details clearly in their communications with the authorities in the prescribed notice form, and if necessary speaking to them directly prior to the giving of the notice itself, particularly with a potentially problematic application.

## Conditions

With the introduction of the Police Reform and Social Responsibility Act 2011,[31] s 113 (3) conditions can be added to a notice following objection, which can then allow the event to take place by countering any concerns over the licensing objectives being undermined.

The ability to add conditions can only be made after an

17 Licensing Act 2003, s 103.
18 Licensing Act 2003, s 107 (4).
19 Licensing Act 2003, s 107 (5).
20 For the meaning of "associate" see s 107 (13) and s 101 (3) – (4).
21 Licensing Act 2003, s 107 (10).
22 Licensing Act 2003, s 104A.
23 Licensing Act 2003, s 105.
24 Licensing Act 2003 (Permitted Temporary Activities) (Notices) Regulations 2005 (SI 2005/2918).
25 Licensing Act 2003, s 107 (8).
26 Licensing Act 2003, s 107 (7).
27 Licensing Act 2003, s 107 (11).
28 Written evidence from Birmingham City Council Licensing and Environmental Health (LIC0141) to the House of Lords Select Committee on the Licensing Act 2003).
29 Licensing Act 2003, s 104 (3).
30 Licensing Act 2003, s 104 (2).
31 Police Reform and Social Responsibility Act 2011, S 113 (3).

official objection has been made by a *relevant person* and the conditions themselves must have been imposed on a premises licence or club premises certificate that has effect in respect of part or all of the same premises as those covered by the notice.

Any conditions must not be inconsistent with the carrying out of the licensable activities under the notice itself.[32] An advantage may be evident here to those commercial operators who are using the TEN to expand their offering at an event upon a licensed site.

If the event is within the scope of their normal activities then they have the advantage of pointing to relevant conditions upon their premises licence in order to counter any objection by the relevant person.

This would seem a disadvantage for those who do not have conditions they could point to and offer upon their licence (or have no licence at all) as the system does not allow the authority to add new conditions to the TEN. This was originally done in the spirit of the system being a quick, cheap and light-touch means of regulating licensable activities for events.

Given that there is not the legislative ability to agree conditions with either the environmental health service or the police prior to the raising of objections, there has, in effect, come into existence a "gentleman's agreement" to run the event in line with conditions upon an existing licence. The alternative is those authorities simply objecting and going through the process of a most likely expensive and time-consuming hearing before a sub-committee in order to seek an official annexing of those conditions on a counter notice.

Those giving notice should be wary of giving promises they cannot fulfil. They should have carefully scrutinised their licence to establish whether the ad hoc agreement sits with the extra event they are intending to run. All good favour and partnership working relationships could be lost if this is not considered. The inclination it appears for some is to simply agree to this in order to avoid an objection and likely subsequent hearing.

## Appeal

Should you receive a counter-notice following a hearing before the licensing sub-committee there is a right of appeal contained within schedule 5, paragraph 16 of the Licensing Act 2003. This appeal is made to the Magistrates' Court.[33] This may be brought within a period of 21 days beginning on the day which the appellant was notified by the licensing authority of the decision they wish to appeal against.

However, it should be noted by virtue of Schedule 5, paragraph 16 (6) that "no appeal may be brought later than five working days before the day on which the event period specified in the temporary event notice begins".

This can be a problem if the person giving notice has decided to leave it until the very last moment with a restrictive timetable prior to the event.

It is prudent therefore to give notice of a potentially controversial event some time before the proposed event takes place.

## The event itself

That "quick, cheap and a light touch" to regulate licensable activities for events can become anything but if the event is not managed in a responsible way.

Exceeding the terms of the notice, most likely by way of either the terminal hour notified or the stated capacity upon the premises, can result in prosecutions brought by authorities under s 136 of the Licensing Act 2003.

While the event is taking place the police or licensing authority officer have the power to enter the premises at any reasonable time and assess its effect on the promotion of the crime prevention objective.[34] Any intentional obstruction to an authorised officer while they are seeking to action their s 108 LA 2003 rights can be a separate criminal offence and can lead to a summary conviction fine at level 2 (£500) on the standard scale.[35]

Finally, the premises user of the notice is obliged to display a copy at the premises, together with a copy of any conditions annexed to the permission.

Once again, if the premises user does not comply with any display requirements without a reasonable excuse an offence is committed.[36] The premises user should be aware that if they have failed to display the notice properly, a police or licensing authority officer can request them to produce the original TEN for any "responsible person's" consideration.[37] If they fail to produce that original document without reasonable excuse, an offence is committed.

Upon reflection, the legislation for TENs, though not without its critics, nevertheless sets out a procedure to follow

32 Licensing Act 2003, s 106A.

33 Schedule 5 Para 16(4).

34 Licensing Act 2003, s 108.

35 Licensing Act 2003, s 108 (3)-(4).

36 Licensing Act 2003, s 109 (4).

37 Licensing Act 2003, s 109 (5).

that is user-friendly for individuals and large organisations.

We have already commented upon the trend towards a heavy commercial aspect of the use of TENs (up to the afforded limits) by many already-licensed premises wishing to increase their offer and their revenue.

The larger the organization, the greater the scope for the responsibility of this aspect to fall to those on the front line at the bar / pub / club who can give the notices to the authorities with or without their own personal licences.

In many company organisations, autonomy is given to these members of staff to drive sales and events for the premises and the TENs structure is seen as a means for them to achieve this aim.

What are the risks to directors and officers of these organisations should the authorities decide to prosecute for offences under the Licensing Act 2003 arising from the management of an event under this system?

Those directors and officers who are prosecuted by the authorities (particularly when the prosecution is based upon the actions of others in their organisations) could consider whether they should really be in court at all. All the more so when their presence is based upon some prosecuting authorities casting a wide net in their interpretation of responsibility for a TEN event.

## The offences

Authorities regularly prosecute both operators and individuals responsible for licensed and unlicensed premises who appear to have carried out a licensable activity, or knowingly allowed a licensable activity to be carried out, other than in accordance with a licence to do so.

Section 136 (1) and (4) of the 2003 Licensing Act 2003 creates the following offence:

*136 Unauthorised licensable activities*

*A person commits an offence if-*

*(a) he carries on or attempts to carry on a licensable activity on or from any premises otherwise than under and in accordance with an authorisation, or*

*(b) he knowingly allows a licensable activity to be so carried on.*

*...*

*(4) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or to [a fine], or to both.*

An offence pursuant to s 136 can be committed in two different ways: either by carrying on a licensable activity otherwise than in accordance with a licence under s 136 (1) (a) Licensing Act 2003; or knowingly allowing a licensable activity to be carried on otherwise than in accordance with the licence (s 136 (1)(b) Licensing Act 2003).

In the case of a prosecution involving a TEN, the activity may simply not been permitted in accordance with the legislation.

It is at the point of prosecution of the alleged offence that some authorities have thrown the net wide and incorporated a case against:

- The individual(s) controlling the event on the night.
- The Landlord or owner / operator of the property or land where the event is taking place.
- In the case of an event on licensed premises, the DPS and the premises licence holder, be they an individual or a corporate body.

The view generally taken is that the corporate should be pursued provided it can be shown that the offence was committed with their "consent, connivance or is attributable to their neglect". This can mean different management levels of that business dependent on the prosecuting bodies' interpretation of "officer";[38] and that means it could extend to a large cross section of individuals and entities.

## Offences by bodies corporate

*(1) If an offence committed by a body corporate is shown-*

*(a) to have been committed with the consent or connivance of an officer, or*

*(b) to be attributable to any neglect on his part,*

*the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.*

*(3) In subsection (1) "officer", in relation to a body corporate, means-*

*(a) a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, or*

*(b) an individual who is a controller of the body.*

A statutorily imposed liability of directors and officers for

38 Section 1173 (1) Companies Act 2006: "officer" in relation to a body corporate, includes a director, manager or secretary;

offences committed by corporate bodies is commonplace in regulatory legislation.[39] A body of case law[40] lends weight to the principles that:

a. The liability of a director in such cases is parasitic: the company must first be shown to be liable before the personal liability of the director may be established. If the company is not liable, neither should the director be.
b. It is not necessary, however, for the company to be convicted of the corporate offence: an individual may be prosecuted alone, and the prosecution would merely need to establish that the corporate body would have been liable.

In body corporates whose structure consists of more than one person, delegation of responsibilities is commonplace, and a number of cases look at this point - particularly in a scenario where an event takes place and no TEN was in place.

We would argue in this article, that a managing director should be free to leave the notification for TENs to a manager / staff member. They should not be obliged to test the truthfulness of the manager's confirmation that the notification had been given for them, unless the circumstances would have put a reasonable person on notice that the instructions in delegating that task had not been carried out.

## Case law

In *Re City Equitable Fire Insurance Co. Ltd*[41] Romer J held that it is perfectly proper for a director to leave matters to a manager and that he is under no obligation to test the accuracy of anything that he is told by such a person, or even make certain that he is complying with the law.

The *City Equitable* case was approved and applied by Lord Parker LCJ in *Huckerby v Elliot.*[42] In that case, pleas of guilty to providing unlicensed facilities for gaming were entered by Windmill Clubs Ltd, by a director of that company, by the company secretary, and also by a manager. Mavis Huckerby, another of the directors, was charged – not as a principal, but in relation to s 305(3) of the Customs and Excise Act 1952, which (so far as is material) provided:

> *Where an offence… which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate… he as well as the body corporate shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.*

Mrs Huckerby's defence was that she thought the relevant licence had been obtained. The divisional court quashed her conviction on the ground that the prosecution had failed to show any neglect on her part. Lord Parker applied the decision in *City Equitable*, and said:

> *Counsel for the respondent conceded that these words 'attributable to any neglect on the part of the directors' refer to the omission to do something which the director was under a duty to do…I know of no authority for the proposition that it is the duty of a director to, as it were, supervise his co-directors or to acquaint himself with all the details of the running of the company.*

In *Attorney-General's Reference (No. 1 of 1995)*[43] the Court of Appeal was again dealing with a statutory provision charging directors with liability for offences committed by limited companies. The material statutory words (Banking Act 1987) were:

> *Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate… he as well as the body corporate, shall be guilty of that offence….*

The court had held that a director who knew that acts (which might lawfully be performed by the company only if it were licensed by the Banking Act 1987), and who knew that those acts were being performed (when no licence existed), had consented to that performance, and was guilty of an offence under the act. It was immaterial that the director did not know that a licence was required as ignorance of the law is no defence.

Taylor LCJ, however, commented by positing a different scenario:

> *There could, for example, in a company with a number of directors responsible for different limbs of the company's business, be a director who believed the licence had been obtained and was not therefore consenting to the offences.*

39 In health and safety legislation and in s 96 Banking Act 1987:
(1) Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate…he, as well as the body corporate shall be guilty of the offence

40 Court of Appeal judgment in Attorney General's Reference (No 1 of 1995) [1996] 1 WLR 970.

41 [1925] Ch 497 at 428-430.

42 [1970] 1 All ER 189.

43 [1996] 1 WLR 970.

We would suggest a strong defence argument exists when a managing director gives instructions to their manager to give the temporary event notices (necessary to authorise the proposed sales of alcohol at extended hours, but the subject of a prosecution as an authorisation did not in fact exist) and they believed that in delegating that task the required notices had been given.

It could be argued that in order to succeed against a director under s 187 of the 2003 Act, the prosecution would have to prove that he consented to or connived not merely at the sale of alcohol, but at the sale of alcohol otherwise than in accordance with an authority (here, a TEN). Alternatively the prosecution may seek to show a director had to check their instructions were carried out: if we successfully seek to apply the case of *Huckerby v Elliot,*[44] no such duty to do so arose.

The position is to be contrasted with a prosecution under s 136(1)(a) of the 2003 Licensing Act. There, it would appear the prosecutor has only to show that the defendant carried on a licensable activity (eg, the retail sale of alcohol) otherwise than in accordance with an authority. Belief that a licence was in existence is no defence *per se*, but may be relevant to the defence of due diligence under s 139 of the 2003 Licensing Act.

In a number of prosecutions regarding licensed premises, the DPS is charged (even if they have not been present at the TEN event). But is there *locus* to say they carried on the unauthorised licensable activity at all?

In *Hall v Woodhouse*[45] Richards LJ said: "*Section 136(1)(a) is directed at persons who, as a matter of fact,* ***actually carry on*** *or attempt to carry on* a licensable activity on or from premises. That is the natural meaning of the language *used. … **the focus is on actual conduct**."* [Emphasis added.]

An appointed DPS who instructed their bar manager to give a TEN (which subsequently was not given by that manager) could argue that he did not carry out the licensable activities because even if he controlled advertising of the event, this is not "carrying out" licensable activities; and that he was in fact DPS on a substantive licence does not necessarily mean that *as a matter of fact* he carried on the licensable activities on the nights in question. The s 182 Guidance provides that the DPS is "*normally*… the person who has been given day to day responsibility for running the premises".[46] Should a court find against those arguments and consider in a particular case that a DPS was carrying on the licensable activities, he would then seek to defend himself against a s 136(1)(a) prosecution by establishing the defence of due diligence under s 139 of the 2003 Licensing Act. The burden of establishing the defence would be on the defendant. The standard is the balance of probabilities.

Section 139 provides a defence if, *inter alia*, the act of carrying on the licensable activity "was due to… reliance on information given to him, or to an act or omission by another person…" and "he took all reasonable precautions and exercised all due diligence to avoid committing the offence".

This would then turn on the facts of the interaction between the DPS and the bar manager, and the structures of management within the company.

## Changing the alphabet?

There appears no intention to re-visit the structure of the legislation, despite increased commercial usage away from what was most likely first envisaged upon its inception.

The Government's response to the House of Lords Select Committee report is given below, with the committee's recommendation appearing first:

> *Conclusion / Recommendation 31: Temporary Event Notices are used for a wide range of purposes, and the impact of a particular event on local residents cannot be reliably determined by whether they fall into broad 'community' and 'commercial' categories. We do not recommend the division of the current TENs system into 'community' and 'commercial'. [Para 344.]*
>
> *Government response: We agree with the Committee's view that changing the current system or introducing different systems for community and commercial events would be undesirable and the Government does not intend to introduce this division.*[47]

Careful and commercial management is the key to a successful usage of the TENs system. Those with that approach benefit the most, which may be to the detriment of both local authorities and communities. Those prosecuting alleged offences must also consider who they can successfully pursue, which would sometimes result in the net not being cast as far as it currently is.

**Paul Henocq**
*Solicitor, John Gaunt & Partners*

44 *Huckerby v Elliot*.

45 [2009] EWHC 1587 (Admin).

46 Para 4.31.

47 The Government response to the report from the House of Lords Select Committee on the Licensing Act 2003: Session 2016-17. HoL Paper 146: *The Licensing Act 2003:post-legislative scrutiny.*

IoL Joint Press Release

# Joint Statement regarding the Scrap Metal Dealers Association and the National Metal Agency

On 31 January the **Institute of Licensing** issued a joint press release with the **British Metals Recycling Association, Local Government Association, National Association of Licensing Enforcement Officers** & **the Vehicle Recyclers' Association** to put on record their views on the recent activity of the SMDA and the NMA

We are aware that the Scrap Metal Dealers Association (SMDA) has contacted licensing authorities, other government agencies and metal dealers asserting that the definition of a mobile collector (as defined in the Scrap Metal Dealers Act 2013 (the Act)) has been misinterpreted by licensing authorities. They are also using their presence on social media platforms, specifically Facebook, to promote this view as well as suggesting that most mobile collectors do not fall under this definition and therefore do not require a licence.

***We do not agree with SMDA's interpretation of the Act, nor do we condone their actions.***

Our view recognises the correct interpretation of the Act to mean anyone dealing in scrap metal requires either a mobile collector's licence or a site licence. A person that collects scrap metal by means of visits from 'door-to-door', whether by appointment or otherwise, is caught by the definition of a mobile collector and as such requires a licence from the relevant licensing authority / authorities. Mobile collectors that operate without a relevant scrap metal dealers' licence are committing an offence and, if convicted, may receive a fine of up to £5,000.

Communications from the SMDA also refer to the formation of a new 'National Metal Agency' (NMA), effective 20 February 2020. The NMA is neither a government, industry nor police organisation and does not have the powers to issue licences or maintain any form of register under the Act. Any views publicised by organisations claiming to be able to issue licences or registrations should be viewed with caution. Submitting operator details to the proposed NMA 'register' is not a substitute for holding a scrap metal dealers' licence as issued by the relevant licensing authority, even if the operator collects by appointment only.

In addition, we would like to remind local authorities of the requirement to provide information on all licences issued in their areas to the Environment Agency (in England) and the Natural Resources Wales (in Wales) so that they can maintain publicly accessible national registers.

Statement issued on behalf of:-

**British Metals Recycling Association**

**Local Government Association**

**Institute of Licensing**

**National Association of Licensing Enforcement Officers**

**Vehicle Recyclers' Association**

# Tango in the night

Night-time operator **Julie Tippins** on what's wrong and right in the late-night economy

As a long-time Fleetwood Mac fan, I think *Tango in the Night* is an apt starting point for a look at the night-time licensing situation - it's all about problems with relationships, sex, drugs and rock'n'roll, dancing (not much tangoing these days) and lure of the night time.

It often seems that all of us, whatever our role in the night-time economy, can get bogged down in the detail and forget the bigger picture, which is that we go out to pubs, bars, clubs, venues, theatres, restaurants and the many other leisure and entertainment spaces available at night to have fun and relax. They provide much needed space for socialising, letting our hair down and enjoying a memorable experience - usually in the company of like-minded people, friends or family. And they can be good for our well-being - a chance to escape the pressures of everyday life - and the vast majority of people do so without harming themselves or others.

As an operator though, we are aware that is not an easy task to deliver what the customer wants and still achieve a return on investment. The financial pressures on business, legal requirements and customer expectations and change in their habits have all had an impact on the night-time economy. Some stats:

- 25% of nightclubs have closed in the last decade, in part due to customers going to nightclubs less often. Attendances have dropped from 15% of people going to a club once a month in 2016 to 11% in 2018 (Mintel);
- between 2007 and 2015, London alone lost 35% of its grassroots music venues (research by the Mayor of London's Music Venues Taskforce).

The difficult operational issues we have to contend don't change much - they're still violence, drugs and minor anti-social behaviour. But we now also have to be alert to threats of terrorism (particularly in London), wider recreational drug use, more incidents involving knives and acid and more reported incidents of sexual harassment or assaults. All these issues require a higher level of skills and knowledge in security staff and venue managers in order to keep the venue, its staff and customers safe. Unfortunately at time when we need a higher skilled workforce more than ever, we face an unprecedented skills and people gap. We are struggling to attract and retain the right people - whether that's security staff or venue staff and managers (and I won't even go into the B word's effect on this!).

We know that hospitality is not seen as an attractive career option - in fact we are used to hearing staff saying they are leaving to get a "proper" job in a different industry. We know that the long hours and traditionally low pay (compared with other sectors) is challenge that we as an industry must address. But we do not have a simple fix that we can apply - as we also have to contend with rising costs for both labour and premises. Bar staff will get above inflation wage increases as National Minimum Wage (NMW) goes up again yet this squeezes the wages pot for the supervisors and managers. Similarly, workplace pensions and apprenticeship levies add to our rising costs.

DHP recently handed back its venue Borderline in London to the landlord - despite spending over a quarter of million in updating and improving the venue. The economics of operating in central London with a grassroots venue proved impossible; the main problem was a massive rent increase coupled with staggering business rates increases. Small venues simply don't have the economies of scale that large venues have and what could have been a financially successful venue in another area of London or even another city just could not generate enough income to cover its costs.

As if all this wasn't tough enough, I haven't even got to the legal challenges yet!

We recognise that police and councils have faced swingeing cuts in the past few years, which has led to a reduction in services. But we also know that some authorities were already adopting different policies when it came to how they interacted with business.

We have built very effective partnerships with some police and licensing authorities; they have taken years to be productive for both parties, but the effort has borne fruit for us all. However, this has not been the case everywhere and I have found some authorities positively do not want to engage with operators; they prefer to see their role as purely an enforcer and contact is only when something needs fixing. Yet where there is no engagement, there is no understanding of what the problem is and therefore the solution pushed by authorities is often ineffective as it does not address the underlying issue.

Partnership, on the other hand, results in the sharing of knowledge and therefore a common understanding of the

problem is formed, and this way an agreed, effective solution is more likely to be found.

I've seen some authorities try to misuse the law to shortcut the correct process as they think it's the only way to get what they want - often because of pressure from above to get quick results. But this never produces good, long-term changes in an area or with an operator - it quickly just turns into a game of cat and mouse and just like in Tom and Jerry, I'd rather be the mouse!

## How to make things better

But being optimistic by nature, I'm all for working on making the future night-time economy a better place for all of us - operators, customers and authorities - and here are some thoughts on how we could do this.

### Local authorities

Adopt "agent of change" - both in policy and practice. There are still too many planning departments that do not ask residential developers to prove that their sound-proofing schemes are adequate to protect late-night clubs and bars from future complaints from new residents.

Provide the political leadership in bringing all interested parties together to work as partners - including planners, politicians, landlords, operators (from all types of business in the city centre), police, and business improvement district managers to create strategies with actions to address the current demise.

### Police

Officers at all levels engage with licensed operators at every opportunity - on a one to one basis, at Pubwatch's, late-night levy boards and BIDs.

Find ways to share and gather information, assist with training across venues.

### Operators

Managers at all levels engage with Police at every opportunity - on a one to one basis, at Pubwatch's, late-night levy boards and BIDs.

Show support to joint initiatives via funding, offering spaces for training and taking up offers of training. Engage with local initiatives, boards, BIDs etc - make sure our voice is part of the conversation.

## Partnerships, and how to build them

All the above relies on effective partnership working, but we get to build partnerships - particularly in areas where there has been mistrust and wariness in the past. Where I've seen it work, it firstly relies on getting the right people in the room (not just the personalities but also the right organisation) and getting a good balance between authorities and private sector. Currently, most partnerships I've been involved with have members from licensing authorities, operators and other interested groups or organisations.

One key stakeholder that so far gets no input is the customer - this is something that I believe needs to be considered or we end up creating solutions in a vacuum. It's not impossible to find ways to include customers - we can conduct market research or surveys to bring their voice into the conversation.

Good partnerships come when everyone commits to take a positive view towards all partners and listens without prejudice to their point of view - here are some of the ways to do this:

### Build trust

Give people a reason to trust you by always doing what you say you are going to do. Be honest and open about progress.

### Create a shared vision

Establish what the partners want to accomplish, both jointly and individually.

Think in win / win solutions.

Being able and willing to put yourself in another person's shoes and understand how they feel is key to building strong stakeholder relationships.

Ask questions - The most effective stakeholder relationships are built on people asking purposeful questions, whether it be to check understanding or prompt discussion.

Have measurable outcomes so you can celebrate success or see you need to find alternative solutions.

## DHP partnerships

Partnership working has benefited DHP and our customers - these are just a few of the collaborations that DHP has participated in recently: Drinkaware - introduction of club crew into DHP venues; National Events Intelligence Unit - sharing intelligence and best practice; late-night levy boards – joint decision making on funding campaigns & initiatives; Safer Sounds Partnership - creating guidance and sharing intelligence; NTIA / SIA workshops on future of the security industry; and Nottingham Leisure Group - NTE forum for operators, authorities and other interested organisations to share and discuss ideas and share concerns.

**Julie Tippins**
*Head of Risk Management, DHP Family*

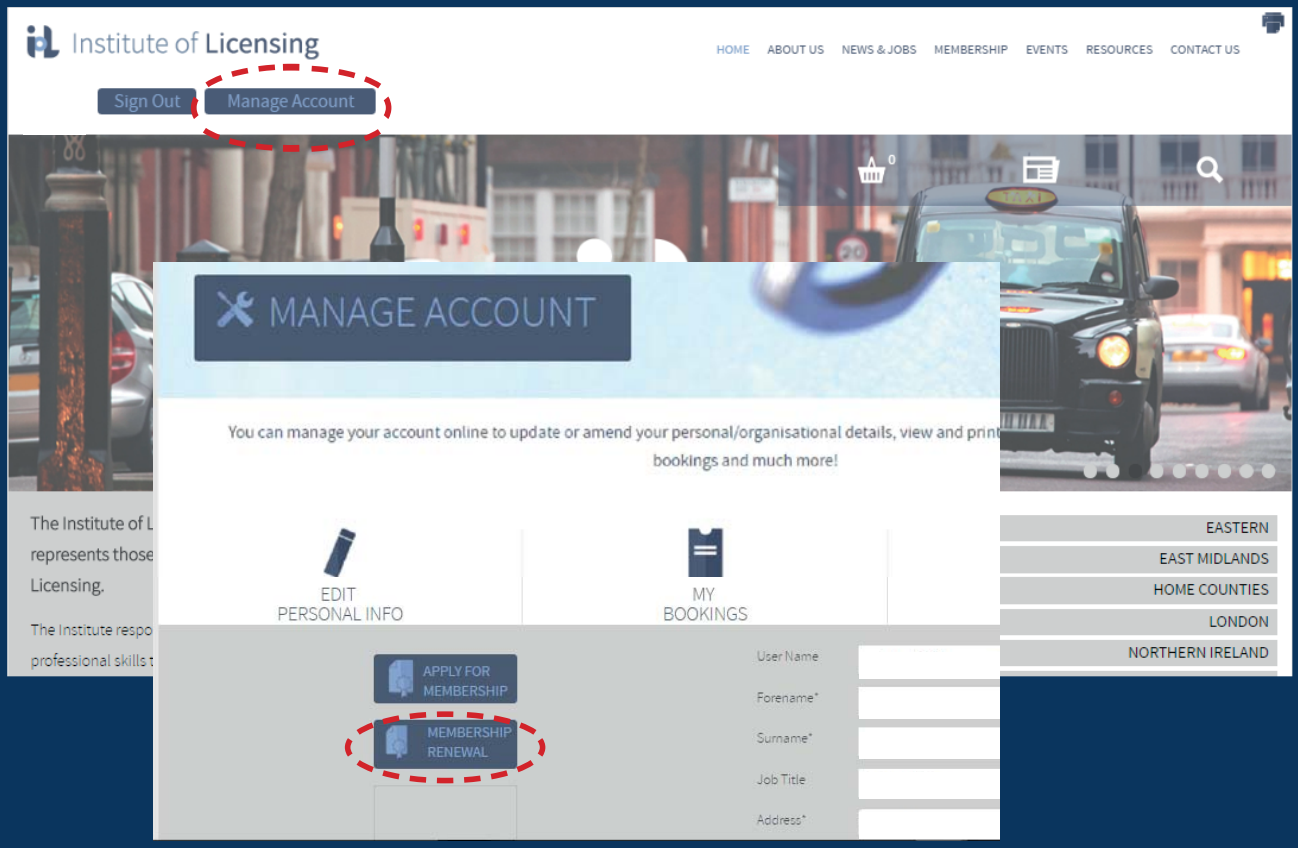
# Membership Renewals

The **2020/2021 membership renewal** date is **1st April**. All Associate/Individual members and Main Contacts for Organisation memberships will be sent a membership renewal email explaining how to renew online and how to download the membership invoice from the website.

You will be able to renew your membership from 1st April by logging onto the website and going to ***Manage Account***, click on the ***Edit Personal Info*** tab and you should see a ***Membership Renewal*** button as shown below.

By clicking on the ***Membership Renewal*** button you will be able to renew your membership, download your invoice and pay in the usual ways.

If you do not have your website login details or you cannot access the invoice email ua at **membership@instituteoflicensing.org** and one of the team will be able to assist.




## 2020 / 2021 Membership Fees

**Personal**

- Individual/Companion/Fellow - **£82.00**
- Associate - **£72.00**

**Organisation**

- Small Organisational Member, up to 6 named contacts - **£310.00**
- Medium Organisational Member, up to 12 named contacts - **£465.00**
- Large Organisational Member, over 13 named contacts - **£615.00**

# Taxi case update: *Rehman v Wakefield City Council & the LGA*

*R (on the application of Rehman) v Wakefield City Council and The Local Government Association* has many ramifications for councils, as **James Button** explains

On 10 December 2019, judgment was handed down by the Court of Appeal in *R (on the application of Rehman) v Wakefield City Council and The Local Government Association.*[1] This case concerned the appeal against the decision of the High Court a year earlier.[2] The appeal was brought by Wakefield City Council which contended that it was possible to recover the costs of enforcement against hackney carriage and private hire drivers via the licence fees levied under s 70 of the Local Government (Miscellaneous Provisions) Act 1976. Section 70 permits licence fees to be levied for hackney carriage and private hire vehicles and private hire operators' licences. This view was opposed by Mr Rehman who was acting on behalf of the Wakefield District Hackney Carriage and Private Hire Association. In the High Court, the Council had lost, with the judge determining that those costs could not be recovered via s 70. The High Court declined to answer whether or not those fees could be recovered via s 53(2) (which concerns the licence fee for hackney carriage and private hire drivers).

The appeal was heard by Sir Terence Etherton MR, Lady Justice King and Mr Justice Lavender. The background to this case was set out in the judgment as follows:[3]

> *In setting the fee for the vehicle licence the Council took into account, as "costs in connection with the control and supervision of hackney carriages and private hire vehicles" within section 70 of the 1976 Act, the costs incurred by the Council in monitoring and undertaking enforcement action against drivers for such things as speeding, smoking in the taxi, dressing inappropriately, parking badly, using a mobile phone, carrying excess passengers, not permitting the carrying of an assistance dog, and various other uncivil and illegal conduct (which were called by HHJ Saffman [in the High Court judgment], and have been called by the parties, "the Activities").*
>
> *The Council quantified the fee in that way in the belief, having undertaken extensive consultation and sought the advice of lawyers, that such costs could not lawfully be recovered through the driver's licence fee under s 53(2) of the 1976 Act but that Parliament's policy was that the licensing regime should be self-financing; and so the Council could and should provide for the recovery of such costs through the scheme rather than leaving it to be borne by the general body of Wakefield council tax payers, and the only appropriate way to do so was by means of the vehicle licence fee.*

The structure of the 1976 Act was carefully analysed[4] which led to the following conclusion:[5]

> *What is apparent from those provisions of Part II, read where appropriate with the 1847 Act, is that each of the three types of licence – vehicle, operator and driver – has a comprehensive and self-contained statutory regime, which addresses grant, terms, suspension, revocation and fee. There is no cross-referencing in relation to any of those matters. The notion that the fee for one type of licence can reflect the costs involved in another, far from being implicit in Part II of the 1976 Act, is entirely contrary to its structure.*

In relation to fees this led to the following comment:[6]

> *The fact that, in the case of each type of licence, the district council can attach such conditions as they consider reasonably necessary indicates that Parliament envisaged that there would be additional requirements to be observed as conditions of the licence after its grant. Plainly, in all those cases the district council would need to monitor compliance with the various requirements and conditions on the basis of which the licence was granted and was to be permitted to subsist until it came to an end or was suspended or revoked. That would inevitably involve, in the case of each category of licence, expense on the part of the district council beyond the cost of the original grant of the licence.*

1 [2019] EWCA Civ 2166 CA.
2 [2018] EWHC 3664 Admin Court.
3 Paras 11 & 12.
4 Paras 25 to 38.
5 At para 39.
6 At para 40.

The court then considered the meaning of s 70 and concluded that it could not cover enforcement action by the Council against the drivers of hackney carriages or private hire vehicles.

It was argued by the Council, with the support of the LGA which was given permission to intervene in the appeal, that licensing regimes were intended by Parliament to be self funding. To support that proposition it cited *R v Westminster City Council (ex p Hutton),*[7] *Liverpool City Council v Kelly,*[8] and *R (Hemming (trading as Simply Pleasure Ltd)) v Westminster City Council.*[9] This argument had failed at first instance and the Court of Appeal stated:[10]

> *We agree with the Judge [in the High Court] that none of those authorities justifies the interpretation of section 70(1)(c) for which the Council contend. Each case turned on the particular statutory scheme and provisions in issue. We can see nothing in Hutton which lends any support for any such general proposition of self-funding, and, in any event, that case, like Hemming, concerned the very different statutory provisions concerning the licensing of sex establishments. Kelly did concern the provisions of section 70 of the 1976 Act but the issue was about the ability to charge for vehicle inspections which failed and so did not result in the grant of a vehicle licence. We cannot see that such an issue, and the decision of the court in that case that the district council could charge for such inspections, throws any light on the very different issue in the present case about the ability to take into account in determining the fee for vehicle licences the costs related to the entirely different and distinct category of drivers' licences.*

The court then considered the provisions of s 53(2) and stated:[11]

> *In any event, we consider that the costs of enforcing the behaviour of licensed drivers can be recovered through the driver's licence fee under section 53(2). The relevant words in that provision are "the costs of issue and administration". The costs of "administration" must be something other than, and in addition to, the costs of "issue". There is no difficulty in interpreting "administration" in its statutory context as extending to administration of the licence after it has been issued. It naturally includes the costs of suspension and revocation, which are events expressly mentioned in Part II of the 1976 Act. Suspension and revocation rest on non compliance with the requirements and conditions for continuing to hold the licence. As we have said, it would therefore have been obvious to Parliament, when enacting the 1976 Act, that costs would be incurred by the district council in monitoring compliance with such requirements and conditions.*

The court explained this in the following way:[12]

> *Furthermore, there would appear to be no obvious reason why, as is plain, the costs of monitoring and enforcing the conditions and requirements for vehicle and operators' licences are recoverable under section 70, but those for monitoring and enforcing the conditions and requirements for drivers' licences are not recoverable under section 53. As we have said, in the case of all three categories of licence there are conditions of the grant which will have to be satisfied so long as the licence subsists; there will be reasonable additional conditions which the district council will wish to attach to the licence itself; and there are changed circumstances since the grant of the licence which Part II expressly states can result in suspension or revocation. In that connection, it is notable that, when section 46 of the 1847 Act was amended by the 1980 Act so as to permit the charging of "such fees as the commissioners may determine to be paid" for the grant of a hackney carriage driver's licence, Parliament did not consider it necessary to amend section 53(2) of the 1976 Act.*

This led to the following conclusion:[13]

> *For those reasons, both on the literal wording of section 53(2) and, if and so far as necessary, applying a purposive interpretation, we consider that the costs of monitoring and enforcing the behaviour of licensed drivers can be recovered through the fee under section 53(2).*

What then is the effect of this judgment?

1. Local authorities cannot recover the costs of enforcement against drivers for non-compliance with the requirements of their licence or other legislation ("the Activities")[14] under the powers contained in section 70 of the 1976 Act.
2. Local authorities can recover the costs of "the Activities" under the provisions of section 53(2) of the 1976 Act.
3. Local authorities must ensure that there is no cross subsidy between the various licence fees.[15]

7 [1985] 83 LGR 461QBD.
8 [2003] LLR 258 Admin Crt.
9 [2015] AC 1600 CA, and [2018] AC676 SC.
10 At para 45.
11 At para 46.
12 At para 47.
13 At para 47.
14 As detailed at para 11 of the judgment.
15 Explained in para 39.

In some ways this is a peculiar judgment. The Council which lodged the appeal lost, but it must be regarded as a Pyrrhic victory for Mr Rehman and the Association. In practical terms, the question of which section the Council uses to recover its costs has little impact on the licensees. They will still be required to cover the costs via their various licence fees. It remains to be seen whether the Council will be required to make adjustments as a result of the approach it has taken hitherto.

The court was clearly correct in deciding that there was no general principle that any local authority licensing regime must of necessity (or Parliamentary intention) be completely self funding. It is obvious that words within the legislation which limit what can be recovered via the licence fee must do just that: limit the costs which can be recovered.

However, in this decision the Court of Appeal has, to an extent followed the approach of the Supreme Court in *Hemming*[16] by pulling a judicial rabbit out of the hat. By extending the meaning of "administration" in s 53(2) to include "the costs of enforcing the behaviour of licensed drivers"[17] it has taken a purposive approach and placed local authorities in a much stronger position than they were on 9 December 2019.

Local authorities will clearly have to carefully reassess their hackney carriage and private hire licensing fee regimes. It is now clear that there must be five separate accounts for hackney carriage and private hire licensing: hackney carriage drivers; private hire drivers; hackney carriage vehicles (proprietors); private hire vehicles (proprietors); and private hire operators. There can be no cross subsidy between those various accounts. While this approach has already been taken by number of local authorities, many have historically worked on the basis that there should be two accounts, one for each of the licence fee levying powers (s 53(2) and s 70). Those authorities will need to move with some alacrity to comply with the provisions of this judgment.

As with any question concerning licensing fees, it is vital that the authority fully understands the costs that it incurs to ensure that lawful fees are levied.

This is an important decision which has significantly altered the understanding of the costs that can be recovered in relation to hackney carriage and private hire licensing, as well as the principles which must be involved in determining those costs.

**James Button**
*Principal Solicitor, James Button & Co.*

16 [2018] AC676 SC.
17 See para 46.

# CBD: regulatory straitjacket meets light-touch enforcement

The use of the cannabis-based substance CBD is creating problems for sellers, users and regulators, as **Leo Charalambides** and **Michael Brett** explain

Cannabidiol (CBD) is a non-psychoactive compound produced by the cannabis plant, *Cannabis sativa L*. Medical interest in and public awareness of this compound has greatly increased in recent years, as ever more extravagant claims are made as to its potential applications and concomitant health benefits. Most notably, CBD has been used in therapy for rare forms of epilepsy, but proponents of CBD regularly claim that it can alleviate pain and mental illness, and improve general well-being. CBD is now sold widely on the UK market, featuring in medicines, food supplements and additives, cosmetic creams and gels, and liquids used in e-cigarettes and "vapes". This market has moved beyond fringe retailers to large national chains, such as Holland & Barrett and Boots, the latter even selling a "CBD Gummy Bears" product. CBD products are now also frequently advertised and sold on premises licensed under the Licensing Act 2003.

Although there has long been a background level of sale of products such as hemp seed oil (derived from pressing the seeds of strains of the cannabis plant with low levels of psychoactive chemicals), the recent surge in the market for CBD sits uneasily in the framework provided by the regulation of drugs by the criminal law. This is particularly so in the light of the approach of the Home Office as set out in policy guidance.

## The scheduling and licensing of CBD

Cannabis, cannabis resin, cannabinol, and cannabinol derivatives are Class B controlled drugs under the Misuse of Drugs Act 1971 (MDA) (para 1, Part II, Schedule 2). This includes the main psychoactive chemical produced by the cannabis plant, tetrahydrocannabinol (THC). The importation / exportation, production, supply, and possession of compounds falling within these parameters are unlawful (ss 3 – 5 MDA). This general prohibition, backed with criminal sanction, is subject to powers on the part of the Secretary of State to authorise prohibited activities (s 7 MDA). Under this broad power, the Secretary of State has made the Misuse of Drugs Regulations 2001 (as amended) (MDR), which sets out when a licence from the Home Office will be required, and the limited cases (in respect of "exempt products" – see regulations 2 and 4(5) MDR) when no licence is required.

CBD is not "cannabis, cannabis resin, cannabinol, [or] cannabinol derivatives": as a compound in its pure form it is not a controlled drug therefore. However, the Home Office takes a precautionary approach to the status of CBD within the statutory framework. In guidance published in August 2019, the Home Office states that there is a presumption that a CBD-containing product would be subject to the controls and prohibitions in the MDA. It justifies this approach on the basis of an underlying presumption that CBD products contain "other cannabinoid content", arising from its view that: (i) "It is very difficult to isolate pure CBD"; and (ii) CBD-containing products often fail to be properly tested to "determine their true content or control status".

Experience shows that the Home Office applies this presumption rigorously. The Government also combines this wide expectation for companies to obtain licences for CBD operations with a restrictive approach to granting those licences. Its guidance states that:

> *For a CBD and other cannabinoid products (sic) to be lawfully available for human consumption it needs to either meet the Exempted Product criteria … or the definition of [cannabis-based product for medicinal use in humans (CBPM)] for its possession to be lawful.*
>
> *Where a product is neither a CBPM nor an 'Exempted Product', licences would not ordinarily be issued to enable the use of a ... controlled drug product outside of bona-fide research or a recognised UK clinical trial.*

As with licences to grow cannabis or "hemp" (low-THC cannabis), the Home Office is focused on the ability of applicants to show how material produced or imported under licences will be lawfully used or consumed downstream. This explains the Home Office's emphasis on the ability of applicants for controlled drugs licences to satisfy the requirements of other relevant regulatory bodies, such as the Medicine and Healthcare Products Regulatory Agency.

The upshot therefore seems to be that the Home Office will only grant licences if required to facilitate business involving a product which is either an "exempt product" or a CBPM, and principally which falls within a clearly identifiable economic chain, particularly with a medical focus.

## CBD as an "exempt product"

A CBD product with traces of THC or another controlled cannabinoid may be capable of free circulation, therefore, if it meets the definition of an "exempt product" (regulations 2(1) and 4(5) MDR). Most significantly this includes a requirement that "No one component part of the product or preparation contains more than 1 milligram of the controlled drug." The nature of the CBD product in question, therefore, and the way in which it is packaged and distributed may be key to keeping within the law. Taken at face value, this provision of the law will apply differently to bulk containers of a product than to small containers for retail sale. The Home Office adopts this simplistic reading of MDR when arriving at the view that the 1 milligram requirement applies to the container in which a product is packaged (however large or small, and however much this will vary in size at different stages of the process) rather than to the typical dose of a product.

An additional requirement, namely that the product is not "designed for the administration of the controlled drug", is also more difficult than it may seem, particularly where a CBD product is intended for direct human consumption. The Home Office indicates that a product is unlikely to meet this requirement in its view unless it is medicinal, and therefore subject to the considerable additional levels of regulation this entails.

The exempt product requirements are not of great use to those interested in CBD-only products: using this route requires an acceptance of *some* controlled drug content in the product, immediately bringing the product within the restrictive approach of the MDA and Home Office licensing regimes.

## CBD products as CBPMs

In a similar way, the CBPM (ie, medicine) exemption is of limited use to consumer-facing CBD products. The effect of a product being categorised as a CBPM is that specialist doctors are able to prescribe the products to patients without a Home Office licence. Companies and individuals that manufacture, supply, or possess CBPMs still require Home Office licences for all of these activities, however, because a key part of the CBPM definition is that it "is or contains cannabis, cannabis resin, cannabinol or a cannabinol derivative" (regulation 2(1) MDR): claiming a product is a CBPM therefore entails an admission that it is or contains a controlled drug.

## Frustration for businesses and regulators

The Home Office's presumptive approach to the scheduling and licensing of CBD may be open to criticism on account of its strictness: after all, drugs control legislation only comes into play when a substance which is a controlled drug within the meaning of the MDA is present as a matter of fact, and not where a controlled drug is merely likely to be present. An unwillingness on the part of the Home Office to accept evidence that a product is in fact free of THC or other controlled cannabinoid (to a level of detection reflecting perhaps the margin of error of reasonably rigorous testing) and therefore not in need of licensing could amount to irrationality or a fettering of discretion and so vulnerable to challenge in the courts.

As suggested above, neither exempt product or CBPM categories are of particular assistance to companies involved in the development and retail of consumer-facing CBD-based or CBD-only products, primarily because, in order to access the (limited) advantages these statutes offer, a concession must be made that a product in fact constitutes or contains a controlled cannabinoid.

The restrictive parameters that the Home Office has set around its licence-granting power therefore have the potential to disadvantage responsible importers, manufacturers, or distributors who (with proper circumspection) contact the Home Office for guidance about CBD-only products. This may particularly be the case where companies wish to import raw natural material containing some small amount of THC in bulk from abroad and process it into CBD-only products in the UK. The final product, at least in theory, is capable of free circulation on the UK market beyond the narrow confines of the exempt and CBMP regulatory carve-outs, but a Home Office licence would be required to bring the raw material into the country, to hold and process the material, and to dispose of any manufacturing by-products containing THC and other controlled cannabinoids.

Companies in this position, as a consequence of the Home Office's stated position, will find themselves caught in a fruitless situation in which: (a) in order to obtain Home Office authorisation for parts of their operation which require it (ie, importation or processing of THC-containing material) they are obliged to demonstrate that their product is either exempt or a CBPM); (b) as such, they will necessarily have to concede that their finished product constitutes or contains a controlled drug; (c) this heavily restricts their ability to circulate and market their product. This may be why companies seem simply to bypass the Home Office when putting their products on the market, particularly where they can be confident that their products do not contain any, or only trace amounts of, controlled cannabinoid.

Fundamentally, however, in terms of enforcement, the Home Office is at a disadvantage vis-à-vis economic operators. The primary way in which controlled drug legislation is enforced is by criminal prosecution, in which context it falls to the prosecuting authorities to prove that a product contains a controlled drug to the criminal standard.

It is not sufficient, as the Home Office maintains at licensing stage, to advance a precautionary, "likely to contain", argument when prosecuting for one of the MDA offences. It may be the challenge posed by this burden, both of proof and evidentiary, that has resulted in almost no discernible enforcement actions being taken against CBD products presently on the market.

## Conclusion

The criminal law in respect of controlled cannabinoids therefore has no satisfactory way of addressing or meaningfully regulating the burgeoning market in CBD products. On the one hand, the all-or-nothing approach of the MDA and the restrictive licensing approach of the Home Office result in poor engagement between businesses and regulators. On the other hand, if the Home Office's precautionary approach is in fact well-founded and large quantities of controlled cannabinoid-containing products are being freely bought and sold on the high street, their enforcement tools are manifestly inadequate and their approach to licensing clearly failing. More nuanced and collaborative schemes for the regulation of cannabis-derived chemicals, which are increasingly popular with consumers, are required. Fruitful avenues may lie in greater synchronisation of Home Office licensing powers with the evidence-based schemes of authorisation for medicines and food-stuffs. The CBD market is booming around the world and a more modern and pragmatic approach to the regulation of such products could provide an economic boost to this young industry in the UK.

**Leo Charalambides**
*Barrister, Francis Taylor Building & Kings Chambers*

**Michael Brett**
*Pupil Barrister, Francis Taylor Building*

# Summer Training Conference 17 June 2020


The Institute's Summer Training Conference changes location for 2020 and is being held at the stunning Crewe Hall Hotel, Cheshire.

The aim of the training day is to provide a valuable learning and discussion opportunity for licensing practitioners to increase understanding and to promote discussion in relation to the subject areas and the impact of forthcoming changes and recent case law.

The draft agenda is available online and speakers will be announced as they are confirmed and released via our e-news, on our Licensing Flash emails and on our website **www.instituteoflicensing.org**

There is a residential option for this event for the night of 16 June. Residential places are limited so book early.

The event will take place during *National Licensing Week*.

To book your place go online to our website or email us at **events@instituteoflicensing.org**

# Does white collar boxing require more licensing intervention?

The film *Fight Club* played its part in encouraging many office workers to pull on gloves and enter the boxing ring but there are concerns that stricter regulation is required to protect them from serious injury, as **Julia Sawyer** explains

Boxing is an inherently high-risk sport, but like motorsport and many other risky organised activities, anyone taking part in a boxing match knows the risks they are facing. However, even though participants knowingly take that risk, there are many control measures that should be in place to protect them.

White collar boxing is boxing between men, and increasingly between women too, who work in offices and have never boxed before but are keen to experience the excitement and test themselves physically and mentally. Typically they train for eight weeks before their first fight.

There have recently been media reports of public safety issues at white collar boxing matches. These have included fights erupting in the audience and participants receiving life-changing injuries, and even a boxer dying back in 2014. So the question is being asked, is there enough regulation to control and manage these events or should additional licensing conditions be enforced to protect public safety.

## White collar boxing

Although white collar boxing began as organised fights between City professionals, it's opened up to include anyone who's never boxed before but wants to get in the ring.

The normal process to participate in white collar boxing is to sign up, find a trainer who'll put you through your paces for eight weeks, enter an event and fight whoever you've been matched with.

For most events, you need to be between 18 and 55 years old to participate.

A gum shield, headgear, groin protection for males and 16oz boxing gloves are required to be worn at most events.

Most fights are set at three two-minute rounds, with a rest interval of one minute after the first and second rounds.

## Governing bodies

The British Boxing Board of Control (BBBoC) is the governing body of professional boxing. This regulatory body sets out specific rules and conditions for a boxer to be licensed, details what medical protection standards are expected, sets out arbitration and disciplinary procedures and appoints referees and timekeepers. To participate in a professional boxing competition, you must be licensed by the BBBoC.

The Amateur Boxing Association (ABA) regulates amateur boxing in the UK. It has established codes that detail the rules and procedures that must be followed for a fight to be approved by the ABA.

While there is no recognised governing body for white collar boxing, there are different organisations which set their own standards and rules.

Promoters do not have to be registered or licensed with any of the above regulating / advisory bodies. The boxing venue must have a premises licence that permits boxing to take place.

## Requirements to participate

All white collar boxers must take a medical test before and after they box and must be aged 18 or over.

You would expect to see the following at a white collar boxing event:

- Insurance
- Paramedic crew ringside and ambulance on standby outside
- Pre- and post-fight medical
- Pre-fight weigh-in showing fighters within 10% of each other's weight
- Anaesthetist and doctors ringside and local neurological unit placed on standby
- Risk assessment

- Matching criteria
- Approved and checked regulated gloves
- Referee training
- Approved rules and scoring criteria
- Sanitisation of shared gloves between bouts
- HIV and Hepatitis B test for fighters boxing without a head guard.

This is good practice but it is not written down in any guidance document. Therefore the number of safety measures to be put in place is determined through the risk assessment process. This process is flawed as it may be steered by the promoter who is interested in making as much money as possible and may not therefore be the best judge of what safety measures should be put in place.

## More regulation?

Should white collar boxing events be more regulated so that a licensing authority has more powers to enforce? Should a licensing authority be preventing the sale of alcohol at these events?

If there is poor management at a multi-sports venue, such as crowd disorder or the safety of the participants has not been considered properly, then that lack of professionalism may affect other events at the venue, not just the white collar boxing.

At many sports events, there are opposing supporters and the risk of crowd disorder is correspondingly high. So the risk assessment process is key to ensuring adequate and appropriate controls are put in place to manage the risk. Enforcement authorities have the tools to be able to implement stricter conditions or controls, and have many legislative powers available to them.

Additional guidance for the safe management of a white collar boxing event would be useful for both enforcement authorities and promoters. The guidance should consider and determine if eight weeks is long enough to train someone to take part in a competition. It should also consider the matchmaking of opponents to ensure a fair fight, and would assess not only weight but also fitness and ability. It should also stipulate what medical cover would be appropriate and what measures are required to prevent crowd disorder.

The event organiser / promoter would be the person held responsible for making sure all adequate control measures were in place, to protect both those taking part and those coming to watch the event.

Guidance would help in providing consistency at the events, set a benchmark and give an understanding to licensing authorities of the standard that is expected to run a safe event. The guidance should be written by people within the industry and enforcement officers who have dealt with these events. This would help achieve a balanced, realistic view of what would be an acceptable standard to run a white collar boxing event safely without making the costs prohibitive.

Information should be provided to participants so that they know what to look for and the questions to ask to ensure their interests are being looked after and that adequate safety measures are in place to protect them. But it also needs to specify that this is a high-risk sport, and that participants are taking a risk. That is the lure that tempts people to face the challenge and push their bodies to the limit - and indeed, without an element of risk some things in life would not be fun or a challenge. But participants need to be well informed and understand the risk they are taking. Once they have been presented with the facts, it is their decision and also in their interests to ensure that all the control measures are in place to protect themselves as far as is reasonably practicable.

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

# Institute of Licensing News

## Membership – it's time to renew

Our membership year will come to a close on 31 March 2020. Members will be invited to renew at that point. The online renewal function will go live on 1 April, at which point existing members with full year memberships will be able to renew their membership online by logging in and going to "Manage Account" and following the instructions under "Renew membership".

The IoL team are keen to help members to renew promptly, and this is also an excellent opportunity to ensure that the details we hold on your IoL record (address etc) are all up to date. We will be contacting all members who have signed up for direct debit as well as members who joined part way through the previous membership year to assist with the renewal process. Please let us know if you have any queries - the team can be contacted via **membership@instituteoflicensing.org**.

## National Training Conference 2019

What a fantastic conference! Thank you so much to everyone involved – it was great to see so many licensing practitioners learning, discussing and networking across the event. The NTC sold out again this year – that's several consecutive years now, and we saw over 80 speakers delivering more than 70 sessions.

A packed programme as always, with many commenting that their biggest challenge was deciding which session to attend. A wonderful mix of delegates – some who have been attending for many years now and others who were experiencing the event for the first time. We had outstanding support from our sponsors and the vibe created in the exhibiting area was fantastic. So many leading experts giving their time to present at the event – and such a great event to be part of. A big thank you to everyone who took part – feedback has been outstanding, and we are already taking bookings and planning for the 2020 Conference (11-13 November this year, returning to the Crowne Plaza in Stratford-upon-Avon).

For the first time, we had a professional photographer there, so we have some amazing images and a video clip as well!

## The Jeremy Allen Award 2019

We were delighted to present the Jeremy Allen Award for 2019 to David Lucas. David's nomination was outstanding, supported by many separate endorsements from industry, regulatory and Government practitioners.

We've covered the award and looked at all of our finalist and nominees in detail in the Winter edition of our *LINK* magazine.

## Fellowship

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

All awards are presented annually at the IoL's Gala dinner which is held during the National Training Conference in November each year.

## National Licensing Week 2020

This year's National Licensing Week (NLW) will run from 15-19 June. NLW is a great opportunity for all licensing practitioners to celebrate the role licensing plays in business, home and leisure, keeping people safe and enabling them to enjoy their social and leisure time with confidence.

Our NLW daily themes remain the same, with the underlying message that "licensing is everywhere":

Day 1 – Positive partnerships
Day 2 – Tourism and leisure
Day 3 – Home and family
Day 4 – Night-time
Day 5 – Business and licensing

Licensing is important and so are the businesses and individuals regulated through licensing, along with the regulators tasked with monitoring and ensuring compliance with legal requirements and local conditions where applicable. National Licensing Week is an opportunity to highlight just how many daily activities are linked to licensing and why. Celebrate your role, your organisation and your work and share it through social media, or other means.

It doesn't take much to be involved. A job swap could be fun, interesting and very worthwhile in getting a deeper appreciation of the work others do and the challenges they face; but equally, a simple blog about an aspect of your daily role in licensing gives others the opportunity to see the role through your eyes – why is it important, who does it make a difference to and what are the challenges and rewards.

*NLW2020* will soon be here and we hope to see more and more engagement, activities and showcasing of organisations in all sectors. We welcome your ideas and, more importantly, your contribution in whatever form suits you to help us fly the flag for licensing practitioners in every sector across the UK.

To find out more and get involved please email **NLW@instituteoflicensing.org**. We look forward to hearing from you! **#NLW2020 #getinvolved #licensingiseverywhere**


## Summer Training Conference

The IoL's *Summer Training Conference* (previously the *National Training Day*) will take place during *National Licensing Week* on Wednesday 17 June this year at Crewe Hall Hotel.

We have a great programme lined up for the day with some fantastic speakers including:

- An industry update from Michael Kill, NTIA
- Managing outdoor events with Sean Williams, Blue Owl Events
- National standards for taxis with James Button
- A legal update from Gary Grant and James Button
- A discussion about the fast-moving debate and developments relating to licensing and planning collaboration with Sarah Clover, Kings Chambers, Andrew Walster, Coventry City Council and IoL Chairman and CEO of Rockpoint Leisure, Daniel Davies.

Why Crewe? Some members will remember that the IoL November *National Training Conference* and *National Training Day* used to move across the regions each year, giving an opportunity to visit different venues and locations. The intention is to reintroduce this for the *Summer Training Conference* (it is more difficult with the November Conference owing to the size of the event). We are very much looking forward to coming to the North West this year and will move to a different region in 2021.

## Consultations and Engagement

We were delighted to learn that the Institute of Licensing's work to promote consistency between licensing and planning has been recognised by the Minister of State for Crime, Policing and the Fire Service.

Kit Malthouse MP wrote to all licensing authorities about "an important issue about collaboration between licensing and planning committees."

He said: "The Government did not agree with the Committee's main recommendation that there should be a trial merger of licensing committees with planning committees… However, there are instances where the synergy between licensing and planning regimes could be improved. For this reason, we amended the Section 182 Guidance to clarify the issue of coordination between the decisions of licensing and planning committees and have worked with the Local Government Association to address the synergy between licensing and planning in their handbook for councillors on the Act, which was published in July."

The Minister went on to praise the work of the Institute saying: "We are supporting the Institute of Licensing (IoL)

in identifying opportunities for improving collaboration between the two regimes and gathering examples of best practice where the regimes interact effectively at a local level. The IoL surveyed stakeholders on this issue and the responses informed two workshops held this year to explore potential solutions in both the short and longer term. We are also supporting the IoL as they scope and develop training for councillors. The IoL have taken an active role in driving this work and we are grateful for their commitment to this important issue."

The IoL have been pro-actively involved in the House of Lord's review of the Licensing Act 2003. Sarah Clover, Barrister at Kings Chambers and Institute of Licensing Director / Chair of the West Midlands Region served the Select Committee as Specialist Advisor during the course of the review. The Select Committee's report was published on 4th April 2017.

In April 2017 the IoL published its response to the House of Lords Select Committee report. In its response the IoL said whilst improvements can be made to the current licensing system, it was not supportive of any approach towards an amalgamation of licensing and planning committees.

The IoL said: "...The licensing of alcohol, in particular, is a specialist area….. The expertise of our members built up over many years should not be underestimated.

"The IoL acknowledges a key recommendation within the Select Committee report suggesting closer integration of the licensing and planning regimes. There are elements of such integration which make good sense such as better communication between council departments and the importance of a planning decision being viewed as a material factor for a licensing committee to take account of, and vice versa.

But it is also clear that these issues are part of a wider debate about strategic place making and management of the night time economy. In fact, the IoL has already been in discussion with the Planning Officers' Society to discuss different aspects integration between licensing and planning regimes that would potentially see a greater role for licensing in such areas as control of use classes and permitted development."

## Consultations

### Liquor licensing laws in Northern Ireland Consultation Document
### Closing date: 6 December 2019

Northern Ireland's Department for Communities launched a consultation on liquor licensing laws, which closed on 6 December 2019. The consultation looked at the current liquor licensing laws, their impact, if any, and what changes could be considered in the future.

The Department stated on the NI Government website that the "consultation paper has been drafted to invite public opinion on current liquor licensing laws in Northern Ireland, and to seek views on whether changes could be made in the future to ensure Northern Ireland has a more flexible and modern licensing framework to respond to changing expectations and lifestyles."

It continued: "It should be noted that any changes to licensing law must also be balanced with the need for regulation in the public interest. We are keen to hear the views of all parties with an interest in licensing law, so that relevant views and evidence can be taken into account in any future policy decisions."

Alcohol licensing is very different in Northern Ireland currently. It is an offence to sell intoxicating liquor without a licence and the Licensing Order (NI) 1996 regulates the sale and consumption of alcohol. This includes who is capable of holding a liquor licence, what kind of premises are suitable for the sale of alcohol (there are 13 types of premises eligible to hold a licence to sell alcohol to the public), and the hours during which alcohol can be sold. New licences for pubs or off-licences can only be granted where the applicant surrenders a valid and subsisting licence. These legislative provisions effectively limit the number of licences available for the whole of Northern Ireland. Applicants are required to have relevant planning permission in place, as well as the title to premises, and must demonstrate that there is a need for the premises (inadequacy of provision). Today, there are an estimated 1,800 liquor licences in circulation throughout the province operating in bars and off-sales, with a finite number for sale at any given time.

The consultation document covered a range of proposals including:

- General licensing system
- Permitted hours
- Young persons
- Deliveries of alcohol
- Advertising
- Restriction on supermarkets and off-sales
- Provision of entertainment in restaurants
- Codes of practice
- Remote sale of alcoholic drinks
- Loyalty schemes

The IoL responded to the consultation, welcoming the opportunity to comment and noting the potential for

modernising the licensing regime in Northern Ireland. The IoL response states:

> "We view this as a valuable opportunity to support and develop the hospitality industry and night-time economy, whilst protecting community safety and public health.
>
> "The IoL is very supportive of the hospitality industry as a foundation for the development of local tourism, as a provider of local employment and skills development and as an important element in working towards building local communities and reduction of social isolation.
>
> "The last general review of Northern Ireland's liquor licensing laws took place in 2012 resulting in the Licensing and Registration of Clubs (Amendment) Bill 2016. The IoL made significant responses to those consultations and this response is based on that pre-existing work.
>
> "If, in considering a review of liquor licensing in Northern Ireland, there is any merit in more closely examining the existing alcohol licensing regimes in Scotland, and England and Wales to establish if any of those arrangements would work for Northern Ireland, the IoL is in an excellent position to assist with key licensing law experts within our membership and Board of Trustees and would be happy to work with the Department for Communities in furthering proposals."

## Open consultations

At the time of writing, there are other consultations underway, and the IoL is intending to respond in each case. They include:

### Commission on Alcohol Harm: An Inquiry into the Effects of Alcohol on Society
### Closing date: 17 February 2020

The Commission on Alcohol Harm has been established to examine the current evidence on alcohol harm, recent trends in alcohol harm and the changes needed to reduce the harm caused by alcohol. The Commission will also examine the need for a new and comprehensive UK-wide alcohol strategy.

The new commission will be chaired by Baroness Finlay of Llandaff and made up of a panel of expert practitioners, cross-party Parliamentarians and health leaders. The Commission will hold three oral evidence sessions in England, Scotland and Wales in early 2020, and has launched a call for written evidence.

### Regulation of Gambling in Northern Ireland
### Closing date: 21 February 2020

A further consultation from Department for Communities sought views on the regulation of gambling in Northern Ireland, and whether changes are now necessary to ensure Northern Ireland has a more flexible and modern licensing framework capable of responding to the many societal and technical changes which have occurred in the industry.

### Consultation on society lottery reform
### Closing date: 12 March 2020

The Gambling Commission has launched a consultation on society lottery reform, seeking views on strengthening some aspects of the licence conditions and codes of practice and producing guidance related to information available to consumers.

It said: "In June 2018 the Government published a consultation on society lottery reform, seeking views on potential changes to sales and prize limits for large and small society lotteries.

"In July 2019, the Government announced that it intends to amend s 99 (3) of the Gambling Act 2005 to raise the per draw limit on lottery proceeds (ticket sales) from £4 million to £5 million, with the result that the maximum individual prize will raise from £400,000 to £500,000.

"In addition, the annual aggregate proceeds limit will rise from £10 million to £50 million. The Gambling Commission is required by s 99 of the Act to attach conditions to lottery operating licences for the purposes of achieving the requirements of s 99.

"So the current limits, which are reflected in licence conditions attached to all society lottery operating licences, will also need to be amended to reflect the changes."

The reasons for changes to, and levels at which the limits will be set are explained in the Department for Digital, Culture Media & Sport's responses document *Government response to the consultation on society lottery reform*.

The Gambling Commission is also looking at the current regulatory requirements to ensure that issues related to the fair and open licensing objective, regarding transparency to consumers, are addressed. The consultation seeks views on strengthening some aspects of the licence conditions and codes of practice and producing guidance related to information available to consumers.

## Training and events

2019 proved a highly successful year, with the most events ever provided, enabling licensing professionals to continue to develop their skills and knowledge. The beginning of 2020 sees a series of events on licensing fees take place in

various locations. These courses are being delivered by Leo Charalambides and Ben Williams of Kings Chambers and include up to date information following the Court of Appeal Wakefield case.

This year we continue to offer our ever-popular *Professional Licensing Practitioners Qualification (PLPQ)*, which is being run in eight areas of the country. Also, online for bookings in 2020 are two Practical Gambling Courses (Manchester and London) with multiple speakers and a casino tour.

Our full calendar of events can be viewed at **www.instituteoflicensing.org/events** and is regularly updated.

The *Animal Licensing - Where are we now?* courses have also been popular, showing that there is still a lot to discuss, and we are progressing well with the development of our *Animal Licensing Inspectors* course.

# IoL Events Calendar 2020

## April
**2 East Midlands Region Training Day**
**2 Taxi Licensing (Basic) - Tunbridge Wells**
**28 Acupuncture, Tattoo & Cosmetic Skin Piercing - ??**

## May
11 Working in Safety Advisory Groups - Solihull
14 South West Training Day
19 - 21 Professional Licensing Practitioners Qualification - Birmingham

## June
2 Licensing Fees - ??
5 South East Training Day
9 - 12 Professional Licensing Practitioners Qualification - London
10 Wales Region Training Day
15 - 19 National Licensing Week
17 Summer Training Conference - Crewe
19 London Region Training Day
24 Practical Gambling - Manchester
30 - 3 July Professional Licensing Practitioners Qualification - Reading

## July
**15 Taxi Conference - Nottingham**

## September
8 Taxi Licensing (Advanced) - ?
10 Taxi Licensing (Advanced) - ?
15 - 18 Professional Licensing Practitioners Qualification - Harrogate
16 Taxi Licensing (Advanced) -
18 London Region Training Day
21 & 22 Zoo Licensing - Yorkshire Wildlife Park
30 Wales Region Training Day

## October
6 South East Region Training Day
7 Practical Gambling -
8 Taxi Conference - (South West TBC)
8 & 9 Public Safety at Events - York
13 Taxi Licensing (Advanced) -
15 Taxi Licensing (Advanced) -
20 - 23 Professional Licensing Practitioners Qualification - South Wales

## November
5 Taxi Licensing (Advanced) -
11 - 13 National Training Conference - Stratford-upon-Avon
23 - 26 Professional Licensing Practitioners Qualification - London

## December
9 South East Region Training Day
11 London Region Training Day

**Bespoke Courses**
As well as offering training open to all we provide bespoke training courses which can be delivered at your organisation. The training courses would be for your employees / councillors etc and closed to general bookings.

For more information and to obtain a quote please email your requirements to
**training@instituteoflicensing.org**

# The future of cannabis licensing for recreational use

Should cannabis use be legalised in the UK, and if so, how should it be regulated? **Gary Grant** points the way forward

Given that demand for cannabis pre-dates civilisation,[1] should its supply today be placed in the hands of a responsible State-run licensing regime or continue to be left to organised crime?

That is the ultimate question policy-makers face when considering whether the United Kingdom should follow the likes of Canada and eleven states in the USA, in legalising and licensing the use and supply of recreational cannabis. A fundamental factor in this judgement-call must be whether the potential harm resulting from recreational cannabis use is likely to be increased or decreased by its legalisation and regulation.

This article concludes that, on balance, the undoubted harms that flow from recreational cannabis use are more likely to be reduced if it were to be legalised and well-regulated. That can be achieved through a licensing regime similar to the one we are already familiar with in the UK and which controls our nation's favourite drug of all - alcohol.

## Cannabis usage – worldwide and UK

Cannabis is the most widely produced, trafficked, and consumed illicit drug in the world. In a 2019 report, the United Nations estimated there were some 188 million users globally.[2]

The Home Office's Crime Survey for England and Wales 2018/19[3] assessed that 7.6% per cent of adults aged 16 to 59 used cannabis in the past year, equating to around 2.6 million people. Cannabis was also the most commonly used drug by young adults aged 16 to 24, with 17.3% having used it in the last year (around 1.1 million young adults). Of particular concern is that cannabis was found to be the most commonly used drug among 11 to 15-year olds, with 8.1% reporting that they had used it in the last year.

Startlingly, when the UK Crime Survey's respondents were asked about their drug use beyond just the past year, around one in three adults (30.2%) aged 16 to 59 admitted to using cannabis at some point in their lifetime. That statistic is worthy of repetition: one in three adults in England and Wales has admitted to using cannabis, a drug prohibited by the criminal law for nearly 100 years.

Cannabis is designated as a Class B drug in the UK under the Misuse of Drugs Act 1971. Simple possession of the drug can therefore carry a maximum penalty of five years imprisonment and a supplier of cannabis faces up to 14 years' imprisonment. Whilst, in reality, a prison sentence is unlikely for a first offence of simple possession of cannabis for personal use, with a police warning or caution more likely, many prosecutions do still take place. In 2017 over 15,000 individuals were prosecuted in the criminal courts of England and Wales for simple possession of cannabis.[4] Even a financial penalty for an offender can destroy an individual's future and opportunities in life (though one notable exception is Lord Ken MacDonald QC, the former Director of Public Prosecutions, who was convicted and fined for supplying a small amount of cannabis by post as an Oxford undergraduate). When a third of adults in England and Wales admit to having used cannabis - despite the criminal sanctions - then one is forced to ask: has criminalising its use actually worked in reducing the potential harms associated with cannabis use? The statistics suggest that the decades long "war on drugs", a term first coined by President Richard Nixon in 1971 as an attempt to cast society's response to drug use as a moral battle between good and evil instead of a public health issue, has been well and truly lost. Both the demand for, and supply of, opiates, cocaine and cannabis have all gone up significantly since 1971. As have the resulting harms, including increased levels of drug-related violence and crime (Al Qaeda is principally financed by opiates and cannabis production).[5] War by other means may now be worthy of consideration or even, perhaps, the pursuit of a more effective strategy of peace, reconciliation and State-control of the market place to better ensure that the harms

1 Evidence of cannabis use has been found at an archaeological site in the Oki Islands near Japan dated to at least 8,000BC. See Tengwen Long et al (March 2017) "*Cannabis in Eurasia: origin of human use and Bronze Age transcontinental connections*", Vegetation History and Archaeobotany, 26(2): 245-258.

2 https://wdr.unodc.org/wdr2019/prelaunch/WDR19_Booklet_2_DRUG_DEMAND.pdf.

3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832533/drug-misuse-2019-hosb2119.pdf.

4 Ministry of Justice data at: http://qna.files.parliament.uk/qna-attachments/931411/original/PQ%20157684%20Tables.xlsx.

5 See Professor David Nutt, *Drugs Without The Hot Air - Making Sense of Legal and Illegal Drugs* (2020. UIT Cambridge), Chapter 17.

of drug use can be reduced.

When such a significant section of our population is disregarding the criminal law as it applies to cannabis, then its continued criminalisation risks calling the law into disrepute more generally. If everyone else is disobeying the law, why on earth should I obey it or, indeed, any other law?

In 2000, an enquiry led by Viscountess Runciman (a former Chair of the UK Mental Health Act Commission) produced a report on behalf of The Police Foundation into the policing of drugs in the UK, with a particular focus on cannabis. She concluded:[6]

> *There can be no doubt that, in implementing the law, the present concentration on cannabis weakens respect for the law… It gives large numbers of otherwise law abiding people a criminal record. It inordinately penalises and marginalises young people for what might be little more than youthful experimentation. It bears most heavily on young people in the streets in cities who are also more likely to be poor and members of ethnic communities. The evidence strongly indicates that the current law and its operation creates more harm than the drug itself.*

Of course, that argument in itself is not conclusive. Just because many people drive over the speed limit on the motorway it does not follow that all legal speed restrictions should be abandoned. But the fundamental difference between cannabis use and speeding is this: cannabis, on the whole, may well harm an individual user but poses little risk of significant harm to others. In contrast, speeding on a motorway creates a risk of harm to the individual speeding driver *as well as* to other road users. Because of the serious risk of harm to *others*, speeding is rightly criminalised so as to protect others from an individual's poor choices. In a modern liberal democracy that is the highest, perhaps only proper, justification for a legal prohibition on the behaviour of a consenting adult. However, the justification for criminalising behaviour that does *not* create a serious and disproportionate risk of harm to others is more elusive, yet that is the position with our current legal approach to cannabis.

A related point is that when consumers of cannabis hear their Government speak of the great evils of illicit drugs, all drugs, in absolutist terms, yet their own experiences suggest otherwise, the voice of Government is diminished – even when they may be making an entirely valid point in relation to more potent drugs like heroin or crack cocaine. The boy who cried wolf is rarely a persuasive role model.

6 http://www.police-foundation.org.uk/publication/inquiry-into-drugs-and-the-law/

When considering the pros and cons of legalisation we need to look at the potential harms of cannabis and the reasons why people wish to consume it. Before doing so, it is helpful to consider cannabis and its role in society. This article gratefully acknowledges the work of Professor David Nutt, Professor of Neuropsychopharmacology at Imperial College, London, (and the author of *Drugs Without the Hot Air: making sense of legal and illegal drugs)*[7] but perhaps best known as the scientist sacked by the Home Secretary as Chair of the Advisory Committee on the Misuse of Drugs Act, for comparing the harms of horse-riding to ecstasy.[8] His comparison was statistically true but was frowned upon by certain parts of the media. The impact of contrived media outrage led to this exchange in the House of Commons on 13 July 2011:

Tom Brake MP: *Does the Prime Minister believe that once a healthier relationship is established between politicians and the media, it will be easier for Governments to adopt evidence-based policy in relation to, for example, tackling drugs…*

Prime Minister David Cameron: *That is a lovely idea…*

## A short history of cannabis

The cannabis or marijuana plant originated in Asia. It has been used by humans for thousands of years for three main purposes: as a fibre, as a medicine and as a recreational drug for pleasure. The stem of the plant is used to make hemp, a fibre widely used for making ropes, netting and fabrics. So important was its use that Henry VIII legislated to mandate farmers to grow it (the decree stipulated that for every 60 acres of arable land a farmer owned, a quarter acre was to be sown with hemp).[9] The buds and resin of the female plant contain numerous ingredients, including tetrahydrocannabinol (THC). This is the psychoactive ingredient that makes recreational users feel "stoned" or "high" (ie, chilled out, talkative, giggly and sociable). The solid brown resin is generally known as "hash", the buds as "weed" or "grass". It can be ingested by eating (eg, in hash-cakes), smoking (eg, mixed with tobacco in rolled-up "joints" or "spliffs" or through a water-pipe), or, more recently, vaped in liquid-oil form in vaporisers and vape-pens, much like an e-cigarette. A more potent form of weed, known as "skunk" (due to its strong smell) has been developed in the past few decades by selective breeding techniques. The THC content in skunk is two to three times higher than in unmodified plants.

Other ingredients of the plant include cannabidiol ("CBD").

7 UIT Cambridge 2nd edition (2020).

8 See in particular Nutt, *Drugs Without The Hot Air*.

9 "Marijuana – the first 12,000 years", Ernest Able, Plenum Press, 1980, cited in Nutt (ibid).

CBD (among other elements in the plant) is widely claimed to have medicinal uses for the relief of pain and anxiety, to reduce epileptic fits and the symptoms of Parkinson's and multiple sclerosis among other ailments. CBD has no mood-altering effects. CBD itself, in isolated form, is not a prohibited drug and is now widely marketed as a "well-being" supplement in health food stores and pharmacies (though care must be taken not to make any unproven medicinal claims).

Cannabis is probably the world's oldest medicine. Although known to medicine since the middle-ages, cannabis was more widely used in the UK from the 1840s. During the British Raj, British doctors witnessed its use in traditional Indian medicine (where it was known as "bhang") and brought it back to the UK as a painkiller. Queen Victoria was regularly prescribed cannabis to aid her menstrual pain and after childbirth (she had nine children). Concerns about widespread cannabis use in British India led to the Indian Hemp Drugs Commission Report in 1894. It concluded that the drug was not harmful and should not be controlled.

During the First World War, soldiers in an effort to escape the hideous reality and trauma of war, used a significant amount of illicit drugs including cannabis, morphine and cocaine. Harrods even sold gift packs containing heroin and cocaine with the tag-line "a welcome present for our friends at the front".[10] During the Vietnam War around two-thirds of American soldiers used cannabis regularly. Depending on the drug involved, stoned soldiers are probably less effective fighting units than sober ones. That said, several armed forces have prescribed various forms of amphetamine as a stimulant to help their soldiers, sailors and pilots stay alert for long periods without sleep (during World War 2, the British armed forces used 70 million amphetamine tablets whilst their German counterparts were dosed up on methamphetamine)[11]. When these soldiers returned to civilian life the authorities were, not unreasonably, concerned that these drug-addicted men turned workers would be less productive if they turned up to work stoned or avoided work altogether, preferring to exist in a drug-haze. Between 1916-1928 a series of laws controlled the supply and use of cannabis and other drugs in the UK but cannabis remained lawful to medically prescribe until 1971. Global efforts to outlaw drugs led to the 1961 United Nations Single Convention of Drugs, and in 1971 the United Nations Convention on Psychotropic Substances. The latter convention led to the Misuse of Drugs Act 1971, the UK law which is still the principal legislative control over cannabis and other drugs. Unlike heroin and cocaine (which have proven medicinal uses and can still be lawfully used under medical supervision), cannabis was thought to have no medicinal benefits at the time. The 1971 Act therefore made it unlawful to possess or supply cannabis even for medicinal purposes (although there were some very limited exceptions introduced in November 2018 if prescribed by a registered specialist doctor).

## Why do humans take mind-altering drugs?

Deliberately creating an altered state of consciousness is a human universal. That altered state can be provoked or created in a myriad of ways - by listening to sublime music, by dancing like no one is watching, musing over a poem, meditation or prayer, being engrossed in a dramatic movie, riding a roller-coaster, bungee jumping and skiing, exploding in joy at your football team's late winner or being hugged by a much loved child, by drinking coffee and tea, eating chocolate and sugar-coated sweets, by taking Diazepam or tobacco or alcohol. For exactly the same reasons some people also enjoy using cannabis and other mind-altering drugs – legal or illegal. All of these human activities that impact on our minds are lawful, with the single exception of cannabis use.

Different societies throughout history have used mind-altering drugs. By way of example, Figure 1 is a map of the world showing the main drugs in use 1,000 years ago.[12]


Figure 1: Main drugs in use 1,000 years ago.

In many cases the consumption of mind-altering drugs has been a part of religious, spiritual and social rituals for tens of thousands of years. From Native Americans ingesting cactus-derived peyote, to Peruvian Shamans drinking an ayahuasca brew, to the wine drank at Catholic sacrament or during a Jewish Sabbath meal. A music festival-goer smoking a spliff is a modern day iteration on the same spectrum.

Nor are humans the only animals to seek out mind-altering drugs. Hornets fly haphazardly, if at all, after feasting on fermenting plums (and often return for more), elephants have been observed tumbling around after consuming ripened Marula fruit that has fallen to the ground, Canadian moose have been photographed slumped over tree branches after eating apples fermenting on the ground.

Academics have suggested there may be an evolutionary

10 Nutt, *Drugs Without the Hot Air*, Ch17.

11 *Ibid*, Ch 17.

12 Map from Nutt, *Drugs Without The Hot Air*.

basis to this behaviour.[13] Plants develop drugs that avert predators by interfering with their brains. Some animals learn to overcome this aversion and turn it to a liking. Those animals best adapted to enjoying the drug are then able to enjoy more life-sustaining food and their offspring, in turn, are more likely to have the same adaptation. These offspring will soon outnumber and replace other animals without a predilection to the plant-based drugs. Now, it is unlikely that a full-proof "evolutionary defence" will be available to a clubber caught with some Ecstasy on a Friday night in the West End of London, but it may provide, at the very least, an explanation.

## Potential harms of cannabis

Having considered why humans take mind-altering drugs, it is necessary to consider the potential harms of cannabis use specifically. Nothing in this article should be taken as encouragement for anyone to take illicit drugs. *South Park*'s Mr Mackey is undoubtedly right when he summarised the scientific learning in this area with his admonition that "Drugs are Bad".

The potential harms of cannabis use include the following:

- Lethargy and de-motivation – which can impact on education, work & relationships
- Temporary memory loss
- It impairs the ability to drive, use heavy machinery etc. safely
- It is associated with schizophrenia and psychotic illnesses – particularly in young, susceptible individuals who are heavy users of high potency varieties of cannabis. There is an ongoing academic controversy as to whether the link is merely "correlation" (ie, people with psychotic tendencies are attracted to cannabis as it helps their ailments) or "causation" (ie, the cannabis use has caused or accelerated the psychosis in people with a genetic pre-disposition to those symptoms).[14]
- The well-known health harms from using tobacco still exist when it is mixed with cannabis to make rolled-up joints.

According to the NHS some 10% of regular users become dependent on it.[15] Withdrawal can cause insomnia, mood swings, irritability and restlessness. In the UK some 17,000 individuals are treated for addiction per year. About one-half are under the age of 18.

So, the question is not whether cannabis has the potential to cause harm to an individual user. It clearly does. The question is whether the degree of harm is such that the State has a right to intervene by totally prohibiting its consumption by informed consenting adults.

## Weighing the risks

There are plenty of drugs, both old and new, which have the potential to cause really serious harm to an individual as well as to others. Professor Nutt has identified one particularly dangerous drug, known colloquially as "Wiz". He describes it as follows with an urgent call to our politicians to do something:[16]

> *A terrifying new "legal high" has hit our streets. Methyl-carbonol, known by the street name "Wiz," is a clear liquid that causes cancers, liver problems, and brain disease, and is more toxic than ecstasy and cocaine. Addiction can occur after just one drink, and addicts will go to any lengths to get their next fix – even letting their kids go hungry or beating up their partners to obtain money. Casual users can go into blind rages when they're high, and police have reported a huge increase in crime where the drug is being used. Worst of all, drinks companies are adding "Wiz" to fizzy drinks and advertising them to kids like they're plain Coca-Cola. Two or three teenagers die from it every week overdosing on a binge, and another 10 from having accidents caused by reckless driving. "Wiz" is a public menace – when will the Home Secretary think of the children and make this dangerous substance Class A?*

For those readers who haven't already guessed, the drug "Wiz" is otherwise known as "alcohol". Given the harm it causes, should alcohol consumption be wholly banned and regulated through the imposition of criminal sanctions against those who dare to have a sip of sherry after a tough day at work? If not, then why should we do so in the case of cannabis?

For those who, in the interests of consistency, are prepared to concede that alcohol should indeed be outlawed (at least for others), one need only turn to the Prohibition experiment in the United States between 1920-1933. It was a wholesale failure. The demand for alcohol in the US did not vanish, but its supply was handed from the regulated producers and licensed bars to the likes of Al Capone and the unlicensed Speakeasies. The quality and safety of the now unregulated

13 Nutt, *Drugs Without The Hot Air*.

14 See for example: https://www.thelancet.com/article/S2215-0366(19)30086-0/fulltext\; and https://www.drugabuse.gov/publications/research-reports/marijuana/there-link-between-marijuana-use-psychiatric-disorders; and https://www.nhs.uk/news/genetics-and-stem-cells/cannabis-use-genetically-linked-to-schizophrenia/. For a useful summary of the current state of academic research, see also Nutt, *Drugs Without The Hot Air,* Ch.5.

15 https://www.nhs.uk/live-well/healthy-body/cannabis-the-facts/.

16 Nutt, *Drugs Without The Hot Air,* Ch.7.

illicit alcohol ("Moonshine") in Prohibition-era America deteriorated to the point that paint-stripper and industrial alcohol were often consumed as the only available alternative and with predictably fatal effects.

In a fascinating study published in *The Lancet,*[17] Professor Nutt and a team of experts forming the Independent Scientific Committee on Drugs carried out a survey of the 20 most popular drugs – legal and illegal – in the UK. The researchers gave a weighted score of harm based on a number of criteria. This "harm-score" was divided into harm to the user (eg, a heroin addict overdosing) and harm to others (eg, the mugging of an old-lady's purse in order to purchase the alcohol, and treatment costs by the NHS). The overall score was the aggregate of both types of harm. Their results are set out in Figure 2 (below). By far the most harmful drug in

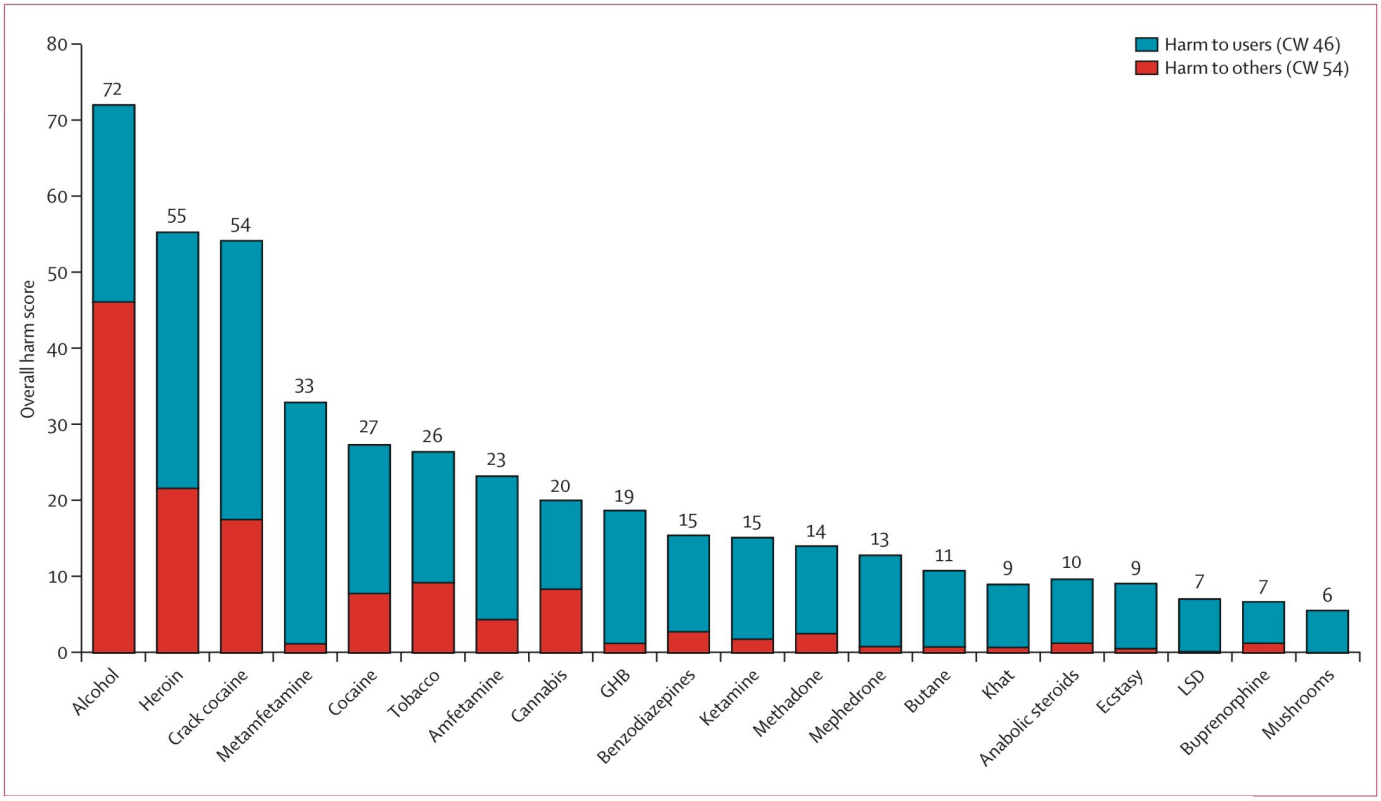



Figure 2: Most harmful drugs, ranked.

our society is the one we know as "alcohol", the nation's favourite, and still lawful, drug. Moving down the table from alcohol, in second and third places are the – relatively - less harmful heroin and crack cocaine (both Class A prohibited drugs). Tobacco comes in at number six. Cannabis appears as the eighth most harmful drug consumed in the UK.

So, when we consider the harms of cannabis use, we need to look at "relative harm". Relatively, cannabis is less harmful than alcohol or tobacco – both of which are legal substances.

As a crude comparison, according to the NHS there are some 5,843 "alcohol-specific" deaths per year.[18] The Office of National Statistics suggests that the annual figure for cannabis-related deaths in England and Wales between 2001- 2017 (ie, where cannabis was mentioned on the death certificate without other drugs or alcohol) ranges from zero to a maximum of four (a similar risk to being killed by a lightning strike).[19] Globally, there is not a single confirmed death where the undisputed cause was an overdose of cannabis.[20]

Having identified the potential harms of cannabis use there is a temptation to lazily conclude that anything harmful should remain prohibited and illegal. Yet, as we have seen with alcohol, there are many perfectly lawful pursuits which carry a serious risk of harm, yet few seriously suggests they should be outlawed for consenting adults. The famous example that led to Professor Nutt's departure as a senior Government Advisor on drugs, namely that Ecstasy use poses a similar risk to human health as horse-riding, is a prime example. Should we criminalise and prohibit horse-

17 *The Lancet*, 6.11.2010: https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)61462-6/fulltext.

18 5,843 alcohol specific deaths in 2017, see: https://digital.nhs.uk/data-and-information/publications/statistical/statistics-on-alcohol/2019/part-2.

19 See https:/www.ons.gov.uk/peoplepopulationandcommuntity/birthsdeathsandmarriages/adhocs/008866drugrelateddeathswherecanabiswasmentionedwithoutothersubstancesbycontributorycausesofdeath2001-2017

20 In a 2019 case a New Orleans' coroner concluded that vaping cannabis oil may have been the cause of a woman's death from respiratory failure. Drug experts have cast serious doubt on that finding: https://www.newsweek.com/thc-overdose-death-marijuana-exposure-united-states-1442742.

riding – generally an activity now pursued for no greater objective than human pleasure? The dangers of playing rugby, downhill skiing, boxing, motor-racing, or even just driving your children to school each morning far exceed the dangers of cannabis use in terms of the risk of a resulting fatality. We all take numerous risks every day. We do so because we are prepared to weigh those risks against the resulting benefits. Human pleasure is one such benefit. From cannabis use (if that is your thing), to drinking a fine single malt whisky (which ought to be everyone's thing), ingesting drugs for pleasure may justify a certain level of risk for some. An individual who takes no risks in life is, as a general rule, likely to be very dull indeed. The question therefore is one of weighing up the risks of harm by legalisation against the potential benefits. That is also the answer to the common question: but aren't the arguments for legalising cannabis the same as those for legalising heroin and crack cocaine, so if we legalise cannabis we must also legalise the more dangerous drugs? Since the question is, or should be, one of weighing up the risks for and against a certain course of action, when the risks of harm are exponentially higher (as with heroin and crack cocaine use compared to cannabis) the scales may well fall the other way and demand the continued prohibition of those more dangerous drugs. In other words, the legalisation of cannabis does not inevitability lead to the legalisation of more potent drugs.

We have already considered the potential harms of cannabis use and how they compare to other risky lawful activities. What are the potential benefits of legalising it?

## Potential benefits of legalisation

The first benefit of legalisation is a basic one - individual liberty. If an informed adult wishes to smoke a joint, doing no harm to anyone else in the process, then why on earth should the State intervene in that pleasure-seeking activity?

The second benefit is to remove organised crime as the sole controller of recreational cannabis production and supply in the UK. Legalisation is unlikely to remove all criminal involvement in the cannabis trade. Criminals still produce counterfeit tobacco and alcohol products despite their legal status. But most people will prefer to buy safer, higher-quality cannabis products from a legal dispensary than buy illegal black-market products supplied by criminal gangs on street-corners. Therefore, the criminal hold on the cannabis trade is likely to be overwhelmingly diminished as a result of legalisation. The removal, or at least reduction, of criminality in the trade is likely to lead to a reduction in the vicious drug turf wars playing out on British streets in the shape of the well-publicised stabbings and shootings that increasingly scar our society. Closely connected to this point is that under-resourced police forces will then be able free-up the time and resources currently taken up by issuing warnings, cautions, and prosecuting cannabis users and suppliers in order to focus on those other crimes that damage Society as a whole even more. The current costs of policing, prosecuting and imprisoning cannabis offenders in the UK have been estimated at £500 million per year with police spending an average of 1 million-hours each year enforcing the cannabis ban.[21] This money and time can surely be put to better use.

In a criminal-led market, standards and quality control tend to be lower than in a legal and regulated market. After all, it is unlikely that a cannabis user will readily report a sub-standard purchase of some illegal hash to his local trading standards officer. In contrast, in a well-regulated, legal market, the State can impose age-restrictions on cannabis purchasers to ensure that young, susceptible brains are deterred from using cannabis. The maximum legal levels of THC (the psychoactive element) in cannabis products can be capped so that the super-strength skunk varieties (ie, those mostly associated with triggering psychotic episodes in young, developing susceptible brains) can be eliminated from the market. The standards of production can be improved. Certain criminal producers of cannabis have been known to use harmful chemicals such as pesticides or solvents in the production process. These dangerous illicit practices can be outlawed in a regulated system so the legal product will be cleaner, safer and more predictable in its potency than that found on the black-market.

The "gateway argument" is often employed by those who wish to retain the status-quo of total prohibition. This argument suggests that if a user starts with cannabis he will inevitably end up taking heroin or crack cocaine. But the criminalisation of cannabis means that an individual is forced to buy the drug from a dealer who may also be keen to push his heroin or crack cocaine products on the user too. Whilst it is true that most heroin and crack cocaine users have also taken cannabis, it is also true that most heroin and crack cocaine users have used alcohol and tobacco. Should they also be banned as gateway drugs? It is not that a cannabis user will inevitably move on to stronger Class A drugs, but rather that a person with a predisposition to using Class A drugs is more likely to be open to trying any drug he can get his hands on, legal or illegal. Moreover, the vast majority of cannabis users never go on to try heroin or cocaine.[22] In light of the gateway argument, legalisation provides this additional benefit: people who are able to buy cannabis from a licensed store face no such gateway, because they

21 See "Potential savings from the legalisation of cannabis", Ben Ramanauskas (May 2018): https://d3n8a8pro7vhmx.cloudfront.net/taxpayersalliance/pages/9387/attachments/original/1526051770/Cannabis_Legalisation.pdf?1526051770.

22 Nutt, *Drugs Without The Hot Air*, Ch 17.

will not have automatic access to the harder drugs, unlike in the criminal black-market. (The Dutch experiment with decriminalising cannabis use in their now famous "coffee shops" was largely designed to allow cannabis users to purchase cannabis without coming into contact with criminal dealers who would push harder (and more profitable) drugs on them. The result is that Holland now has some of the lowest levels of heroin use in Europe).[23]

If, as this article suggests, the supply of cannabis should only be through licensed dispensaries, then a fit and proper person test can be introduced to ensure that those involved in the manufacture and supply of cannabis are responsible individuals detached from criminality.

Hundreds of thousands of otherwise law-abiding individuals, who happen to enjoy an occasional spliff, will no longer be stigmatised as criminals or have to associate with criminals who currently have total control of the supply of cannabis in the UK. This does not help either the individual or Society as a whole. Similarly, individuals who have health or addiction issues associated with cannabis use can more freely access healthcare without the fear of outing themselves as criminals.

Then there is the money. The illegal UK market in cannabis has been estimated at some £2.5 billion per year (based on the estimated sale of 255 tonnes of cannabis in 2016/17 to about 3 million UK users).[24] All of this money currently goes into the hands of criminals who are prepared to murder, maim and steal to protect their profits. Would it not be better for legal cannabis sales to be taxed so that the money raised benefits the public as a whole rather than the interests of organised crime?

The Institute of Economic Affairs (IEA) has estimated that if legal cannabis sales made up 95% of the market, it would produce annual tax revenues of £495 million (with VAT plus a 10 per cent tax), £557 million (VAT plus a 20 per cent tax) or £690 million (VAT plus a 30 per cent tax). Further, savings to the NHS and other public services would amount to at least £300 million per annum. In a report published in 2018, the IEA concludes:[25]

> *When these savings are added to excise tax revenues of £690 million plus new streams of income tax, business tax and VAT created by the legal industry, claims about cannabis legalisation providing a £1 billion windfall to the Treasury seem pessimistic. It is likely that tax revenues alone would exceed this. Meanwhile, lower prices would leave cannabis consumers with more money in their pocket, allowing hundreds of millions of pounds to flow into other areas of the economy.*

In our brave new world outside the EU, UK governments will be searching for new revenue streams and new industries that create employment opportunities (the US cannabis industry employs 211,000 full-time workers).[26] In a legal, regulated cannabis market, they have one ready and waiting to be exploited with the revenue used for the public good (including expenditure on the care and treatment of cannabis abusers who require medical intervention).

A further benefit is that if the legalisation of cannabis increases its availability then it is likely that some people who would previously have drunk alcohol on a night out would, instead, choose to take the relatively less harmful mood-enhancer - cannabis. An individual drunk on alcohol is far more likely to resort to violence and anti-social behaviour than a stoned, soporific cannabis user. The more cannabis replaces alcohol as our recreational drug of choice, the more peaceful our town and city centres are likely to become.

Although it is assumed that the legalisation of cannabis will lead to an increase in its consumption, somewhat counter-intuitively the experience in Portugal since it decriminalised all illicit drugs in 2001 was that the overall levels of drug abuse halved within a decade (primarily because the most problematic users were treated as a health issue rather than locked up in prison cells).[27]

## The global trend towards legalisation

Given the harm / benefit ratio in the debate on legalisation, there is now a clear global trend towards the legalisation of cannabis for recreational use. By the beginning of 2020 these countries have now legalised cannabis for recreational use: Canada, South Africa,[28] Uruguay, and Georgia. In the United States, 11 states have followed suit (despite prohibition at Federal level): California, Illinois, Maine, Washington, Colorado, Massachusetts, Michigan, Nevada, Oregon, Alaska, Vermont as well as Washington DC (and a total of 33 states have legalised cannabis for medical use). In Australia, the Australian Capital Territory (ACT) which covers the capital Canberra, legalised recreational cannabis use from 31

23 Nutt, *Drugs Without The Hot Air*, Ch.17. Prof Nutt opines that a far more effective gateway to Class A drug-use is the criminalisation and imprisonment of cannabis offenders.

24 https://iea.org.uk/wp-content/uploads/2018/06/DP90_Legalising-cannabis_web-1.pdf.

25 *Ibid*.

26 https://www.forbes.com/sites/kevinmurphy/2019/05/20/cannabis-is-becoming-a-huge-job-creator/.

27 https://www.forbes.com/sites/erikkain/2011/07/05/ten-years-after-decriminalization-drug-abuse-down-by-half-in-portugal/#38bebc133001.

28 In September 2018, the South African Constitutional Court legalised the use of cannabis by adults in private places despite the Government's objections.

January 2020. In addition to full legalisation, a further 45 countries have effectively "decriminalised" recreational cannabis use, in the sense that there is a recognised policy that the police will take no action in relation to possession and, in some cases, the supply of cannabis for personal use. These countries include the Netherlands, Belgium, Italy, Spain, Portugal, and Israel as well as a further 15 states of the USA. Although many police forces in the UK have indicated that cannabis possession is a low policing priority we have not quite reached the stage of decriminalisation yet.

## UK support for legalisation

In 2002 an ambitious young Conservative MP, David Cameron, observed in a debate in the House of Commons that "drugs policy has been failing for decades" and called for the United Nations to consider legalising and regulating all drugs.[29] However, upon his elevation to the Prime Ministership, eight years later, he did little to modify these failing policies.

In the 2019 General Election, and for the first time in history, one of the main UK political parties (the Liberal Democrats) pledged to legalise cannabis for personal use in its manifesto: [30]

> *The prohibitionist attitude to drug use of both Labour and Conservative Governments over decades has been driven by fear rather than evidence and has failed to tackle the social and medical problems that misuse of drugs can cause to individuals and their communities. Liberal Democrats will take a different approach, and reform access to cannabis through a regulated cannabis market in UK, with a robust approach to licensing, drawing on emerging evidence on models from the US and Canada.*

In June 2018 the Chief Constable of Durham Police, Mike Barton, called for legalisation with this reasoning (as reported in The Guardian):[31]

> *The status quo is not tenable. It's getting worse. Drugs are getting cheaper, stronger, more readily available and more dangerous. I have come reluctantly over the years to the conclusion that we need to regulate the market.*

The former leader of the Conservative Party, Lord William Hague, made a similar plea for legalisation in a Daily Telegraph article in June 2019 when he wrote:[32]

> *The UK's drug policy is "inappropriate, ineffective and utterly out of date... The battle is effectively over". Issuing orders to the police to stop people smoking cannabis "were about as up to date and relevant as asking the army to recover the Empire.*

When *The Guardian* and *Daily Telegraph* are both carrying pleas for legalisation of cannabis then the objective observer needs, at the very least, to sit up and take notice. In a frenzy of admissions during the 2019 Conservative leadership contest, several candidates fell over themselves to admit using illicit drugs in their student days and beyond. There is an appalling hypocrisy in play when politicians who have themselves used illicit drugs still wish to criminalise others for doing the same.

## How can recreational cannabis be licensed: a Californian model?

For UK-based licensing practitioners the control of legal cannabis in California provides a familiar regulatory framework for the UK to follow. California itself is of roughly comparable size to the UK with a population of 40 million (the UK's is 66 million). The state covers 163, 696 square miles (UK - 93,600 square miles). California, if it were an individual nation, would be the fifth largest economy in the world with a GDP of $2,747 billion in 2018 (ahead of India and the UK and just behind Germany). The Californian experience is therefore worth considering because reasonable parallels can be drawn to the UK's circumstances. In 1996 California legalised cannabis for medicinal use and some 2,000 non-profit licensed dispensaries were established. Twenty years later, in 2016, the state held a referendum and Californians approved the legalisation of cannabis for recreational use by a majority of 57% to 43% ("Proposition 64"). This led to the Adult Use of Marijuana Act 2016.[33]

The law permits adults to grow, use, give away or transport marijuana for personal use in the entire state of California. In a system with echoes of our own sex entertainment licensing regime, local governments (city and county) can elect whether or not to licence or prohibit commercial cannabis activities, including growing, testing or selling cannabis (eg, in licensed cannabis stores / dispensaries) in their districts.[34]

29 https://www.independent.co.uk/news/uk/politics/tory-contender-calls-for-more-liberal-drug-laws-505824.html.

30 https://www.libdems.org.uk/plan.

31 https://www.theguardian.com/society/2018/jun/24/durham-police-chief-mike-barton-for-legalisation-cannabis-uk.

32 https://www.telegraph.co.uk/news/2018/06/18/war-cannabis-has-failed-utterly-tories-should-consider-new-approach/.

33 https://static.cdfa.ca.gov/MCCP/document/Comprehensive%20Adult%20Use%20of%20Marijuana%20Act.pdf. See also the revised Medicinal and Adult-Use Cannabis Regulation and Safety Act: https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=BPC&division=10.&title=&part=&chapter=&article.

34 Although deliveries cannot be prohibited.

As would be expected there are very strict controls in place. Only persons over the age of 21 are permitted to use or buy cannabis. Individuals may only lawfully possess up to 1oz (25.5g of dry cannabis) for personal use and may cultivate up to six live cannabis plants only for personal use.

The Californian law imposes a number of restrictions on where cannabis may be used. These include bans on smoking where tobacco smoking is currently prohibited (eg, bars, offices etc), smoking or vaping in a public place (eg, a park) or within 1,000 feet of day care centres, schools, or youth centres while children are present (except in private homes), or whilst driving or riding in motor vehicles, boats or planes.[35]

Restrictions are in place to control store-front and billboard advertising. "Special event" licences (similar to our Temporary Event Notices) can be granted to cover, for example "Weed Festivals".

A licence is required for all phases of the cannabis industry including cultivation, testing, manufacture, distribution, transport and retail sales. All cannabis products must be tested by a state-licensed lab and pass through the hands of State-licensed distributors, who also collect taxes on cultivation and retail sales.[36]

At the time of writing about 20% of California's 482 municipalities have now adopted the legislation permitting commercial cannabis activities. There are some 187 licensed retail outlets in the City of Los Angeles itself and 873 in the whole State of California.[37] There are 208 fully licensed commercial growers of cannabis in California and a further 1,532 growers who are still operating on provisional permits as they go through the application process which requires extensive paperwork, proof that the applicant is a fit and proper person and can introduce appropriate security measures.[38] Failures to abide by licence conditions can result in the revocation of the licence.

The cannabis market is heavily taxed. Retail purchases attract a 15% excise tax. Commercial growers pay taxes / duties of $9.25/oz per flower or $2.75/oz leaf. In 2018, tax revenues reached $345m on a turnover of $2.5 billion. The money raised goes into the California Marijuana Tax Fund which distributes 60% of its income to youth programs, 20% to environmental damage clean-up and 20% to public safety. These recipients of legal cannabis revenues are, it may be thought, considerably more worthy than the pocket of your average criminal drug-dealer in the UK who currently profits from its prohibition.

## Conclusion

In an ideal world, nobody would take mind-altering drugs which carry a risk of harm to themselves or others. But we do not live in such a world. When a third of the UK's population admit to using cannabis in their lifetime, and when criminal prohibition as part of the "War on Drugs" has led to an increase in both the demand for and supply of cannabis since it began in 1971, then it is time to take an adult and pragmatic approach to the legalisation of cannabis for recreational use in the UK. The harms associated with cannabis use are likely to be reduced if its supply is removed from criminals and handed over to a legal licensed regulated market run by local authorities. Those addicted to cannabis should be treated as a public health priority, not criminalised. The Californian model provides a useful framework meriting close attention in the UK if we genuinely wish to reduce the harms caused by cannabis, as opposed to pandering to hysterical media reports and certain policy-makers posturing as puritans.

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35 There is an exception for commercial vehicles specifically licensed for such purposes without children present.

36 For a helpful summary of the Californian cannabis licensing regime, see: https://www.canorml.org/california-laws/california-cannabis-laws/.

37 As of September 2019.

38 As of July 2019.

# Occasional licences - where next?

The trade is awaiting the Scottish Government's response to a consultation carried out last summer on occasional licences. **Michael McDougall** assesses the likelihood of a fee increase and whether the number and duration of occasional licences will be restricted

As is often the case, a seemingly peripheral licensing issue can have a more pronounced effect than would appear apparent at first blush. This article will look at the occasional licence regime in Scotland, the use of occasional licences, the perceived problems and the proposals for reform.

Occasional licences can, at times, unite the licensing boards and the trade. Both groups point to a proliferation of their use coupled with the low cost and relatively light touch approach to scrutiny. Some 25,726 occasional licences were granted in Scotland during 2018-2019,[1] up from 24,299 the year before.

Previous calls for reform of occasional licences have seen legislative changes in the past and all the evidence suggests that we are likely to see changes to the regime and / or application costs in 2020.

## Background

Occasional licences are dealt with under s 56 of the Licensing Scotland Act 2005[2] and are defined in s 56(1) as licences issued "in relation to any premises (other than licensed premises) within the board's area… authorising the sale of alcohol on the premises". Accordingly, they cannot be applied for in respect of a premises which benefits from a premises licence (other than a premises licence subject to the provisions of s 125 of the 2005 Act for a members' club).

As the Scottish Government itself recognises, "the purpose of the occasional licence is to cater for the multitude of events which take place on premises which do not hold premises licences but nonetheless the premises can feature the sale of alcohol from time to time, for example fêtes, wedding receptions and arts events. When used in their envisaged role, occasional licences offer a flexible regime for the hospitality and entertainment sector to provide alcohol at events where a premises licence is not in place".[3] The question therefore seems to be whether they are being utilised beyond what was originally envisaged.

There are three categories of persons under s 56(2) eligible to apply for an occasional licence:

i) the holder of a premises licence;
ii) the holder of a personal licence; and
iii) a representative of any voluntary organisation.

The fees are set by regulations and are currently £10 per application.[4] Each application can last for a maximum of 14 days and there is no restriction on the number of occasional licences that a premises or personal licence holder can apply for in a calendar year.[5]

The details required in the application form are prescribed and it would be readily accepted that the level of detail an applicant needs to supply is in no way taxing (albeit a number of licensing boards have introduced their own bespoke application forms or supplementary appendix that seek additional information). There is no requirement for any additional certification (from building control or environmental heath, for example) and once an application is lodged, the licensing board is only required to give notice of the application, along with a copy, to the chief constable and the licensing standards officer (LSO). The Procedural Regulations[6] also require the licensing board to publish details of the application on the board's website for a continuous period of seven days to coincide with the notification to the police and LSO. The pool of consultees is notably smaller than for a premises licence application under s 21 of the 2005 Act. It does not include community councils or the NHS, for example.

The police have 21 days from the receipt of the notice to

1 *Statistical Bulletin Crime and Justice Series: Scottish Liquor Licensing Statistics 2018-19*
https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/PubLiquor/LiqLic18-19

2 Hereinafter "the 2005 Act".

3 https://www.gov.scot/publications/licensing-scotland-act-2005-consultation-reviewing-fee-occasional-licences-considering-limit-number-duration-occasional-licences-summary-responses/

4 The Licensing (Fees) (Scotland) Regulations 2007 (SSI 2007/553).

5 There are restrictions on the number of occasional licences and the cumulative duration of same applied for by voluntary organisations in a calendar year - s 56(6) of the 2005 Act.

6 Licensing (Procedure) (Scotland) Regulations 2007 (SSI 2007/453).

lodge with the board a recommendation that the application be refused for the purposes upholding any of the licensing objectives, should that be their view. The LSO also has a 21-day period within which to lodge a report with the board. The timeframes can be modified under s 57(5) to fast track the process down to 24 hours on cause shown.

While in theory any person may comment or object (if they saw the advert on the board's website), in practice, objections and representations routinely only come from the police and the LSO. It is common for the police and the LSO to propose conditions or amendments to the application.

Despite the assertions by the Scottish Government, it is hard to specify what the "typical use" of occasional licences is. Occasional licences have many uses including the fêtes and galas referenced above but, additionally, certain sectors of the trade have become increasingly reliant on them.

"Pop-ups", for example street food markets, will often have an alcohol offer, and current fashion dictates they are located in disused industrial or outdoor public spaces not suitable for a premises licence. These markets can run at regular intervals or for prolonged periods.

Many pub and restaurant operators will use occasional licences to licence external pavement café areas (in conjunction with other permits), running them consecutively across the summer months.

In some board areas they can be used to bridge the gap between practical completion of a new premises and the confirmation of the provisional premises licence. While this is normally for a finite period of time, it can, because of extraneous issues, extend for months or more in some cases.

Occasionals are, of course, vital to the outdoor music and festival scene. Interestingly this arena was one of the first battlegrounds that lead to a restriction.

The occasional licence regime has been criticised in the past over the interplay between it and the Civic Government (Scotland) Act 1982's handling of public entertainment licensing (PEL). As originally implemented, the 2005 Act provided an exemption from the need for a PEL under s 41(2)(f) of the Civic Government (Scotland) Act 1982 for "licensed premises within the meaning of the Licensing (Scotland) Act 2005 in which public entertainment is being provided during licensed hours …". This definition of "licensed premises" included premises licensed by way of occasional licence. Critics pointed out that large-scale events and festivals could, in theory, take place under the authority of a simple occasional licence with little statutory notification required and for a fee of just £10.

The 1982 Act was restricted in November 2016 to apply only to "premises in respect of which a premises licence within the meaning of s 17 of the Licensing (Scotland) Act 2005 has effect in which public entertainment is being provided during licensed hours …" thus removing the PEL exemption for occasional licences.[7] As an aside it should be noted that a PEL is optional and subject to the terms of each local authority's resolution. This means that in some local authority areas an event may need a temporary public entertainment licence in addition to an occasional licence, whereas in a neighbouring local authority it does not.

This is one instance where occasional licence issues have been raised with the Scottish Government, and they have listened and taken steps to amend offending legislation.

Licensing boards have long asked the Scottish Government to revisit the fee level for occasional licences. But although a review is arguably overdue, a broad brush approach may have a deleterious impact on the licensed trade.

## Current consultation

A broad spread of organisations and interested parties have communicated their concern to the Scottish Government about occasional licences. They cited the appropriateness of the fee and the lack of restriction on numbers per year and consecutive use, which they say leaves the system open to abuse.

The Scottish Government carried out a consultation on occasional licenses between April and July 2019 with the summary of responses published in December 2019.[8] It makes for interesting reading.

The purpose of the consultation was to seek views on whether to raise the fee for an occasional licence (from the current price of £10), and if it is agreed to increase the fee, to ask what that new fee level should be. Views were also sought on fixing a limit on the number and duration of occasional licences for premises licence holders and personal licence holders.

From the 76 responses (66 of which are published)[9] there was a majority in favour of increasing the fee per application (52 out of 76). This body of opinion included licensing boards

7 Amended on 1 November 2016 by the Air Weapons and Licensing (Scotland) Act 2015.

8 https://www.gov.scot/publications/licensing-scotland-act-2005-consultation-reviewing-fee-occasional-licences-considering-limit-number-duration-occasional-licences-summary-responses/

9 https://consult.gov.scot/criminal-law/occasional-licences/consultation/published_select_respondent

and licence holders and their representatives.

For those opposed to the increase in fee, many cited their own circumstances (as voluntary organisations or small members clubs) with little financial means to meet an increased cost and their reliance on the profit from occasional licensed events to support their wider organisational aims.

This spilt in responses raises the possibility of a dual fee regime with different costs applicable to commercial and non-commercial applicants.

The responses favouring an increase in the fee, by and large, agreed that the fee should increase to between £50 to £100 per application, albeit some analysis from licensing boards demonstrated that the cost of processing complex or contentious occasional licence could exceed £500.

Respondents were split on the question of whether there should be a cap on continuous trading by way of occasional licence: 37 respondents agreed that limits should be put in place, while 33 did not. Suffice to say, those in favour of a cap referred to concerns about the comparative price of an occasional licence versus a premises licence application fee and annual fee. They perceived a commercial advantage to operators using occasional licences. Those opposed to a cap pointed to, amongst other things, the prejudice to businesses engaged in providing professional outside catering and bars for events. From a regulatory perspective a cap would be difficult to enforce. For example, a business engaged in wedding bar catering could have multiple personal licence holders employed and applications could be made using a spread of personal licences. Furthermore, there is no national local authority database to track personal licence holders applying for occasional licences across different board jurisdictions. Without some wider changes and infrastructure, enforcing a cap would be difficult to say the least.

Finally, the consultation elicited other suggestions including amending the legislation to empower a board to vary, suspend or revoke an occasional licence once issued. There is an attraction to this if, for example, a multi-day event suffered from public order on day one. At the moment there is no statutory power to allow the licensing board to take action.

The consultation responses are now being considered by the Scottish Government, which will need to determine whether or not to introduce secondary legislation to increase the fee for the occasional licence and / or prescribe a limit on the number and duration of occasional licences for premises licence holders and personal licence holders.

In light of the responses, a fee increase seems almost certain but it is less likely that a limit on number and duration will be imposed. Wider legislative changes requiring primary legislation, such as the power to revoke or suspend occasional licences, may be a longer term project as part of wider licensing reforms of the 2005 Act.

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# Open justice, agenda papers, and the Licensing Act 2003

Applying the open justice principle to statutory hearings raises some interesting questions for access to licensing documentation generally, says **Charles Holland**

What details should licensing authorities post on their websites about forthcoming hearings to determine applications under the Licensing Act 2003?

Many local authorities will tell you that this falls under Part VA of the Local Government Act 1972, which relates to "Access to Meetings and Documents of Certain Authorities, Committees and Sub-Committees", and that the answer is that the 1972 Act requires the meeting agenda and report to be placed on the local authority website. Quite often you will hear that agendas and reports need to be on the website "five clear days" before the meeting to comply with the 1972 Act.

In this article, I am going to tell you that those local authorities are wrong: one of the many quirks and features of the licensing regime under the 2003 Act is that the provisions in Part VA of the 1972 Act do not apply. I will explain why this is the case, and I go on to look at what local authorities should be doing if the 1972 Act does not govern the procedure. The answer may well be that they should pretty much act *as if* the 1972 Act applied: but the (circuitous) route by which we get to that answer throws up some features of the 2003 Act regime and the wider principles of the newly developing concept of "open justice", as well as a refresher course on the Openness Regulations, all of which may be of some general interest to local authorities and licensing practitioners.

## Licensing authorities: some basics

Section 3 of the 2003 Act makes various species of local authorities licensing authorities for the areas for which they act. As licensing authority, each must carry out its functions under the 2003 Act ("licensing functions") with a view to promoting the licensing objectives: s 4(1). Each must also have regard to its licensing statement and the s 182 guidance: s 4(3).

A licensing authority must establish a licensing committee of at least ten, but not more than 15, members of the authority: s 6(1). Subject to certain exclusions (set out in s 7(2)), all matters relating to the discharge by a licensing authority of its licensing functions are, by virtue of s 7, referred to its licensing committee and, accordingly, that committee must discharge those functions on behalf of the authority: s 7(1).

A licensing committee may establish one or more sub-committees consisting of three members of the committee: s 9(1).

Section 9(2) provides that regulations may make provision about:

*(a) the proceedings of licensing committees and their sub-committees (including provision about the validity of proceedings and the quorum for meetings)*
*(b) public access to the meetings of those committees and sub-committees*
*(c) the publicity to be given to those meetings*
*(d) the agendas and records to be produced in respect of those meetings; and*
*(e) public access to such agendas and records and other information about those meetings.*

Section 9(3) provides that "subject to any such regulations, each licensing committee may regulate its own procedure and that of its sub-committees".

Section 183(1) provides that regulations may prescribe the procedure to be followed in relation to a hearing held by a licensing authority under the Act, and, in particular, may - amongst other things - require a licensing authority to give notice of hearings to such persons as may be prescribed.

The Licensing Act 2003 (Hearings) Regulations 2005/44 (as amended) ("the Hearings Regulations") have been made under s 9(2).

## The Hearings Regulations

Regulation 6(1) of the Hearings Regulations requires a licensing authority to give a notice stating the date on which and time and place at which the hearing is to be held (the "notice of hearing") to specified persons. By way of example, notice of hearing under s 18(3)(a) (determination of an application for a premises licence) is to be given to the applicant and persons who have made relevant representations.

By virtue of regulation 7, the notice of hearing must

be accompanied by specified information (regarding the party's rights under certain of the Hearings Regulations, the consequences of non-attendance or non-representation, the procedure to be followed at the hearing and any particular points on which the authority considers that it will want clarification at the hearing from a party) together with specified documents. By way of example, notice of hearing under s 18(3)(a) when given to the applicant must be accompanied by copies of the relevant representations.

Regulation 14 provides that, subject to a public interest exception, the hearing shall take place in public.

Regulation 30 requires an authority to take a record of the hearing and to keep it for 6 years.

But there is *nothing* in the Hearings Regulations that deals with the matters in s 9(2)(c), (d) (insofar as it relates to agendas) and (e). So, the Hearings Regulations are *silent* about:

*(c) the publicity to be given to those meetings*
*(d) the agendas to be produced in respect of those meetings; and*
*(e) public access to such agendas and records and other information about those meetings.*

## Premises Licences Regulations

To take an application for a new premises licence as an example, s 17 of the 2003 Act sets out the application procedure. Section 17(5) provides that the Secretary of State must by regulations require both the applicant and the licensing authority to advertise applications. The relevant regulations are the Licensing Act 2003 (Premises licences and club premises certificates) Regulations 2005/42 ("the Premises Licences Regulations").

So far, so open. But there is nothing in the Premises Licences Regulations about what dissemination should be made of agendas and records and other information about hearings.

## Local Government Act 1972

Part VA of the Local Government Act 1972 makes provision for access to meetings and documents of certain authorities, committees and sub-committees.

Sections 100A-100D of the 1972 Act relate to the meetings of principal councils.

Section 100E(1) then applies ss.100A-100D "to a committee or sub-committee of a principal council as they apply in relation to a principal council". Section 100E(3) provides:

Any reference in this Part to a committee or sub-committee of a principal council is a reference to—

*(a) a committee which is constituted under an enactment specified in section 101(9) below or which is appointed by one or more principal councils under section 102 below; or*
*(b)* [not relevant]
*(bba)* [not relevant]
*(bbb)* [not relevant]
*(bb)* [not relevant]*; or*
*(c) a sub-committee appointed or established under any enactment by one or more committees falling within paragraphs (a) to (bb) above.*

For a licensing committee to fall within s 100E, it has to be a committee falling within s 100E(3)(a) or a sub-committee of such a committee (so as to fall within s 100E(3)(c)). Spoiler alert: it isn't.

Firstly, s 101(9) has been repealed and so is of no import. It has never specified the 2003 Act. We can stop worrying about it.

Secondly, s 102(1) provides, *inter alia*, that for the purpose of discharging any functions in pursuance of arrangements made under s 101, a local authority may appoint a committee of the authority and any such authority may appoint one or more subcommittees. So we have to look at s 101. Section 101(1)(a) provides that "subject to any express provision contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of their functions" by a committee, a sub-committee or an officer of the authority. If this looks promising, well it isn't, because s 101(15) provides "Nothing in this section applies in relation to any function under the Licensing Act 2003 of a licensing authority (within the meaning of that Act)".

So, a licensing committee is not appointed by a principal council under s 102 of the 1972 Act, because of the exception in s 101(15). Instead it is established under s 6 of the 2003 Act. Part VA of the Local Government Act 1972 Act does not apply to the proceedings of a licensing committee or any sub-committee thereof.

## Consequences of Part VA of the 1972 Act not applying to licensing committees

Help! Where does this leave local authorities?

The fall-back position within the 2003 Act is found in s 9(3): subject to any provision in regulations made under s 9(2), the licensing committee may regulate its own procedure and that of its sub-committees.

I have already observed that the Hearing Regulations are silent as to the matters in s 9(2)(c), (d) (insofar as it relates to agendas) and (e). So these matters are matters for the licensing committee. By way of reminder they are:

- the publicity to be given to meetings
- the agendas to be produced in respect of meetings; and
- public access to such agendas and records and other information about those meetings.

So, a licensing committee can set its own rules. Of course, it does not have *carte blanche* in terms of regulating its own procedure and those of its sub-committees. Local authorities do not operate in a vacuum. I now go on to consider what statutory provisions, guidance and other duties may affect or otherwise influence how the procedure should be regulated.

## Licensing objectives

As already stated, by virtue of s 4(1) of the 2003 Act, a licensing authority must carry out its functions under the Act with a view to promoting the licensing objectives.

When a licensing committee sets its own and its sub-committees' procedures under s 9(3), that is a licensing function which therefore must be carried out with a view to promoting the licensing objectives.

Giving publicity to its meetings, preparing agendas for those meetings and providing public access to agendas, records and other information are all matters which could impact on the licensing objectives.

As a general principle, one would think that the more publicity given to meetings, the more public access given to papers and the more comprehensive agendas are, the more likely it is that the licensing objectives will be promoted. Exposing full papers to public scrutiny would be likely to encourage public participation in hearings. For instance, it might be likely that if a representation is mounted on a completely false basis, it is more likely that this would be drawn to the committee's attention if the wider public has been able to see it.

The input of the community in licensing decisions is an important consideration: see Toulson LJ (as he then was) in *R. (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31 at [41-43]:

> *41. As Mr Matthias rightly submitted, the licensing function of a licensing authority is an administrative function. By contrast, the function of the district judge is a judicial function. The licensing authority has a duty, in accordance with the rule of law, to behave fairly in the decision-making procedure, but the decision itself is not a judicial or quasi-judicial act. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires. (See the judgment of Lord Hoffmann in Alconbury at para 74.)*
>
> *42. Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on. Sometimes a licensing decision may involve narrower questions, such as whether noise, noxious smells or litter coming from premises amount to a public nuisance. Although such questions are in a sense questions of fact, they are not questions of the "heads or tails" variety. They involve an evaluation of what is to be regarded as reasonably acceptable in the particular location. In any case, deciding what (if any) conditions should be attached to a licence as necessary and proportionate to the promotion of the statutory licensing objectives is essentially a matter of judgment rather than a matter of pure fact.*
>
> *43. The statutory duty of the licensing authority to give reasons for its decision serves a number of purposes. It informs the public, who can make their views known to their elected representatives if they do not like the licensing sub-committee's approach. It enables a party aggrieved by the decision to know why it has lost and to consider the prospects of a successful appeal. If an appeal is brought, it enables the magistrates' court to know the reasons which led to the decision. The fuller and clearer the reasons, the more force they are likely to carry.*

## Section 182 Guidance

By virtue of s 4(3) of the Act, in carrying out its licensing functions, a licensing authority must have regard to any guidance issued by the Secretary of State under s 182 of the Act.

Paragraph 1.5 of the s 182 guidance issued in April 2018 points out that the 2003 Act, in addition seeking to promote the licensing objectives, "also supports a number of other key aims and purposes" which are "vitally important and should be principal aims for everyone involved in licensing work". They include:

> *encouraging greater community involvement in licensing decisions and giving local residents the*

*opportunity to have their say regarding licensing decisions that may affect them.*

## Legislative and Regulatory Reform Act 2006

Section 21 of the Legislative and Regulatory Reform Act 2006 provides that, subject to any other requirement, a person exercising a regulatory function to which the section applies must have regard to specified principles including the principle that regulatory activities should be carried out in a way which is *transparent, accountable, proportionate and consistent.*

By virtue of the Legislative and Regulatory Reform (Regulatory Functions) Order 2007/3544, the s 21 requirement applies to persons exercising functions under the 2003 Act.

Section 23 of the 2006 Act provides that "in determining any general policy or principles by reference to which the person exercises the function", a regulator should have regard to the Minister's Code of Practice. The relevant code is the Regulator's Code[1] of April 2014. Whilst the thrust of the Regulators' Code deals with the relationship between the regulator and the regulated, of relevance is the 6th general principle: *Regulators should ensure that their approach to their regulatory activities is transparent*.

## Open justice

In *R (Guardian News and Media Limited) v Westminster Magistrates' Court* [2013] Q.B. 618, (CA) Toulson LJ (for it was he), said (at [1]):

> *Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes—who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well known passage quoted by Lord Shaw of Dunfermline in Scott v Scott [1913] AC 417, 477: "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."*

That case concerned an application by *The Guardian* newspaper for copies of documents referred to in open court during extradition proceedings. The Court of Appeal held [70] that *the requirements of open justice apply in all tribunals exercising the judicial power of the state*. Here, *The Guardian* wished to be able to refer to the documents for the purpose of stimulating informed debate about the way the justice system dealt with suspected international corruption and the system for extradition of British subjects to the USA. The Court held that unless some strong contrary argument could be made, the courts should assist rather than impede such exercise [77]. The debate was a matter of public interest about which it was right that the public should be informed; and the public was more likely to be engaged by an article which focused on the facts of a particular case than by a more general or abstract discussion.

The application of open justice to "all tribunals exercising the judicial power of the state" was then extended in *Kennedy v Charity Commission* [2015] A.C. 455 to non-judicial bodies carrying out a statutory inquiry. The definition of a statutory inquiry includes, I shall suggest, a licensing hearing.

*Kennedy* concerned a journalist's request of the Charity Commission for disclosure of information relating to statutory inquiries carried out into the affairs of a particular charity (founded by one George Galloway MP). The journalist made a request under s 1 of the Freedom of Information Act 2000 ("FOIA"). The Commission relied on the exemption in s 32(2) which provides:

> *Information held by a public authority is exempt information if it is held only by virtue of being contained in—*
>
> *(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or*
> *(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration*

An "inquiry" for these purposes means "any inquiry or hearing held under any provision contained in, or made under, an enactment": s 32(4) FOIA.

Pausing there, it would seem that a hearing before a licensing sub-committee under the 2003 Act would be an "inquiry" for these purposes. It is a hearing. It is held under a provision contained in the 2003 Act.

The majority of the Supreme Court held that the Commission was entitled to rely on the s 32(4) FOIA exemption in relation to the FOI request.

The Court went on to consider what the position would

1 https://www.gov.uk/government/publications/regulators-code

have been had Mr Kennedy had made his request, not under FOIA, but under the Charities Act 1993 construed in the light of common law principles and article 10 of the European Convention on Human Rights (if and insofar as article 10 may be engaged).

The majority held that the effect of the principle of open justice as described in *R (Guardian News and Media Limited) v Westminster Magistrates' Court* applied *not just to judicial bodies, but to public bodies carrying out a statutory inquiry* (see Lord Toulson (as he had become) at [108]). So where there was a legitimate public interest in the conduct of inquiries by such bodies (as there was in the case of the Charity Commission's inquiries into the proper function and regulation of charities), in the context of the relevant legislation (which should be the starting point – see, eg, Lord Toulson at [125-126]), the body should accede in the public interest to a request for disclosure, except so far as the public interest in disclosure is demonstrably outweighed by any countervailing arguments (see Lord Mance at [49]).

The question of what to disclose (in the absence of statutory provision) is for the statutory body (Lord Toulson at [128]). There is no need for a specific statutory provision requiring disclosure.[2]

In *Kennedy*, the Charities Act 1993 identified the Commission's objectives, functions and duties in terms which made clear the importance of the public interest in the operations of both the Commission and the charities which it regulated. The first objective given to the Commission was "to increase public trust and confidence in charities", while the fifth and last was "to enhance the accountability of charities" to, *inter alia*, the general public. The Commission's general functions included "obtaining, evaluating and disseminating information in connection with the performance of any of its functions or meeting any of its objectives". As its first general duty, "the Commission must, in performing its functions, act in a way (a) which is compatible with its objectives, and (b) which it considers most appropriate for the purpose of meeting those objectives"; and, as to its fourth such duty, "in performing its functions, [it] must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed)".

Pausing there, the matters included in "best regulatory practice" in the Charities Act 1993 are *identical* to the principles to which a local authority must have regard in carrying out its licensing functions by virtue of s 21 of the Legislative and Regulatory Reform Act 2006.

Significant weight was placed by the majority of the Supreme Court in *Kennedy* on the duty of the Commission to perform its functions with regard to the principle that its activities should be transparent (see, eg, Lord Mance at [51, 55 and 92], and Lord Toulson at [132]).

In asserting that the principle of openness should be extended to inquiries within the meaning of s 32 FOIA, Lord Toulson said [122] that "[a]lthough such inquiries and hearings may vary considerably in nature and scope, it is fair to describe the conduct of them as a quasi-judicial function". He went on to suggest that the principle of open justice applying to judicial functions applied equally to quasi-judicial functions [124].

This categorisation of inquiries (within the s 32 FOIA definition) as "quasi-judicial" was criticised by Lord Carnwath in his dissenting judgment [236], who said that Lord Toulson "gives no further authority or explanation for the use of that somewhat imprecise and outmoded expression". Indeed, support for Lord Carnwath's dissent can be found in the judgment of Toulson LJ (as he then was) in *Hope and Glory* (CA) at [41].

Whilst Lord Carnwath's dissent and Lord Toulson's conflicting earlier judgment might reveal a flaw in the majority's reasoning, the characterisation of a licensing committee as "exercising a power delegated by the people as a whole to decide what the public interest requires" hardly militates against disclosure. And the dissenting speeches (Lord Carnwarth and Lord Wilson) were not in favour of Mr Kennedy being denied access to the documents - on the contrary, they reached that he should have the access to the documents by the requested route of a FOI request (s 32 FOIA to be read down to give effect to article 10 ECHR).

Despite his dissent in *Kennedy*, in *R (CPRE Kent) v Dover District Council* [2018] 1 W.L.R. 108, Lord Carnwath gave a judgment of the Supreme Court where he stated, *obiter*, that the principle of open justice applied to the decision-making process of local planning authorities: [55]:

> *Doody [a case that concerned the power of the Home Secretary to fix a minimum period before life prisoner would be considered for parole] concerned fairness as between the state and an individual citizen. The same principle is relevant also to planning decisions, the*

2 Per Lord Toulson at [129]:
*The power of disclosure of information about a statutory inquiry by the responsible public authority must be exercised in the public interest. It is not therefore necessary to look for a particular statutory requirement of disclosure. Rather, the question in any particular case is whether there is good reason for not allowing public access to information which would provide enlightenment about the process of the inquiry and reasons for the outcome of the inquiry.*

> *legality of which may be of legitimate interest to a much wider range of parties, private and public: see Walton v Scottish Ministers [2013] PTSR 51, paras 152–153 per Lord Hope of Craighead DPSC. Here a further common law principle is in play. Lord Bridge saw the statutory duty to give reasons as the analogue of the common law principle that "justice should not only be done, but also be seen to be done" (see para 25 above). That principle of open justice or transparency extends as much to statutory inquiries and procedures as it does to the courts: see Kennedy v Information Commissioner (Secretary of State for Justice intervening) [2015] AC 455 , para 47 per Lord Mance JSC, para 127 per Lord Toulson JSC. As applied to the environment it also underpins the Aarhus Convention, and the relevant parts of the EA Directive. In this respect the common law, and European law and practice, march together (compare Kennedy para 46 per Lord Mance JSC). In the application of the principle to planning decisions, I see no reason to distinguish between a ministerial inquiry, and the less formal, but equally public, decision-making process of a local planning authority such as in this case.*

In *R (DSD, MBV, Mayor of London, News Group Newspapers Limited) v Parole Board of England and Wales* [2018] EWHC 694 (Admin) (the judicial review of the decision to parole the "Black Cab Rapist" John Worboys), the Divisional Court agreed with Counsel for News Group that "the open justice principle is multifaceted and its application is not 'all or nothing'". Reliance was placed on Lord Toulson's explanation in *Kennedy* (at [115]) that:

> *The fundamental reasons for the open justice principle are of general application to any such body [viz. a body exercising the power of the state], although its practical operation may vary according to the nature of the work of a particular judicial body.*

The Hearing Regulations make provision for the hearing to be in public (subject to public interest exemptions) and for a record to be kept of the hearing. Anyone can make representations in relation to licensing applications (subject to restrictions on frivolous or vexatious representations). Anyone who has made a representation may attend and make representations at a hearing (regulations 15 and 16 of the Hearings Regulations). Public engagement in the process is positively encouraged by the Act, by the s 182 Guidance (and by the very nature of the proceeding (see *Hope and Glory*). I have ventured to suggest that a hearing under the Act is an inquiry for the purposes of s 32 FOIA, thus bringing it within the category of "inquiries" that the majority of the Supreme Court considered were subject to the open justice principle. Furthermore, as with the Charity Commission, a licensing authority is subject to a statutory *duty* to act with transparency.

In my view, the principles of open justice apply to hearings before licensing sub-committees.

If I am right about that, then sub-committees should accede to requests for disclosure unless the public interest in so doing is demonstrably outweighed by any countervailing arguments. And here, s 9(2) of the Act contemplates "public access" to such papers. I think this is wider than "watchdog" access.

## Openness Regulations

The Openness of Local Government Bodies Regulations 2014 have been made under s 40 of the Local Audit and Accountability Act 2014 ("the Openness Regulations").

Regulation 8 of the Openness Regulations provides:

> *(1) The written record, together with any background papers, must as soon as reasonably practicable after the record is made, be made available for inspection by members of the public—*
> *(a) at all reasonable hours, at the offices of the relevant local government body;*
> *(b) on the website of the relevant local government body, if it has one; and,*
> *(c) by such other means that the relevant local government body considers appropriate.*
>
> *(2) On request and on receipt of payment of postage, copying or other necessary charge for transmission, the relevant local government body must provide to the person who has made the request and paid the appropriate charges—*
> *(a) a copy of the written record;*
> *(b) a copy of any background papers.*
>
> *(3) The written record must be retained by the relevant local government body and made available for inspection by the public for a period of six years beginning with the date on which the decision, to which the record relates, was made.*
>
> *(4) Any background papers must be retained by the relevant local government body and made available for inspection by the public for a period of four years beginning with the date on which the decision, to which the background papers relate, was made.*
>
> *(5) In this regulation "written record" means the record required to be made by regulation 7(1) or the record referred to in regulation 7(4), as the case may be.*

There is an exception for confidential information in regulation 9. A "relevant local government body" includes local authorities.

The record required to be made by regulation 7(1) is a record of any decision "if it would otherwise have been taken by the relevant local government body, or a committee, sub-committee of that body or a joint committee in which that body participates, but it has been delegated to an officer…".

"Background papers" means those documents other than published works that relate to the subject matter of the decision or, as the case may be, part of the decision and in the opinion of the proper officer disclose any facts or matters on which the decision or an important part of the decision is based and were relied on to a material extent in making the decision: regulation 6.

This is a historical requirement to publish documents after decisions are taken. It only applies to delegated decisions. The Openness Regulations therefore go to context??AP as to what should be disseminated prior to a public hearing before a committee.

## What should licensing authorities do?

If (as I contend) Part VA of the Local Government Act 1972 does not govern prior access to agenda and reports for hearings under the 2003 Act, it follows that, strictly speaking, licensing authorities should consider the fall-back position, which is that subject to any provision in regulations made under s 9(2), the licensing committee may regulate its own procedure and that of its sub-committees. As seen, the Hearings Regulations say nothing about prior dissemination of agenda papers.

What should a licensing authority do in reviewing and setting its own procedure?

I think regard needs to be had to the following matters:

- the licensing objectives: whether placing the full set of papers on the website (subject to any necessary redactions or justified exclusions) promote the licensing objectives;
- the s 182 Guidance and in particular the key aims and purposes of the legislation identified in §1.5;
- the requirements of s 21 of the Legislative and Regulatory Reform 2006 Act and in particular the need when carrying out licensing functions to have regard to the principle that regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent (with particular regard to the principles of transparency and accountability);
- in formulating its own procedure, the need to have regard to the Regulator's Code, and the sixth general principle therein, namely that regulators should ensure that their approach to regulatory activities is transparent;
- the common law principle of open justice, which in my view applies to hearings before licensing sub-committees, and how best to discharge the duties thereby arising on it;
- articles 10 and 6 of the ECHR, if they add anything to the common law principle of open justice (which the Supreme Court has doubted)[3];
- the fact where delegated decisions are made, background papers have to be disclosed by virtue of the Openness Regulations - it would seem odd if the disclosure obligation was wider for delegated decisions than for contested hearings;
- the public sector equality duty under s 149 of the Equalities Act 2010;
- the duty imposed by s17A of the Crime and Disorder Act 1998.

In my view, one way of setting a procedure which had regard to those matters would be for matters to be conducted *as if* Part VA of the 1972 Act applied to hearings before the licensing sub-committee (subject to the express refinements in the Act and in the Hearings Regulations).

This has the advantage that rather than deal with requests for access on a case by case basis, the presumption will simply be that documents are placed on the website unless the public interest in doing so is outweighed by the public interest in not doing so in any case. It is a ready-made code with which local authorities and their officers will be familiar.

So, business as usual? Well, the applicability of the open justice principle to statutory hearings raises some interesting questions for access to licensing documentation generally. There may be scope for access to papers traditionally thought to be confidential (so agenda and reports relating to hackney carriage and private hire applications, for instance). Indeed in some controversial applications involving App-based operators, local authorities have shown more willingness than in the past to be transparent about the decision-making process: whether this was by instinct or by reference to the developing jurisprudence, it is a sensible course to take.

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3 See *Kennedy* (*op cit*), paras [89] – [91], and [147].

# The appeals process: is there a better way?

The appeals process is not working but how can it be improved? **Richard Brown** has some suggestions

A fit-for-purpose appeal process is key to the efficacy and fairness of the entire Licensing Act 2003 (LA03) framework. The avenue of appeal to the Magistrates' Court discharges the duty under Article 6 Human Rights Act 1998 to provide the right to a fair hearing. Yet the LA03 appellate system has taken something of a hammering in recent years. Is there a better way? Or is there, as Blur once sang, no other way?

I was reminded of this again when I read an article on the Institute's website notifying of another reduction in the fee level to a mere £60 (down from a peak of £410 in 2014). This is the latest in a series of incremental increases and then decreases in the appeal fee (see my article in (2019) JoL 23). Given that cost is a major bar to access to justice, the incremental reductions should be welcomed. Yet if the reduced fee leads to more appeals (particularly the sort of opportunistic appeal reported in (2019) JoL 24)[1] it is difficult to see how this will not make concerns about the appellate system even more vehement.

For there is clearly much dissatisfaction with the appellate system. Most recently, the system was the topic of a specially convened expert panel session at the Institute's National Training Conference in November 2019 to discuss whether the system is fit for purpose (spoiler: it isn't), and what to do about it. The views expressed by the panel and by delegates were almost uniformly negative. Like Alan Partridge, many seemed in favour of "revolution, not evolution".

Much of focus of the expert panel was the level of dissatisfaction among operators and local authorities. Not a lot was said about the lot of resident objectors, but in my view they are at least as liable to get a raw deal.

Back in 2017, following its detailed post-legislative scrutiny of LA2003, the House of Lords Select Committee conducted a detailed post-legislative scrutiny of LA03 and expressed some trenchant views on the appellate system in its final report.[2] Taking its cue from evidence submitted by some major names in licensing, it concluded that reform was "essential".[3] Nor was that the first expression of discontent. Philip Kolvin QC set out the case for reform in an important and comprehensive article in (2014) JoL 8.

The Select Committee concluded that the system was broken and recommended that licensing appeals be transferred to the planning inspectorate. While my view is that a specialist planning inspectorate-style system should be given consideration, the Select Committee's conclusion was clearly linked to its recommendation that planning committees determine licence applications. With respect, the latter recommendation was, I believe, fundamentally misconceived. The former recommendation has more merit as a starting point for debate.

Kolvin, in contrast, focussed on improving the current appellate system. The suggestions he set out in 2013 are sensible and cogent and the majority are not difficult to implement. That they have evidently not been implemented, and the appellate system still provokes such antipathy, is concerning but perhaps not surprising.

A major concern of those who dislike the current system is the length of time for an appeal to be listed. It may be useful to remind ourselves what Article 6 says. The Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. Article 6 states (my emphasis):

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing* ***within a reasonable time*** *by an independent and impartial tribunal established by law.*

1 *Uddin v Rother District Council,* Hastings Magistrates' Court, 26 September 2018, and the subsequent refusal of permission for judicial review, C0-634-2019.

2 *The Licensing Act 2003: Post-legislative scrutiny* https://publications.parliament.uk/pa/ld201617/ldselect/ldlicact/146/146.pdf - Ch.4.

3 *Ibid* para 185.

The delay almost always prejudices residents. On the grant of an application for a new premises licence or to vary a premises licence, an "other person" who made a relevant representation, took the time to attend the hearing, played a full role in the process and addressed the sub-committee, and now feels aggrieved by the decision, and may of course appeal. However, the decision takes effect when it is made. In contrast, when a licence review is granted, the decision is stayed pending the end of the appeal period, or determination of any such appeal (whichever is later). This difference typically works to the advantage of an operator. This is particularly so on a licence review. Residents who have suffered nuisance from a premises, taken weeks or months to make complaints, gather evidence, perhaps meet with the council and / or the premises, submit a review, wait at least two months for a hearing and then, after all that, succeed with their review, are then told that in fact the decision won't take effect. Indeed, it may well not take effect for six months or more.

It can, however, work distinctly in favour of a licence holder / applicant, given that the appellate court is not restricted to considering only the evidence before the licensing authority. Indeed, the evidence before the Magistrates' Court may bear little resemblance to the evidence before the licensing authority, in both volume and content. This is particularly so on a standard review, where it can be tactically advantageous (albeit brave) to hold back at the initial hearing with one eye on the longer game and the requirement to prove the decision "wrong - even if not wrong at the time. Granted, this may put an appellant at costs disadvantage if they succeed on appeal, but the odds are stacked against an appellant in gaining a costs award from a local authority anyhow.

Perhaps there is an element of crocodile tears in some of the protestations. For every lawyer who has bemoaned the length of time their client has had to wait for an appeal hearing, there is another who has used precisely that delay to the advantage of their client. Perhaps -ye gods!- some do both. One of the reasons I am in favour of a rebalancing - evolution, not revolution - is to correct this inequity.

Another way in which residents can be prejudiced is that they have little control over the appeal process. Having applied for a review application and obtained a successful outcome, they are then relegated to mere bit players on an appeal by the licence holder. It is vital that their views are taken into account on any proposals to settle. Indeed, this proposition is judicially supported[4] and was supported in the Select Committee's recommendations.[5] Local authorities should not find themselves brow-beaten into agreeing a settlement without taking full account of the views of resident objectors. The Select Committee recommended that licensing authorities go further and should publicise the reasons which led them to settle an appeal.

## A vicious circle

The relative scarcity of licence appeals in some or numerous Magistrates' Courts up and down the country - and therefore the lack of expertise - perhaps explains the dissatisfaction many feel with the system. Anecdotal evidence is all very well, but my first thought was to see what statistics are available - to investigate how many appeals have been submitted in recent years and, more to the point, how many local authorities did *not* have appeals.

The question of why the number of appeals has dropped so significantly is intrinsically linked to the question of what is wrong with the current system, and the alleged lack of expertise in Magistrates' Courts. It is a circular argument. Stakeholders are dissatisfied with the system because of a lack of expertise in the courts. Fewer appeals are submitted. Because fewer appeals are submitted, the courts become even less used to dealing with appeals.

In recent years, even in somewhere like Westminster, with its 3,200 premises licensed under LA03, appeals from a decision of a licensing sub-committee are infrequent and appeals which proceed to a contested hearing are rarer still. It was clear from the NTC panel discussion that this is a pattern around the country. A charitable explanation (which was expressed by at least one contributor to the Select Committee's oral evidence sessions) is that decisions of licensing sub-committees up and down the country are of such unimpeachable quality, elucidated in comprehensive written reasons produced expeditiously, that the "losing" party / ies are loathe to scale the edifice in all but the most egregious exceptions to this rule, or else in a speculative "hail Mary" punt. Stop laughing at the back.

Although this is surely fanciful, it must also be the case by now that the quality of decision-making (or, at least, the quality of the formal written iteration of the decision and the justification for it) has improved, albeit some would say from a low base. The High Court has in a succession of cases not so much gently nudged local authorities to improve their decision making and their reasoning as bludgeoned its point home with a sledgehammer.[6] This should inevitably reduce the number of appeals.

4 See *Mayor & Burgesses of London Borough of Tower Hamlets v Ashburn Estates Ltd (trading as the Troxy)* [2011] EWHC 3504 (Admin).

5 See para 173 of the Select Committee's Report.

6 See eg, *Little France Ltd v London Borough of Ealing* [2013] EWHC 2144.

I turned to the trusty old tome, the *Alcohol and late night refreshment licensing England and Wales* statistics,[7] which has been produced annually (with a couple of sabbaticals). A search for year ending 31 March 2019 drew a blank, and I vaguely recalled a proposal mooted by the Home Office to gather and produce such statistics bi-annually rather than annually. I would therefore take my baseline figure from 31 March 2018.

Unfortunately, no figures for appeals were gathered (or, at least, published) in year ending 31 March 2018 either.

I therefore had to go back to 2017. Unfortunately, the parameters on which the statistics are predicated are frustratingly inconsistent, and precise parallels cannot be drawn. However, trends can be discerned.

The figures supported my initial supposition. In the year ending 31 March 2017, there were 79 appeals against a decision arising from a new licence / club premises certificate or variation decision, which were accounted for by 44 local authorities. Of the 79 appeals, 29 were withdrawn, 17 were dismissed, 15 alternative decisions were made by the courts, 4 were remitted back to the authority with directions, and 14 were still awaiting an outcome. Therefore, only 36 appeal hearings actually took place in the entire year.

Of the 79 appeals, the number ranged from 1 to 14 appeals in any one particular authority. In no fewer than 296 authorities (which responded), no appeal was completed against an application decision.

There were 124 appeals against a licence review decision, which were accounted for by 66 authorities. Of these, the number ranged from 1 to 13 appeals by a particular authority. In 274 authorities, no appeal was lodged against the licence review decision. Of the 124 appeals against the licence review decision, 38 were withdrawn, 34 dismissed, 28 alternative decisions were made by the courts and 24 were still awaiting an outcome at year end. Therefore, only 62 appeal hearings actually took place in that year.

In total, 98 appeal hearings took place. It is impossible to divine from this the precise number of local authority areas which did not see an appeal, but it is clearly likely to be a very high percentage, and somewhere between 274 and 296.

A similar pattern can be seen in previous years. In the year to 31 March 2016, there were 72 completed appeals against an application decision for a new premises licence / club premises certificate or a variation, which were accounted for by 29 authorities; of those, the number ranged from 1 to 15 appeals in any one authority. There were 304 authorities that had no completed appeals against an application decision.

There were 121 completed appeals against a licence review decision, which were accounted for by 64 authorities; of those, the number ranged from 1 to 8 appeals in any given authority. There were 270 authorities that had no completed appeals against the licence review decision.

In the year ending 31 March 2016, 77 authorities reported that at least one appeal was made against any decision and 257 authorities reported that no appeals were made against any decision. The House of Lord's Select Committee saw this as "remarkable". No figures were produced for 2015, but earlier years see large numbers of authorities with no appeals in any given year.

Clearly, then, a huge number of Magistrates' Courts do not see a licensing appeal from one year (or even in some cases, decade) to the next.

Magistrates' Court hearings are presided over by either professional district judges or deputy district judges (from a professional legal background), and by lay justices. The latter are the bedrock of the judicial system in Magistrates' Courts in England and Wales and have been for centuries. It has been suggested that licensing appeals are too complex for these lay justices. Pre-Licensing Act 2003, many would have been well versed in licensing principles. Given that we are now entering the middle of the second decade since Licensing Act 2003 came into force, it is unsurprising that this expertise has been lost. I support the current system's noble aims to place residents more towards the centre of the process and decision-making undertaken by those who are democratically accountable (I appreciate this may bring to mind Mandy Rice-Davies' famous quote during the Profumo affair - "Well, he would, wouldn't he"), but it has undoubtedly left a vacuum of knowledge and experience at the appeal stage.

It would be unfair to point the finger of blame solely at the courts themselves for handling appeals in such an unsatisfactory way that parties are not willing to take a chance. As would be expected in the years following the bedding-in of LA03, lacunae and lack of nuance in the legislation were probed and explored by lawyers. To the extent that these avenues have been closed, fewer appeals will be made. Even the creativity of the best licensing lawyers has a limit. So, if we can discount that the reduction in numbers of appeals can be attributed to universally sage decisions and prolix reasons, and is not solely to do with deficiencies in courtrooms, are we left with any alternative

7 https://www.gov.uk/government/collections/alcohol-and-late-night-refreshment-licensing-england-and-wales-statistics.

reasons for the decline of appeals? Here are a few thoughts.

1. Better decision-making, as elected members both grow more experienced and can tap into the wealth of experience of senior officers and legal advisers.
2. Better reasons – a more comprehensive elucidation of the reasons why a decision has been made.
3. Potential loopholes being closed by cases going up to the High Court – for instance, the clarification of the correct approach to alleged procedural irregularities.[8]
4. Although the appeal fee is less, spurious appeals to buy an operator more time will have been discouraged by the *Uddin* case.
5. Case law on third party costs. Wealthy backers will be much less keen to run appeals through impecunious incorporated entities if they liable to be the subject of costs orders as individuals.[9]
6. Delays and a lack of proactive case management by the courts can lead to spiralling costs on all sides.
7. Better guidance for local authorities – for example the new *Councillors' Handbook*.[10]
8. Good practice becomes more ingrained.

## Conclusion

There is no easy answer. Personally, I favour a solution which concentrates expertise in a small number of district judges who can operate across a number of Magistrates' Courts, easing the burden on lay magistrates. While this would lose the local expertise which lay justices bring to bear, and which was a key factor in the Magistrates' Court retaining the appellate function in the first place, the importance of local expertise in this (and only this) context is exaggerated.

Firstly, district judges also hear appeals. There is no reason why they should or would have any particular relevant local knowledge. Secondly, local expertise should have been utilised in the initial hearing. Members of the licensing sub-committee are entitled to use their local knowledge and should do so at every opportunity in order to make sensible decisions in the public interest. The Appellate court must decide that '"because they disagree with the decision, it is therefore wrong". They should not lightly reverse a decision. Lay justices preferring their own local knowledge to that of democratically elected members charged with making decisions on that very basis is unlikely to reach the threshold of rendering the decision "therefore wrong",[11] and so their local knowledge is clearly secondary in importance to that of the elected members, and can be replaced by the technical expertise of professional judges without detriment to the principle of decision making in the public interest for the local area.

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8 See *R (on the application of D&D Bar Services Ltd) v Romford Magistrates' Court* [2014] EWHC 344 (Admin).

9 See *Aldemir v Cornwall Council* [2019] EWHC 2407 (Admin).

10 https://www.local.gov.uk/sites/default/files/documents/10%2036_Licensing_Act_2003_V04%203_1.pdf.

11 *R (Hope and Glory Public House Limited) v Westminster Magistrates Court and ors* [2009] EWHC 1996 (Admin).

# Getting strict with under-age players and credit-card gamblers

A local authority cancelling a pub's gaming machine permit and the Gambling Commission banning credit cards are the two gaming issues assessed here by **Nick Arron**

In November 2019, the London Borough of Redbridge cancelled the licensed premises gaming machine permit (LPGMP) held by JD Wetherspoon at the George pub in Wanstead.

The cancellation followed two failed gaming machine test purchase operations in January and June 2019. Officers from Trading Standards and the Licensing Service, with the Metropolitan Police, conducted a programme of underage test purchase operations of public houses holding LPGMPs in the borough. During the first visit, police cadets aged under 16 played on two Category C gaming machines; they were not asked for identification. The machines the cadets played on were within sight of the bar.

Following the first failed test purchase a written warning and compliance advice were given to the pub. In response JD Wetherspoon conducted further training and implemented measures to prevent under 18s playing on the Category C gaming machines.

During the second failed test purchase, staff at the pub again failed to prevent the police cadets from gambling on the machines. The cadets were not challenged by staff and no age verification process took place as they gambled on a Category C gaming machine. The police report that the machines were positioned within two metres of the bar, and that the pub was fairly busy at the time, with people at the bar waiting to be served. Most tables were occupied. According to the licensing authority and police, the cadets were at the machines for around two minutes, with one minute browsing time prior to play.

Following the second failure the pub moved the machines to improve visibility, retrained staff and increased its Challenge 21 signage.

## The legislation

Section 46 of the Gambling Act 2005, Invitation to Gamble, states that a person commits an offence if he invites, causes or permits a child or young person to gamble. Under the Act, a child is under 16 and a young person 16 or 17 (see s 45 of the Act). Permitting an under 18 to gamble on a Category C machine is an offence.

The George held a LPGMP s 283 and Schedule 13 of the Act authorising seven Category C machines only, but according to reports five machines were available at the time of the operation. Category C machines have a maximum stake of £1 and maximum prize of £100.

In addition to the permit, under s 282 of the Act, premises with a relevant alcohol premises licence can benefit from an automatic entitlement to two Category C or D gaming machines, should they follow the notification requirements contained within the Act. Under s 284 the licensing authority may disapply the automatic entitlement. It may also cancel a LPGMP and the cancellation provisions are found in the Act at schedule 13 paragraphs 16 to 18.

The permit may be cancelled if the authority thinks that:

(a) It would not be reasonably consistent with pursuit of the licensing objectives for the permit to continue to have effect.
(b) Gaming has taken place on the premises in purported reliance on the permit but otherwise than in accordance with the permit or a condition of the permit.
(c) The premises are mainly used or to be used for making gaming machines available.
(d) An offence under this Act has been committed on the premises.

Before cancelling or varying a permit the licensing authority shall:

(a) Give the permit holder at least 21 days' notice of the authority's intention to consider cancelling or varying the permit.
(b) Consider any representations made by the holder.
(c) Hold a hearing if the holder requests one.

(d) Comply with any prescribed requirements for the procedure to be followed in considering whether to cancel or vary a permit.

Section 64 of the Act authorises the police and licensing officers to request a child or young person to act as a test purchase operative.

## The Code of Practice for gaming machines in clubs and premises with an alcohol licence

The Gambling Commission published a consolidated "Gambling Code of Practice" for gaming machines in clubs and premises with an alcohol licence in 2014, which was updated in January 2020. The code places conditions on the LPGMP regarding the location and operation of gaming machines in pubs.

Under Code Provision 1, compliance with the Code is the responsibility of a designated person; in pubs in England and Wales this is the designated premises supervisor under the Licensing Act 2003 alcohol premises licence.

Code Provision 2 requires the machines to be situated on the premises so their use can be supervised either by staff whose duties include supervision (including bar or floor staff) or by other means. It requires the permit holder to have in place arrangements for such supervision and it requires the machines to be located away from cash machines.

Code Provision 3 is not a condition of the permit. It sets out good practice and it requires permit holders to put into effect procedures intended to prevent under-age gambling which should include procedures for checking the age of those who appear under age. Code Provision 3 also provides the Gambling Commission's best practice advice on the state and types of identification which would be considered acceptable forms of identification: these are, a PASS logo, a driving licence with photocard or a passport.

## Gambling Commission's results of national test purchasing

The Gambling Commission has previously highlighted its concerns regarding under 18s playing Category C machines in pubs.

In November 2018 it issued a statement regarding tests on a sample of pubs in England which indicated that 89% failed to prevent children under 18s accessing Category C gaming machines. Working with licensing authorities over a six-month period, 61 tests were conducted. The 89% failure rate compares to a pass rate of 70% - 85% for most age-restricted products such as alcohol or tobacco (source Serve Legal).

The Commission reported that the failure rate did not vary significantly between licensing authorities nor between large pub companies and independents.

Subsequently the Gambling Commission wrote to the Local Government Association and the Welsh Local Government Association about its findings.

A similar exercise was conducted in October 2019 with a failure rate of 84%.

## Decision of the Sub-Committee

The proposal being considered by the Redbridge Licensing Sub-Committee at the hearing was whether to cancel the LPGMP and remove the automatic entitlement for two machines.

The licensing authority decided to cancel the permit but did not disapply the automatic entitlement under section 282 and as a result the George is permitted to maintain two Category C or D gaming machines.

## The Railway Bell

Redbridge Council has also taken action against The Railway Bell pub in George Lane, South Woodford. Again, there were two failed test purchase operations - in January and June 2019 - when the under 18s were able to enter the pub and play on the Category C machines and then challenged.

In this case no hearing took place and, although Greene King surrendered its permit, the pub has retained the automatic entitlement to two gaming machines as above.

These cases highlight the difficulties pubs have had supervising their gaming machines to prevent test purchase failures. Licensed gambling premises such as adult gaming centres or betting shops are adult-only venues and can manage entry to the premises to prevent underage access, an option not available to pubs.

## Ban on gambling on credit cards

In January this year the Gambling Commission confirmed that there will be a ban on gambling businesses allowing customers in Great Britain to use credit cards to gamble.

The ban will be effective from the 14 April 2020 and will apply to all online and offline gambling products with the exception of non-remote lotteries.

The Gambling Commission's decision to prohibit gambling with credit cards followed its review of online gambling and the Government's review of gaming machines and social responsibility measures (a public consultation was carried out between August and November 2019).

It is estimated that 800,000 consumers use credit cards to gamble and research undertaken by the Commission shows that 22% of online gamblers using credit cards to gamble are classed as problem gamblers.

The prohibition has been effected by a new operating licence condition on the use of credit cards which states:

> *All non-remote general betting, pool betting and betting intermediary licences, and all remote licences (including ancillary betting and ancillary lottery licences) except gaming machine technical, gambling software and host licences.*
>
> *Licensees must not accept payment for gambling by credit card. This includes payment which a licensee may have recovered through money service businesses.*

The regulatory framework for gambling already prevents non-remote casino, bingo, adult gaming centre and family entertainment centre operators from accepting payments by credit card, and no gaming machine can be configured to accept payment by credit card. The new condition prevents all remote operating licences, including online casino, online bingo, land based and online betting, external lottery manager and society lotteries, from accepting credit cards.

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

# Book review

## Paterson's Licensing Acts 2020

**Publisher: Lexis Nexis**
**Price: 319.99 + VAT** (IoL members get 15% discount)

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

The case of *R (Rehman) v Wakefield Council* in the High Court at [2018] EWHC 3664 (Admin) and the in the Court of Appeal at [2019] EWCA Civ 2166 provides a timely reminder of the important role that academic and professional texts have in the licensing regimes. In the High Court His Honour Judge Saffman noted:

> *[27] I have had regard to the academic discussion in both* Button *and* Paterson's*. The reference in* Button *is 4th Edition, Chapter 4, page 154. That seems to relate predominately to Section 53 rather than Section 70, but insofar as it does relate to Section 70, the conclusion reached by the editor is perhaps informative. It is that 'It does not seem possible for a Local Authority to recover general compliance or enforcement costs for hackney carriages or private hire vehicles via the licence fees'. If that is a general observation, the obviously it is equally applicable to Section 70 as it is to Section 53.*
> *[28] As to* Paterson's*, I was referred to the 127th edition, paragraph 2.54 where it is said "the difference in wording between Section 53(2) and Section 70 has led to the suggestion, that enforcement costs such as the prosecution of unlicensed drivers are not recoverable under Section 53(2), whereas they are in relation to the prosecution in relation to unlicensed vehicles under Section 70. Opinion is far from unanimous, however, and until the matter is resolved by the High Court, it remains uncertain whether the recovery of enforcement costs as part of a driver's fee is or is not lawful". With great respect to Mr Gouriet, who as I understand is the editor of* Paterson's*, that is not particularly helpful from where I am sitting.'*

While Saffman J may not have found *Paterson's Licensing Acts* particularly helpful in the specific context of the issues before him, it must be acknowledged that the editors of *Paterson's* and *Button* provide an essential service in setting out both clearly established legal principles and also shining a light (to paraphrase Keats) on areas of uncertainty, mystery and doubt. I hope that it is not an overly bold assertion to suggest that this *Journal* also makes some contribution to content and quality of discussion within the application and operation of local authority licensing regimes.

As expected the editors of *Paterson's* have updated their commentary:

> *In* Rehman v Wakefield Council *(unreported: CO/1325/2018) the High Court quashed the licence fees charged for private hire vehicle and hackney carriage licences set by Wakefield City Council, following a claim for judicial review by the Wakefield District Private Hire and Hackney Association.*
> *The court held that the fees charged by Wakefield Council were unlawful. In particular, the Council had wrongly interpreted s 70 of the Local Government (Miscellaneous Provisions) Act 1976 and had erroneously charged the costs of enforcement against drivers (for speeding, bad parking, dressing inappropriately and a miscellany of uncivil or illegal conduct) to the control and supervision of vehicles. Wakefield's case had been that the costs were properly accounted for against vehicles because the errant drivers were driving vehicles. The learned judge described that as 'stretching beyond breaking point' the language of the section, and refused permission to appeal to the Court of*
> *Appeal.*
> *The case is of wider importance as it dispels any suggestion that there is a general principle of law that licensing regimes should be self-financing. The judge made it clear that a local authority's entitlement to recover from the licence fee the costs of administering a licensing regime is governed by the words of the empowering statute. Where Parliament has awarded local authorities a broad discretion to set such licence fees 'as they think reasonable', the courts have upheld policies of full cost recovery on the ground that the policies, being reasonable, are intra vires; but where, as in LG(MPA) 1976, s 70, the power to charge a fee is circumscribed by reference to specific heads of recovery, recovery is restricted to those specified heads. Licensing authorities are creatures of statute and have no powers beyond those which statute has given them. It is understood that leave has been granted to appeal to the Court of Appeal." (Paterson's Licensing Acts 2020, Preface, xvii)*

The Court of Appeal decision will no doubt be included in the electronic update issued in the Summer of 2020 and in the print edition of 2021. It is this constant review, professional consideration and updating that makes *Paterson's* such an essential resource for licensing professionals. Whether one agrees or disagrees with its commentary and submissions *Paterson's* provides the opening words if not always the final word which, naturally, is left to the higher authority of the courts. As ever, *Paterson's* remains authoritative, engaging and relevant.

# Book review

## How to open a Grassroots Music Venue
and
## How to run a Grassroots Music Venue

**Publisher: The Music Venue Trust**
**Price: free to download**

Reviewed by **Richard Brown**, *Solicitor, Licensing Advice Service, Westminster CAB*

Grassroots music venues are where so many of our world-class musicians take their first steps on the road to success. They are a vibrant and vital part of the UK's successful creative industries and must be allowed to prosper.

These are not my words, but the words of HM Government in its response to the DCMS's *Ninth Report of Session 2017–19*. Successive governments have introduced measures to support grassroots music venues (GMVs) and to stem the flow of closures. Changes to national planning guidance, deregulation of licensing legislation, political support and, most recently, rates rebates, have been aimed at giving a helping hand to GMVs in ways which may make the alcohol on-trade cast envious glances.

And yet. And yet. There are still clearly serious challenges in opening or keeping open GMVs. The reasons why this is, and the answers to how to approach and mitigate these challenges, can be found in two guides produced by the Music Venue Trust (MVT). The MVT is a charity set up in 2014 and aims to 'protect, secure and improve the nation's grassroots music venues'. To further this, the MVT has produced two guides: *How to open a Grassroots Music Venue*, and the companion piece *How to run a Grassroots Music Venue*. The guides can be read separately, although there is a degree of commonality in the actual content of each book. Both guides are lengthy, at 143 pages and 141 pages respectively, plus a glossary / guidance section at the end. That it is necessary (and it is) to produce what are intended to be practical and straightforward guides which are of this length perhaps illustrates some of the difficulties inherent in bringing together what is, usually, a labour of love.

I am of the old-school who prefers to read a hard copy of something, but the guides are best read online (http://musicvenuetrust.com/books/) as they helpfully link and cross-reference to other sections of the books themselves or other resources. In this way, the length of the books is kept within reasonable bounds, for there is much to wade through.

Writing this review has been a trip down memory lane, stirring half-remembered recollections of sticky floors, storied venues and sore heads. No doubt this is partly romanticised through the filter of hindsight. I imagine almost everyone has a favourite memory of experiencing a band for the first time. It might be their mates' band, or a band which went on to great things. It may be a band which never went on to do much but which struck a chord at the time. Some of my best memories are of venues which either no longer exist at all or do not exist in any recognisable way to their former incarnations.

A modern, purpose- built venue emblazoned with the branding of a mid-range fizzy lager brand or generic out-of-town Enormodome does not resonate like a small sweaty box where the Arctic Monkeys played their first London gig. Yet for every Coldplay honing their craft at Clwb Ifor Bach before going on to play at the Millennium Stadium nearby, there are thousands upon thousands of jobbing or hobby bands who perform for the love of the thing. The attrition rate for bands "making it" is of course vast, but the lifeblood of the live music scene is niche acts and performers whose appeal, to quote Ian Faith, the legendary sometime manager of Spinal Tap, is becoming more selective.

But the books are not romanticised assurances that the next Bob Dylan will inevitably pass through the door of your newly opened venue. The challenges are laid bare. The stall is set out from the beginning – highlighted in bold on the first page of the first chapter are the words *No-one recommends getting into the business because it's a money-spinner*. The structure of the books is clear and logical. There is just the right emphasise on formality and legal / licensing jargon (the helpful Guidance section at the end of each book is a useful way to ensure enough is said without clogging up the main body of the text) while keeping the focus on the practicalities. Uppermost is the need to diversify. Few venues can exist on a diet of three gigs per week and dead time in between. To be a community venue is to be part of that community, and so the books exhort owners to use their spaces creatively – yoga classes in the day, a café, a rehearsal space, quizzes, filming, a space to have a coffee or a hot chocolate. It also adds income streams, so everyone's a winner.

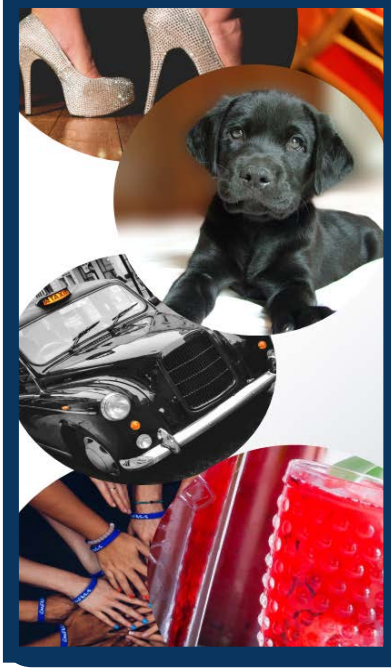
There is also a very useful section on the best legal structure for the business, with a focus on becoming a Community Interest Company.

The two points which jumped out at me most starkly were, firstly, how many proprietors of GMVs fell into the role or, rather, the life. It seems like a similarly ill-defined and serendipitous career path as working in the (dare I say overlooked?) branch of the legal profession headed

"licensing". Secondly, how much of a struggle the occupation seems to be on a day-to-day basis. Owners of venues can seem assailed on all sides by dark forces including, yes, the dreaded "residents". The books do not sugar-coat this. But, particularly in the case studies which are studded throughout (and it should be noted that despite the content of each book being similar, the case studies are different in each) the rewards which are less tangible than the bottom line are what drives the process. This is something of a motif throughout.

It is the need to stay afloat while providing such valuable community resources which is at the epicentre of the books, and all else flows from that. The case studies are wide-ranging – a feature on the 100 Club in central London is followed by a piece on the West End Centre in Aldershot – and frequent without becoming dominant. These practical examples really help weld the advice to the reality. No-one ever said it was going to be easy. But with the guides at hand, a real and valuable resource is available to those willing to pick up the baton.

# National Training Conference
## 11-13 November, Stratford-upon-Avon



Our signature event the National Training Conference will be held at the Crowne Plaza, Stratford-upon-Avon.

Over the three days there will be a great line up of speakers delivering a packed and informative programme and evening activities. The draft programme will be posted online soon!

The three day training event covering all of the major licensing related topics in addition to training on the niche areas of licensing. The days are themed to ensure there is always a training topic that will be of interest to delegates.
The Institute of Licensing accredits the three day course for 12.5 hours CPD, 5 hours on the Wednesday and Thursday and 2.5 hours on Friday.

**Training Fees:**
Due to the number of days and night combinations on offer there is a Fee Calculator online under the Fees tab in the event information. Non-members booking for 3 days & 2 or 3 nights accommodation will benefit from complimentary membership for 2020 / 2021 membership year.

This event has sold out year on year so make sure you book your place(s) early to avoid disappointment. The 'Early Bird' booking discount is only available until 31 August 2020.

# Driving Safety Forwards

We're committed to making our cities safer, more efficient, and more sustainable - and we're putting our resources to work to get it done.

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Both passengers and drivers have access to our 24/7 support directly through the app, so whether it is a quick question or an incident to report, it's easy to get help.

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We work closely with local councils up and down the United Kingdom to address issues they may have. Councils also have access to a dedicated 24/7 support line.

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All Uber rides are tracked by GPS from start to finish and the Share My Trip feature enables passengers to let their loved ones know where they are at all times.

Uber

Learn more about how we work with local authorities at **uber.com/info/uk/uber101**

# JOURNAL OF LICENSING - CONTRIBUTOR PROFILES

## 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.

## JAMES BUTTON

*Principal, James Button & Co*

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

## DANIEL DAVIES

*Chairman, Institute of Licensing*

Daniel 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.

## PAUL HENOCQ

*Solicitor, John Gaunt & Partners*

Paul joined John Gaunt in December 2016. He handles all works under both the Licensing Act 2003 and Licensing (Scotland) Act 2005, along with dealing with prosecutions by organisations like the Health and Safety Executive, the Environment Agency, Local Authorities' Trading Standards and Environmental Health departments.

## MICHAEL MCDOUGALL

*Solicitor, TLT*

Michael is a licensing solicitor at TLT, where he is an Associate. He has represented a broad range of operators at various licensing boards. He was previously Assistant Clerk at Glasgow City Council and is a member of the Law Society Licensing Sub-committee.

## 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.

## 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.

## 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.

## GARY GRANT

*Barrister, Francis Taylor Building*

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

## 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.

## 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.

## JULIE TIPPINS

*DHP Family*

Operations Manager of DHP which she joined in 2010, overseeing its venues and its supporting operational functions. She moved to Head of Compliance in 2013 and is now responsible for many legal aspects of the business – including health and safety, licensing and planning matters. She is a member of IOSH and the CIM and play an active role in the licensing discussions within the city.

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