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Daniel Davies, MIoL
Chairman, Institute of Licensing

Welcome to the latest edition of the Institute of Licensing's *Journal of Licensing*. This edition has been published to coincide with our signature event, the National Training Conference in November. All delegates attending the NTC will receive a copy.

It has been a busy year for IoL and we can look back with some pride at how we have consolidated our position as the professional body for licensing practitioners. We have been busy developing our portfolio of training courses, and in the pipeline we have training that is aimed at police licensing officers and council members who sit on licensing committees. This development follows on from the recommendations made by the House of Lords committee that reviewed the Licensing Act 2003, which identified a training need for councillors and police to promote consistency and fairness in the licensing process.

Animal licensing has also featured strongly over the course of this year. I attended a reception at 10 Downing Street in August to celebrate the passing of "Lucy's Law", the culmination of the campaign to ban third-party puppy sales – a cause dear to my heart as a dog owner and animal lover. We are also developing a new course in inspection of animal premises that will coincide with the legal requirement that such inspectors have a recognised qualification.

I am also looking forward to giving evidence to the Parliamentary Select Committee on Regenerating Seaside Towns and Communities. This is another cause that resonates with me as I grew up in a seaside town, New Brighton on the Wirral, and I am leading a project that I hope will assist in its regeneration.

This edition of the Journal contains several interesting articles that are of topical interest. Barrister Sarah Clover writes on the "agent of change" for licensing applications principle and how that will be incorporated into law. Barrister Gary Grant discusses immigration and illegal workers in the licensed trade – a topic that will come to the fore as we prepare to leave the European Union and free movement of people ends. On another topical licensing issue, Professor Roy Light discusses cumulative impact policies and there's also an article jointly authored by Dr Darren Baxter and Dr Jed Meers where they question the evidence base for "vertical drinking". And last, but not least, an article from Mike Smith on the introduction of a livery for taxis by Guildford Council.

Our signature training event, the National Training Conference, takes place in Stratford-upon-Avon on the 14-16 November and offers a packed agenda of talks and discussions from a range of top speakers – see our website for the full agenda. I look forward to meeting as many of you as possible during the event.

Finally, we are excited to announce our newest publication. The *LINK* magazine (Licensing, Information, News and Knowledge) will join the *Journal of Licensing* as a regular IoL publication bringing you contributions from a wide variety of people, on all areas of licensing and from differing perspectives and providing a regular channel to update you about progress with IoL projects, course development, events, and much more. IoL members should already have received the first edition and we look forward to your feedback.

I hope you enjoy this edition of the Journal and find it a stimulating read, and as always, we welcome your feedback.

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Leo Charalambides, FIoL
Editor, Journal of Licensing

At their core, licensing decisions involve an evaluative judgement in which decision makers take into account equally compelling yet competing interests between operators, regulators and wider civil society.

In the case of R *(on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31 [42] the Court of Appeal reminds us that:

> *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 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 a 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 licensing objectives is essentially a matter of judgment rather than a matter of pure fact.*

It seems to me that the debates concerning the application of agent of change principles - considered by Sarah Clover and Freddie Humphreys in this current issue - whether in planning or in licensing, are an attempt to assess this balance and evaluate and (perhaps) accommodate these competing tensions. Of particular significance to the assessment of this evaluative balance are the appointed professional experts, that is the responsible authorities and the appointed experts that together provide evidence and advice to the decision makers. The Section 182 Guidance (at paragraph 9.12) now recognises, in my view rightly, that each "responsible authority will be an expert in their respective field"; that "licensing authorities [and magistrates] must therefore consider all relevant representations from responsible authorities carefully"; and that "it remains incumbent on all responsible authorities to ensure that their representations can withstand the scrutiny to which they would be subject at a hearing". Notwithstanding this, I am not convinced the representatives of the responsible authorities appreciate their role as experts or are treated with the respect that their expertise properly deserves.

Of equal concern is the sometimes excessive importance and weight attached to the self-appointed "independent" expert. While I recognise that many independent experts have extensive professional experience, they are not organised by a regulatory body, they have no code of conduct and nor are they subject to any requirements for continuing professional development.

The role of professional and independent experts, their expected conduct and the weight to be given to each became a live and contentious issue before District Judge Meeks sitting at Newcastle Magistrates' Court in *Endless Stretch Limited v Newcastle City Council and Danieli Holdings Limited* (2018). Charles Holland, writing the leading article in the current issue, examines this case and the questions it raises and suggests ways of seeing and using expert evidence in the licensing field. I agree with him that those who instruct, give or face expert evidence would be well advised to consider either paragraph 3 of Practice Direction to CPR Part 35 or CrPR 19.4 as the standard by which the format and quality of evidence in question should be judged.

The publication of our November issue coincides with the Institute's National Training Conference. This annual gathering provides the ideal forum to debate and consider the role of all experts within the full spectrum of the important specialism of local government licensing. I look forward eagerly to Stratford, and to hearing our members' thoughts on this and many other issues of the day. Being licensing professionals to our core, I've no doubt there will be many "compelling but competing" viewpoints to consider.

The use and abuse of expert witness evidence in licensing

Expert opinion should stick to the facts and leave advocacy to others, says **Charles Holland**

Don't take too seriously all that the neighbours say. Don't be overawed by what the experts say. Don't be afraid to trust your own common sense
- **Benjamin Spock**, Dr Spock's Baby and Child Care (1945)

I remember the first time I saw an expert report in a licensing case. It thumped down on the bench in front of me at Sunderland Magistrates' Court, just as its author made his way to the witness box to give evidence. Following a short in-chief confirmation of the report's content (that there was no demand for my client's proposed off-licence), it was my turn to cross-examine. No notice had been given that an expert was to be called. The year was 1996; the rule seemed to be that, when it came to licensing, there were no rules.

Ah, the good old days. And, I confess, there may well have been subsequent cases where my client's expert report was introduced as a rabbit might be from a magician's hat. Indeed, I can recall my consternation when commentary in *Paterson's Licensing Acts* suggested that the coming into force of the Human Rights Act 1998 could mean that notice would have to be given if an expert was to be called, and even require the disclosure of the written fruits of that expert's research in advance![1] Good grief! Next they will be telling us that we have to pay regard to the decision below when appealing!

But enough of the past - things are much better now, surely?

In the civil courts, procedural reforms introduced by the Civil Procedure Rules 1998 (CPR) fundamentally changed the approach to expert evidence in civil trials. The new rules sought to restrict the use of expert evidence, introduced a procedural code for advance disclosure of reports and the narrowing of issues thereafter, and codified the common law principles as to the content of reports. The criminal courts have caught up, with a series of rules (now the Criminal Procedure Rules 2015 (CrPR)) providing for advance disclosure of expert evidence within active case management by all criminal courts. But licensing continues to fall between the gap, being perceived as neither CPR fish nor CrPR fowl. Although increasingly sophisticated case management directions emanate from Magistrates' Courts, even Westminster's (frequently serving as a model elsewhere), with its provision for tabs and indexes and pagination, makes no distinction between the evidence of lay and "expert" witnesses.

It is still feasible to introduce expert evidence in licensing appeals without the procedural scrutiny that is second-nature in the civil courts (and rapidly becoming so in the criminal courts). And, I will suggest in this article, too often the duties an expert owes the court (and potentially committees) is forgotten. It is not uncommon in licensing to come across biased "expert" evidence, tailored to please the expert's paymaster (if not actively advocating on behalf of his case).

Civil cases: Part 35 of the Civil Procedure Rules

The relevant rules are found in Part 35 of the CPR:

- *The court* and the parties *have a duty to* restrict *expert evidence to that reasonably required to resolve the proceedings: CPR 35.1.*
- *Expert evidence may not be adduced without the court's* permission*: CPR 35.4(1)*
- *Experts have* an overriding duty to the court to help it on matters within their expertise, which overrides any obligation *to the persons instructing and / or paying them: CPR 35.3(1)-(2).*
- *Expert evidence is to be given in* a written report *unless the court directs otherwise: CPR 35.5(1).* [2]
- *Parties can put* written questions *about an expert's report to an expert for the purpose of clarification of the report, and the expert's answers (which, if not given, can result in the exclusion of his evidence) form part of his report: CPR 35.6.*
- *The court can direct that a* single joint expert *be used in lieu of each party calling* their own experts*: CPR 35.7. The Court can direct that experts conduct* discussions *to*

1 The Justices' Clerks' Society's Good Practice Guide (1999), proposed that expert reports should be served on the court in advance of the hearing, and that it saw "no objection" to prior exchange.

2 In some tracks the presumption is that experts will not give oral evidence: CPR 35.5(2).

identify and discuss expert issues in the proceedings and, where possible, to reach an agreed opinion on them: CPR 35.12.

- *Expert reports must contain a statement stating that the expert understands and complied with their duty to the report: CPR 35.10(2).*
- *Expert reports* must state the substance of all material instructions, *whether written or oral, on the basis of which the report was written: CPR 35.10(3).*
- *Those instructions are* not privileged, *but disclosure of them will not be ordered or cross-examination upon them will not be permitted unless the court is satisfied that there are reasonable grounds to consider that the statement of instructions is inaccurate or incomplete: CPR 35.10(4).*

Further meat to those bones is added by the Practice Direction to Part 35 (PD 35). Section 2 sets out the general requirements of expert evidence, largely mirroring the "Cresswell Principles" (of which more below):

2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.
2.3 Experts should consider all material facts, including those which might detract from their opinions.
2.4 Experts should make it clear –

a. when a question or issue falls outside their expertise; and
b. when they are not able to reach a definite opinion, for example because they have insufficient information.

2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

PD 35 also prescribes the content and form of an expert's report:

3.1 An expert's report should be addressed to the court and not to the party from whom the expert has received instructions.
3.2 An expert's report must:
(1) give details of the expert's qualifications;
(2) give details of any literature or other material which has been relied on in making the report;
(3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based;
(4) make clear which of the facts stated in the report are within the expert's own knowledge;
5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
(6) where there is a range of opinion on the matters dealt with in the report –
(a) summarise the range of opinions; and
(b) give reasons for the expert's own opinion;

(7) contain a summary of the conclusions reached;

(8) if the expert is not able to give an opinion without qualification, state the qualification; and

(9) contain a statement that the expert –
(a) understands their duty to the court, and has complied with that duty; and
(b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014. [3]

3.3 An expert's report must be verified by a statement of truth in the following form – I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Criminal cases: Part 19 of the Criminal Procedure Rules

A "low fat" version of the Part 35 regime (but perhaps with "new improved flavour") operates in the criminal courts. The main difference is that permission is not required to rely on expert evidence (as one would expect where the defendant's liberty is at stake). The relevant rules are found in CrPR Part 19. They include requirements that:

- *An expert must* help the court to achieve the overriding objective *(that criminal cases be dealt with justly) by giving opinion which is* objective and unbiased, *within the expert's area of or areas of expertise and by actively assisting the court in fulfilling its duty of case management, in particular by complying with directions made by the court and at once informing the court of any significant failure (by the expert or another) to take any step required by a direction: CrPR 19.2(1).*
- *That duty* overrides *any obligation to the person instructing and/or paying the expert: CrPR 19.2(2).*
- *The duty specifically includes obligations (a) to*

3 Which can be found on the Judiciary's website.

define the expert's area of expertise (i) in the expert's report, and (ii) when giving evidence in person; (b) when giving evidence in person, to draw the court's attention to an question to which the answer would be outside the expert's area or areas of expertise; and (c) to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement: CrPR 19.2(3).

- *Expert evidence may not be introduced without agreement or the court's permission unless (a) it is admitted as a fact or (b) a written expert report is served as soon as is practicable: CrPR 19.3.*
- *CrPR 19.4 provides that expert reports must contain similar information to that provided for in PD 35.*
- *The court may direct experts to discuss the expert issues in the proceedings and prepare a statement for the court of the matters on which they agree and disagree, giving their reasons: CrPR 19.6.*
- *The court has power to direct that evidence is to be given by a single joint expert: CrPR 19.7.*

Active case management in the civil and criminal courts

Both the civil and the criminal courts use active case management to identify whether experts are required at an early stage. In the civil courts, the form N150 allocation questionnaire requires the parties to identify whether expert evidence is required. For criminal matters in the magistrates, the CrPR 3.2 and 3.3 "Preparation for trial" form has boxes to be ticked in respect of certain expert disciplines (fingerprint, DNA, medical, scientific evidence) and a reminder of standard time limits for service of expert reports.

In directions hearings for Magistrates' Court licensing appeals where I have appeared in recent months, disbelief has been expressed by two separate district judges that no similar system exists in licensing cases.

That astonishment no doubt reflects the position that in criminal cases, the old days of "ambush" are long gone. R (*on the application of Aylesbury Vale District Council) v Call A Cab Ltd* [2013] EWHC 3765, concerned offences of unlawfully operating private hire vehicles contrary to the Local Government (Miscellaneous Provisions) Act 1976, which is an adoptive Act. On the day of the trial, for the first time, the defence took for the point that there was no proof that the prosecuting local authority had resolved to adopt the 1976 Act. Treacy LJ was less than happy (at [33]):

> *… I was concerned on reading these papers to see that the issue of the validity of the by-law had not been raised at the case management hearing, nor had it been raised in the defence statement. Good practice, and the observations on a number of occasions by this court, dictate that an issue of this nature should be raised well in advance of the hearing so that all parties are in a position to present relevant evidence to the court at the time when the case is listed for hearing. In this instance an adjournment of over a month was necessary and a further day of court time was taken up. In reality, the raising of the issue at such a late stage can properly be described and has been described as tantamount to an ambush. I repeat that it is not good practice and it should not happen in the future.*

Case management in licensing

In a recent licensing appeal heard in by DJ Kate Meek sitting at Newcastle Magistrates' Court, *Endless Stretch Limited v Newcastle City Council and Danieli Holdings Limited,* concerning a premises called "Stack", "Westminster" style directions left the (trade objector) appellant sufficient room to serve (without prior warning that it intended to do so) a voluminous (114 page) expert report just four weeks before the appeal, giving the respondents two weeks in which to consider it and formulate such written evidence as they wanted to put in response. Seeking an adjournment was not an option given the commercial imperative of dealing with the appeal rapidly (the premises were in the course of construction).

A month in advance is clearly better than getting the report when the expert is walking towards the witness box. But it is unsatisfactory that in an appeal of significant commercial significance to an operator, involving an operation of importance to the local community and economy, an expert was sprung on the respondent in a manner that would be out of the question in any run of the mill personal injury claim or building dispute.

One lesson going forward is for respondents to raise at case management the question of expert evidence, and, perhaps, to ask for a direction along the lines that expert evidence is not to be permitted unless a report complying with CrPR 19.4 is served in good time, with CrPR Part 19 to apply generally to expert evidence in the appeal.

Magistrates have an implied power to control and regulate their own procedure to ensure effective resolution and determination of the function imposed upon them by the statute at play: per Moses LJ in *R* (*Chief Constable of Nottinghamshire) v Nottingham Magistrates Court* [2009] EHWC 3182 (Admin) at [35]. Given that the magistrates (or, in taxi licensing and firearms cases, the crown court) will be familiar with CrPR Part 19, this seems a sensible, accessible and ready-made code to use in imposing some sort of discipline on what litigants might otherwise consider to be free rein to deploy expert evidence. And, as I go on to detail,

Part 19 CrPR codifies - and therefore reinforces - the common law duties and responsibilities placed on experts that are all too often ignored in practice.

An expert's duties and responsibilities at common law

In *National Justice Compania Naviera SA v Prudential Assurance Co. Ltd.* ("The Ikarian Reefer") [1993] 2 Lloyd's Law Reports 68, Cresswell J, exasperated by the volume and content of expert evidence as to what caused that particular ship to catch fire, set out "the duties and responsibilities of experts in civil cases" as *including*:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

These propositions (known as "the Cresswell Principles") represent a statement of an expert's duties and responsibilities at common law which have been approved at the highest level (*Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at [53]).

They therefore apply to experts giving evidence to *courts* where no other code applies: so including courts hearing licensing appeals (as was accepted by DJ Meek in the *Stack* appeal (para G.2.8)).

What about licensing sub-committees?

What of licensing sub-committees, which, as *Hope and Glory*[4] tells us, are administrative rather than quasi-judicial bodies?

As such, they are entitled, if not obliged, to take into account all relevant matters, "whether or not any reports or information … would be strictly admissible in a court of law": *Kavanagh v Chief Constable of Devon and Cornwall* [1974] 1 QB 624, per Roskill LJ.

Does this mean no rules apply to the admission of expert evidence before committees and other decision-makers?

I suggest that while it is easy to justify a permissive approach to the admissibility of factual evidence, it is hard to see why a similarly permissive attitude should be taken to expert opinion evidence. Though facts might be in short supply, and therefore a regulatory body should take account of all facts that are be available, the same cannot be said about opinion evidence created for the purpose of the hearing.

If an "expert" is giving opinion evidence to a licensing sub-committee, then I suggest there is no good reason why, if any weight is to be given to the same, the expert should not have complied with the Cresswell Principles (and be seen to have complied with them). Requiring that standard of an expert would correspond with a licensing authority's duty to behave fairly in the decision-making process. [5] It is hardly "fair" if an authority receives expert evidence without any enquiry as to whether the same is biased or slanted, independent or written to order.

While *Hope and Glory* has emphasised the distinction between bodies exercising an administrative function on the one hand and the courts on the other, in cases involving "open justice", the courts have *equated* the responsibilities placed on courts and non-judicial tribunals. In *R* (*Guardian News and Media Limited) v Westminster Magistrates' Court* [2013] QB 618, Toulson LJ (as the then was) said that "the requirements of open justice apply in all tribunals exercising the judicial power of the state", a principle said by the *Supreme Court in Kennedy v Charity Commission* [2015] AC 455 to apply to all public bodies carrying out an "inquiry" (as defined in the Freedom of Information Act 2000 - a definition which would include licensing sub-committees).

It seems difficult to see how, if licensing sub-committees

4 *R (Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31 at [41].

5 Ibid.

must apply "open justice", it is somehow permissible for them to risk bringing about injustice by receiving expert evidence that fails to comply with the Cresswell Principles. This is particularly given that, by virtue of s 21(2) of the Legislative and Regulatory Reform Act 2006, in the exercise of their functions, licensing authorities must have regard to the principles that those functions should be carried out in a way which is, amongst other things, transparent, accountable and consistent.

Competence of experts

In Kennedy v Cordia (Services) the Supreme Court agreed (at [43]) that the South Australian case of *R v Bonython* (1984) 38 SASR 45 gave relevant guidance on the admissibility of expert evidence:

Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.

Admissibility needs to be dealt with as a preliminary issue, but matters relevant to admissibility are also relevant to weight. In the *Stack* appeal, the respondents decided not to contest the admissibility of the expert report, but take the points relevant to it on weight, an approach with which, in her detailed written judgment[6], the judge agreed. [7]

Though the expert must be "skilled", by special study or experience, the fact that he has not acquired knowledge professionally goes merely to weight and not admissibility: *McCaughan v Secretary of State for Northern Ireland* [2009] NIQB 65 at [15-21]. Expert knowledge can be acquired in a particular sphere through repeated contact with it in the course of one's work, notwithstanding that that expertise is derived from experience rather than from formal training: *R v Oakley* [1979] RTR 417 (CA).

Police officers - frequent witnesses in licensing cases - can give expert evidence relating to matters about which they have acquired in-depth knowledge. Examples in the case law include the values of prohibited drugs and what paraphernalia is associated with drug dealing[8] and the practices of gangs.[9] Police officers with specialist training in the investigation and reconstruction of road traffic accidents routinely give evidence in criminal and civil trials.

A person can become so involved with a particular transaction that expertise is acquired in relation to it: a so-called "ad hoc" expert. So, for example, when a police officer studied a video tape about 40 times, examining it frame by frame and replaying it as often as he needed to do so for the purpose of giving evidence to the jury that the persons seen on the video were those accessed of the offences recorded there (*R v Clare and Peach* [1995] Cr.App.R. 333).

Responsible authorities

Where a police officer (or indeed any other public servant) is called as an expert to give opinion evidence, whether by training or experience or both, he or she comes under the same duties to the court as any other expert.

The s 182 Guidance explicitly recognises that responsible authorities, including the police, are a source of expertise. Paragraph 9.12 (as amended following criticism of its predecessor[10] by the House of Lords' Select Committee) provides:

> *Each responsible authority will be an expert in their respective field, and in some cases it is likely that a particular responsible authority will be the licensing authority's main source of advice in relation to a particular licensing objective. For example, the police have a key role in managing the night-time economy and should have good working relationships with those operating in their local area. The police should usually therefore be the licensing authority's main source of advice on matters relating to the promotion of the crime and disorder licensing objective. However, any responsible authority under the 2003 Act may make representations with regard to any of the licensing objectives if they have evidence*

6 A copy of which can be found on my blog at https://www.cholland.comThe relevant sections on expert evidence are also set out on the "Civil Litigation Brief" blog at https://www.civillitigationbrief.com

7 Para 4 of section G.2.

8 *R. v Hill (1992) Cr.App.R. 456 (CA).*

9 *Myers v The Queen (Bermuda)* [2015] UKPC 40.

10 Which provided that the licensing authority "should accept all reasonable and proportionate representations made by the police unless the authority has evidence that to do so would not be appropriate for the promotion of the licensing objectives".

to support such representations. Licensing authorities must therefore consider all relevant representations from responsible authorities carefully, even where the reason for a particular responsible authority's interest or expertise in the promotion of a particular objective may not be immediately apparent. However, it remains incumbent on all responsible authorities to ensure that their representations can withstand the scrutiny to which they would be subject at a hearing.

The evidence of the police and responsible authorities will often be a mix of factual evidence and opinion evidence. Factual evidence will include matters such as crime statistics or noise levels (albeit that some ostensibly "factual" evidence is - in reality - expert opinion evidence - the selection of past incidents are considered relevant); opinion evidence will often be directed to the likely future effect of a decision.

It must of course be borne in mind that a licensing sub-committee, or for that matter an appeal court, cannot delegate the decision-making role to the expert (*Kennedy v Cordia (Services*) at [49]). It is on occasion permissible for an expert to express an opinion on the "ultimate issue" but caution needs to be exercised when an expert does so.

It is worthwhile checking with responsible authority witnesses whether they have considered what their approach to the tribunal is. Have they attempted to be objective and unbiased? Are they there to assist the committee (or the court)? If they are there to assist the committee, would that override instructions from superior officers? It is also good practice to separate the roles of advocate and witness for responsible authorities.

Independence and objectivity; an expert should avoid advocacy

Any expert who purports to give self-described "independent" expert evidence can expect to have that assertion checked. In the words of DJ Meek in the *Stack* appeal (at [G.2.7]):

In any court proceedings, parties can expect the evidence on which they rely to be tested and, where appropriate, robustly so. The evidence of expert or skilled witnesses, as much as any other (arguably perhaps more so) must be able to withstand that rigorous scrutiny if it is to be afforded weight and if it is to be of assistance to the Court in the way it should be. Where the evidence is found to be lacking it is likely to effect the weight that is given to it and the assistance it can provide the court particularly where the court has other conflicting evidence on which it can rely and place greater weight.

In the event, DJ Meek was not persuaded that the expert in question had given independent or impartial evidence.

48. Having considered all of his evidence I was left with the clear impression that Mr Turnham, whether because he was influenced by his initial instructions or otherwise, did not produce an independent or impartial study or give independent or impartial evidence. I cannot reconcile his explanation about his impartiality within the ambit of his instructions to consider negative aspects not least because on occasions when he was asked about the partiality of aspects of his evidence he referred back to the limitations of working within those instructions. On one reading of at least sections of his evidence it appears that he was not only impartial but determined in his instructions and made positive efforts to point out the negative. I was also concerned about Mr Turnham's understanding of his role within the proceedings – whether it was a neutral role to assist the court or an adversarial one to maintain his own position or benefit his client.

49. There were times when I considered he adopted an inappropriately adversarial approach and others when I considered him to be evasive particularly when he considered himself or his findings to be being subject to challenge. At times I was equally, if not more, concerned about the manner in which he dealt with questions as with the answers that finally came. I regret to say that Mr Turnham's approach to questions when he was, or perceived he was, being challenged or criticised all too frequently led to evasive and obstructive exchanges. On occasions he appeared affronted or surprised that he was subjected to rigorous cross examination about relevant issues or that the Respondents had undertaken a forensic approach to his evidence.

50. There were errors, inaccuracies and omissions in his report about matters of varying significance. They were almost always adverse to the 2nd Respondent and were not acknowledged until his live evidence and then remained unexplained. Given their nature I consider them difficult to understand. There are a variety of possibilities none of which, particularly in light of my view of his independence, are particularly attractive in the context of an independent expert providing evidence to a court. At best they suggest that he had not read or thoroughly understood the documentation he had been provided with.

51. I too accept that Mr Turnham has some experience of relevance to this appeal. I do not suggest that his evidence is inadmissible or should be given no weight at all. I was unable to undertake any comparative assessment of his expertise not least given his own evidence about the shortage of supply of such experts or consultancies and his area of work being unregulated or monitored or attached to any professional body. On the basis of the evidence I heard I consider that his report was presented in a way

that in some respects over exaggerated his experience, the reach of MAKE Associates and the resources that had been deployed in preparing the report. This not so much in a dishonest way but in a manner that, whether inadvertently or otherwise, painted a less than accurate picture.
52. The images presented in his report that had come from [the Appellant's guiding mind] Mr Robertson, whilst not necessarily the most significant issue themselves, although not insignificant, captured a number of my concerns that also arose elsewhere: they demonstrated partiality and an adherence to his instructions rather than an adoption of the approach he previously said he had taken to present the negative, positive and neutral notwithstanding his instructions; that he had as part of his preparation of the report obtained source material from his client and not just that which he knew his client had already but also asking his client to carry out a review; they were out of date; he made assumptions about them and demonstrated a lack of attention to detail and enquiry that would be expected from an independent expert witness; he was evasive when being questioned about them; the way in which he chose to present them in the report arguably added to the lack of objectivity; he presented them as illustrative of his point; when questioned about them he did not see, or was unprepared to see, any problem with his approach.
53. When he was re-examined by Mr Gouriet QC about the criticisms that had been made of him his answers afforded me little comfort. He confirmed that whatever else may be said his evidence was truthful, he had not exaggerated or minimised it to benefit his client or damage the 2nd Respondent, he did not change anything in his report at the request of third parties nor did he set out determined to find negative cumulative impact (although again said that was what he was asked to look for). He was asked if he had reflected on the criticisms that had been made in cross examination and whether he could see some force in them. He thought there were some legitimate concerns about presentation. Asked if he would carry forward some lessons for the future his response appeared to acknowledge that the underlying detail on which conclusions were based was not made available. The concerns about his evidence cannot be dismissed as presentational, they are more fundamental than that. It was also a little late to acknowledge the failing in underlying detail. In my view his responses did not demonstrate any real acceptance of those criticisms nor that he understood the impact of them.
54. I make it clear I do not consider that Mr Turnham was dishonest in his evidence. My concerns were not of the truth or lies variety. Nonetheless, there were real issues about credibility. For the reasons I have given I do not accept that Mr Turnham's evidence as independent expert evidence. For the same reasons the weight I feel able to give his evidence of substance is reduced.

While a judgment of such length and detail is atypical in the licensing field (the section on expert evidence alone running to 54 paragraphs in a judgment running in total to 113 pages), the issues identified by DJ Meek in Stack are very common in the civil courts.

Time and again, the civil courts have rejected expert evidence, biased in favour of the instructing party, which has strayed into advocacy. Examples are not hard to find. Just a handful from this year:

- *Gee v DePuy International Ltd* [2018], where Andrews J. observed (at [19]):

The Court heard and read evidence from a wide range of experts in numerous different disciplines. Whilst most of the experts, irrespective of who called them, were mindful of their duties to the Court, I regret to say that a minority of the claimants' experts were not. Some gave the appearance of acting as advocates in the claimants' cause. Sometimes that was not entirely the expert's fault, because of the approach he had been instructed to take, but others were plainly partisan, and their reports lacked the necessary balance and impartiality. That has meant that, unfortunately, I have found their evidence unreliable, and I have placed little or no weight upon it or preferred the evidence of DePuy's experts in matters that were contentious.

- *Ruffell v Lovatt, 4 April 2018*, Winchester County Court, HHJ Hughes

The contrast between Dr Jenner's determined advocacy of the claimant's position and the more considered and balanced evidence of the other three medical experts was striking. The other experts listened to the questions and answered them, briefly and as best they could. Dr Jenner did not... I cannot rely on the opinion evidence of Dr Jenner.

- *The LIBOR appeal, R v Pabon* [2018] EWCA Crim 420 (at [52]):

Put bluntly, Rowe signally failed to comply with his basic duties as an expert. As will already be apparent, he signed declarations of truth and of understanding his disclosure duties, knowing that he had failed to comply with these obligations alternatively, at best, recklessly. He obscured the role Mr O'Kane had played in preparing his report. On the material available to us, he did not inform the SFO, or the Court, of the limits of his expertise. He strayed into areas in his evidence (in particular, STIR trading) when it was beyond his expertise (or, most charitably, at the outer edge of his

expertise) – a matter glaringly revealed by his need to consult Ms Biddle, Mr Zapties and Mr Van Overstraeten. In this regard, he was no more than (in Bingham LJ's words) an "enthusiastic amateur". He flouted the Judge's admonition not to discuss his evidence while he was still in the witness box. We take a grave view of Rowe's conduct; questions of sanction are not for us, so we say no more of sanction but highlight his failings here for the consideration of others.

Biased experts who misunderstand that their role is to help the court rather than to argue their clients' cases can do more harm than good to their clients' causes. They waste court time and the parties' costs; more seriously, they risk injustice.

Conclusions

Expert evidence is prevalent at all levels of licensing. In its true sense, it is given not just by the ostensible "experts", be they acoustic specialists or licensing consultants (often with a policing background): it comes from officers of police, environmental health, licensing, trading standards, and so on. Where evidence of expert of opinion is being given, whoever by, the witness should be aware of, and be complying with the Cresswell Principles.

Compliance with the duties in those principles requires conduct that may seem to be counter-intuitive to some. It includes:

- Understanding and accepting an overriding duty of helping the tribunal, regardless of whether that might help the "client" (whether that be a paying client or, in the case of a public servant, the body for whom they work).
- Keeping an open mind - looking at all the facts, not just the "helpful" facts; making provision (including setting aside time) to consider the other evidence in the case, and, if that evidence causes a change in opinion, making that known to those who instruct (or employ) you.
- Showing the "workings" - explaining how opinions are reached, disclosing underling documents such as photographs and notes, and - if views are subject to qualifications or caveats, saying so.
- Never assuming the role of advocate for the "client".

A point often lost is that an expert who sets out to be (and is seen to be) fair and unbiased is far more persuasive than an expert who puts the boot in at any given opportunity. A professional doing his or her best to assist the court is far more effective than an unregulated "hired gun".

At the risk of being overly didactic (and at the risk of making petards by which I might be hoisted at some future point) those who instruct, give or face expert evidence would be well advised to consider either paragraph 3 of Practice Direction to CPR Part 35 or CrPR 19.4 as standard by which the format and quality of evidence in question should be judged.

As a specialist field, licensing can suffer from not having the bulk of material that wider disciplines have to work with. The creation of the Institute of Licensing is one way in which the sector has sought to adopt professional standards. Although outside the scope of this article, and probably above my pay grade, I wonder whether there is scope for the Institute to be providing training - and possibly qualification and associated regulation - to those who wish to provide expert evidence to committees and courts?

Charles Holland
Barrister, Trinity Chambers and Francis Taylor Building

Events Calendar

November 2018
14 - 16 National Training Conference, Stratford - upon - Avon
24 - 27 Professional Licensing Practitioners Qualification, East Grinstead

December 2018
6 East Midlands Region Meeting & Training Day, Nottingham
6 North East Region Meeting & Training Day, York
6 Wales Regional Meeting
12 North West Region Meeting & Training Day, Warrington
13 South East Region Meeting & Training Day, Faversham
14 London Region Meeting & Training Day, Kennington

March 2019
12 - 13 Zoo Licensing Course, Bristol
19 - 22 Professional Licensing Practitioners Qualification
22 London Region Meeting & Training Day, tbc

May 2019
14 - 17 Professional Licensing Practitioners Qualification

June 219
17- 21 National Licensing Week
19 National Training day

September 2019
20 London Region Meeting & Training Day, tbc

November 2019
20- 22 National Training Conference

Taxi and private hire vehicle licensing - steps towards a safer and more robust system

The Government has surprised many by proposing a far more widespread set of changes to taxi licensing than was anticipated, as **James Button** explains

On 24 September the Department for Transport finally published the long-awaited report of the ministerial working party into hackney carriage and private hire licensing, Taxi and private hire vehicle licensing - steps towards a safer and more robust system.

This was set up in June 2017, with a fairly limited brief, and was due to report in December 2017. It has been severely delayed, not least because John Hayes was replaced as Transport Minister by Nusrat Ghani in January 2018.

Nine months after it was expected, what does it say? It is a lengthy document, running to 68 pages, and it is clear that it addresses issues more widely than was expected from the initial brief.

The working party took evidence on three areas:

- Protecting passengers
- Cross-border working and enforcement
- Driver welfare / trade conditions and appropriate regulation

After due consideration, and having taken evidence from 39 organisations, and heard live evidence from 11 of those, including the Institute of Licensing in both cases, it has produced its report with 34 recommendations. These only apply to England (including London). Scotland and Northern Ireland have their own legislative provisions, while the Welsh Government has suggested that it will introduce its own taxi legislation for Wales by 2022 (although at the time of writing, progress on that seems to have stagnated).

These recommendations will be considered in order, with a short commentary on each. The body of the report contains much more detail and should be read in its entirety.

Recommendation 1

Notwithstanding the specific recommendations made below, taxi and PHV legislation should be urgently revised to provide a safe, clear and up to date structure that can effectively regulate the two-tier trade as it is now.

This is a vital and urgent call to the Government. The legislation controlling hackney carriage and private hire activity is woefully inadequate for the third decade of the 21st century. Despite the problems caused by Brexit, new taxi legislation must be formulated, introduced, passed and implemented without delay.

Recommendation 2

Government should legislate for national minimum standards for taxi and PHV licensing - for drivers, vehicles and operators (see recommendation 6). The national minimum standards that relate to the personal safety of passengers must be set at a level to ensure a high minimum safety standard across every authority in England.

Government must convene a panel of regulators, passenger safety groups and operator representatives to determine the national minimum safety standards. Licensing authorities should, however, be able to set additional higher standards in safety and all other aspects depending on the requirements of the local areas if they wish to do so.

This is essential, and failure to act on this recommendation will seriously undermine any future attempts to improve standards across England.

Recommendation 3

Government should urgently update its Best Practice Guidance. To achieve greater consistency in advance of national minimum standards, licensing authorities should only deviate from the recommendations in exceptional circumstances. In this event licensing authorities should publish the rationale for this decision.

Where aspects of licensing are not covered by guidance nor national minimum standards, or where there is a desire to go above and beyond the national minimum standard, licensing authorities should aspire to collaborate with adjoining areas to reduce variations in driver, vehicle and operator requirements. Such action is particularly, but not exclusively, important within city regions.

As far as is known, the delay in updating the Best Practice Guidance is in large part because the Department for Transport has been awaiting the report from the working party. While this may seem like a chicken and egg situation, it is clear that this must proceed without any further delay (it was supposed to be consulted on in 2016!).

The suggestion for collaboration between neighbouring authorities is sensible, and it will be interesting to see how enthusiastically (or otherwise) this is undertaken.

Recommendation 4

In the short-term, large urban areas, notably those that have metro mayors, should emulate the model of licensing which currently exists in London and be combined into one licensing area. In non-metropolitan areas collaboration and joint working between smaller authorities should become the norm.

Government having encouraged such joint working to build capacity and effectiveness, working with the Local Government Association, should review progress in non-metropolitan areas over the next three years.

This makes a lot of sense, but the legislation would need altering to enable this to happen. At present there could be a joint board, but the hackney carriage vehicles, and drivers would need to be licensed under multiple licences to enable standing and plying for hire across existing district borders.

Recommendation 5

As the law stands, 'plying for hire' is difficult to prove and requires significant
enforcement resources. Technological advancement has blurred the distinction between the two trades.

Government should introduce a statutory definition of both 'plying for hire' and 'prebooked' in order to maintain the two-tier system. This definition should include reviewing the use of technology and vehicle 'clustering' as well as ensuring taxis retain the sole right to be hailed on streets or at ranks.

Government should convene a panel of regulatory experts to explore and draft the definition.

This is desperately needed, and well overdue. In 1959 (almost 60 years ago, when the Town Police Clauses Act 1847 was only 120 years old), the Lord Chief Justice Lord Parker observed:

> *The court has been referred to a number of cases from 1869 down to the present day dealing with hackney carriages and stage carriages. Those decisions are not easy to reconcile, and.... I have been unable to extract from them a comprehensive and authoritative definition of "plying for hire".*[1]

Recommendation 6

Government should require companies that act as intermediaries between passengers and taxi drivers to meet the same licensing requirements and obligations as PHV operators, as this may provide additional safety for passengers (eg, though greater traceability).

The fact that hackney carriage booking agents do not need any licence, and there is no control or check over their activities, is a loophole that has caused concern for many years.

Recommendation 7

Central government and licensing authorities should 'level the playing field' by mitigating additional costs faced by the trade where a wider social benefit is provided – for example, where a wheelchair accessible and / or zero emission capable vehicle is made available.

While this is a laudable aim, it is difficult to see how any really meaningful reduction in costs could be offered without large-scale subsidies from central government.

Recommendation 8

Government should legislate to allow local licensing authorities, where a need is proven through a public interest test, to set a cap on the number of taxi and PHVs they license.

This can help authorities to solve challenges around congestion, air quality and parking and ensure appropriate provision of taxi and private hire services for passengers, while maintaining drivers' working conditions.

This again raises the question of trade protection, but if there was a much wider and more carefully considered "public interest test", as opposed to the blunt and questionable "unmet demand test", there could be useful

1 *Cogley v Sherwood* [1959] 2 QB 311 (at 323).

congestion and pollution benefits.

Recommendation 9

All licensing authorities should use their existing powers to make it a condition of licensing that drivers cooperate with requests from authorised compliance officers in other areas. Where a driver fails to comply with this requirement enforcement action should be taken as if the driver has failed to comply with the same request from an officer of the issuing authority.

This makes perfect sense. The question of how "out of district" enforcement is funded needs to be considered. If a district spends a lot of time and effort (and therefore money) enforcing against out of district vehicles and drivers, how will they recoup those costs from the "home" authority?

Recommendation 10

Legislation should be brought forward to enable licensing authorities to carry out enforcement and compliance checks and take appropriate action against any taxi or PHV in their area that is in breach of national minimum standards (recommendation 2) or the requirement that all taxi and PHV journeys should start and / or end within the area that issued the relevant licences *(recommendation 11)*.

Again, this is both sensible and essential, but the same funding considerations (see 9 above) will apply.

Recommendation 11

Government should legislate that all taxi and PHV journeys should start and / or end within the area for which the driver, vehicle and operator (PHV and taxi – *see recommendation 6*) are licensed. Appropriate measures should be in place to allow specialist services such as chauffeur and disability transport services to continue to operate cross border.

Operators should not be restricted from applying for and holding licences with multiple authorities, subject to them meeting both national standards and any additional requirements imposed by the relevant licensing authority.

Although this seems an attractive idea, with the potential to remove activity taking place remote from the licensing authority's area, there may be problems in some locations where district boundaries meet. For example, in the north of Manchester, Manchester, Bury and Salford councils meet. A Manchester resident could not use a Bury vehicle to travel to Manchester Airport. There are many other similar examples across England.

Perhaps a requirement that the journey must start or finish in the authority that licensed the vehicle or a *neighbouring authority* would be more practical.

Recommendation 12

Licensing authorities should ensure that their licensing, administration and enforcement functions are adequately resourced, setting fees at an appropriate level to enable this.

This is to be welcomed, but requires a change to ss 53 and 70 of the Local Government (Miscellaneous Provisions) Act 1976 to enable full cost recovery for the entire hackney carriage and private hire licensing regime to be recovered via the licence fees.

Recommendation 13

Legislation should be introduced by the Government as a matter of urgency to enable Transport for London to regulate the operation of pedicabs in London.

Certainly. The absence of regulation makes a mockery of the regulation of other passenger transport vehicles, hackney carriages and private hire vehicles

Recommendation 14

The Department for Transport and Transport for London should work together to enable the issue of Fixed Penalty Notices for both minor taxi and PHV compliance failings. The Department for Transport should introduce legislation to provide all licensing authorities with the same powers.

Absolutely. This would bring hackney carriage and private hire enforcement into line with a lot of other areas of local government activity, and provide a rapid and cost-effective enforcement process.

Recommendation 15

All ridesharing services should explicitly gain the informed consent of passengers at the time of a booking and commencement of a journey.

This is important and makes sense. However, it requires an understanding of exactly what is being booked on the part of the public.

Recommendation 16

The Department for Transport must as a matter of urgency press ahead with consultation on a draft of its Statutory Guidance to local licensing authorities. The guidance must be explicit in its expectations of what licensing authorities should be doing to safeguard

vulnerable passengers. The effectiveness of the guidance must be monitored in advance of legislation on national minimum standards.

This is essential, but there is no obvious reason why it cannot be combined with the revised Best Practice Guidance to hasten the process.

Recommendation 17

In the interests of passenger safety, particularly in the light of events in towns and cities like Rochdale, Oxford, Newcastle and Rotherham, all licensed vehicles must be fitted with CCTV (visual and audio) subject to strict data protection measures. Licensing authorities must use their existing power to mandate this ahead of inclusion in national minimum standards.

To support greater consistency in licensing, potentially reduce costs and assist greater out of area compliance, the Government must set out in guidance the standards and specifications of CCTV systems for use in taxis and PHVs. These must then be introduced on a mandatory basis as part of national minimum standards.

This makes perfect sense but will run into severe difficulties with the Surveillance Commissioner, as many authorities have found. Panic buttons to activate the system (for either drivers or passengers) render the system almost pointless. The law needs to be changed to make it clear that such systems are mandatory and thus exempt from challenge.

Recommendation 18

As Government and local authorities would benefit from a reduction in crime in licensed vehicles both should consider ways in which the costs to small businesses of installing CCTV can be mitigated.

This is a sensible suggestion, but again may require subsidy from Central Government.

Recommendation 19

National standards must set requirements to assist the public in distinguishing between taxis, PHVs and unlicensed vehicles. These should require drivers to have on display (eg, a clearly visible badge or arm-band providing) relevant details to assist the passengers in identifying that they are appropriately licensed, eg, photograph of the driver and licence type i.e. immediate hire or pre-booked only.

All PHVs must be required to provide information to passengers including driver photo ID and the vehicle licence number, in advance of a journey. This would enable all passengers to share information with others in advance of their journey. For passengers who cannot receive the relevant information via digital means this information should be available through other means before passengers get into the vehicle.

These are both very sensible suggestions, and vital where hackney carriages and private hire vehicles are in fact the same types of vehicles – saloon or estate cars - and the differences that distinguish them at present can be minimal.

Recommendation 20

All drivers must be subject to enhanced DBS and barred lists checks. Licensing authorities should use their existing power to mandate this ahead of inclusion as part of national minimum standards.

All licensing authorities must require drivers to subscribe to the DBS update service and DBS checks should must be carried out at a minimum of every six months. Licensing authorities must use their existing power to mandate this ahead of inclusion as part of national standards.

This is vital. It could be made much easier with the full co-operation of the Disclosure and Barring Service and simplification of the rules, guidance and forms.

However, this does not go far enough and similar requirements must be in place for operators and proprietors, due to their involvement in the overall hackney carriage and private hire industry.

Recommendation 21

Government must issue guidance, as a matter of urgency, that clearly specifies convictions that it considers should be grounds for refusal or revocation of driver licences and the period for which these exclusions should apply. Licensing authorities must align their existing policies to this ahead of inclusion in national minimum standards.

This is available already, in the Institute of Licensing's Guidelines on Suitability. It is hoped that these will be incorporated into the revised Best Practice Guidance.

Recommendation 22

The Quality Assurance Framework and Common Law Police Disclosure Provisions must be reviewed to ensure as much relevant information of conduct as well as crimes, by taxi and PHV drivers (and applicants) is disclosed ensuring that licensing authorities are informed immediately of any relevant incidents.

This is essential, and should be actioned without delay.

It should be made clear that information on arrest, charge and conviction should be passed to licensing authorities immediately, and should also extend to operators and proprietors.

Recommendation 23

All licensing authorities must use the National Anti-Fraud Network (NAFN) register of drivers who have been refused or had revoked taxi or PHV driver licences. All those cases must be recorded, and the database checked for all licence applications and renewals. Licensing authorities must record the reasons for any refusal, suspension or revocation and provide those to other authorities as appropriate. The Government must, as a matter of urgency, bring forward legislation to mandate this alongside a national licensing database *(recommendation 24)*.

The NAFN Database is now live, and although it has been criticised as being cumbersome to populate and use, it is essential. If the Government is as quick at providing a national taxi database as it has been in providing a national database of personal licence holders under the Licensing Act, the NAFN system will be all that is available for the foreseeable future.

Recommendation 24

As a matter of urgency Government must establish a mandatory national database of all licensed taxi and PHV drivers, vehicles and operators, to support stronger enforcement.

Agreed but it must be established quickly.

Recommendation 25

Licensing authorities must use their existing powers to require all drivers to undertake safeguarding / child sexual abuse and exploitation awareness training including the positive role that taxi / PHV drivers can play in spotting and reporting signs of abuse and neglect of vulnerable passengers. This requirement must form part of future national minimum standards.

This is already required by a number of authorities, but should be mandatory, with an agreed minimum standard.

Recommendation 26

All individuals involved in the licensing decision making process (officials and councillors) must be obliged to undertake appropriate training. The content of the training must form part of national minimum standards.

This is essential. Those applying and holding licenses must be certain that those applying the standards are fully competent to do so.

Recommendation 27

Government must review the assessment process of passenger carrying vehicle (PCV) licensed drivers and / or consideration of the appropriate boundary between taxis / PHVs and public service vehicles (PSVs).

HC / PHV licensing and PSV licensing have long had an uneasy relationship, with too may overlaps and loopholes. The relationship needs to be addressed and clarified.

Recommendation 28

Licensing authorities must require that all drivers are able to communicate in English orally and in writing to a standard that is required to fulfil their duties, including in emergency and other challenging situations.

This is also vital, and it is disappointing that it needs to be said. As HC / PHV drivers are both providing a service, and are also placed in positions of great responsibility, the ability to communicate readily with passengers and others is essential.

Recommendation 29

All licensing authorities should use their existing powers to **require that the taxi and PHV drivers they license undergo disability quality and awareness training. This should be mandated in national minimum standards.**

As with the CSE awareness training referred to in recommendation 25 above, this is already required and provided by a number of councils, and it should be mandatory, and introduced to agreed standards as soon as possible.

Recommendation 30

Licensing authorities that have low levels of wheelchair accessible vehicles (WAVs) in their taxi and PHV fleet should ascertain if there is unmet demand for these vehicles. In areas with unmet demand licensing authorities should consider how existing powers could be used to address this, including making it mandatory to have a minimum number of their fleet that are WAVs. As a matter of urgency, the Government's Best Practice Guidance should be revised to make appropriate recommendations to support this objective.

This is certainly a laudable aim. WAVs are useful for many disabled people, but are not the only solution. The problem with any form of quota system is deciding who will bear the burden of the increased costs. That is why the approach taken by many local authorities for hackney carriages - that any additional vehicles must be WAV - is a system that works.

It remains to be seen whether such an approach could work for PHVs.

Recommendation 31

Licensing authorities which have not already done so should set up lists of wheelchair accessible vehicles (WAVs) in compliance with s 167 of the Equality Act 2010, to ensure that passengers receive the protections which this provides.

Absolutely, and this should be done without delay. The powers have been available for 18 months, yet a large number of authorities seem to be finding this difficult to implement.

Recommendation 32

Licensing authorities should use their existing enforcement powers to take strong action where disability access refusals are reported, to deter future cases. They should also ensure their systems and processes make it as easy as possible to report disability access refusals.

Again, this is essential. Otherwise, some of our most vulnerable members of society are being badly prejudiced against.

Recommendation 33

The low pay and exploitation of some, but not all, drivers is a source of concern. Licensing authorities should take into account any evidence of a person or business flouting employment law, and with it the integrity of the National Living Wage, as part of their test of whether that person or business is "fit and proper" to be a PHV or taxi operator.

The suggestion that employment responsibilities can be taken into account as part of the consideration of fitness and propriety is interesting, and supports the views in the Institute of Licensing's Guidelines that it is the whole character of the person (or company) that needs to be taken into account in determining safety and suitability (the phrase used to explain and replace "fit and proper" in the Guidelines).

When a worker is working part time, or is self employed, it may prove problematic to establish the true facts.

Recommendation 34

Government should urgently review the evidence and case for restricting the number of hours that taxi and PHV drivers can drive, on the same safety grounds that restrict hours for bus and lorry drivers.

This is essential. At present there are not only no limits, but also nothing to prevent a bus or lorry driver working their limited hours, then driving a hackney carriage or private hire vehicle for many hours.

Conclusion

Having commented on each recommendation, the bigger question is if, and when, the Government will act on these suggestions. We await a formal Government response to the Law Commission report, which should have been made by May 2015. In the meantime, we have seen more ill-considered tinkering under the Deregulation Act. This report must serve as an immediate alert to the Government. It should not be allowed to simply drift into the long grass (possibly via shorter grass) and be forgotten.

James Button, CIoL
Principal, James Button and Co Solicitors

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Cumulative impact: controlling availability

The change from cumulative impact policies to cumulative impact areas puts cumulative impact on a statutory basis and changes how licensing authorities must consider new applications, as Professor **Roy Light** explains

For some 600 years, licensing provisions have sought to regulate the availability of alcohol in a number of ways, one of which is to restrict the number of outlets - historically through the concept of "need"[1] and more recently by way of "cumulative impact".

Over the years licensing provisions have been tightened and relaxed, swinging between liberalisation and constraint, in line with prevailing public opinion and government policy. The latest period of liberalisation gained momentum after the Second World War. By the end of the twentieth century the number of licensed premises had expanded dramatically, they were no longer required to close in the afternoons and more late night / early morning licences had been granted. The gaps left in towns and city centres, as companies such as banks and building societies relocated, were filled by clubs and bars. Off-licence numbers also increased and in a time of economic boom there was cash available to go out and have fun.

This latest liberalising period culminated in the passing of the Licensing Act 2003.[2] Yet even before the Act came into force in 2005 the pendulum had swung back towards constraint. The promised laissez faire approach to alcohol availability (and a Continental cafe culture) quickly evaporated as we were propelled through a period of liberal constraint into a severe bout of legislative repentance. Cheap alcohol, increased availability, so-called binge drinking [3] and town / city centre crime and disorder presaged calls for minimum pricing, tough enforcement and even a return to the concept of "need" as a basic criterion in licence applications.

The liberalising aims of the Licensing Act appeared out of step with current thinking. Unease at the ill-effects of alcohol had become increasingly apparent and by the end of the century, alcohol-related crime and disorder had become a cause for concern, particularly in and around town and city centres. This continued into the 21st century with anxiety being expressed over the possible adverse social implications of the new law. [4] The pendulum had swung against liberalisation and in effect against the 2003 Act. This resulted in the Home Office launching various measures, one of which was cumulative impact policies. Not included in the 2003 Act, cumulative impact policies were introduced by the statutory guidance published to accompany the Act.

The cumulative impact provisions were the subject of much debate and amendment and that debate continues. For example, from the House of Lords Select Committee on the Licensing Act 2003: [5]

We heard a diverse range of opinions on CIPs over the course of the inquiry. Many local authorities and police forces believe them to be useful instruments, with Staffordshire Police for example arguing that "Cumulative Impact Policies are used effectively within Staffordshire and have assisted greatly in limiting the detrimental effect of excessive licensed premises within specific areas" (para.405).

The Sunderland Health and Wellbeing Board claimed that the higher level of scrutiny they require from new applicants has resulted in a higher quality of licensed premises. In their view, CIPs encouraged applicants to consider more seriously "how best to 'upgrade' the quality of their application", discouraging more disreputable "vertical drinking establishments", in favour of "more upmarket restaurants and wine bars" (para.406).

A number of industry representatives we have heard from opposed CIPs on principle. CAMRA described them as "blunt instruments", which are "inappropriate in areas where there are still too many pubs closing every week." Admiral Taverns argued that they should be "the exception rather than the norm as they restrict development and initiative and can allow stale ideas to become un-challenged" (para.407).

1 A commonly cited reason for refusal of a licence application until need was abandoned in 1999 was the existence within the area of sufficient licences to meet demand so that the applicant had failed to show that there was a need for another licence.

2 For a more detailed account see Light R (2005) "The Licensing Act 2003: liberal constraint?" *Modern Law Review 68(2) 268-285.*

3 Originally meaning a prolonged drinking session of two days or more during which other, normal activities were abandoned, today the term is generally understood to refer to a single session of immoderate alcohol consumption or drinking to get drunk.

4 See, for example Plant, M & Plant, M (2006) Binge Britain: Alcohol and the national response, OUP.

5 House of Lords Select Committee on the Licensing Act 2003: post-legislative scrutiny, Report of Session 2016-17 - published 4 April 2017 - HL Paper 146, paras.402-12.

Cumulative impact policies

Section 182 of the 2003 Act provides that the Secretary of State must issue, and from time to time revise, guidance:

To aid licensing authorities in carrying out their functions under the 2003 Act and to ensure the spread of best practice and greater consistency of approach. This does not mean that we are intent on eroding local discretion. On the contrary, the legislation is fundamentally based on local decision-making informed by local knowledge and local people. [6]

The guidance was published in July 2004 and cumulative impact policies (CIPs) became part of the new licensing regime. Cumulative impact was justified by reference to t*he potential impact on the promotion of the licensing objectives of a significant number of licensed premises concentrated in one area.*[7] The guidance sought to draw a distinction between "need" as relating to commercial viability and "cumulative impact" as referring to a density or concentration of premises in a particular area as a cause of crime, disorder or public nuisance.

The guidance on CIPs stated that if a licensing authority identifies an area of cumulative impact as a cause of crime, disorder or public nuisance and evidence is available to support this view, for example from a Crime and Disorder Reduction Partnership, then the authority may specify that area in its local licensing statement. This would raise a *rebuttable presumption that applications for new premises licences … will be refused, if relevant representations to that effect are received.*[8]

Cumulative impact areas

Cumulative impact policies operated (and proliferated) for some 13 years until replaced by cumulative impact areas (CIAs) which were introduced into the 2003 Act at s 5A by s 141 of the Policing and Crime Act 2017.[9] Section 5 of the 2003 Act (statement of licensing policy) is amended so that in determining or revising its policy, a licensing authority must have regard to any cumulative impact assessments published by it under section 5A; must summarise any CIAs published under s.5A; and must explain how the authority has discharged its duty in this respect. The provisions took effect on 6 April 2018 and revised statutory guidance containing major revision on cumulative impact was published in April 2018. [10]

The change from CIPs to CIAs is not simply one of name but puts cumulative impact on a statutory basis and significantly reforms the way in which licensing authorities must consider and monitor cumulative impact measures. Putting CIPs on a statutory footing aims to:

provide greater clarity and legal certainty about their use … When introducing the proposed changes in the House of Lords, Baroness Chisholm of Owlpen said the system needed reforming because "not all licensing authorities are making effective or consistent use of" CIPs. In addition, the licensed trade had "concerns about the transparency of the process for putting a CIP in place and the quality of evidence used as the basis for some. [11]

The Home Office Impact Assessment on the proposal noted:

We will also aim to ensure that LAs use robust and up to date evidence to support the implementation and retention of CIPs in their area … Under the present arrangements CIPs can be implemented on relatively weak grounds and remain in place for a number of years based on limited or outdated evidence. This can lead to disproportionate restrictions on new business and potentially an associated impact on communities where a CIP places restrictions. [12]

Publishing a CIA

Authorities wishing to publish a CIA must revise their local statement of licensing policy to that effect and specify the areas and types of premises to which it will apply, as well as the evidence on which it bases the assessment. [13]

By s 5A of the Act, before the authority publishes a CIA it must consult with the police, fire & rescue services, local health board, premises, club premises and personal licence holders, and businesses and residents in the area. It must provide to those consulted:

(1) The reasons why it is considering publishing a cumulative impact assessment.
(2) A general indication of the part or parts of its area which it is considering describing in the assessment.

6 DCMS (2004) *Guidance issued under Section 182 of the Licensing Act 2003.*

7 *Ibid* para.3.13.

8 *Ibid* para.3.19.

9 Policing and Crime Act 2017 (Commencement No. 8) Regulations 2018.

10 *Revised Guidance issued under section 182 of the Licensing Act 2003, April 2018, London*: Home Office (paras. 14.19-14.48).

11 *Alcohol: cumulative impact assessments*, House of Commons Briefing Paper Number 07269, 2 May 2017.

12 *Putting Cumulative Impact Policies on a statutory footing*, IA No: HO 0253 (1/11/2016).

13 CIAs do not apply to TENs *however it is open to the police and environmental health authority (as relevant persons) to refer to evidence published within in a CIA when objecting to a TEN* (Guidance para.14.27).

> *(3) Whether it considers that the assessment will relate to all relevant authorisations or only to relevant authorisations of a particular kind.*

The statutory guidance makes clear the steps that a licensing authority should take when considering whether to introduce a CIA:

> *(1) Identify concern about crime and disorder; public safety; public nuisance; or protection of children from harm in a particular location.*
> *(2) Consider whether there is good evidence that crime and disorder or nuisance are occurring, or whether there are activities which pose a threat to public safety or the protection of children from harm.*
> *(3) If there is evidence such problems are occurring, identify whether these problems are being caused by the customers of licensed premises, or that the risk of cumulative impact is imminent.*
> *(4) Identify the boundaries of the area where problems are occurring (this can involve mapping where the problems occur and identifying specific streets or localities where such problems arise).*
> *(5) Consult those specified in s 5(3) of the 2003 Act, and*
> *(6) Subject to the outcome of the consultation, include and publish details of the special policy in the licensing policy statement.* [14]

The authority must consider the nature and extent of any cumulative impact and the evidence to support it *before* it goes to consultation and give this information to those being consulted so that they are able to give an informed response. The Home Office guidance concludes:

> *After considering the available evidence and consulting those individuals and organisations listed in section 5(3) of the 2003 Act and any others, a licensing authority may be satisfied that it is appropriate to publish a CIA* (para.14.33).

Consultation

The Supreme Court decision in *Haringey* 2014[15] is the leading authority on how local authorities should carry out consultations. It held that if there is a method laid down by legislation, as there is in the Licensing Act, it must be followed; and where there is a duty to consult it is not enough to go through the motions. The authority should give sufficient reasons for any proposal to allow a consultee to *give an intelligent consideration and response* to what is being proposed. There is an obligation to let consultees know *what the proposal is and exactly why it is under positive consideration … telling them enough (which may be a good deal) to enable them to make an intelligent response.* Adequate time must be given for consideration and response.

The Cabinet Office published *Consultation principles: guidance* in 2008 which was last updated on 19 March 2018. The guidance is for government departments and is accepted to be equally relevant to local authorities. It states: "Be clear what questions you are asking. Consultations should be informative. Give enough information to ensure that those consulted understand the issues and can give informed responses."

The Act and statutory guidance make clear the steps that a licensing authority should take when considering whether to publish a CIA. They are more prescriptive than was previously the case. If the steps are not followed properly, and / or sufficient evidence adduced, the lawfulness of the CIA may be open to challenge.

Reviewing a CIA

Licensing authorities must within three years of publishing a CIA review it to assess whether it remains of the opinion set out in the assessment. While it should have been the case that CIPs were reviewed on a regular basis the guidance now lays down the process to be followed which includes a full consultation. If the authority is of the opinion that the CIA should be retained it must publish the evidence upon which it bases that view – *this is likely to involve the collation of fresh or updated evidence.* [16] If an authority fails properly to review its CIA within three years the CIA may be open to challenge.

What of the 200-plus CIPs that have been introduced around the country pre-April 2018? There are no transitional provisions that apply to CIPs as they were not in the 2003 Act but as the guidance provides:

> *However, any existing CIPs should be reviewed at the earliest practical opportunity to ensure they comply with the legislation. It is recommended that the review should take place within three years of the commencement of the legislation on CIAs or when the licensing policy statement is next due for review, whichever is sooner. This will ensure that any CIPs in place before the commencement of the provisions on CIAs adhere to the principles in the legislation (in particular concerning relevant evidence and consultation).* [17]

CIPs will therefore continue as before but should be reviewed *as soon as is practicable* and in any event within three years or when the licensing policy is reviewed. Prudence would suggest that "as soon as is practicable" would be wise so that any challenge to the CIP may be met

14 *Ibid* para.14.34.

15 *R (on the application of Moseley (in substitution of Stirling Deceased)) (AP) v London Borough of Haringey* [2014] UKSC 56.

16 Guidance, para.14.36.

17 Guidance, para.14.36.

(this is particularly the case if the authority has not reviewed the CIP for some time).

Effectiveness of CIPs / CIAs

Throughout the history of alcohol regulation it is apparent that efforts have been made to strike a balance between the wish to support the expansion and development of retail alcohol outlets, in line with changing patterns of life and demand, against any increased risks to the population from alcohol-related harm or disorder. CIPs and the new CIA provisions continue that endeavour.

The latest figures show there are 223 CIPs which are accounted for by 107 licensing authorities, with the number in any given authority ranging from one to eight. In the year to the end of March 2017 there were 9,778 applications for new premises licences with 1,124 applications (11%) in relation to premises within CIPs. Of the 9,175 decisions on applications in that year 97% (8,937) were granted and 3% (238) were refused. Of the 9,175 decisions, 1,061 were in cumulative impact areas with 94% granted and 6% refused. There was a slightly larger difference in relation to variation applications with 98% granted and 2% refused; while of those in CIPs 93% were granted and 7% refused.

The effectiveness of CIPs is clearly more complex and problematic than these figures suggest. For example, we do not know the nature of the premises and licensable activities concerned, the hours granted or the conditions added. And there may well be regional variations. Yet it is plain that CIPs do not operate as bar in the majority of cases.

The Home Office rationale for CIAs is that:

> *Providing greater transparency and legal certainty on the required process through legislation should help to improve consistency in decision making and garner support from all sides.*

Whether CIAs deliver these benefits remains to be seen.

Professor Roy Light
St John's Chambers, Bristol

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Licensing Act 2003 appeal fees, and trouble in Ambridge

Richard Brown considers the possible implications of the recent drop in appeals fees, and notes the verisimilitude of a licensing drama in the Archers

The ability for local people to become involved in licensing processes is a fundamental principle of Licensing Act 2003. Indeed, it is the r*aison d'etre* of the Licensing Advice Project. It follows that access to justice on appeals is equally important. This was recognised as a key finding of the House of Lords Committee's Post-Legislative Scrutiny of Licensing Act 2003. I wrote in my last article about the modest increase in rights of objectors in this regard set out in the revised s 182 Guidance. Will a recent significant decrease in the fee required for an appeal encourage more appeals against decisions of licensing authorities?

Cost is often a prohibitive factor for anyone considering whether to dive headlong into the appeal system. On top of lawyers' fees, potential appellants aggrieved at the decision of a licensing sub-committee can understandably blanch when asked to fork out a large fee simply to issue their complaint in the Magistrates' Court. The fee has often been reported as being £410 (£400 before 2014), which indeed it has been for many years – but only for applicants for licences and licence holders. In a move which may not assist with easing the clogged up Magistrates' Court lists, the Court of Protection, Civil Proceedings and Magistrates' Courts Fees (Amendment) Order 2018 came into force on 25 July 2018, drastically reducing the fee payable to £70.

It is not often that the industry and the public can all cheer a change in the law which is mutually beneficial. However, the fee reduction is actually not so drastic for residents. In fact, although the reduction has provided equality between the various potential appellants, it amounts to an 83% reduction for the industry, but simply returns residents more or less to the position as it was up until 2014. I am unable to make any cogent argument about any unfairness in this, as the Magistrates' Court Fees (Amendment) Order 2007 created an entirely new category of appeal under Schedule 5 Licensing Act 2003, effectively increasing the cost for the trade from £25 to £400.

From 2007 up until 2018, the fee for a licensing appeal was expressed in various Magistrates' Court Fees Orders as being applicable to various categories of appeal set out in Schedule 5 to Licensing Act 2003. It was £400 from 2007, with a slight increase of £410 from 2014. This is a sum which could perhaps easily be swallowed by a large company with deep pockets, less so by an individual objector (or indeed a small business). However, a close inspection reveals that the relevant Orders omitted those appealing under Schedule 5 para 2(3), para 3(2)(b), para 4(3), para 8(2)(a) and (c) and para 8A(2)(c) (ie, "other persons") from paying this fee. Instead, the fee payable was, up until 2014, only £75. In 2014 this increased, with little fanfare or protest, to £205 – an increase of 173%, although still half the fee payable by a licence holder or putative licence holder.

The reductions are part of a wider change initiated by the Ministry of Justice (MoJ) affecting a range of fees in a number of courts. The rationale for the change is set out in the Explanatory Note to the 2018 Order, which explains that fees have been reduced "to reflect the cost of the service provided". The MoJ's impact assessment [1] states that following a review of fees charged compared with actual costs, they had established that some fees were "inadvertently" set at a level higher than full cost recovery without the necessary Parliamentary approval, and therefore needed to be reduced.

At first glance, the MoJ's figures brook no argument.[2] According to Schedule A, the "cost recovery rate" for a Licensing Act 2003 appeal is a staggering 686%, although leading to a relatively modest over-recovery of £79,000. The "cost recovery rate" for an "other person" appeal is difficult to gauge, as it is included with the general figure for appeals by way of complaint (300%).

How "inadvertent" this was is open to debate. According to a consultation in 2013 / 14[3] full costs recovery was not

1 https://www.legislation.gov.uk/ukia/2018/106/pdfs/ukia_20180106_en.pdf.

2 Schedule A of the Impact Assessment.

3 https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/.courtfeesconsultation.pdf

being achieved by the then level of fees, hence the increase in fees in order to achieve full costs recovery. This state of flux may not surprise practitioners trying to keep abreast of central government initiatives. The Magistrates' Court Fees (Amendment) Order 2014 subsequently increased the fee for "other persons" from £75 to £210, and for applicants etc from £400 to £410. It was unclear why cost recovery levels for an "other person" appeal should be less than any other appeal.

In any event, the reductions will be welcomed by future appellants of whatever hue. With the appeals procedure under Licensing Act 2003 already a subject of some debate, will the reduced fees lead to more appeals? It is very conceivable that it will, even if it doesn't lead to a significant increase in appeals which actually proceed to a full hearing. The difference in the cost of initiating an appeal is significant. This could have a bearing tactically on the approach of parties (and, perhaps, the licensing authority) at hearings.

The MoJ's impact assessment considered this possibility, in the context of changes to "court user behaviour". They largely reject the theory that decrease in cost will lead to an increase in demand, mainly because the vast majority of the over-recovery is in respect of council tax liability orders. It is not clear that any specific assessment regarding licensing appeals was undertaken, although the MoJ does say that a monitoring framework will be implemented to ensure that the fees do reflect the correct level.

Incidentally, the fee required for the Magistrates' Court to state a case for the opinion of the High Court has also reduced significantly from £515 to £155 (a decrease of 70%). Given the expense of a judicial review, this may potentially improve access to justice to those who remain aggrieved on a point of law following a Magistrates' Court hearing. Although stating a case can be a significant time commitment from the magistrates / justices, the Ministry of Justice found that the amount recovered was 332% over the cost recovery level

Licensing and popular culture – the Archers goes do-Lalli

National Licensing Week 2018 ran from 18 to 22 June 2018. It is the brainchild of the Institute of Licensing, and aims to provide an opportunity for practitioners "to promote their work and raise awareness of licensing and its impact on everyday lives" and to emphasise that "Licensing is Everywhere".

Through August and September 2018, a major story arc in an iconic soap opera focused on a topical licensing issue. Coincidence? Perhaps. Nevertheless, seeing licensing issues feature prominently in the lives of ordinary members of the public is something which is not common. The two major soap operas, EastEnders and Coronation Street, are centred around pubs, but the viewer does not get to see licensing issues at play. The Archers, that venerable staple of Radio 4 since 1951, is currently running a storyline which could serve as a licensing exam question. An incident at the village beer festival has torn the village in half. Given the sequence of events, it must be that a "summary review" of the premises licence has resulted.

A venue's owner, Elizabeth, has a premises licence and runs events under the auspices of the licence. The owner's son, Freddie, was found in possession of a quantity of drugs at a beer festival held at the premises, and subsequently charged with possession with intent to supply. For this single incident, the premises licence was suspended, pending a full review hearing. Application for a summary review can be made if a senior member of the area's police force is of the opinion that the premises "are associated with serious crime or serious disorder or both" (LA03 s 53A(1)(b)). Presumably Ambridge District Council's licensing sub-committee fully considered the relevant case law, *Lalli,*[4] which examined the question of whether a single incident (in that case, of violence) was sufficient to constitute an "association" with serious crime or serious disorder or both.

The arrest occurred on Friday 3 August, and the licence was suspended (s 53B(3)(d)) on Monday 6 August, presumably as an "interim step", pending a full review. This accurately fits the time frame under the Act (s 53A(2)(a) and (5). On Thursday 9 August Elizabeth fails to get her licence back, presumably at a hearing constituted to reconsider the interim steps, (s 53B(6). She considers lying – which would be an offence (s 158(1)(a)). There are references to notices referring to "serious crime" – the application must of course be advertised (s 53A(3)(c). Friends offer to speak on her behalf at the hearing – as is their right under s 53C(7).

Suppliers and caterers are up in arms at lost profits. Bookings are cancelled or moved elsewhere. There is even an insight into the tactical aspect of appeals when on 14 August a friend has an idea about a mate who has an off-licence and has his licence suspended and simply transfers the licence into another person's name and continues trading. Elizabeth then tries to win over licensing authority by installing more CCTV. All in all, it is a pretty accurate picture of a summary review, and shows how it has an impact beyond the licence holder, to the community. I await the full review hearing with interest. Licensing is indeed everywhere.

Richard Brown
Solicitor, Licensing Advice Centre, Westminster CAB

4 *R (Sharonjeet Lalli) v Metropolitan Police Commissioner and Newham Borough Council* [2015] EWHC 14 (Admin).

Agent of change: it's here - but what is it?

The new national planning policy framework has implications for licensed premises in the vicinity of proposed developments, but exactly what those implications are will be a matter for case-by-case assessment, suggests **Freddie Humphreys**

It's here. For the first time since its initial publication in 2012 there is an updated National Planning Policy Framework (NPPF). In launching the update, Secretary of State for Communities, James Brokenshire said: "Fundamental to building the homes our country needs is ensuring that our planning system is fit for the future. This revised planning framework sets out our vision of a planning system that delivers the homes we need. I am clear that quantity must never compromise the quality of what is built, and this is reflected in the new rules."

So clearly, the focus is on housebuilding. But for those working in the licensing world, we find something of much greater interest at paragraph 182 of the NPPF: the adoption into the planning system of the "agent of change principle".

Paragraph 182 of the new NPPF states:

> *Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed.*

In order to properly understand what this means for licensed premises, it is necessary to remind ourselves of a few basic principles of the planning system. When making decisions on planning applications the law dictates that decisions must be taken in accordance with the development plan for the area unless material considerations indicate otherwise.[1] The NPPF is a material consideration to which regard must be had when local planning authorities (LPAs) determine planning applications, and so too, now, is the agent of change principle set out above. Furthermore, as paragraph 182 also states that LPAs should have regard to the agent of change principle when producing their local plans, within time we can expect to see greater refinement of this principle as LPAs adopt policies of their own which reflect / incorporate agent of change.

It is essential to note that planning policy is just that, policy: it is not law. What this means is that while regard now has to be had to agent of change in determining planning applications, it does not mean that it will always prevail as it may still be outweighed by other material considerations. How the principle is to be applied in any given case is a matter for the decision maker - ie, it involves an exercise of planning judgment.

Bearing in mind this background it is worth asking, what does paragraph 182 actually mean? Well, the correct interpretation of planning policy is a matter of law for the courts to determine and so with time, no doubt, we will see a body of case law build up which gives us guidance on this question. Nevertheless, an initial analysis of the text of the policy suggests that the interpretation of some elements are likely to be more controversial than others.

The obvious starting point is to consider what it is concerned with. The answer to this appears in terms in the first sentence of the paragraph: it is seeking to ensure "that new development can be integrated effectively with existing businesses and community facilities". The question then becomes what is meant by "new development" and "existing businesses and community facilities". New development is not defined anywhere in the NPPF, but in planning law development is generally understood to mean the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of buildings or other land[2]. Paragraph 182 tells us explicitly that new development includes changes of use so there can be no argument about whether or not that is included. What is meant by "new development" as opposed to simply "development" is an important point as

1 Section 38(6) of the Planning and Compulsory Purchase Act 2004.

2 Section 55 of the Town and Country Planning Act 1990.

it will determine whether or not the paragraph is engaged. For example, if a residential block of flats seeks planning permission to make a number of external alterations, does that engage this paragraph? Or because the flats are already in existence, does that mean it is simply development rather than new development? Given the purpose which the paragraph is aimed towards, I think it more likely that the correct interpretation will be found to be that it is concerned with the creation of something entirely new, rather than a mere modification to something that is already there. But again, the answer to this question is likely to be a fact-sensitive one that has to be determined on a case by case basis.

Planning authorities can only grant or refuse planning permission for development that requires planning permission. This may seem a statement of the obvious but it is a significant one. Some development does not require an express grant of planning permission as it benefits from permitted development rights which are conferred by a general development order. In such instances, LPAs' ability to considered the acceptability of the development by reference to policy are much more limited and, in many cases, absent altogether. For example, the change of use of certain retail and other premises under Class M of the GPDO. In such cases, LPAs will not be able to invoke agent of change because it will be beyond the scope of their powers. This is significant for licensed premises as when they are potentially effected by a development that is being carried out by permitted development rights, their ability to make representations to the LPA will be much more limited.

Next, what is meant by "existing businesses and community facilities"? The paragraph gives us a partial answer to this question by listing "places of worship, pubs, music venues and sports clubs" as examples. It is clear that this list is simply illustrative rather than exhaustive and it seems likely that most licensed premises will fall within the class of either being a business or community facility.

What the paragraph then seeks to do is prevent exiting businesses and community facilities from having "unreasonable restrictions" placed on them as a result of new development. No definition of what will constitute an "unreasonable restriction" is provided. In law, an unreasonable decision is sometimes defined as a decision so unreasonable that no reasonable decision maker could have made it.[3] However, it seems likely that what amounts to an unreasonable restriction will be a question of fact and degree for the decision maker to decide on a case by case basis, having regard to the specific context of the business or community facility that is to be effected by the new development.

As well as there being no definition of what is meant by "unreasonable", there is no explanation of what is meant by a restriction. In the context of a licensed premises, does this mean an impact upon its hours of operation, which licensable activities it is able to carry out, or how the premises' customers are able to physically access the premises? Arguably, it is all of these things and more. Again, it is likely to be given a broad interpretation so that if the presence of the new development would negatively alter how an existing facility or business operates, then that could amount to a restriction.

It is perhaps in the final sentence of the paragraph that we find the crux of the principle: "Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed" (emphasis added).

It seems that what this is seeking to do is put the onus on the new development, the agent of change, to mitigate against any significant adverse effect that pre-existing businesses or community facilities might have against its future use or occupation. To ascertain whether or not the obligation to put in place mitigation is engaged, there are a number of steps to be considered.

The first step is an evidential one. The words "could have" indicate an initial threshold that there must be some evidence that the new development could be impacted by development that is already in existence. In the absence of any evidence, it is not possible to say that there could be any effect and so the existence of some evidence of potential impact must be a pre-requisite to relying on this principle. The use of the word "could" is interesting. The authors of the paragraph chose to use this rather than, say, "would". There is a difference between the two: "would" implies a greater degree of certainty than "could" and would have therefore seemingly demanded a greater degree of evidence to demonstrate that an effect "would" occur. Whereas, the use of the word "could" suggests that the evidence relied on to engage the principle does not need to be as robust as demonstrating certainty of impact, potential for impact might be sufficient. Yet again, ultimately the question of whether there "could" be an impact is going to be one of judgement.

The nature of "adverse effect" is also not defined and so there is seemingly no limit to the nature of the effect that the paragraph is concerned with. The obvious type of effect when thinking about licensed premises is noise nuisance but the

3 This is what is known as *Wednesbury* unreasonableness.

paragraph does not provide any specification in this regard and so other effects could also be caught by it. Whether or not something is significant can only really be considered in context. What is significant in one case could be insignificant in another. So in assessing significance of an adverse effect it will be necessary to have regard to the nature of the new development, its size and the sensitivity of its users, to name but a few potentially relevant factors.

The paragraph ultimately requires that where there is evidence that there could be a significant adverse effect on the new development caused by exiting businesses or community facilities, then “suitable mitigation” needs to be provided. But to what level? The answer to that is wholly lacking in the paragraph. Does it require total mitigation so that there is no effect, or mitigation to reduce the level of effect to simply being below a significant adverse effect? This issue is likely to be hotly contested in front of decision-takers. Licensed premises will want to see as much mitigation put in place as possible in order to try prevent any complaints being made about their premises, whereas developers will want to minimise the amount of mitigation they are required to install in order to keep costs down.

As is clear from the preceding paragraphs of this article it is simply not possible to definitively say where we are now. What it is possible to say is that agent of change is now here. The new NPPF has been published and from its date of publication LPAs are required to have regard to it. At a very minimum what it means is that LPAs should consider whether new development could be adversely effected by existing businesses and community facilities. If they consider that the new development could be adversely effected, they then need to consider what that level of effect is. If they consider it to be significant then they should be requiring the agent of change (the developer) to mitigate against it. What the appropriate level of mitigation should be is a question that is open to discussion, along with many of the other issues raised above, but it is ultimately likely to be a matter of judgement for the decision taker.

Freddie Humphreys
Barrister, Kings Chambers

Regional Training Days

North West
12th December 2018 - *Warrington* 15

East Midlands
6th December 2018 - *Nottingham*

North East
6th December 2018 - *York*

South East
13th December 2018 - *Faversham*

London
14th December 2018 - *Kennington*

Wales
6th February 2019 - *Llandrindod Wells*

Immigration and illegal workers in licensed premises

The Immigration Act 2016 is a Government response to widespread concerns about the number of foreigners entering the UK. **Gary Grant** puts the legislation in a wider context

Great Britain has long been taken over by immigrants. Our capital city, Londinium, was founded by Italians nearly 2,000 years ago. These Romans had very different values to us, failed to fully integrate yet changed our laws and culture forever. Our alphabet is Roman. Yet we use an Arabic counting system and measure lengths with a French system. We drink a Chinese concoction called tea and wear an Indian style of clothes in bed called pyjamas. A few hundred years after the Romans left our sceptred isle, Anglo-Saxons from Germany, Denmark and northern Holland invaded and illegally settled in our country. Scandinavians then did similarly over a thousand years ago. They raped and pillaged. They refused to learn our language (and even more disconcertingly never actually wore horns on their helmets). Then the French Normans came via Hastings, uninvited, and with malicious intent to supplant our heritage, laws, customs, and currency with their own very foreign ones. Our country's official language was established as Norman French. Whether we liked it or not. These immigrant parvenus confiscated land from the peoples of Great Britain without compensation. They took our jobs and controlled the best positions. Meanwhile immigrant craftsmen designed and built the most British of landmarks at the Tower of London. Jews, Roma, Celts, Picts, French Huguenots, Indians, Africans, Germans, Russians, West Indians and Eastern Europeans all followed in wave after wave of immigration. Right up until today. Sometimes they did so lawfully, at other times illegitimately.

Our traditional national dish, fish and chips, was the invention of Jewish refugees from Portugal and Spain. More recently, our favourite cuisine has returned to the purer, more British dish we know as chicken tikka masala.

Britain's pride in its recent Olympic glories rests heavily on the shoulders of a slender long-distance runner born in Somalia. The father of our next King is a Greek immigrant, only here by virtue of a particularly convenient marriage to Elizabeth, whose grandfather changed his German family name from Saxe-Coburg-Gotha shortly before the First World War. George I, the German aristocrat who became the first Hanoverian King of Great Britain, would have rolled in his grave. And what could be more British than the Mini car, the design of yet another Greek immigrant ? Our concept of democracy as a political model (as well as the equally esteemed editor of this journal) both have their genesis in the very same Mediterranean cradle of civilisation. The most British of all shops, Marks and Spencer, bears the names of two Polish Jewish immigrants. Harrods is owned by the State of Qatar which bought it from an Egyptian immigrant. Our current Home Secretary is the son of Pakistani immigrants and the current Speaker of the House of Commons stems from Romanian Jewish stock. Our greatest war leader, Winston Churchill, was the son of an immigrant American mother. Indeed the insignificant author of this article is only here thanks to his Jewish forebears' escape to Britain from the Russian anti-semitic pogroms over a century ago.

The United Kingdom itself, as its name suggests, is the rather glorious mixing and merging of four very different and equally proud nations. Each with their own language, literature, history, tribal myths, outlook and culture. England's Patron Saint, whose cross was waved with pride at the recent World Cup (and also, ironically, by English Nationalists), was a Roman soldier of Greek origin who never set foot in England. The jury is still out on whether he managed to slay the dragon.

There has rarely been a time when these waves of immigration did not cause concern, consternation, or worse, among the British people. They usually expressed themselves civilly but not always. Having arrived with the Norman Conquest a hundred years earlier, in 1190 the Jewish community of York was trapped in the castle by a mob of townspeople. All were either massacred or committed suicide to avoid the worse fate that awaited them outside the castle walls. Exactly 100 years later the entire Jewish population of England was expelled on the orders of Edward I (the "Hammer of the Scots"). They returned again at Oliver Cromwell's invitation. The Windrush generation of invited immigrants from the Caribbean arrived in the UK in the 1950s and 1960s to signs in the front windows of certain B&Bs helpfully explaining: "No Irish, No Blacks, No Dogs". More recently, the same generation became collateral damage in the pursuit of a "hostile environment" for "illegal" immigrants sought after by Governments of all flavours over the past decade. Their treatment is our disgrace.

Our responses to immigration ebb and flow. To a considerable degree the UK can rightly boast of its toleration for immigrants from around the world and has positively welcomed and sheltered them. But, sometimes, our response has been less congenial. It can be a response rooted in fear and suspicion of "the other". As a tribal species, "others" soon become a focus of our discontent. They can be exploited by "populist" leaders to firm up parochial loyalties and create a sense of unified purpose by creating a common enemy. This is particularly so when our lives may not be going to plan, the economy is sick and change is upon us with all the insecurities that can bring. Identifying a scapegoat, and anyone perceived as different will do, can help alleviate those insecurities. It cushions us from the reality that we all need to constantly adjust to survive and prosper in a rapidly changing world. The familiar calls then come that these immigrants do not share our values, are alien to our culture and refuse to integrate. They take our jobs and housing, drive down salaries and place overwhelming stresses on our schools, hospitals and other public services. They are merely rapacious economic migrants and not "proper refugees" escaping terrors in their homelands, and so, the argument goes, deserve none of our sympathy and much of our wrath.

The increasingly scorned "economic migrants" from Eastern Europe and farther afield often represent the most dynamic and industrious members of their own societies. Men and women who possess the courage to gamble everything by migrating to a strange land, more stable and blessed by providence than their own, in order to make a better life for themselves and their loved ones through their hard work. Which one of us has a different objective in life? Who among us has the coldness of heart to condemn them?

The reality is that Great Britain's vitality, culture, values, and a fair degree of its success, has long depended upon, or at the very least has been heavily influenced by, immigration. Anyone who claims to be an indigenous Brit wishing to preserve our "national purity" reveals themselves to be not so much a patriot as a rather lousy historian of the imaginary country they pretend to love. The very essence of "Britishness" flows from the bubbling melting pot of our differences.

But history also demonstrates that unchecked immigration can be a highly disruptive force in society. It requires change, often rapid change. And many people are resistant to, and suspicious of, such change unless it is very carefully managed. The failure to do so may lead to hardships, resentment, prejudice, and the migration of otherwise decent people to the extremes on both the far left and far right of politics.

The recent Government focus on stamping out illegal workers within licensed premises should thus be seen as another attempt by the State to manage these changes and deal with the challenges that have arisen from the most recent wave of migrants into Albion.

The current challenges in the licensed sector

Why the current focus on licensed premises and what has been done to address the concerns surrounding illegal workers?

Immigrant workers are crucial to the UK's leisure and hospitality sector. Overall, some 40% of employees are from the EU with a further 10% arriving from the rest of the world. The number of restaurant workers from outside the UK has risen to 61%. This recently led Kate Nicholls, the CEO of UK Hospitality, to comment (in July 2018)[1]:

> *This research underscores the message that UK Hospitality has highlighted to the government about the vital importance of EU workers to the hospitality sector, and the sector's overall importance to the UK economy. The Government has provided employers with short-term reassurances but we are now at a stage where we need to be urgently discussing future immigration policy beyond the transition period; one that will have a significant impact on the landscape of the sector.*

But sheer numbers is not the whole picture. Along with the vital (and lawful) immigration of workers into the UK's licensed sector comes those in the country illegally and / or without the right to work here. According to the Home Office, about 60% of all civil penalties for illegal working served in the UK in the year to February 2017 were issued in the retail, hotel, restaurant and leisure industry sectors. In other words the licensed sector. When introducing the Immigration Act 2016, the Immigration Minister, Robert Goodwill, explained[2]:

> *Illegal working cheats the taxpayer, has a negative impact on the wages of lawful workers and allows rogue employers to undercut legitimate businesses. These new measures will allow us to work more effectively with licensing authorities and the police to prevent illegal working in a high risk sector and take the action needed against businesses flouting immigration laws … Today's licensed premises provisions form part of a wider package of measures in the Immigration Act 2016 to tackle illegal*

1 http://casualdiningmagazine.co.uk/news/2018-07-19-just-half-of-workers-in-uk-hospitality-are-from-britain.

2 Robert Goodwill, *https://www.gov.uk/government/news/new-powers-to-tackle-illegal-working-in-licensed-premises* . The "English irony" of his name is not completely lost on the British Jewish author of this article, despite the welcome concerns recently expressed by the leader of Her Majesty's Loyal Opposition.

working, which is a key driver of illegal migration to the UK, and often leads to exploitation. They follow similar changes to the licensing regime for private hire vehicles and taxis which were introduced in December.

A further harm caused by the employment of illegal workers is its association with "modern slavery": the gross exploitation of vulnerable people for profit. Not all illegal workers are necessarily exploited. Some are paid a perfectly decent wage for a reasonable job properly done. But a significant number of illegal workers are likely to suffer on the darker side of employment practices. Employers of illegal workers know that the chances of their employee complaining to the authorities is small – because it may well involve mutually-assured destruction.

The type of issues experienced in licensed premises were illustrated in the well-known High Court decision in *East Lindsey District Council v Abu Hanif.*[3] Mr Hanif ran a take-away restaurant on the Lincolnshire coast called Zara's. He employed Mr Miah as a chef. But Mr Miah was in the UK illegally and had no right to work. He was paid in cash a salary well below the national minimum wage. PAYE tax was helpfully deducted from his wages by his employer who then pocketed the money himself instead of handing it over to the Revenue. In concluding that the council's original decision to revoke the premises licence at a review hearing was, on the particular facts of the case, the right one, Mr Justice Jay observed[4]:

Having regard in particular to the twin requirements of prevention and deterrence, there was in my judgement only one answer to this case. The respondent exploited a vulnerable individual from his community by acting in plain, albeit covert, breach of the criminal law. In my view his licence should be revoked. The respondent exploited a vulnerable individual from his community by acting in plain, albeit covert, breach of the criminal law. In my view his licence should be revoked.

In other cases, practitioners will be familiar with allegations where employees were paid no wages whatsoever for their work but instead were thrown scraps of food at the end of the day and permitted to sleep on filthy mattresses in vermin-infested broom cupboards or even in vans parked in the street. This treatment would sometimes coincide with mental, physical and sexual abuse of the dependent worker.

This treatment would sometimes coincide with mental, physical and sexual abuse of the dependent worker.

At the other end of the scale is a case that attracted significant media coverage just before Christmas 2017. A popular family-run Italian restaurant in leafy Twickenham, regarded as a "social institution", was the subject of a police review of the premises licence when an illegal worker was found working as a waiter. That waiter had been working at the restaurant for 20 years, mostly under a previous owner. When the current operators took over the restaurant they were told, and had good reason to believe, that the waiter was Italian. In fact he was born just the other side of the Italian-Albanian border and so had none of the advantages of being an EU citizen. The review application met with a tsunami of opposition from the local community, including local councillors. The licensing sub-committee, rightly, judged this case to be at the bottom end of seriousness, refused to revoke the licence and added modest conditions to the licence. The case demonstrates that each must be judged on its own facts and the proper outcome may be very different depending on the circumstances - even in today's climate[5].

The Immigration Act 2016, and the significant changes it brought into the licensing system, was not, by any stretch, the beginning of the Government's recent war against illegal workers in licensed premises. The Secretary of State's s 182 Guidance to the Licensing Act 2003 had for several years prior to the 2016 Act coming into force already identified the employment of illegal workers as a type of criminal activity that should be treated "particularly seriously" and where, on a licence review, it was expected that "revocation of the licence – even in the first instance – should be seriously considered" by the licensing authority."[6]

Immigration Act 2016 and licensing

The impact of the Immigration Act 2016 on licensing has been hugely significant. This article does not attempt a full exposition. For that the reader can turn to *Paterson's*, the bible of licensing law. But, in summary, the 2016 Act, most of whose relevant provisions came into force in April 2017, introduced the following reforms:

(i) Lowered the mental element in the pre-existing criminal offence of employing an illegal worker so that all that was required to be proved was that the employer either knew (as before) or had reasonable cause to believe the worker had no right work in the UK.
(ii) Increased the maximum penalty for the offence from two to five years' imprisonment plus an unlimited fine.
(iii) Increased the maximum civil penalty to £20,000 per

3 [2016] EWHC 1265.
4 At paragraph 18.
5 http://www.richmondandtwickenhamtimes.co.uk/news/15659956.Kew___s_long-standing_Caffe_Mamma_Ristorante_allowed_to_keep_licence/.
6 Section 182 Guidance (April 2018), paragraphs 11.27-11.28.

worker.
(iv) Inserted a new definition of entitlement to work into the Licensing Act 2003 (s 192A).
(v) Made the Home Secretary a Responsible Authority entitled to have his say on licence applications and in reviews (and immigration enforcement officers, with increased powers of entry and search, are being notably pro-active in assisting local authorities and police forces with their investigations into illegal workers in licensed premises and pursuing subsequent enforcement proceedings).
(vi) Issued guidance to local authorities on the prevention of illegal working in licensed premises and on right to work checks.
(vii) Prohibited individuals without the right to work in the UK from applying for premises or personal licences.
(viii) Placed a duty on applicants for licences to provide the licensing authority with documentation proving their right to work in the UK.
(ix) Introduced a system of illegal working closure notices and compliance orders to enable Home Office immigration enforcement officers to rapidly close an offending premises under the supervision of the magistrates' courts and later the licensing authority when the court's order triggers a premises licence review.

Conclusion

Our periodic national obsession with immigration is at least as old as the country we all live and work in. Though immigration throughout the centuries has helped to shape the culture and values we patriotically support, history shows that immigration must be carefully and thoughtfully managed to avoid the age-old backlash. The availability of work, including in the licensed sector, is a heavy pull factor encouraging immigrants to illegally enter the UK. Therefore the increased powers designed to deter the employment of illegal workers in licensed premises are an important step in managing the change and challenges that immigration brings.

As us British would say, "the more things change, the more they stay the same" or, as originally coined, "plus ça change, plus c'est la même chose".

Gary Grant
Barrister, Francis Taylor Building

Zoo Licensing
12 & 13 March 2019
Bristol

This two day course will focus on the licensing requirements and exemptions to Zoo licensing.

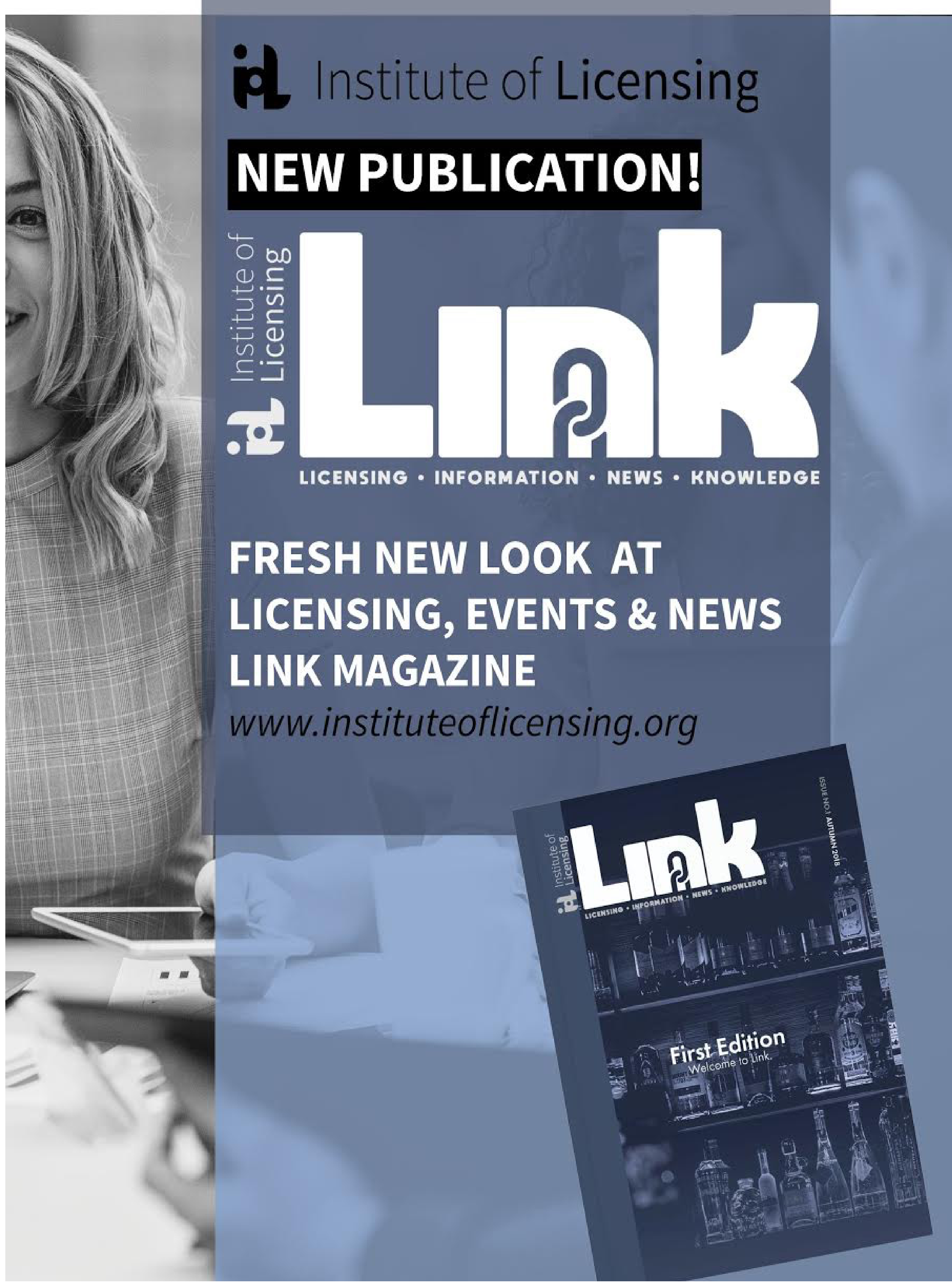
The first day will focus on zoo licensing procedure, applications, dispensations and exemptions. We will also review the requirement for conservation work by the zoo with input from the zoo's conservation officer.

The morning of day two will be spent with staff from the zoo conducting a mock zoo inspection. We will have access to various species of animals and the expert knowledge of the zoo staff. The afternoon will include an inspection debrief with vet staff reviewing the inspection, question and answer session on the inspection, then presentations on inspectors reports, refusal to licence, covering reapplications for zoos, dispensations and appeal and what to do when a zoo closes.

The non-member rate will include complimentary individual membership at the appropriate level until 31st March 2020.

The Institute of Licensing accredits this course at 10hrs CPD (5hrs per day).

Full details can be found on www.instituteoflicensing.org



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Welcome to Link.

Institute of Licensing News

National Training Conference 2018

Issue 22 of the *Journal of Licensing,* the November edition, coincides with 22nd National Training Conference, once again being held at the Crowne Plaza in Stratford-upon-Avon. With another exciting programme including over 60 sessions delivered by expert speakers in every field of licensing, this again promises to be an excellent event.

As always, the NTC programme covers a huge range of licensing and related subjects, and boasts an impressive range of speakers from industry, local authority, police and the legal world. We are indebted to our speakers for allowing us to offer such a wealth of training and discussion opportunities, and equally to our sponsors who support the event year on year allowing us to provide maximum value to delegates as well as giving them the opportunity to consider new products, systems and ideas.

It is always a great pleasure to facilitate this event, welcoming delegates from all over the UK for a fantastic learning and networking experience.

Team news

There have been some changes within the team over the last few months. Helen O'Neil left our admin team in May and more recently we have said goodbye to Hannah Keenan who left us in September after five years with the IoL to pursue a master's degree. Hannah has been a key member of the editorial team for the *Journal of Licensing* as well working with our sponsors and supporting our training and events. We will miss them both and wish Hannah and Helen all the best for their new ventures.

We are, however, delighted to welcome Lauren Pierce, who replaced Helen in the admin team, and Carla Sparrow has more recently taken on the role of Editorial / Graphic Designer and will join the Editorial team for the *Journal.*

National Licensing Week

National Licensing Week is an excellent initiative and continues to establish itself more and more each year. Growth so far has been fantastic, and it is undoubtably an important initiative for businesses, regulators and the public. It provides a fantastic opportunity to raise public awareness on important issues. A good example of this in 2018 was the County Lines campaign (Home Office and Crimestoppers) which we were able to promote before and during National Licensing Week. 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, whether it involves running a licensed business, advising on or regulating licensable activities. A blog 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?

There was a definite vibe on Twitter during NLW 2018 and we'd like to better it again in 2019, so tweet about your life in licensing, what you are doing each day, things you feel strongly about (in licensing terms) and so on. Use **#NLW2019** and include **@licensingweek**.

We are committed to continuing National Licensing Week and 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.

For more information and to get involved, email **NLW@instituteoflicensing.org**.

LINK magazine

The Institute of Licensing is delighted to announce our new publication LINK (Licensing, Information, News and Knowledge). We are delighted to announce the first edition of LINK, our new regular publication which will complement our established and well-respected Journal of Licensing. Through LINK we will provide you with news and information about licensing, the IoL and other areas of interest, bringing you contributions from a wide variety of people, on all areas of licensing and from differing perspectives. We intend to celebrate and showcase the IoL regions, people, achievements and initiatives locally and nationally. LINK will be a regular channel to update you about progress with IoL projects, course development, events, and much more. LINK will be distributed to IoL members on the same basis as the Journal is. IoL members should have received thier copy.

Enjoy this inaugural edition of LINK. Let us know what you think and make suggestions for future editions - volunteer to contribute or point us in the right direction. We look forward to hearing from you!

Training and events

2018 has proven to be an extremely busy year for the IoL

in relation to training and course development. We were delighted with the feedback from our taxi conferences in April (Swindon) and July (Leeds) and plan to repeat these events again next year.

Our gambling training has also proven popular with great feedback. One memorable bit of feedback from a long-term IoL member was that this was the best course (IoL or otherwise) she had been on for a very long time! Again, we will look at repeating these in 2019.

We significantly increased the number of professional licensing practitioner qualification (PLPQ) courses in 2018, with 10 courses compared with five in 2017, in order to meet demand. The courses continue to be popular with members and non-members alike.

Animal welfare training has been in demand as a result of the new arrangements coming into force in October 2018 and we have been extremely fortunate to have an excellent project team enabling the provision of a series of one-day courses, which started in September. We are, of course, also looking at the training requirements for qualified inspectors going forward and will keep members informed on developments in this regard.

Our training plan for 2019 is in progress but, as always, we welcome your thoughts and suggestions about training courses you would be interested in.

Suitability guidance for taxis and private hire

There continues to be substantial media attention highlighting the importance of robust vetting of applicants in the hackney carriage and private hire trades, and there are plenty of examples unfortunately of the consequences of not doing so.

The Institute's *Guidance on determining the suitability of applicants and licensees in the hackney and private hire trades* has been in circulation now for six months and we have been delighted with the response so far.

A survey of local authorities has been undertaken with a view to assessing the impact of the guidance, which was produced by IoL in partnership with LGA, LLG and NALEO. We look forward to sharing the results of that survey in due course.

Consultations

Society lotteries reform (June 2018)

In June the Department for Digital, Culture, Media & Sport launched a consultation on changes to the amount of money society lotteries can raise for good causes. The consultation concerned both large and small society lotteries and considered Government recommendations to increase the maximum draw prize for large society lotteries to £500,000 (previously £400,000). The consultation also asked for views on increasing the number of tickets society lotteries can sell to a value of £100 million per year and the amount they can raise per draw to £5 million.

In the case of small society lotteries, the consultation sought views on amending individual per draw sales limits to £30,000 or £40,000 and annual sales limits to £400,000 or £500,000. The consultation noted that there has not been a strong call from the sector for any change to sales limits for small society lotteries, but the Government considers that increasing the limits would help towards minimising the administrative and regulatory burdens.

IoL members were consulted via online survey although very few responses were received. The views from those who completed the survey indicated:

Large society lotteries

- Support for the Government's preferred option to increase the individual per draw sales limit to £5 million (currently £4 million).
- Support for the Government's preferred option to increase the individual per draw maximum prize limit to £500,000 (currently £400,000).
- A more divided response to any amendments to the annual sales limit with 50% of responses supporting that this remain at £10 million.

Small society lotteries

There was a rather different response when considering small society lotteries with 89% considering that the sales thresholds for small society lotteries (£20,000 for an individual draw, and a £250,000 annual sales limit) should remain unchanged.

Respondents considered that there would be no real benefit to amending the limits and that any changes would probably increase the administrative and regulatory burden on local authorities.

Government confirms ban on third-party sales of puppies and kittens

Confirming the Government's support for the prominent Lucy's Law campaign, Defra published a consultation on an outright ban that will mean anyone looking to buy or adopt a puppy or kitten must either deal directly with the breeder or with one of the nation's many animal rehoming centres.

The DEFRA website states that there although there are no records kept on third-party sales, estimates indicate there could be anything between 40,000-80,000 sales in Great Britain annually; and that there are approximately 74 pet shop holders actively selling puppies, of which 63 are in England.

The proposed ban will apply to England only.

Agent of change – plus ca change?

The agent of change principle is often discussed as if it were one single, concrete concept, but it is not. The principle appears in a number of different forms throughout planning policy and guidance but it does not have any definition within statutory law. It is sometimes described as a rule which requires incoming developers building new residential properties near existing music venues to install sound insulation into their new buildings, but this is a very narrow interpretation. The term itself has been used to cover any requirement - from insulating new build, to insulating the music source - to secure the harmonious co-existence of noise sources and noise receptors.

The National Planning Policy Framework (NPPF) and the National Planning Practice Guidance (NPPG) are Government policy, not law. Versions of the agent of change principle have always been present in this policy, and the current vogue for the latest iteration does not make it new. Old NPPF at para 123 always required attention to be paid to impacts of new development upon existing businesses. The NPPG currently provides further information on how to mitigate the adverse impacts of noise, and a future version is anticipated. Both sets of guidance have existed since 2012.

In 2013, the agent of change principle was filleted specifically to apply to new permitted development regulations, exclusively upon the conversion of office buildings to residential. This was enshrined in law in 2016.

In November 2016, the Mayor of London announced that he would be introducing an agent of change rule into the next London Plan. The Draft Plan was in consultation between December 2017 and March 2018, but there is still no word on what will become of draft Agent of Change Policy D12.

On 7 February 2017, the Government published the Housing White Paper - "Fixing our broken housing market". The annex of the paper, at A140 and A141, confirmed the current status of the agent of change principle in the existing NPPF and set out the intention to amend it "to emphasise that planning policies and decisions should take account of existing businesses and other organisations, such as churches, community pubs, music venues and sports clubs, when locating new development nearby and, where necessary, to mitigate the impact of noise and other potential nuisances arising from existing development". This was publicised at the time as being a major breakthrough, but then everyone forgot about it.

In May 2017, the Welsh Assembly announced the intention to adopt the agent of change principle into future editions of Planning Policy Wales (the equivalent of NPPF).

On 5 December 2017, a UK ministerial statement on planning was made with regard to the implementation of the agent of change principle in Scotland. Work on the legislation there, as opposed to policy, is ongoing.

In January 2018, a private members' bill to introduce the agent of change principle into law received its first reading. It received significant support and no objections. Further readings of the bill were timetabled but did not happen because the Government offered as an "alternative" the amendments to the NPPF that, as seen above, were always proposed in any event.

The bill would have imposed upon planning decision makers a duty to take particular care before granting planning permission that might have a negative impact, akin to that arising where heritage assets are affected. This would have worked, in the context of the agent of change principle, by applying extra pressure on developers and decision-makers to get the equilibrium right whenever new development would be likely to upset the status quo for existing music venues and other noisy businesses, which were there first and not causing a problem in their environment to date. The introduction of new noise sensitive receptors, and then giving them precedence in future proceedings when they come into conflict with the noise sources, is the very issue that the agent of change principle is trying to cure.

The bill was not to be: there was no political appetite for it, and policy was long ago selected as the preferred vehicle to try and deliver the perceived agent of change benefits.

The euphoric reception of the adoption of para 182 of the NPPF 2018, in the press and elsewhere, betrays a misunderstanding as to what has actually occurred with agent of change of the ground. In this context, it might be concluded that all change is good change, but agent of change remains a scattergun concept that achieves, to date, so much less than it is capable of.

Sarah Clover
Barrister, Kings Chambers, Birmingham

Fire safety is not a tick box exercise

When to carry out a fire safety assessment is one of the tricky aspects of ensuring you have the correct systems in place, as **Julia Sawyer** explains

The Great Fire of London in 1666 led to a major change in how buildings were built. In the following year, the London Building Act was passed and for the first time surveyors were empowered to enforce the regulations. Throughout the centuries since, compliance with the regulations has always posed challenges for creative architects and engineers pushing the boundaries of building design and construction. Right up to and including the present day, building professionals find their work can bring them into conflict with fire safety regulations and legislation and the safe management of a premises.

To ensure there is an adequate fire safety management system in place it is important that any premises uses a fire strategy and fire risk assessment as the basis on which to build a fire safety management system.

With a new build or a refurbished venue, there is always a balance to be struck over when is the most appropriate time to carry out a fire risk assessment. The purpose of a fire risk assessment is to look at the risk to life and building. Guidance tells us that a fire risk assessment should be carried out before work is carried out that presents a risk of injury or ill health.

The fire strategy details the life safety systems that are required to be in place to protect life and the building. This is carried out at the planning and design stage with all relevant people involved, prior to a building being occupied by staff and the public. But the most realistic time to carry out a fire risk assessment is when the building is occupied, which goes against what the guidance tells us.

This article looks at the differences between a fire strategy and a fire risk assessment, the importance of both, and how the design stage is crucial for achieving a robust fire safety management system that's agreed with all the relevant people involved.

Fire strategy

A fire strategy is an all-encompassing document that acts as an overview how fire can impact on a building and a business. A fire can threaten not only people's lives but also an organisation's assets and ability to operate normally, thereby disrupting business functionality.

Building regulations require that there should always be an alternative escape route in the case of a fire. This can be difficult in buildings with open plan design or single staircase escape routes. A fire strategy sets out the means of escape and measures that must be put in place to prevent fire and, if one should occur, to limit its spread.

Typically, they will cover:

- Evacuation routes and exits
- Fire alarms and emergency lighting
- Fire fighting equipment
- Fire rating of walls, doors, floors and structure
- External fire spread issues
- Facilities for the fire brigade

The fire strategy will also include details of any fire engineering that has been used, such as smoke modelling, evacuation modelling or structural fire engineering. It should also include control measures to make sure on-going maintenance is put in place, and that the strategy remains effective for the life of the building.

There are numerous methods of achieving the performance requirements of the Building Regulations for any type of building or development. The most common approach is using Approved Document B, BS9991 and BS9999.

A good strategy demonstrates and establishes the objectives for means of escape, including travel distances, escape within the compartments, escape within common areas, disabled evacuation, number of escape routes and final discharge widths based on occupancy load factors. Each identified group will be analysed with consideration given to independent means of escape and any impact caused from reliant evacuation.

A fully engineered fire risk strategy will identify the extent of fire protection required throughout the building including linings, unprotected areas and the standard required for external wall construction. The strategy should describe

the applicable design standards for external vehicle access, hydrants, location and number of access points, fire-fighting lifts, internal access, dry / wet rising fire mains, etc, evaluate current fire service access and advise as to the applicable engineering solutions available to satisfy both the Building Regulations and the relevant local fire authority.

The strategy often takes the form of a plan. The complexity of the building will indicate the scope of detail required on the plan. If it is a small building with one route in and out, initially a simple scaled drawing of the premises would be sufficient, showing any relevant structural features, storage and plant, etc. The plan should indicate hazards and persons especially at risk, and identify where combustibles and ignition sources come together, or are in close proximity, and the action to be taken. If there's a fire at the premises, a copy of the plan would assist the fire service's operations. The more complex the building with shared use, etc, the more detailed the plan should be.

Fire risk assessment

A fire risk assessment is a process involving the systematic evaluation of the factors that determine the hazard from fire, the likelihood that there will be a fire and the consequences if one were to occur.

The Regulatory Reform (Fire Safety) Order 2005 imposes a statutory duty on owners, occupiers, managers or employers to provide reasonable fire safety for all personnel who work within the building or have reason to be within the building, for example contractors, customers etc. This is enacted under the Regulatory Reform (Fire Safety) Order 2005 in England and Wales, the Fire (Scotland) Act 2005 in Scotland and the Fire and Rescue Services (Northern Ireland) Order 2006 in Northern Ireland. Under these regulations, the “responsible person” is legally obliged to ensure that the fire risk assessment is carried out and to deal with any problems that were highlighted during that assessment. (The relevant phrase is “duty holder” under the Scotland regulations and “appropriate person” under the Northern Ireland regulations.) Employees also have a statutory duty to take care of themselves and others who may be affected by their acts or omissions.

- A fire risk assessment should look at the following areas: The identification of people at risk from fire in or around the premises
- Planning and protection of escape routes from any area that may be threatened by fire
- Construction and finishing with suitable materials and embodying fire resistance in the structure
- Segregation of high fire risk / hazard areas
- Fire warning systems and, where appropriate, systems for the automatic detection of fire
- Automatic fire extinguishing systems to limit the growth of fire
- Smoke control measures to maintain the effectiveness of escape routes and to assist fire fighters
- The provision of fire-fighting equipment, whether for use by employees in containing fire in its early stages or by way of assistance to the fire service
- The provision of reasonable access to the building for the fire service, including facilities for the safe and rapid extinction of fire by the fire service
- Effective management control systems
- The fire risk assessment should be reviewed:
- If it is no longer valid
- If there has been a significant change

There is no set frequency for carrying out a review, if the above does not apply then guidance states an annual review is recommended.

A generic fire risk assessment can be carried out with plans, material specifications, capacities, etc. This looks at what should be in place in a clinical environment, from plans through to the fire strategy and looking at a building layout.

However, it is not until human factors are added - lack of training, human error, lack of experience, demographics, language, culture - that you can truly have a realistic fire risk assessment.

This is always difficult to have a realistic fire risk assessment in place for a new build or a refurbishment of a premises when deadlines are tight. A fire risk assessment can be written using the fire strategy, and the design specifications of the building written by the fire engineer and structural engineer and architect. But what these cannot show are the management issues that often evolve when a building has been in operation and this is what the enforcing authorities see. They don't see the fire strategy, they see issues such as:

- Blocked fire exit routes
- Covering of heat / smoke detectors
- Dirty extraction fans
- Equipment that has had no maintenance
- Poor housekeeping
- Fire shutters blocked
- Lack of awareness of fire safety procedures in staff
- Furniture and / or equipment placed in front of life safety systems

The fire risk assessment should be treated as a live document – not just carried out and then left on the shelf. It

should aid training of staff and should be revised to inform and instruct the staff who implement fire safety procedures.

Management needs to keep staff motivated to place a high priority on fire safety issues. Ways to avoid complacency need to be introduced, so that fire safety is always treated with the care and consideration that is required rather than becoming a tick box exercise. A walk around is no good when the building is empty; it needs to be carried out during get-ins and get-outs, when the building is full of people, to ensure your fire strategy is actually being complied with. Only this way can the responsible person for the building be sure that everyone in there would be able to get out safely should an emergency occur.

Ideally, a fire strategy and fire risk assessment should be in place prior to a venue opening the doors to the staff and public, and a further independent fire risk assessment be carried out once the venue is open.

More often than not, because of time and financial constraints, a venue's fire strategy is often not communicated to those working at the premises. Just as worryingly, the independent fire risk assessment is usually not reviewed until a year has gone by.

It is the author's opinion that an independent fire risk assessment should be carried out within the first three months of the premises being opened to give a true reflection of how the venue is being managed and how the life safety systems are operating. In addition, training given to staff should include detail from the fire strategy.

Be prepared

When an enforcement officer calls, make sure:

- Staff are knowledgeable – they know where to find documentation, they know where the assembly point is and they know what to do in an emergency situation.
- Documentation is easily available to them – to include the fire strategy, the fire risk assessment, the maintenance and testing record of the fire alarm system, the staff training records.

Get in the habit of:

- Ensuring the fire doors are not wedged open. If there are certain doors in the building that are opened regularly, fit them with an electronic door hold-open that will automatically close on activation of the fire alarm system.
- Ensuring that furniture / equipment does not obstruct the fire exit routes.
- Ensuring the space below any fire and security shutters is kept clear.

Make sure you have a fire strategy and fire risk assessment in place

If you don't have a fire strategy in place, a retrospective one can be carried out to benchmark the existing condition against contemporary guidance (ie, Approved Document B or BS 9991.) This would identify deficiencies, provide information of the likely impact of each deficiency, and suggest mitigation that could be deployed.

Julia Sawyer
Director, JS Consultancy

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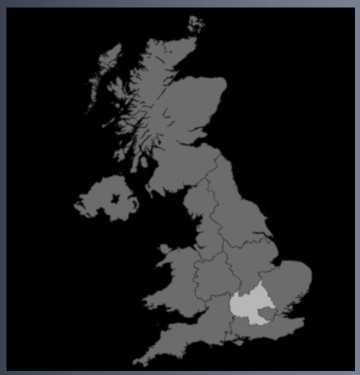

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Night Lives: a new approach to licensing the night-time economy

Possession of a controlled drug is a criminal offence but several police forces are supporting a drug-testing system that makes no attempt to punish drug users. This concept of co-existence of aims is one which is very familiar to licensing practitioners, suggest **Matt Lewin**, **Dr Henry Fisher** and **Professor Fiona Measham**

In 2016, 3.9m people attended festivals in the UK. In the same year, two independent festivals – Secret Garden Party in Cambridgeshire and Kendal Calling in Cumbria – piloted a service which provided on-site drug safety testing for festival-goers. Last summer, that service had expanded to three festivals. This summer, it has doubled to six.

The term coined for this service is Multi Agency Safety Testing (MAST). It invites festival-goers to submit substances of concern that they have brought onto site or bought on site for forensic testing to establish their chemical content and potency. The results of the testing are provided as part of an individually-tailored package of harm reduction advice and information is delivered by a trained healthcare professional. Crucial to the success of the service is that no one is at risk of arrest or of having any substances that they do hand over for testing confiscated.

Possession of a controlled drug (that is, a drug controlled and classified as an illegal drug under the Misuse of Drugs Act 1971 and the Misuse of Drugs Regulations 2001) is a criminal offence. Anyone approaching an on-site testing service in possession of a controlled drug is, in principle, committing a criminal offence. Equally, a person inciting another to commit an offence, or who encourages or assists a person to commit an offence, is themselves committing a criminal offence.

Yet Cambridgeshire, Cumbria, Hampshire, and Avon and Somerset Police have all supported the delivery of MAST on their patch and many more forces are planning to follow suit. Superintendent Hunt of Cambridgeshire Constabulary, who was the police officer responsible for policing the very first MAST service at 2016 Secret Garden Party, was reported as having said to *VICE* magazine: "We have some very clear objectives – they are to protect the vulnerable and to attack criminality. For me, if you're safeguarding people that render themselves vulnerable because of their possible use or drink or drugs, then why wouldn't you? Why wouldn't I agree with something that might help stop a loss of life? This 100% isn't a laissez faire attitude. As a police officer, an agent of the law, drugs possession and drugs supply are criminal offences, and we have to take a hard line. But I think they can co-exist."

The concept of co-existence is one which is very familiar to licensing practitioners. The risk of crime, disorder and nuisance, as well as harm to both adults and children is inherent in the business model of a typical licensed premises that sells alcohol late into the night. Yet the four licensing objectives strive for an ideal of co-existence between licensed premises and their neighbours: by requiring licence holders to operate their premises responsibly and in a way which minimises the risk of those identified harms from coming to pass.

Co-existence is also the concept that sits at the heart of the "Three Ps" approach to dealing with illegal drugs at leisure events. The "Three Ps" – Prevent, Pursue, Protect – was first developed at Kendal Calling in 2016, following the death of Christian Pay at the festival the previous year and draws on UK counter-terrorism policing. It is intended to be a more pragmatic alternative to the typical "zero tolerance" approach that leisure events and licensed premises are required to adopt as a condition of their licence, which does not appear to have made any meaningful dent in the number of people taking illegal drugs or coming to harm as a result.

The policy provides a structure for licence holders and their staff, the police, the licensing authority and others to work together to reduce drug-related crime and drug-related harm associated with licensed premises. It directs all parties to work towards: preventing drugs from getting on site or into the premises; pursuing those suspected of supplying drugs on site; and protecting the public from drug-related harm, including through innovative and effective harm reduction initiatives such as drug safety testing.

The policy has been designed to fulfil the licensing objectives of preventing crime and promoting public safety. While it results in less priority being given to the policing of drug possession (a policy already adopted by police forces across the country such as the Durham Checkpoint and Bristol Drugs Education Project), it redirects resources

towards the policing of more serious drug-related crime, such as supply,and other public safety concerns, such as preventing violence and safeguarding against vulnerability. It also reflects the fact that, under the 2003 Licensing Act, all four objectives are of equal weight and therefore keeping people safe from harm is just as important as enforcing the criminal law.

The Three Ps is just one of the many recommendations made in Night Lives, a joint report published by the All-Party Parliamentary Group for Drug Policy Reform, Durham University, The Loop and Volteface, which sets out practical solutions for managing drug use in the night-time economy. Your co-authors had a hand in the report: it was written by Dr Henry Fisher and Professor Fiona Measham, and Matt Lewin was an expert contributor.

Following interviews with 50 representative stakeholders in the night-time economy, the report identified the perceived barriers to the introduction of harm reduction focused policies such as the Three Ps and MAST in night-time environments, and proposed practical solutions for overcoming these perceived barriers. The central importance of partnership working between licensing practitioners and other stakeholders in local government, law enforcement and business underpinned many solutions. The recommendations flow from a recognition that measures to reduce drug harms, when implemented correctly, can both improve public health and safety, and prevent crime.

We argue that there ought to be no controversy among licensing practitioners about moving away from “zero tolerance” to a more pragmatic approach to drugs on licensed premises, or in adopting the recommendations in Night Lives which call for measures which go beyond the management of individual licensed premises and which can be applied across UK town and city centres.

Underlying the report is a message with which we would hope no one involved in the licensed trade would disagree: keeping people safe from harm ought to be our first priority.

Matt Lewin,
Barrister, Cornerstones
Dr Henry Fisher
Policy Director, Volteface and
Professor Fiona Measham,
Department of Criminology, Durham University

National Training Day 19 June 2019 Oxford

The Institute’s summer training day will return to Oxford for 2019. The National Training Day will take place at The Oxford Belfry Hotel, which is conveniently located near the M40 motorway.

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.

Full details of the agenda and training fees can will be release soon and will be found in the Licensing Flash emails and on our website - www.instituteoflicensing.org.

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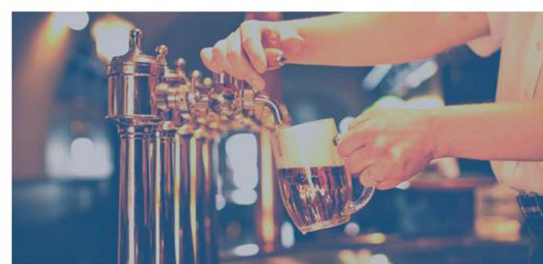

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Consultations, and outcomes

DCMS consultation on lottery reform, the much awaited outcome on gaming machines and changes to the Licence Conditions and Codes of Practice are all assessed by **Nick Arron**

In June, the (DCMS) published a consultation paper on its proposed reform to both large and small society lotteries. The consultation recognises that the lottery market has diversified with major charities using lotteries in order to raise funds and that societies are turning to remote ticket sales via websites to boost player numbers.

The consultation has been informed by recommendations made by the House of Commons Culture, Media and Sport Select Committee following a call for evidence by the DCMS back in March of 2015, together with advice given by the Gambling Commission.

When considering the advice it was to give, the Gambling Commission was asked to consider the following objectives:

1. The regulatory framework for society lotteries should not be overly burdensome.

2. Public trust and confidence in society lotteries and the good causes with which they are associated should be maintained; and

3. Reform should not jeopardise the position of the National Lottery and its returns to good causes.

Of particular interest to licensing authorities will be the proposed reform to small society lotteries. This would mean a change to the thresholds at which small society lotteries would require an operating licence from the Gambling Commission; the idea being that there would be a reduction in the regulatory burden. The Gambling Commission acknowledges within its summer bulletin that, should this reform be implemented, there would be an impact on licensing authority workloads as small society lotteries must be registered with the local authority within which the main office of the society is situated.

The changes to thresholds that have been put forward for small society lotteries (note that there is no Government preferred option) are:

a. Raising the maximum permitted proceeds from an individual draw from £20,000 to either £30,000 or £40,000; and

b. Raising the maximum permitted annual sales limit from £250,000 to either £400,000 or £500,000.

Should the changes come into force there will be other matters to take into consideration such as the limitations on societies when they promote a large lottery, and how once they have operated a large lottery they are then prevented from promoting any small lottery for four calendar years after the date that the large lottery was first promoted. There may be a requirement for transitional arrangements to deal with this point.

For large society lotteries which require a licence from the Gambling Commission, the call for evidence noted that by increasing limits, more funds could be raised for good causes. Society lotteries have been calling for sale and prize limit reform and the Gambling Commission advised that small changes to the limits would be unlikely to have a significant impact on the national lotteries' ability to generate returns for good causes. The consultation paper does however advise that it will be imperative to weigh up the risks to the National Lottery versus the ability of societies to raise additional funds in order to strike the right balance.

The Government's preferred proposed reforms for large society lotteries are:

a) Raising the maximum sale proceeds from a single lottery draw from £4 million to £5 million;

b) Raising the maximum single prize limit per draw from £400,000 to £500,000; and

c) Raising the maximum permitted annual ticket sales limit from £10 million to £100 million.

The consultation closed on 7 September 2018, and further details should now be available.

Category B2 stakes to be reduced to £2

It wouldn't be a gambling update without mentioning the reduction of the maximum stakes for Category B2 or Fixed Odds Betting Terminals (FOBTs). You may recall from the previous Journal that we were awaiting the DCMS response to the consultation on changes to gaming machines and social responsibility measures.

The headline-hitting announcement came mid-May, shortly after my last article, with the DCMS issuing its response which confirmed that the maximum stake for category B2 machines (FOBTs) will be reduced from £100 to £2.

The change will be made via secondary legislation and will require approval from Parliament. As at the time of writing, a timeframe for the changes has not yet been set; the press release advised that the Government will need to "…engage

with the gambling industry to ensure that it is given enough time to implement and complete the technological changes." If I was a betting man I would say implementation is going to be early 2019.

In addition to the announcement in respect of category B2 machines, the Government has also confirmed that:

- The Gambling Commission is to work with the industry in order to improve player control measures. This includes looking at the potential for ending sessions when player limits are met thereby limiting session losses to a cap.
- The Gambling Commission is to explore the costs and benefits of tracked play B1, B2 and B3 machines. In the last Journal I highlighted this aspect as an area of concern for operators owing to tracked play being expensive along the elevated social responsibility?? , which will likely mean a fall in revenues.
- Stake and prize limits are to remain as existing for other gaming machines.
- Stakes and prizes for prize gaming are to be uplifted with the Commission being asked to monitor and potential risks following this change.
- The Gambling Commission seeks to strengthen protections around online gambling including stronger age verification rules, improving terms and conditions and proposals to require operators to set limits on consumers' spending until affordability checks have been conducted.
- A major multi-million pound advertising campaign promoting responsible gambling, supported by industry and GambleAware, will be launched later this year.
- The Industry Group for Responsible Gambling (IGRG) has amended its code to ensure that a responsible gambling message will appear for the duration of all TV adverts.
- Public Health England will carry out a review of the evidence relating to the public health harms of gambling.
- As part of the next licence competition, the age limit for playing National Lottery games will be reviewed, to take into accounts developments in the market and the risk of harm to young people.

New licence conditions and codes of practice

In early August, the Gambling Commission announced that, following a twelve week consultation conducted earlier in the year, it will be updating the Licence Conditions and Codes of Practice (LCCP). The changes will come into effect on 31 October 2018. In its consultation response the Gambling Commission advises that "the changes will clarify the outcomes licensees must deliver for consumers, and provide a firmer basis for us to tackle those licensees who fail to deliver them."

The changes focus on three areas with the following key amendments to be introduced:

Marketing and advertising

A specific requirement for licenses to adhere to UK advertising codes. This is being elevated to a social responsibility code provision and, as such, if a licensee does not comply with this code, then the Gambling Commission can use the full range of its regulatory powers including financial penalties and revocation of licences.

Requirements about misleading advertising to be clear.
More stringent conditions relating to direct marketing meaning that customers cannot be contacted via direct marketing without their informed and specific consent in order to prevent spam marketing emails or text messages.
Licensees to be responsible for the actions of third parties, including marketing affiliates.

Unfair terms and practices

- Changes to the LCCP in order to make it easier for the Gambling Commission to take action when a licensee is not complying with the rules regarding:
- Consumer notices
- Changes to customer contracts
- Unfair commercial practices at any stage of a customer relationship.

Complaints and disputes

- Changes to the LCCP to clarify the outcome that licensees must handle complaints in a fair, open, timely, transparent and effective manner.
- Guidance is to be provided by the Gambling Commission for Licensees in order to assist and will include direction on:
- Defining complaints and disputes
- Complaint handling procedures
- Receiving complaints from different sources
- Time limits for complaints handling and escalation
- Customer information standards
- Reporting requirements

The above changes reflect the Gambling Commission's priorities as set out in its Strategy 2018 -2021 with the focus on protecting the interests of consumers, raising standards and improving the way in which it is to regulate the industry.

Nick Arron
Solicitor, Poppleston Allen

Questioning the evidence base for vertical drinking

Although licensing legislation has been informed by the concept of standing drinkers tending to anti-social behaviour, the evidence for this supposition is distinctly shaky, argue **Dr Darren Baxter** and **Dr Jed Meers**

Alcohol licensing has long been concerned not just with *where* people drink – those physical characteristics of the premises, entrances / exits, capacity, the vicinity, and so on[1] – but also with *how* they drink. One point of distinction has remained surprisingly resilient throughout the 20th century and into the post Licensing Act 2003 landscape: whether patrons drink standing up or sitting down. Government guidance, pasted into local authority licensing policies up and down the country, refers to this as the problem of "high volume vertical drinking" – the drinkers themselves known as HVVDs. The thesis is simple: vertical drinking quickly renders you horizontal.

The Home Office's guidance, issued under s 182 Licensing Act 2003, goes as far as to state that "previous research has demonstrated" vertical drinking "can have a significant bearing on the likelihood of crime and disorder"[2]. References to this "previous research" are sadly absent – an unsurprising omission when one tries to source studies which support the claim. We argue that the evidence base for differentiating vertical drinking from other forms is not convincing. It is a hangover (of a different sort) from early regulatory efforts inspired by the temperance movement which has little empirical basis.

Previous contributions to this journal have challenged "myths"[3] about alcohol or the "dodgy statistics" used to inform policy-making[4]. We suggest that vertical drinking can be placed in a similar category. A seemingly technical term based on an understanding of the physical environment and concerns over public safety, which is in reality – we argue – merely a proxy for distinguishing between "good" and "bad" drinkers.

The roots of vertical drinking

Concerns about drinking standing up are far from a UK-only phenomenon. Anxieties about what was known as perpendicular drinking informed early waves of state-level prohibition in the United States – as one 19th century contributor put it: "Make a law that nobody shall drink standing, and you will do all that possible by law... I shall make the title *An Act Against Perpendicular Drinking*'[5]. The term crept into public discourse in England at the height of concerns about Victorian gin palaces – with their extended bars and little seating – which were derided as an American import in Parliamentary debates on liquor licensing[6]. The term is peppered through the Peel Commission's influential 1899 report, justifying its own treatment under the heading "long bars and perpendicular drinking"[7].

Although consternation over drinking while standing was clearly present throughout the late 19th and early 20th centuries, evidence for its ill-effects was not. Rowntree's poverty study provided a trite recognition of "perpendicular drinking" as a point of distinction between premises based on observations of York pubs[8], but it was not until the Mass Observation study in the 1930s – a ethnographic report into "Worktown", a pseudonym for Bolton – before a detailed examination of drinking in public houses was published.

This study is at the root of the HVVDs. In wide-ranging

1 See Charalambides' discussion of 'good evidence' in Issue 15: Leo Charalambides, "A practical approach to evidence and decision making" (2016) 14 *Journal of Licensing*, 4-9.

2 Home Office, *Revised Guidance issued under s 182 of the Licensing Act 2003* (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705588/Revised_guidance_issued_under_section_182_of_the_Licensing_Act_2003__April_2018_.pdf> accessed 24th August 2018.

3 Suzanna Fitzgerald QC and Paul Chase, "Alcohol – the other side of the story" (2016) 14 *Journal of Licensing*, 22.

4 Kate Nicholls, "Dodgy stats belie alcohol's true value – they must be challenged" (2015) 13 *Journal of Licensing*, 42.

5 Dio Lewis, *Prohibition: A Failure* (Ticknor and Fields, 1875) 10-11.

6 HC Deb 26 June 1878 Volume 241 col. 277.

7 Royal Commission on Liquor Licensing Laws, *Report of Her Majesty's Commissioners Appointed to Inquire into the Operations of the Laws Relating to the Sale of Intoxicating Liquors* (House of Commons, 1899) 126.

8 Seebohm Rowntree, *Poverty: A study of town life* (1901) 309-310.

research – which rewards reading in full – the authors opine on issues as diverse as topics of pub conversations and the hats worn in pub lounges on Sundays. Importantly for our purposes, there is a chapter on drinking speed. The team observed over 1,000 pub-goers in Bolton – what they describe as "very difficult, laborious work"[9] – finding that the average consumption time for a gill of beer differed depending on whether the observed was in a pub lounge or vault. Those in the former (who are more likely to be seated) drank more slowly; the latter (who are more likely to be standing) drank more quickly. It is this study, returned to throughout other studies on the physical environment and alcohol consumption, which inspired the 20th century efforts to get drinkers to sit down.

The lack of modern evidence on vertical drinking

Given the importance and pervasiveness of the idea that the physical environment is central to influencing alcohol consumption, robust research papers are few and far between. The Home Office's Research, Development and Statistics Directorate and Crime Reduction Research Series reports both rely heavily on two studies to support their conclusions on the effect of over-crowding, and therefore standing, on drinking.[10] The first is an Australian study by Hamel et al, the original text of which acknowledges that "surprisingly little research" exists in the area before concluding that none of their variables on physical environment – including levels of seating – affected levels of violence once other factors were controlled for.[11]

The second is the so-called MCM study, also drawn on by the Number 10 Strategy Unit in their development of proposals which led to the 2003 Act, which is not concerned with vertical drinking at all, but rather the effective division of space – such as the erection of screens to support people flow – within drinking establishments.[12]

Why continue to use 'vertical drinking'?

Given the pervasiveness of the term and its employment in both Government and locally-implemented policy, we are left doubtful of whether distinguishing premises as vertical drinking establishments is really anything other than a common-sense shorthand for the sort of drinkers we do not want in city centres. We would be grateful if those licensing authorities – particularly in cumulative impact zones – who use the term vertical drinking to differentiate between establishments would get in touch if there is evidence they reply upon. If the focus is on drinking standing up or sitting down, we suggest that is not a distinction borne from evidence. If it is a proxy for something else, then what?

Dr Darren Baxter
Research Fellow, The Institute for Public Policy Research [writing in a personal capacity]
Dr Jed Meers
Lecturer in Law, York Law School, University of York

9 Mass Observation, *The Pub and the People: A Worktown Study* (Faber and Faber, 1943) 170.

10 See Ann Deehan, "Alcohol and Crime: Taking Stock" (Home Office Crime Reduction Series, 1999).

11 Ross Homel and Jeff Clark, "The prediction and prevention of violence in pubs and clubs" (1995) Crime Prevention Studies, 1-45.

12 MCM Research, Conflict and violence in pubs (MCM Research Ltd, 1990) 30.

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Licensing policies - fresh thinking?

Glasgow, Aberdeen and Edinburgh have taken very different approaches to their proposed new policies, as **Stephen McGowan** explains

Across Scotland, licensing boards are consulting in various ways on the updates to their licensing policies as we approach the five year update period in November 2018. The Licensing (Scotland) Act 2005 has been in force now since 2009 and this will be the fourth version of these various policies across the 35 licensing boards in Scotland. You would expect that over this period the licensing system would have settled down to some extent, but the opposite is true. We have had a continuous onslaught of changes to the licensing system in the last ten years, so that licensing practitioners of all backgrounds have barely had a chance to draw breath. Will the fourth iteration of these policies finally put down roots, or will the statutory flux mean we are still in a voyage of licensing discovery? Our three largest cities - Glasgow, Aberdeen and Edinburgh - have all taken extremely different approaches to their proposed new policies and each has attracted press coverage as the consultation processes unfold. So what do they have in store?

Glasgow – supporting live music culture?

Let's look at Glasgow first. The largest licensing authority in Scotland has put forward a proposed policy which has a number of bold and novel ideas, the most significant of which is almost certainly the idea of a pilot project for 4am licences for late-opening entertainment premises in the city. The proposal will apply to city centre premises only and, as I understand it, will be in the form of encouraging major variation applications seeking 4am, which will be considered on their own merits but in light of the new 4am approach – and if granted would subsist for a one year period before being "called in" for a review to see how it is working.

The policy reflects on continued issues over what may or may not constitute substantial or significant entertainment and has even created a policy definition for what constitutes DJ live performances. In order to be classed as substantial entertainment, a DJ set in Glasgow must meet the following six criteria:

1. *All music must be selected and played by a DJ or DJs on a live basis.*
2. *The DJ must be concerned with DJing music and not engaged in other activities within the licensed premises.*
3. *The equipment being used must allow at least two tracks to be played simultaneously.*
4. *The equipment being used must allow the DJ to control the pitch (or tempo) and volume of the tracks being played and also control the sound equalisation of those tracks across at least three frequency bands - treble, mid-range and bass.*
5. *The venue must provide monitor speakers to facilitate the maximum performance of the DJ.*
6. *The licensed premises must have an adequate sound system which has been subject to acoustic room controls.*

It is envisaged that this new test will be used in contemplation of 4am applications. There is an ongoing debate in the city over the existence of so-called "hybrid" licences, which are typically late- opening bars that may be licensed from 11am to 3am; compared to what might be termed genuine nightclub premises and may only be licensed from 7pm to 3am.

A number of nightclub operators have been concerned that later opening bars are encroaching into their commercial zone. However, financial implications are irrelevant to a licensing decision. Premises with the 11am to 3am licences have been granted under previous regimes but it now means that both "hybrid" and nightclub premises could make 4am applications.

If the Glasgow 4am pilot goes ahead, it will be interesting to see how many operators apply and how successful these are for the city. The board policy does reflect consistently on how important music is to Glasgow on a cultural level, and to that end it even proposes adopting the agent of change principle as part of licensing policy. This would be novel to say the least. The agent of change principle is of course a planning principle and has not even been adopted into Scottish planning law formally (yet), never mind in licensing law. It has been raised anecdotally at licensing hearings across Scotland and the rest of the UK by solicitors like me arguing against neighbour complaints of course – but to formally adopt this within licensing policy is something entirely new and I suggest a seriously bold step. There have been some other cases where licensing boards have approached something along these lines. For example, in Perth & Kinross, following a licence review in which I appeared for a hotel premises, the board reacted to the case by withdrawing its

own policy on noise and public nuisance. I had referred to the agent of change in submissions and it was clear that the board members were sympathetic to this position.

Edinburgh – going in the opposite direction?

The capital city is taking a very different approach to policy. The board as it currently sits has in recent months made decisions which are in stark contrast to its own existing policy. Applications for on-sales starting at 9am are within policy in Edinburgh, but are now facing refusal or considerable scrutiny; similarly, applications for restaurants seeking a licence to 3am – which, again, is within policy - are also now being asked to cut back to 1am. It is clear that the current board members have little time for the policy of their predecessors and are openly ignoring and undermining it in various applications. And, unlike the somewhat liberal and imaginative approach of Glasgow, Edinburgh appears to be going in the opposite direction. They have, for example, put forward a suggestion in their new policy consultation to increase restrictions on children and young person's access to licensed premises, which has attracted considerable press coverage and is perhaps seen as a surprising move for a city which has such a high profile tourism and culture demographic.

However, this is no surprise for those of us who appear before the Edinburgh board regularly, as again individual applications have been scrutinised in relation to children's access for some time, and it has long been the case now that applications seeking a relaxation for children and young persons access is almost certainly continued at the first calling to allow for a site visit to occur. At the same time, Edinburgh is also proposing to increase the number of overprovision zones within the city. Currently, Edinburgh has only one "full" overprovision zone – the Grassmarket – but also another seven or so areas which it labels as areas of "serious special concern", which are a sort of "overprovision-lite". The new policy has put forward 38 – yes, that's 38 – areas of possible overprovision. This is a sea-change approach for the board in the capital, which for years has been known to have a more liberal approach to licensing than many other authorities. It is not difficult to see why some commentators might suggest that creating 38 new "no licence" areas gives the impression that Edinburgh is closed for business, yet others will no doubt take the view that such a measure is necessary to tackle alcohol harm.

Aberdeen – championing the night-time economy?

Finally, a fascinating story is emerging in Aberdeen with respect to its licensed hours. This is a city which has some difficult times in the night-time economy, with the oil and gas sector downturn meaning fewer people coming in from the rigs and ships. Aberdeen has responded boldly, appointing Scotland's first Night-Time Economy Manager, and leading a number of night-time economy initiatives through the Business Improvement District, Aberdeen Inspired. There have been a number of applications for later hours granted, and some rejected, for clubs and bars of varying types, and the city has found itself in a state of fluidity. Now, the Aberdeen policy has cut through all of the hoops and limbo poles surrounding what constitutes entertainment and what "style" a particular premises might be, and simply said that the terminal hour for the city centre is 3am. No substantial entertainment test, no debates over whether you are a pub or a club or a hybrid or something else. This is courageous thinking from a licensing board clearly struck with efforts made by the BID and the council to reinvigorate the night-time economy. However, the move has been controversial. The nightclub industry in the city are very concerned about this and worry that it will just means pubs will all open to 3am.

From a licensing practitioner view, what is really important here is that I think this is probably the first proper effort by any licensing board in Scotland to truly deliver what Sheriff Principal Gordon Nicholson proposed in his report which led us to the Licensing (Scotland) Act 2005 – the introduction of the single "premises" licence and doing away with all the old categorisation, ie, "public house", "restaurant", "entertainment" and so on.

The single premises licence was supposed to revolutionise the licensing world – but what has actually happened is that we have ended up with a single premises licence but with all the old licence categories through the "back door" of licensing policy on hours. It will be fascinating to watch the Aberdeen policy unfold.

Stephen McGowan
Partner and head of licensing (Scotland), TLT LLP

How Guildford introduced its taxi livery policy - successfully

Introducing big licensing change to the local taxi trade was a major undertaking for the council that has not always got things right in the past. **Mike Smith** explains how it succeeded this time

Since Guildford Borough Council introduced a taxi livery requirement in late 2015, I have received a number of enquiries from other local authorities which are looking to adopt the same policy. As the training officer for the IoL South East Region, I am passionate about working to raise standards and am keen to share Guildford's experiences for the benefit of others who are looking to go down a similar route.

Anyone who's been on a training course will know that Guildford is cited as an example of the challenges that a council can receive from the taxi trade – more specifically around the setting of fees and how historically we got this wrong. With the introduction of the livery policy, we were yet again challenged and this case went all the way to the Court of Appeal. However, on this occasion we were able to defend the challenge successfully.

The basis for a livery is s 47(2) of the Local Government (Miscellaneous Provisions) Act 1976 which allows a council to require any hackney carriage licensed by them "to be of such design or appearance or bear such distinguishing marks as shall clearly identify it as a hackney carriage".

The decision to adopt a livery policy cannot be taken lightly and by the time the council's new draft policy came for approval in December 2015, it had been subject to nearly two years of consultation. The livery was only one requirement designed to improve standards; we introduced a range of measures, including a BTEC qualification for all drivers, private hire vehicle door signage, a subsidised fee for wheelchair accessible vehicles and a strengthened previous-convictions policy.

Part of the consultation involved commissioning market research on the ideas proposed in the draft policy to raise standards, not just with reference to livery but also driver training. Of those questioned, 84% supported the idea of being able to identify a taxi easily and 75% supported professional driver training. We also consulted with disabled groups about the concept of a livery and how this could be used to assist the most vulnerable members of society who rely on taxis to get about. The consultation provided a robust, evidence-based justification for our proposals.

The reports accompanying the policy to our licensing committee and Full Council described a number of potential benefits to a livery, such as improving identification, creating a strong local identity and increasing safety by giving members of the public confidence that they are stepping into a licensed vehicle. As any reader of *The Hitchhiker's Guide to the Galaxy* will know, Guildford is a popular location for "aliens" (even those closer than planets in the vicinity Betelgeuse) to claim residence, and like any other town or city with a vibrant night-time economy has its own share of "cross- border hire" problems.

Unfortunately, the licensed trade was on the whole not supportive of the livery idea and there was limited engagement with the consultation. In order to try and encourage participation, the council held working groups, drop in sessions and forums in order to try to engage with the trade. The position of a minority of the trade was very much that if a livery were adopted, this decision would be challenged. The predominant trade association in Guildford attempted to stop the report to Full Council on the evening of the meeting to discuss what alternatives to a full body wrap could look like, if the council were to impose the livery requirement for licensed taxis.

We have a unique, full body wrap in "Guildford teal". This option was recommended by a working party of councillors who considered options such as a "standard' base colour or a base colour with different colour panels. There are, of course, arguments either way for using a standard vehicle colour. While this may be easier for some members of the taxi trade, a standard colour like black or white may not achieve the desired result of making the vehicle easily and uniquely identifiable. Then there is the question of what may happen to all the black or white private hire vehicles licensed.

The Guildford livery specification is achieved by "wrapping" a vehicle in coloured plastic film. The wrap is an Avery Supreme product material and is specially manufactured in this colour. We also require the council logo and lettering on the front doors.

There are a number of companies who provide this service. We have a list of suppliers, though this is not an approved or a closed list and any company can join provided they can demonstrate that they can wrap a vehicle to the specification required. The business relationship remains between the drivers and company. The council is not involved as we do not own the vehicles, and did not want to go down the route of a procurement exercise. Initially we worked with one supplier who wrapped one of the council's fleet cars as a mock up, but following approval of the policy we had a number of different companies approach us wishing to be involved. Many had become aware of the policy in the media, and some had been approached by drivers directly.

We decided against including spraying vehicles as an option in the policy. The cost is similar to wrapping, although spraying would last longer. The difficulty with spraying is the potential for variation in colour between batches, and the fact that re-spraying a vehicle is permanent whereas the wrap is easily removed. The objectives of a unique livery are a little undermined if, for example, there were a lot of teal vehicles which are former taxis driving around Guildford.

The council allowed until 1 January this year for existing licensed vehicles to be liveried. Following approval of the policy, any new or vehicle change had to be liveried. However, it took more time than we anticipated for the wrap material to be manufactured, partly due to a reluctance of proprietors to wrap their vehicle so soon after adoption of the policy; and consequently, as suppliers had received limited bookings they in turn were reluctant to buy material.

After meeting with suppliers, and advising that the council had adopted a policy which needed to be implemented, material was ordered and the first vehicles were liveried after a few weeks. We contributed 25% of the cost, up to a value of £315 for vehicles who adopted in the first seven months. We had around 30 proprietors taking us up on this offer, out of around 180 licensed vehicles at the time.

The legal challenge

As readers will know, the only way to challenge an adopted local authority policy is through judicial review in the High Court. While we received a pre-action protocol letter from a driver, the policy was not challenged in this way.

Instead, some parts of the trade backed one driver who had liveried his vehicle in a challenge against the "implied" livery condition on his licence under the provisions of s 47(3) of the Local Government (Miscellaneous Provisions) Act 1976, which gives a right of appeal against any conditions attached to a licence. I say the "implied condition" as at the time livery did not appear as a licence condition (although it does now). However, despite this, the driver argued in the Magistrates' Court that as the council required livery, it amounted to a condition which he had the right to appeal against, as he did not consider a livery "reasonably necessary".

This meant that during the initial magistrates appeal we had the situation where a driver argued that a condition which didn't appear on his licence should appear so that he could have the opportunity to appeal it. He then argued that he didn't want it on his licence anyway as he didn't want to livery his vehicle.

The case was heard at the Magistrates' Court and subsequently the Crown Court. In each case our argument was that as the livery was required by our policy, to challenge the condition in this way would effectively amount to an attack on the policy itself.

As a number of leading cases on licensing policy make it clear that a policy cannot be challenged in either court, and because the driver made no case to be treated as an exception to the policy - it was simply that he just didn't like it - we successfully argued for the case to be dismissed.

The Crown Court refused to state a case for appeal to the High Court, and the decision of the Crown Court to refuse to allow further appeal was itself judicially reviewed.

The High Court refused the judicial review upon initial application and two further oral reconsiderations. The driver then lodged an appeal with the Court of Appeal, but this was refused upon application, meaning an end of the road to the proceedings.

The impact of the case while it was still ongoing meant that a number of members of the trade believed that the policy itself was being challenged. Although we communicated through a regular newsletter to drivers, they were being regularly misinformed by colleagues on the rank and many delayed wrapping their vehicles until the end of legal proceedings, which caused a rush towards the end of the deadline.

We have managed to recover most of our legal costs - and set our fees correctly in Guildford now to recover the time we spend on the various licensing functions. However, we will not get back the time we spent dealing with the challenges, which has delayed other work.

The case *(Simmonds v The Crown Court at Guildford)* appears as a "stop press" in the latest edition of Jim Button's book, once again making Guildford a focus for licensing case law, albeit on this occasion for all the right reasons.

Taxi licensing has been under the microscope a lot recently with terrible events taking place in places such as Rotherham and South Ribble. Licensing practitioners and councillors should be looking at ways to improve safety in this service area. I would rather be criticised for trying to introduce a measure which is unpopular with members of the trade but might help the public, than court popularity with taxi drivers at the possible expense of public safety. I feel the livery makes our taxis look more professional and easily identifiable for reasons of safety and many members of the public I have spoken to agree.

If you are considering introducing a livery, please do not underestimate the time that it will take. This is not just in dealing with the questions and challenges from the trade (and those members of the public who taxi drivers may speak to in their taxi) but also practical decisions over livery aesthetics and how it will be achieved and implemented.

We also wanted to help those drivers who did want to implement, so that we could maintain a positive relationship with the trade. We allowed a period of just over two years for compliance, and even after the deadline passed we have suspended a few vehicles which did not comply.

Introducing any contentious policy, particularly one involving taxis, can become a way of life for the licensing team responsible. While I was enjoying a well-deserved break at this year's Le Mans 24 hour race in France. I arrived at a hotel car park, halfway down the Mulsanne Straight to watch part of the race and found one of our licensed liveried vehicles parked in the car park!

Mike Smith
Licensing Team Leader, Guildford Borough Council

E-LEARNING

The Institute of Licensing and Gambling Commission have jointly worked together to produce two more gambling e-learning modules to add to the existing suite of gaming machine modules.
The new modules are designed to help Licensing Authorities (LAs) and other co-regulators to improve their understanding of the Gambling Act 2005 and their powers to inspect premises.

Module:
Inspection powers and preparation

This module is designed to help licensing authorities and other co-regulators understand their powers of inspection under the Gambling Act 2005 and what preparation to undertake in advance of conducting and inspection.

Module:
Inspecting a betting premises

This module will help licensing authorities police and other co-regulators improve their understanding of what to check and look at when conducting an inspection of a betting shop – both inside and outside the premises.

GAMBLING
COMMISSION

Reading appeals Uber decision

Although judgment went against it recently, Reading is determined to establish via the High Court that a parked-up Uber driver was standing for hire, as **James Button** reports

In July the long-awaited decision in the prosecution by Reading Borough Council of an Uber driver for plying for hire was determined. This case was widely recognised as being a test case (even by the judge) and has caused significant interest and comment. It is of course only a magistrates' decision, and makes no alteration to the law, but as the council has indicated that it intends to take the matter to the High Court, this is a useful introduction to what will potentially become a significant and important senior court decision.

The facts were fairly straightforward. In January 2017, Mr Ali was a licensed private hire driver, driving a licensed private hire vehicle. Both licences had been issued by Transport for London (TfL), and he was working for Uber under its London operators' licence[1]. He was lawfully parked on the public highway in Reading (on the Kings Road). His vehicle was one of around 60 vehicles operated by Uber appearing on the Uber app as being located in Reading at the times in question (the prosecution concerned two offences, alleged to have been committed either side of midnight on 21 and 22 January 2017). When he was approached by enforcement officers, he said that he was waiting for bookings to come to him via the Uber app.

The council argued that the appearance of the vehicle on the app amounted to plying for hire because it was a solicitation to hire the vehicle (although as the vehicle was stationary, this should have been a reference to "standing for hire"[2]).

The defence argued that such an approach would mean that any booking of private hire vehicle by means of an app would amount to plying for hire, and this approach would fly in the face of significant senior court precedent.

The judge established the following:[3]

13. *From the evidence I found the following:*

- *Mr Ali's car had no markings indicating it was for hire although it had two small TfL roundels, one in the back window and one in the front windscreen, which were highly visible. Specifically, the car did not advertise a number to contact to hire the car.*
- *Mr Ali's car was parked lawfully on both occasions.*
- *Mr Ali's car was not waiting in a taxi stand nor was he next to a bus stop or stand.*
- *Mr Ali was not available to a person hailing him on the street.*
- *Mr Ali did not hoot or flash his lights towards any persons nearby.*
- *Mr Ali's windows were closed.*
- *Mr Ali's vehicle was one of a number shown on the Rider app.*
- *Mr Ali's vehicle was visible to any Uber customer on the app.*
- *Mr Ali's vehicle was depicted as the outline of a car on the app (see tab 18 page 103).*
- *This vehicle outline advertises the presence of an Uber driver.*
- *The app does not show any features which might identify a particular driver or a particular car.*
- *The only way Mr Ali was going to pick up a passenger was via the Uber app.*

She also summarised the way in which she understood the Uber app and booking mechanism to work[4]:

14 I find the app works in the following ways:

- *The app is provided by Uber (I am not distinguishing between various Uber companies).*
- *An Uber customer who has downloaded the app communicates over the Internet with Uber's servers to request the provision of a vehicle with a driver. When opening the app the customer can see a list of available vehicle types in their area. The rider enters a destination, gets a fare estimate from Uber and requests a booking.*
- *The nearest driver is informed via the driver version of the app of the request and that driver has ten seconds to accept the request. At that point the driver is not told the destination.*

1 Since this decision was handed down, Senior District Judge (Chief Magistrate) Emma Arbuthnot has stood down from any further cases involving Uber. This is because her husband is an advisor for a firm that has advised one of Uber's largest investors – see https://www.theguardian.com/technology/2018/aug/18/uber-judge-steps-aside.

2 See *"Button on Taxis: Licensing Law and Practice"* 4th edition paragraph 8.8.

3 At paragraph 13 of the judgment.

4 At paragraph 14 of the judgment.

- *If the driver accepts the ride, Uber (the licensed PHV operator) then confirms and records the booking and allocates the trip to the driver.*
- *Uber then provides to the driver and passenger (or "rider" as passengers are called) the details of the other.*
- *The driver then goes to the pickup location to meet the rider and the journey proceeds.*
- *The rider cannot choose a specific driver or the specific car.*

There was significant legal argument, and the judge was directed to a large number of senior court decisions, including: *Case v Storey*[5]; *Clarke v Stanford*[6]; *Allen v Tunbridge*[7]; *Cavill v Amos*[8]; *Sales v Lake*[9]; *Armstrong v Ogle*[10]; *Cogley v Sherwood*[11]; *Rose v Welbeck Motors Ltd*[12]; *Milton Keynes Borough Council v Barry*[13]; *Chorley Borough Council v Thomas*[14]; and *Brentwood Borough Council v Gladen*[15].

The judge also considered extracts from *Paterson's Licensing Acts 2018*[16] and the Law Commission's report *Taxi and Private Hire Services*[17].

Having considered these matters, in a comprehensive judgment her conclusions were as follows. These are reproduced in full because it is now clear that Reading Borough Council is taking this matter to the High Court, and the case will clearly hinge on many of these conclusions.

> *34. I have set out above the findings I have made. Mr Ali's vehicle did not have a distinctive appearance. A member of the public seeing the vehicle on Kings Road at that time of night (in the early hours of 21 or 22 January 2017) may have guessed that it was a mini-cab because it was a dark coloured car with darkened windows but there were no outward signs, for example, no company telephone numbers were displayed. The TfL roundels were not of such prominence that it could be said that there was something on the vehicle which cried out "I am for hire" in the way described in the* Rose v Welbeck *case, which I find, in any event, turned on its own facts.*
>
> *35. Mr Ali was not near a hackney carriage stand and if he had been approached by passengers from the street, I accept he would not have contacted Uber to make the booking for them. The facts concerning Mr Ali are very different to those set out in Milton Keynes Borough Council v Barry.*
>
> *36. Mr Ali would never have accepted to take a passenger before contact had been made via the Uber app. The facts here are far from the facts of Chorley Borough Council v Thomas. Mr Ali would never have allowed a passenger to get into the vehicle from the street before a booking via Uber had been made.*
>
> *37. Mr Ali's vehicle could not be hailed nor did it wait at a stand. He did not drive around looking for passengers nor did he wait on the street, flashing his lights or hooting at members of the public.*
>
> *38. Mr Ali's passengers or riders come via the Uber app. Mr Ali was in central Reading waiting to be contacted by Uber. An Uber customer goes onto the Uber app which shows a number of TfL licensed Uber vehicles, the drivers of which are logged on nearby. Mr Ali is not identified nor is his car but it is shown in outline on a map. It is not the driver but Uber which gives a fare estimate depending on the vehicle type chosen by the passenger.*
>
> *39. Uber's server tells the nearest driver about the request, he or she has 10 seconds in which to accept or reject the trip. If the driver accepts then Uber confirm the booking, records it and the trip is allocated to him or her. The details of the passenger are then provided to the driver and the driver goes to the pick-up location to meet the rider. The rider cannot choose a specific driver or vehicle.*
>
> *40. I accept that Mr Ali decides when and where to work. I accept that Uber describes him as the principal whilst they are said to be his agent. I don't find the concept of principal and agent helpful in determining whether Mr Ali was plying for hire in the context of the Uber app. I have not thought it appropriate to consider where and when the contract to provide a service is made.*
>
> *41. The fact that Mr Ali's vehicle had no distinctive markings, was not at a stand and was not available to pick up passengers on the street combined with the fact that the whole transaction was conducted via an app where the booking process starts, is recorded and the fare estimated, leads me to find that Mr Ali was not plying for hire.*
> *42. I am conscious that this decision prevents Reading from*

5 (1868-69) LR 4 Ex 319.

6 (1871) LR 6 QB 357.

7 LR 6 CP 481.

8 (1900) 64 JP 309.

9 [1922] 1 KB 553.

10 [1926] 2 KB 438.

11 [1959] 2 QB 311.

12 [1962] 1 WLR 1010.

13 (Unreported) 3 July 1984 DC.

14 [2001] LLR 62.

15 [2005] RTR 12.

16 2018 LexisNexis ISBN: 9781474303774.

17 https://www.lawcom.gov.uk/project/taxi-and-private-hire-services/.

determining how many mini cab drivers are for hire at any time but this is a consequence of the legislation and of my view of the authorities relied on by the parties.

43. I find the app follows from the job-master, then the telephone booking system and is the most up-to-date way of booking a mini-cab. I have no doubt that the technology will move forward and be susceptible to challenge in the future. So far as the app based booking system in this case I do not find that I can be sure that Mr Ali was plying for hire in those circumstances.

As stated at the beginning of this article, this does not form any kind of precedent, and is simply one decision on one set of facts. However, it is important because it is the springboard to the High Court, and when this case is heard (which will probably be in the first half of 2019) that will then be a senior court decision.

Is this decision correct? To an extent this will depend upon the reader's particular viewpoint, but it does follow a considered pattern of senior court decisions. On the facts, it does seem difficult to see how the vehicle could be standing for hire. Even if it was exhibited to a prospective passenger (and that would require that prospective passengers to be located on the same street, and in close proximity to the vehicle) there is still the problem that it was not available for immediate hire via negotiation with the driver. The hiring could only be undertaken by using the Uber app. While it is quite clear, and fully accepted, that the use of technology such as this app reduces the lead in time between the booking being made with the operator, and the journey commencing, the fact remains that there is still that process undertaken.

The other problem, which is not referred to in the judgment, is that if appearing on the Uber app does amount to standing for hire, every private hire vehicle would be unable to park between jobs. If it was parked outside its district it would be standing for hire; likewise if it was parked within its district. The only way round that would appear to be to disconnect from the Uber app, but that would prevent bookings being made!

It was also interesting that there was apparently little consideration of the principle that a licensed private hire vehicle, driven by a licensed private hire driver, and under the control of a licence private hire operator, can undertake a pre-booked hiring anywhere in England and Wales, and is not limited to doing so within the district in which it is licensed. This principle was established in *Adur District Council v Fry*[18] and does go towards supporting Mr Ali's position. There was also no reference to the decision in *Nottingham City Council v Woodings*[19] which is often considered to be the leading case on standing and plying for hire and the apparent omission does seem surprising.

This case and the subsequent decision generated considerable discussion and publicity, and there is little doubt that the forthcoming High Court case will generate even more.

James Button CIoL
Principal, James Button & Co Solicitors

18 [1997] RTR 257 DC.
19 [1994] RTR 72.

2019 Dates for the Diary

National Licensing Week
17 - 21 June 2019

National Training Day
19 June 2019

National Training Conference
20 - 22 November 2019

Book review

Institute of Licensing
Guidance on the suitability of applicants in the taxi and private hire trades

Publisher:
Institute of Licensing

Price: Free

Reviewed by **Andy Eaton,** *FIoL, Solicitor, Wealden & Rother Councils Shared Legal Services*

I wonder how many other IoL members have, like me, had to explain to newly elected councillors the difficult concept of fit and proper, or as we prefer to say in these more modern times, safe and suitable, as part of their training. In truth, over recent years the Local Government Association has done a very good job in its Councillors' Handbook, but in April this year the Institute of Licensing published the results of its long running project to produce what we hope will be a definitive guide for councils and their councillors on the process of judging suitability of applicants.

From the opening pages, the document speaks of the critical importance for decision makers in licensing to put public protection foremost in their minds. It informs the reader of the unique element to licensing that imposes no obligation on the councillors to place any weight upon a right to work for an applicant, compared to the right of the public to be assured that their driver and operator can be trusted to perform to high standards of honesty, decency and professionalism.

The guide goes on to provide an extremely helpful section on offending, re-offending and the risk factors in considering the prospects of re-offending on those who claim to be re-habilitated. It deals with the likelihood of further offending and the impact / harm those offences can cause. All this information is incredibly helpful for those of us who have to guide councillors through applications from those who have an offending history, however innocuous that history may appear on paper.

In fairness, while I have not seen many applications before the councillors in my 30 years of advising committees for murder or rape, I have seen countless numbers for drunk driving and theft, where the possibility of re-offending is quite probable. It is these occasions when councillors can be tempted to allow thoughts of "giving the applicant a chance" to creep into their decision making, forgetting that the essential criteria is whether the public is best protected by a grant or a refusal, as opposed to some game of chance that has unpleasant potential consequences.

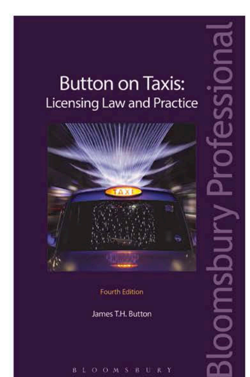
There is an excellent overview of the role of taxi / private hire licensing which will help councillors understand the complex licensing regime. It breaks the differing regimes down into understandable sections, which will make it easier for councillors to identify the nuances of the licensing process. Throughout this section, councillors are guided through the need to see the role of the regimes in protecting the public, offering helpful experience on answers to common questions that are often raised at hearings. The section also includes the helpful fit-and-proper test for drivers and the more recent test for operators, which will greatly assist councillors in understanding the rationale behind their decision-making role.

The final section offers a practical and clear explanation of the standards that councils should adopt in order to prevent unsuitable applicants from gaining licences. Offences are formulated in general terms, as opposed to a schedule of exact offences, which allows the policy to stand the test of time for changes in legislation in the future. So rather than a huge list of theft offences, it simply states any offences relating to dishonesty. That will assist councillors in not having to have an in-depth knowledge of specific offences, and also alleviates the need for constant updates having to go back into the committee process.

This document represents a huge piece of work by the Institute. It is hoped that councils across the country will chose to adopt the guidance as their convictions policy, and thereby create a level playing field for standards across the country. It would certainly help in providing common standards of suitability and prevent applicants from "shopping around" for the council with the easiest criteria in order to obtain a licence. That would certainly help all of us who strive to make the standards of licence holders as high as we can. I can only urge all members of the Institute to speak with their managers to works towards adoption at their own councils.

Button on Taxis, 4th Edition

James TH Button



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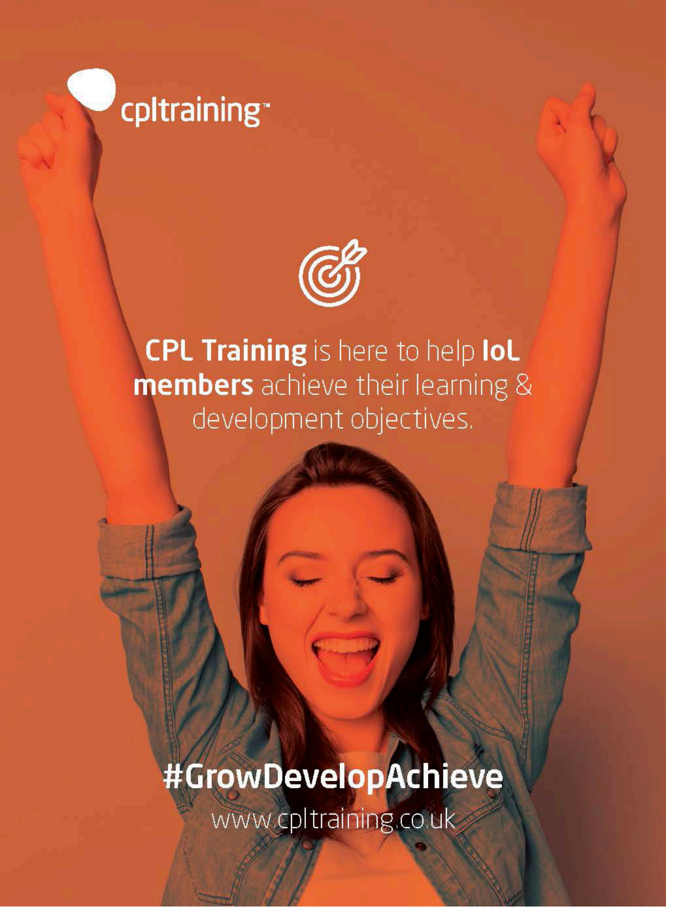

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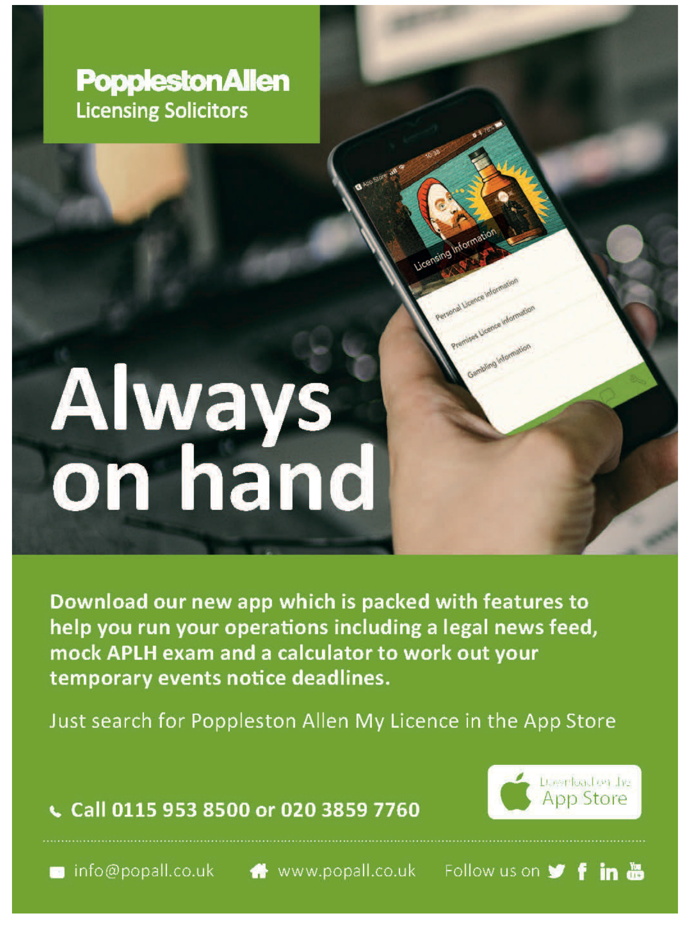
Delivering end-to-end digital licensing solutions

Our Digital Platform for Licensing provides a package of software and services to licensing teams across the UK, supporting them in achieving efficiency and meeting citizen expectations.

With the capability to support multiple licensing journeys – from taxi and HMO to entertainment and alcohol – we offer a secure and flexible service that achieves channel shift at all stages to save significant time, money and effort and enhance service delivery.

If you're looking for full integration across the board and a platform that fully services both your organisation and your customers, speak to our team to find out more.

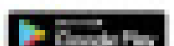
For further information or a demonstration, email marketing@idoxgroup.com or visit www.idoxgroup.com



We take safety seriously

We believe that technology can bring added accountability and transparency to every trip. Validated accounts, driver photos, and a two-way rating system all help build trust. Every trip is tracked by GPS, meaning you can share a live map of your journey with loved ones. And every driver is licensed by a local council and has been through an enhanced background check.

Uber



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