NUMBER 32 MARCH 2022

Journal of Licensing

The Journal of the Institute of Licensing

In this issue

Institute of Licensing

Journal of Licensing ISSN 2048-9110

Journal of Licensing

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

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

The Institute's Journal of Licensing is available to Institute members free of charge, with individual members receiving a copy and a set number of copies being provided to organisation members as follows:

- Small Organisation member - 3 copies
- Medium Organisation member - 4 copies
- Large Organisation member - 6 copies

Additional copies are available to Institute members at only £10.00 each (plus P&P + VAT). Non-members may purchase the Journal for a fee of £92.00 (plus P&P + VAT) which will include complimentary membership at the appropriate level for the remainder of that membership year (all memberships are renewable on 1st April annually).

To order copies, please email orders@instituteoflicensing.org

This issue shall be cited as (2022) 32 JoL.

Daniel Davies, MIoL
Chairman, Institute of Licensing

It was great to see so many of you in Stratford-Upon-Avon in November for the 25th anniversary National Training Conference (NTC). The IoL and NTC have both come a long way since the inaugural Local Government Licensing Forum, and it was great to hear some stories from those heady days as told by Dave Daycock at the gala dinner.

The IoL would like to extend our congratulations to all those who received an award, with a special mention to Andy Parsons from the Home Office, who was adjudged winner of the coveted Jeremey Allen award.

The theme of the dinner was "silver", reflecting the 25th anniversary. In keeping with this, the edition of the *Journal of Licensing* which delegates received in their packs had a silver cover. Although we are back to the usual blue this time, I hope this does not reflect the mood music in the licensing world, which now seems more buoyant than it has been for some time.

This did not perhaps seem the case as 2021 drew to a close and the Omicron variant spread, but this now seems to have receded. The Government has announced that remaining domestic Covid restrictions in England will be lifted a month earlier than planned on 24 February "provided the current encouraging trends in the data continue". Together with spring approaching, with another summer of pavement licences, and with Her Majesty the Queen's Platinum Jubilee almost certainly to be the subject of a relaxation of licensing hours, there are reasons for optimism.

The NTC also marked the 10th anniversary of the *Journal of Licensing.* No sooner than delegates had departed the NTC the Editor was planning for the next 10 years, and sourcing articles for this edition.

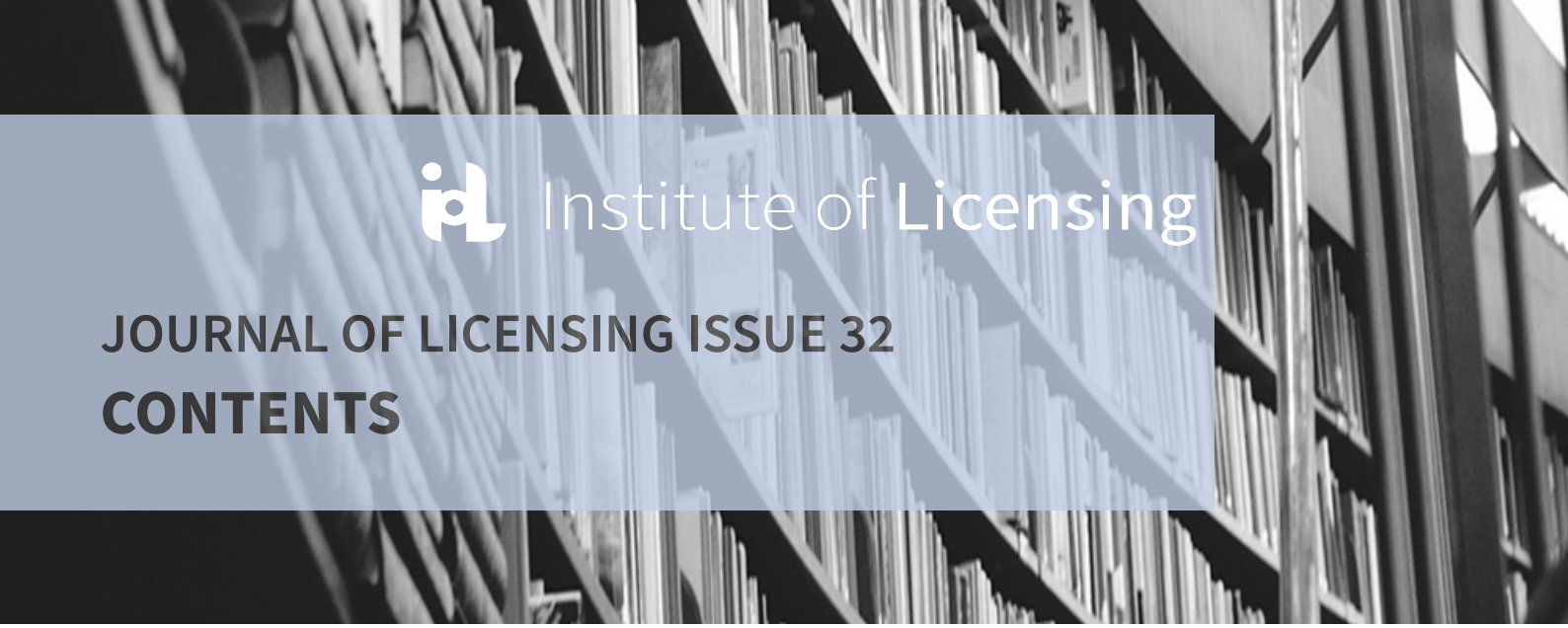
One of the strengths of the *Journal* is that it reflects the "broad church" of the IoL itself in the scope of the topics covered. The lead article in this edition is a case in point – Jamie Mackenzie of Unified Transport Systems provides an analysis of how to address the problem of crowded roads, an issue crucial to many areas of licensing both directly (taxi licensing) and indirectly (deliveries to licensed premises).

We are also keen to stimulate debate in these pages. As individuals we are not a homogenous mass, and there will be differing opinions on the topics of the day. In this spirit, Charles Holland provides a counterpoint to the views expressed on remote hearings in the previous edition.

Elsewhere, a persuasive case for regulating non-surgical cosmetic procedures is set out by Sarah Clover, and Nick Arron and Richard Bradley examine recent work of the Gambling Commission. James Button gives his assessment of points arising from the latest in the private hire vehicle litigation concerning two operators, Uber and Free Now.

We also have updates from Scotland and Northern Ireland, and of course the regular features from Julia Sawyer and Richard Brown.

I hope you enjoy this edition.



Institute of Licensing

JOURNAL OF LICENSING ISSUE 32

CONTENTS

Leo Charalambides, FIoL
Editor, Journal of Licensing

Licensing functions are nestled within wider duties and obligations imposed on local authorities, another of which is the promotion of equality – the Public Sector Equality Duty, s 149 Equality Act 2010. Returning to a subject that is close to me, I remind our membership and readers of the s 182 Guidance which states that:

> *14.66 A statement of licensing policy should recognise that the Equality Act 2010 places a legal obligation on public authorities to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation; to advance equality of opportunity; and to foster good relations, between persons with different protected characteristics. The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.*
>
> *14.67 Public authorities are required to publish information at least annually to demonstrate their compliance with the Equality Duty. The statement of licensing policy should refer to this legislation, and explain how the Equality Duty has been complied with. Further guidance is available from [the] Government Equalities Office and the Human Rights Commission.*

In this issue Chris Grunert considers the anonymisation of representations based upon a recent judgment: *Greaves v Craven District Council* (North Yorkshire Magistrates' sitting at Scarborough Magistrates' Court) 21 January 2022. That same judgment also invites consideration of the promotion of equalities within the exercise of licensing functions. In its decision to reject the application by the wife of the former premises licence holder, the subcommittee considered that the premises would be run as a joint enterprise between husband and wide and that the wife would not be able to act independently of her husband(!). In her witness statement to the court, the appellant stated: "I would refute any suggestion that I am controlled by my husband and find such a suggestion (without any evidence) extremely offensive and would not imagine such a suggestion would have been, made, had the roles been reversed."

During cross examination it was accepted by the respondent local authority that its recently adopted (July 2021) statement of licensing policy did not contain any reference to its equality duty as advised by the s 182 Guidance (above). This is now being addressed by the authority.

In my experience it is not uncommon to find no more than a passing reference to the Equality Act 2010 within statements of licensing policy, typically within a list of other legislative provisions, in a way which calls to mind a tick box exercise. Rarely does a statement of licensing policy demonstrate how it intends to grapple with equalities considerations in the exercise of its licensing functions.

The magistrates agreed with the appellant and found that: "The reference to Mrs Greaves not being capable of acting as a licence holder due to the influence of her husband is capable of being constructed as sexist and discriminatory. The absence of any equality assessment being applied renders the statement inappropriate and the tribunal misdirected itself as to the weight it attached to it."

Given the broad aims and goals of the public sector equality duty it is perhaps unsurprising that local authorities struggle with the practical consideration and application of the duty in the exercise of its licensing functions. This is not just a matter for the local authorities; operators within our entertainment, hospitality and night-time economies have an equally vital role to play in the promotion of equalities, diversity and inclusivity, and this too is being recognised and addressed in our local licensing strategies and polices.

The public sector equality duty is to be exercised in substance, with rigour and with an open mind (*R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158). In my view it requires much more than an acknowledgment of the duty. The next issue of the *Journal*, alongside our regular features, will contain a focus upon equalities consideration within licensing. I would very much welcome examples of challenges and initiatives that address equalities issues within licensing. I will endeavour to pass this on to our contributors for the next issue. Please email me at journal@instituteoflicensing.org.

As always it is with great pleasure that I welcome you to this issue of the *Journal* and I look forward to beginning work on the next.

Freeing up our crowded roads

We need to rethink our approach to small- and medium-sized transport provision if we want to free up space on our crowded roads, says **Jamie Mackenzie**

By the end of March 2020, as the country endured the first lockdown of the coronavirus pandemic, one small but significant positive emerged from the darkness. From across the country came stories of people experiencing uncommon sounds as towns and cities fell otherwise silent. As the din and roar of road traffic evaporated, birdsong could again be heard in our urban spaces.

Statistics from that period show that transport use fell significantly[1] (as would be expected) and by early April use of cars, light goods vehicles and heavy goods vehicles had fallen to 27% of usual levels. The only mode of transport to see an increase was cycling (again, to be expected) and for a brief period, as Steven Lovatt said in the *Guardian*, "The Earth could hear itself think".

Alas, by the end of August 2020 road use was back to pre-pandemic levels, and the songs of the birds were once again lost to the cacophony that is modern urban living.

Of course, this is just one small element of a complex picture. For many reasons (earning money to pay the bills being a very important one among them) people had to get back out to go to work, make calls, see friends and all of the other things denied to us as a result of the public health emergency. The figures show they chose to do so in privately owned cars.

The roads are full up

I doubt there is anyone working in transport planning today who disagrees with the notion that we need to seriously - and permanently - reduce the number of vehicles on our roads.

I am someone who has spent much of my working life driving (often long distance), and, to an extent, enjoying my driving; yet even I think the idea of allowing millions of metal boxes to be parked on roads outside of our houses is increasingly indefensible.

For those who live in urban areas, the notion of private vehicle ownership by the masses is - generally speaking - an odd concept (and a fairly new and short-lived one in terms of human history). That said, as things stand, the cold reality is millions do need these vehicles for all sorts of vital reasons.

For many residents, local transport networks are simply not as convenient as owning a private car; even though, in many cases, this huge investment may spend days parked up going nowhere. We know that many residents are not well served by the local alternative options. We also know there are some examples where residents are well served and still choose to drive (because driving in those places is also easy). It is certainly the case that many will continue to drive even when it is not that easy; it's hard to give up a roof, windows, and a decent heater.

Clearly, to encourage a switch to other forms of transport, we need to restrict access (or more accurately, *the terms of access*) to cars and vans in some places. However, we cannot, and must not, do this at the expense of equality of opportunity and safety; that is not progress - that is half-measures for an easy life.

"But we are already doing some of this!"

Yes, we have already restricted access in some places. Meanwhile, conflict over use of road space grows daily.

Instead of measured and logical development, we have hastily conceived schemes designed to force the issue and different user groups blaming one another for the mess we are all in.

As a general theory of how to build a service or product, the "if you build it they will come" approach (a misquote that has long been debunked anyway) seems to be applied a lot in transport planning these days. Cycle lanes, cycle hire schemes, car-hire scheme, mobility hubs, bus gates, low-traffic networks - all of these are, in themselves, good ideas.

But they cannot work by simply pretending that the biggest cohort of small- to medium-sized transport providers and SMEs in the country don't exist, or, more importantly perhaps, that the services offered by these businesses are not essential to many.

There are over 340,000 taxi and private-hire drivers in

1 https://www.gov.uk/government/statistics/transport-use-during-the-coronavirus-covid-19-pandemic.

England and Wales.[2] There are hundreds of thousands more independent couriers. These vehicle types, and their drivers, provide invaluable services to people living in our communities. We know this. In fact, we saw this very clearly over the past two years where food and goods delivery services played a vital role in keeping the country safe.

Preventing access for these services through a blanket ban on cars and vans driving in some areas does not help to build a safer, healthier community, and, importantly, it will not encourage people to give up their private cars.

The city of the future

I often do a thought experiment with attendees on our courses; I ask whether, if they were tasked with building a town from scratch, would they allow private cars and vans to drive everywhere, as they are mostly allowed to do now.

The general consensus is no. *Why would you?*

I agree. But what about taxis, minicabs, and delivery vans?

Well, it probably won't be a surprise to hear that the view changes. These vehicles should be allowed. But how exactly? And what type of vehicles? And how do we reconcile this view with the need to make our streets safer for everyone?

We will make our street safer for everyone by reducing the number of private vehicles on the roads.

Taxis, minicabs, and delivery vans can play an important part in reducing private vehicle ownership. To achieve this, these vehicles should be allowed carefully controlled and safe-speed access to areas otherwise blocked to regular car and van traffic. These vehicle types provide invaluable services to people living in the community. Restricting access does not serve everyone equally and means residents choose to use private cars for some journeys because it is more convenient.

As far as possible, we have to match this convenience on our public transport networks.

But if you allow this access, wouldn't there be too many vehicles in some places?

This is the counter argument isn't it? Too many vehicles in some places. No control. Dangerous.

Where we are at this moment, I have to say I agree. I could make a good argument for some of the very best professional drivers I know having access to some restricted areas, but you cannot allow general access now. Not when public roads are close to breaking point and standards of driving among transport drivers so variable. But with a bit of simple planning, some thought, and some effort, there is absolutely no reason this way of doing things cannot work to the benefit of everyone.

A new type of driver

What is a taxi driver?

What is a bus driver?

What is a parcel delivery driver?

What is a food delivery driver?

Many people, including those who work in the industries listed, may see these as distinct roles. A taxi driver carries people, not parcels. Granted they may occasionally do the odd courier job but in general, that's not how they make money. Many minicab drivers switched to food delivery in the recent pandemic. Some will stick with that and others will go back to carrying people as soon as possible. A courier with a van cannot carry people.

There are, of course, some licensing reasons behind some of these distinctions but, these aside, the distinctions are mostly arbitrary. The one thing all of those working in these industries have in common is that they are (or at least, *should be*) professional drivers. And using those professional driving skills, they are delivering essential services. A truth never more evident than over the past two years.

The idea that, with bicycles and walking (and possibly the odd bus), we will do away with the demand for smaller private transport options is illogical.

Around 1.65 million new vehicles were registered in the UK in 2021. This is very marginally higher than 2020, but still significantly down on pre-pandemic numbers. Interestingly though, registrations by private buyers increased by 7.4% showing that people still think buying a car (and a new car at that!) is the best option.[3]

The roads do not need more cars and vans but they will always need some vehicle type, larger than a cargo bike (and sometimes with a roof and a heater), that provides the capability for delivery services. And to go with this vehicle type a driver who is multi-skilled and can operate safely in all

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/997793/taxi-and-private-hire-vehicle-statistics-2021.pdf.

3 https://media.smmt.co.uk/december-2021-new-car-registrations/.

situations. If we do not support these services when planning our transport networks, private car ownership will not fall in the way we need it to.

How can we create the best small vehicle transport network of the future?

Transporting people or goods in small- to medium-sized vehicles is an important job. It is often a critical job. Much has been made of how these essential frontline workers must be better supported in the future but without any useful examples provided of how this can be achieved.

How do we incorporate these vehicle types in a safe and fair system?

How do we ensure a fair price for use of these services that protects the local community, supports economic sustainability, and makes the best use of a finite road network?

1. Learning

Education is essential if we are to create this new type of service. You would expect the MD of a training company to say this. But I hope we all agree that the skills now required (high driving standards; disability and equality awareness; excellent customer service; safeguarding of children and adults at risk; first aid; data compliance; and infection control) are not low-level skills.

In order to do the type of work our communities need (home to school transport, non-emergency patient transport, and social care transport) and to look after our residents (dementia-friendly towns, special access to low traffic neighbourhoods, access to shops to support our town centres as places of community), *drivers must be suitably skilled*.

Additionally, *we must encourage a new understanding among existing drivers*, and those looking to become drivers, that the types of transport services listed above are not mutually exclusive.

Drivers should be able to deliver all of these services from one single flexible platform. Drivers should have total choice, scheduling their day to take advantage of all options the market has to offer.

The efficiencies a platform like this would bring to our transport service would naturally reduce the number of vehicles on the road. People already do this, of course. Well, sometimes. A bit. But not nearly enough to make any sort of difference. And even those who do it may have two or possibly three strings to the bow. Why not multiple strings?

2. Increased understanding and respect – a fairer price

Those who achieve these skills deserve respect. They deserve to be able to use these skills to earn a fair wage. Very few professions expect a high level of skill to go unrewarded. In other professions, the more you are trained, the more you earn. Why are professional drivers treated differently?

Driving is not just moving stuff from A to B. Unified does not provide services with regards to HGV driving but again, we only have to look at very recent events to see how important such skills are. And yet some of the comments about HGV drivers I read during recent issues clearly show that there is much misunderstanding (and ignorance) over what this difficult, stressful, yet essential job entails.

3. Accepting that we need some small- and medium-sized delivery vehicles

Yes, bikes can make deliveries. They can be efficient and they are clean. Even so, we will still need other passenger and cargo vehicles.

4. Accepting that humans are good at this stuff

Lastly, we must accept and understand that even with the advent of driverless cars, *humans are better at providing the services listed above*; especially as we want (and need) multi-skilled operatives. Show me a robot car that can carry the shopping for a customer, while also keeping an eye on customer safety, helping with a tricky seatbelt, and making sure the passenger has not forgotten anything in the vehicle…

A human being knows how to deal with this. A human being can take the time and help. A human being also asks how a person's day has gone. What they've been up to recently. How the family are. Assistive technology in cars is fine, but replacing professional drivers with machines is inefficient and illogical when we consider all of the value-add a trained driver can offer to keep our communities healthy and safe.

I'll come back to the issue of autonomous vehicles another time (they do fit in but not quite in the way they are being touted) but for now, with the technology unlikely to be deployed en-masse for quite a while yet and a range of essential jobs done (perfectly well, thanks!) by human beings, we should be focusing on what we need our transport network to provide to our communities rather than how we can deploy the latest technology just because it looks interesting.

I have a feeling that small-scale transport services (taxi and minicab services in particular) are overlooked for reform; this is likely because someone somewhere is convinced that they,

or perhaps the human element of them, will just disappear at some point. If that person would like to give me a call I'd love to talk it through. Autonomous vehicles will have their place. What we certainly don't need is millions of privately owned autonomous EVs filling up our roads. What we do need are professional drivers delivering a range of services to support our communities.

Conclusion

Matched with more efficient use of the right type of vehicle, professional drivers will leave the roads quieter and safer, allowing for more cycling and walking and, eventually, as efficiencies in local transport services increase, a genuine reduction in the use and ownership of private cars.

Jamie Mackenzie
Managing Director, Unified Transport Systems

Private hire bookings - with whom are they made?

James Button clarifies two recent court judgments on, firstly, the operator's contractual arrangements with passengers and, secondly, what is meant by 'plying for hire'

Everyone knows that for a lawful private hire journey carrying passengers, there must be three licences in place – the private hire driver's licence, the private hire vehicle licence and the private hire operator's licence. That is made clear in the legislation, both within and outside London. The requirements are contained in s 46 of the Local Government (Miscellaneous Provisions) Act 1976 for England and Wales, and ss 2 and 4 of the Private Hire Vehicles (London) Act 1998 within London.

The requirement for the three licences, which must all be issued by the same authority, was made clear in *Dittah v Birmingham City Council; Choudry v Birmingham City Council,*[1] followed by *Murtagh v Bromsgrove District Council,*[2] and *Shanks v North Tyneside Borough Council.*[3] In *Milton Keynes Council v Skyline Taxis and Private Hire Ltd,*[4] the phrase "the trinity of licences" was accepted by the High Court, and in the Department for Transport Guidance *Statutory Taxi and Private Hire Vehicle Standards*[5] the reference is to the "triple licensing lock".

In addition, the legislation makes it clear that the contract for a private hire journey is made with the operator who initially accepts that booking, even if it is subsequently subcontracted to other another operator.

This is covered in s 56 of the 1976 Act:

> *(1) For the purposes of this Part of this Act every contract for the hire of a private hire vehicle licensed under this Part of this Act shall be deemed to be made with the operator who accepted the booking for that vehicle whether or not he himself provided the vehicle.*

Within London, those requirements are arranged slightly differently, but the net effect is the same. The specific powers relating to sub-contracting are found in s 5(5) of the 1998 Act:

> *(5) For the avoidance of doubt (and subject to any relevant contract terms), a contract of hire between a person who made a private hire booking at an operating centre in London and the London PHV operator who accepted the booking remains in force despite the making of arrangements by that operator for another contractor to provide a vehicle to carry out that booking as sub-contractor.*

That situation was widely accepted, but in some cases, seemingly not observed or complied with. There had been a long-running dispute between Uber and its drivers over their status. Uber maintained that they were self- employed, but the drivers wanted the rights associated with employment. That culminated in the judgment of the Supreme Court in *Uber BV v Aslam*[6] in which the court concluded that Uber drivers were workers for the purposes of employment law.

However, and although the case did not directly concern the private hire legislation itself, during the hearing it became clear that Uber arranged its business in such a way that the contract for the hiring of a private hire vehicle was made between the hirer and the driver, with Uber simply acting as an agent to put the two parties in contact. That was highlighted by Lord Leggatt as being contrary to the requirements of the 1998 Act, as that required the contract to be made with the operator. In his view, if Uber's approach was to be lawful, every Uber driver would have to hold a private hire operator's licence.[7]

This led to an application to the High Court by Uber and a similar operator, Free Now, for a declaration that the operator does not have to enter into a contractual obligation

1 [1993] RTR 356 QBD.

2 [2001] LLR 514 QBD.

3 [2001] LLR 706.

4 [2018] LLR 73 Admin Crt.

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

6 [2021] RTR 29 SC.

7 This is detailed in para 46-49 of the Supreme Court judgment.

with the passenger. This was heard in conjunction with a judicial review brought by the United Trade Action Group Limited (UTAG) against the decision of Transport for London (TfL) to licence Free Now, as its business model was unlawful because the contract was made between the driver and the hirer. UTAG asserted that if that was the case, Free Now could not be a fit and proper person to hold a private hire operator's licence.

The court identified two issues:

Firstly, whether there must be a contract between the operator as the principal and the passenger to carry out the booking.

Secondly, whether a driver using the Free Now app (which was in this respect similar to Uber's) to enter into a contract directly with the hirer was unlawfully plying for hire contrary to the Metropolitan Public Carriage Act 1869.

It was accepted that TfL did not review the contractual terms of an operator when it considered its suitability for a licence. In the view of this author, that is probably not dissimilar from the approach taken by most local authorities.

The court then considered the impact of both the 1998 Act in respect of Greater London and the 1976 Act in respect of the remainder of England and Wales (excluding Plymouth).[8] The court then also considered the point raised by the Supreme Court and the submissions made by the parties.

The court acknowledged that it did not matter that in 1998 the systems being used in 2021 were not even imagined by Parliament.[9]

It concluded that the 1998 Act required a contract to exist between the hirer and the operator, and that that contract requires the operator as principal to provide a vehicle and driver to convey the passenger to the agreed destination, and that was the definition of a private hire booking. It came to the same conclusion in respect of the 1976 Act.

Accordingly it agreed with the analysis of Lord Leggatt in the Supreme Court and stated that "in order to operate lawfully, an operator must undertake a contractual obligation to passengers".[10]

In my view this cannot have come as a surprise to anybody as that is how the law has been regarded and used, and understood to have been used, for the 46 years since the passing of the 1976 Act, and that approach had never been questioned in the 24 years since the passing of the 1998 Act.

The court went on to say that TfL would have to reconsider its approach and "review the contractual terms of an operator when considering a licence application".[11]

This will seemingly place a similar requirement on all local authorities in England and Wales. It should be noted that both Uber and Free Now have agreed to modify their processes to accommodate the judgment.

The court then moved to the second question, that of whether the driver using the Uber app was unlawfully plying for hire, contrary to the requirements of the London legislation.

Here it is important to consider the wording, which differs from the wording used in the legislation applicable outside London.

The definition of hackney carriage in s 4 of the Metropolitan Public Carriage Act is as follows:

> *"Hackney carriage" shall mean any carriage for the conveyance of passengers which plies for hire within the limits of this Act, and is neither a stage carriage nor a tramcar.*

And a stage carriage is defined in the same section in these terms:

> *In this Act "stage carriage" shall mean any carriage for the conveyance of passengers which plies for hire in any public street, road, or place within the limits of this Act, and in which the passengers or any of them are charged to pay separate and distinct or at the rate of separate and distinct fares for their respective places or seats therein.*

It can be seen that for a London hackney carriage the requirement is that it is a vehicle that "plies for hire".

Outside London, s 38 of the Town Police Clauses Act 1847 defines a hackney carriage in a slightly wider way:

> *Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance, and every carriage standing upon any street within the pre-scribed distance,*

8 Plymouth City Council has not adopted the provisions of the 1976 Act. Instead it uses the Plymouth City Council Act 1975, which is very similar to the 1976 Act, and in fact s 14 (1) of the Plymouth Act is identical to s 56(1) of the 1976 Act.

9 See para 27.

10 At para 35.

11 At para 36.

having thereon any numbered plate required by this or the special Act to be fixed upon a hackney carriage, or having thereon any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of this Act; and in all proceedings at law or otherwise the term "hackney carriage" shall be sufficient to describe any such carriage:

Provided always, that no stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed for that purpose, and having thereon the proper numbered plates required by law to be placed on such stage coaches, shall be deemed to be a hackney carriage within the meaning of this Act.

It can be seen that outside London, a hackney carriage is a vehicle that not only plies for hire, but which can also stand for hire. This author has long argued that there is a distinction between standing and plying: standing is when the vehicle is stationary at a hackney carriage stand or elsewhere on the street; plying is when the vehicle is cruising.[12]

It is quite clear that that distinction does not exist within London.

The High Court considered what is meant by plying for hire, acknowledging that despite various amendments to the London legislation over the last 150 years,"'plying for hire' has remained without a statutory definition".[13]

The court then gave us its take on what is meant by plying for hire. As this is the most recent judgment to consider this question, it is worth reproducing this in full:

The cases

43. As the Law Commission recognised in its May 2014 Report "Taxi and Private Hire Services":[14]The current (two tier) system relies heavily on the imprecise concept of 'plying for hire', which performs the very important function of defining what taxis alone are allowed to do in undertaking rank and hail work. However, the meaning of the concept is not set out in statute and has become the subject of a body of case law that is not wholly consistent.

44. Nevertheless some themes have emerged. We need refer to only three of the cases. First, in Sales v Lake[15] *Lord Trevethin CJ described plying for hire in the following terms:*

"In my judgment a carriage cannot accurately be said to ply for hire unless two conditions are satisfied. (1) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and (2) the owner or person in control who is engaged in or authorizes the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers. If I may so express myself he must have appropriated, or be able at the time to appropriate, a carriage to the soliciting or waiting."

45. Thus plying for hire consists of soliciting or waiting for passengers without any previous contract with them. In the case of a black cab, which is hailed in the street, there is no such prior contract or arrangement.

46. Second, in Cogley v Sherwood[16] *it was held that there must be some "exhibition" of the vehicle to the public in order for the vehicle to be plying for hire. Lord Parker CJ noted that the cases were not easy to reconcile and that there was no authoritative definition (we would note that, although not referred to in the judgment, Sales v Lake was cited), and suggested that it was unnecessary and inadvisable to attempt to lay down an exhaustive definition. Nevertheless, included within the concept of plying for hire was that the particular vehicle in question should be exhibited in some way:*

"In the ordinary way, therefore, I should, apart from authority, have felt that it was of the essence of plying for hire that the vehicle in question should be on view, that the owner or driver should expressly or impliedly invite the public to use it, and that the member of the public should be able to use that vehicle if he wanted to. Looked at in that way, it would matter not that the driver said: 'Before you hire my vehicle, you must take a ticket at the office', *aliter*, if he said: 'You cannot have my vehicle but if you go to the office you will be able to get a vehicle, not necessarily mine."

47. Lord Parker recognised, however, that there were cases where a vehicle had been held to be plying for hire without being on view. Mr Justice Donovan agreed that the term connotes "some exhibition of the vehicle to potential hirers as a vehicle which may be hired", although this does not necessarily require that the vehicle must be on view. Mr Justice Salmon also said

12 See para 8.8 of *Button on Taxis: Licensing Law and Practice* 4th edition.

13 See para 42.

14 Law Com No. 347, para 1.19.

15 [1922] 1 KB 553.

16 [1959] 2 QB 311.

that "a vehicle plies for hire if the person in control of the vehicle exhibits the vehicle and makes a present open offer to the public, an offer which can be accepted, for example, by the member of the public stepping into the vehicle".

The most recent senior court decision relating to plying for hire (although as it concerned the 1847 Act, arguably the prosecution should have been for illegal standing for hire) is *Reading Borough Council v Ali*,[17] which concerned an Uber driver. It had been argued that this should be distinguished from the matter being considered in the present UTAG case.

The High Court considered the facts in Reading[18] and then recited the key elements of the judgment.[19] Despite the arguments on behalf of UTAG to distinguish that decision from the facts being considered, the court came to the following conclusion (again reproduced in full):

53. While Reading v Ali *was concerned with specific facts – Mr Ali, parked in his car in Reading, waiting for a booking – we are concerned with the Free Now business model, the issue being whether Free Now facilitates or encourages its drivers to break the law by plying for hire. As we understand it, the way in which drivers using the Free Now app typically operate corresponds in all respects to the findings of fact made by the Chief Magistrate in* Reading v Ali*, which we have set out above. The contrary was not argued and we proceed on that assumption. Accordingly we are not concerned with the position which might arise if an individual driver chose to operate differently.*

54. On that basis, in our judgment Reading v Ali *is in all respects indistinguishable from the present case. As demonstrated by Ms Lester and Mr Kolvin, the arguments advanced on behalf of the Council in* Reading v Ali *and rejected by the court were the same as those advanced on behalf of UTAG in this case. In particular, the court addressed the contractual position which comprises Mr Matthias's principal ground of distinction, but stated in terms at [37] that "whatever the correct contractual analysis, … it has no impact on the question we have to decide". We respectfully agree with that conclusion. Since the question whether a vehicle is plying for hire necessarily focuses on what it is doing before any contract is concluded, it can make no difference whether any contract of hire which may result is made with the operator or the driver.*

55. It is therefore our duty to follow Reading v Ali*. We conclude, therefore, that Free Now does not facilitate or encourage its drivers to ply for hire and that this ground of challenge to TfL's decision to grant it an operator's licence must fail.*

Therefore, the final conclusion of the High Court was:

57. We have concluded, perhaps not surprisingly, that the Supreme Court meant what it said in Uber v Aslam *and that we must follow the decision of this court in* Reading v Ali*. Accordingly we grant a declaration in both proceedings that in order to operate lawfully under the Private Hire Vehicles (London) Act 1998 a licensed operator who accepts a booking from a passenger is required to enter as principal into a contractual obligation with the passenger to provide the journey which is the subject of the booking. Otherwise we dismiss the claim for judicial review.*

What then is the practical effect of this decision?

It confirms the law as it has always been widely understood. The trinity of private hire licences is required for a lawful private hire journey carrying passengers, and in that trinity, the contract is made between the hirer / passenger and the operator. That operator remains liable under that contract even if that hiring contract is subcontracted to another licensed operator.

In the case of such a subcontract, it is clearly important that the terms of that contract make clear the required provision of a private hire car and driver (which must comply with the trinity of licences for the ultimate operator that discharges the booking) which must be provided, and if it is not, the original operator will look to subsequent subcontractors for compensation if the original operator is sued for breach of contract by the hirer.

There will also need to be a contract between every operator and their drivers, (and possibly vehicle providers if the driver and the provider are not one and the same). This will be to fulfil the booking by arriving at the appointed time and undertaking the journey to the requested destination; and if the driver is to handle the fare, to charge the fare agreed between the operator and the hirer or levy a fare in accordance with the contractual arrangements of that operator.

As there is no change to the established position, and no change to the law, it is unlikely that the day to day working arrangements between customers operators, drivers and vehicle providers will change. However, it is by no means

17 [2019] 1 WLR 2635.

18 See para 48.

19 Paras 33 to 39 of the Reading judgment, cited at para 49 of the UTAG judgment.

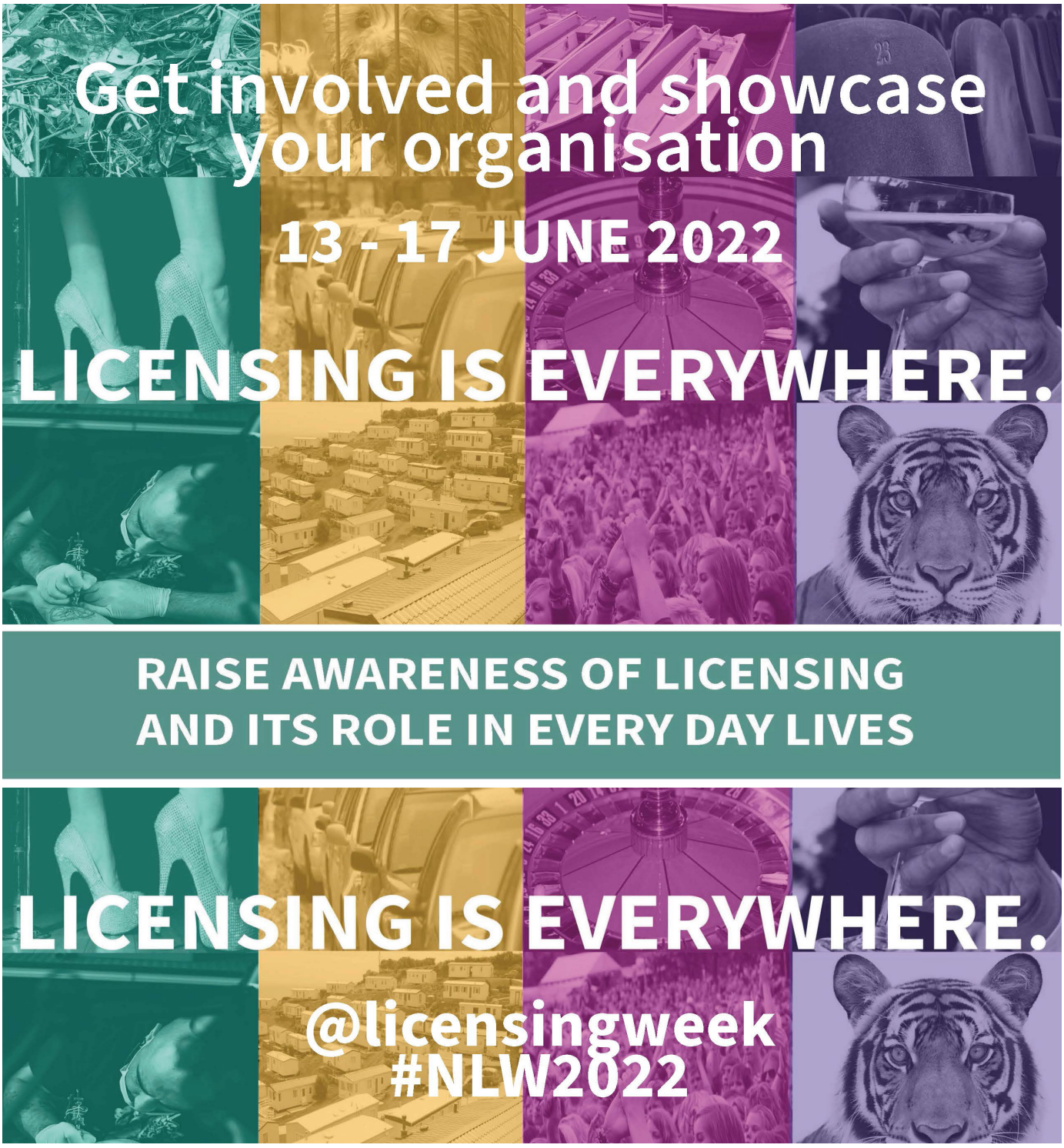
clear how detailed contracts are in these circumstances, or indeed whether there are many written contracts or written terms and conditions, so this is a matter that the industry may need to address.

It is important that these contractual arrangements are clear, because the High Court has placed local authorities and TfL under a duty to examine those contractual arrangements when considering an application for an operator's licence.[20]

So although passengers may see little difference, there is clearly a need for potentially significant behind-the-scenes developments.

James Button
Principal, James Button & Co Solicitors

20 See para 36.



Suspending driver licences

Members need to follow a demonstrably rational procedure when deciding whether to suspend a driver's licence – this is not the time for showing 'who is boss', says **Andy Eaton**

In the last edition of the *Journal* ((2021) 31 JoL) James Button touched upon the concept of proportionality of local members' decisions when deciding on whether to suspend a driver's licence following any disciplinary action – and importantly, the length of any suspension.

In my 40-year career, how many times have I heard woeful stories of members handing down suspensions for several months, often six, when responding to driver misdemeanours.

After many years of prosecuting drivers under the 1847 & 1976 Acts I have rarely, if ever, achieved the maximum fine, which in the vast majority of cases is £1,000 (see, for example, s 76, LG(MP)A 1976). Typically the fine imposed has been in the region of £500. Higher fines close to the maximum permitted have, in my experience, only been imposed in the most aggravated of circumstances.

The contrast between the relatively low financial penalties imposed as a criminal sanction and the long suspension imposed as a regulatory measure invites reflection. If we accept, for the sake of discussion, that the average weekly wage for a driver is around £600, a six-month suspension equates to a loss of income of £15,600 (£7,800 for a three-month suspension).

A lengthy period of suspension typically leads to an immediate appeal by the driver, who remains able to drive pending the appeal. In these circumstances, if the suspension sanction is examined in terms of the financial consequences to the driver; if the scale of the suspension when weighed against the misdemeanour itself is taken into account; if the process by which members had considered the appropriate length of suspension is assessed; and if the likely financial penalty in the event of a criminal conviction is considered, then I suspect the bench would be compelled to allow the appeal on the basis of unreasonableness and disproportionality.

Quite apart from the disappointment of losing the appeal, there would also be the cost implications. A finding that the licensing authority acted unreasonably strips away the protection afforded by the decision in *Bradford v Booth* [2001] LLR 151 [25].

The Court of Appeal in *Hope & Glory* [2011] 3 All ER 579 reminds us that "the licensing function of a licensing authority is an administrative function" [40]. Decisions by the council should demonstrate good administration and good regulation of the taxi trade, not an opportunity for punitive measures. In my experience, and confirmed by colleagues anecdotally, there is a small minority who fail to appreciate this distinction and adopt a very harsh approach.

Thankfully, although most members can keep a sense of perspective, they are often nevertheless confused about what period of suspension would be reasonable and appropriate in all the circumstances of a given case – one week, two weeks or three months? Sometimes they will be struggling for a sense of direction; and at other times, they will be looking to teach the driver a lesson.

Of course, the first decision the members should be considering in any licence review is whether the facts of the case and the conduct of the driver are so unacceptable that they consider the individual no longer suitable to hold the licence. In those cases, they should not hesitate to revoke, and the Department of Transport's Statutory Standards of July 2020 informs members that under no circumstances should they be offering the benefit of the doubt in favour of a driver where the safety of the public is at stake:

> *5.14 Licensing Authorities have to make difficult decisions but (subject to the points made in paragraph 5.4) the safeguarding of the public is paramount. All decisions on the suitability of an applicant or licensee should be made on the balance of probabilities. This means that an applicant or licensee should not be 'given the benefit of the doubt'. If the committee or delegated officer is only "50/50" as to whether the applicant or licensee is 'fit and proper', they should not hold a licence. The threshold used here is lower than a criminal conviction (that being beyond reasonable doubt) and can take into consideration conduct that has not resulted in a criminal conviction.*
>
> *9.10 A suspension may still be appropriate if it is believed that a minor issue can be addressed through additional training. In this instance the licence would be returned to the driver once the training has been completed*

without further consideration. This approach is clearly not appropriate where the licensing authority believe that, based on the information available at the time, on the balance or probability it is considered that the driver presents a risk to public safety.

If the members accept the driver is still suitable but they are unsettled by the facts of the case, they can then consider the appropriate sanction upon the licence. On hearing any mitigating factors, such as a previously unblemished career, or an expression of genuine regret by the driver, the members can consider whether penalty points or a written warning are sufficient to deal with the issue.

It is my view that the vast majority of driver misconduct cases can, and indeed should, initially be dealt with by either penalty points, see (2020) 28 JoL, or warnings, as part of any stepped enforcement policy.

Only where the case demonstrates a pattern of poor behaviour or judgement on the part of the driver, as evidenced by the award of previous points or warnings, should the members be considering suspension. And in cases involving serious misconduct the members should be considering revocation, not suspension, given the threshold for suitability to hold the licence.

Following the advice in the Department of Transport's standards document, the use of immediate suspension where a training course is an option is an ideal use of the power under s 61 of the 1976 Act. However, it is often difficult to find suitable "anger management" or "behavioural management" courses in order to be able to exercise that particular power. Even speed awareness courses are not always available for non-police matters.

If it is the case that the driver has already accrued penalty points or has a previous warning, the members may then consider suspension to be an appropriate response. The decision to suspend should be well reasoned and considered, with the length of suspension carefully calculated and not simply an arbitrary number of weeks plucked from the air.

In the Magistrates' Court, once the magistrates reach the stage of sentence they often have the benefit of sentencing guidelines. In the case of motoring offences and environmental crime, the guidelines take the magistrates through a stepped process which ascertains the severity of the offence, the scale of the impact on any victim (or land) and the intention of the offender, in order to reach a well-reasoned sentence. It seems to me that a comparable document dealing with the impact of the driver misbehaviour would be very helpful to members when deciding the period of suspension. Whether the misbehaviour involved a member of the public, or had a direct impact on the public, as opposed to say a driver's altercation with another driver, could rightly have some influence on the length of suspension.

I can remember cases where the driver's behaviour in a punch-up on the rank, traumatised a young child who witnessed the incident, which subsequently led to a period of bed wetting as a result. Such an aggravating feature must surely carry more weight when sentencing than the case of a driver who has had a punch-up around a corner out of sight with a fellow taxi driver, notwithstanding the unacceptable debacle of two licensed drivers fighting in a public space. Similarly, a driver who has accumulated 12 penalty points for repeated failures to keep the council informed of his address might be considered to have committed a more serious offence than a driver who perhaps accumulates 16 points at once for a number of failures in one incident.

I think officers need to be aware that some members will often seek to brandish powers of suspension in a cavalier attitude that seeks to demonstrate to drivers that they are to be obeyed. Decisions like this, often for the most minor of infringements, detract from the sensible and appropriate work done by the vast majority of licensing members throughout the regions.

Importantly, if any decision following a hearing is to be sustainable at appeal, the council will have to demonstrate to the magistrates that the decision was reasoned, rational and measured in the face of all the evidence before the panel.

The use of suspension guidelines by the members, together with their stepped analysis of the facts of the case, and the need to ensure that the conditions of licence are followed, and equally, that driver behaviour has to be maintained at a high standard, are all factors that would assist the magistrates in reaching a decision on the appeal.

If the members' decision to suspend for, say, six weeks is considered, well-reasonable and rational, it is highly unlikely that the magistrates would overturn it.

Andy Eaton
FIoL

Anonymity - a case study

Anonymous representations in licensing applications have been on the rise but this is not a healthy phenomenon, argues **Chris Grunert**

> *The openness of judicial proceedings is a fundamental principle enshrined in Article 6(1) of the European Convention on Human Rights (the right to a fair trial). This underpins the requirement for a prosecution witness to be identifiable not only to the defendant, but also to the open court. It supports the ability of the defendant to present their case and to test the prosecution case by cross-examination of prosecution witnesses. In some cases it may also encourage other witnesses to come forward.*
>
> CPS - Witness protection and anonymity - Legal Guidance[1]

I have been a licensing lawyer for many years (some may say too many). I recall the days of the licensing justices and travelling from court to court to present my cases and clients to the magistrates.

I also recall the frantic days of transition and the second appointed date (24 November 2005). In this experience I am far from unique. As a generation of practitioners, we have been around since day one and have seen how the law has developed and common practices have spread across England and Wales. A level of homogeneous practices in certain aspects can now be found across the country although there remain several exceptions.

One such common practice has become the spread of anonymous representations from members of the public who may oppose the grant of a new licence or variation of an existing business or support a review of the licence. Anecdotal evidence suggests this practice is a done as a matter of course and not in the limited circumstances prescribed by the guidance.[2] Under the Licensing Act 2003 the applicant and all those making relevant representations become a "party to the hearing" (Reg 2, Licensing Act 2003 (Hearings) Regulations 2005), the effect of which is to impose certain rights and obligations upon all the parties (Reg 7) (Hearings Regulations 2005). The processing of that data within the application and representations falls within clear legal obligations placed upon the council to carry out its functions as the licensing authority (see Art 6(1)(c) GDPR) and within the clear performance of its public licensing functions as a licensing authority (see Art 6(1)(e) GDPR).

Anonymity is not described nor appears to have been considered in the 2003 Act at all. When addressed in the s 182 Guidance, readers are cautioned to limit the application of anonymity (9.27) or provide alternative solutions (9.29 and 9.30).

The anonymity of witnesses has been grappled with by the highest of courts and lawmakers alike. All have struggled to weigh anonymity, as a necessity in limited circumstances, against the fundamental principle of openness to ensure a fair trial.

The issue on anonymity has been considered in many different areas of law, both criminal and civil, and when subject of recent *judicial dicta*[3] the consensus of opinion has been that anonymity must be the exception, not the rule; there must be a hurdle which those seeking anonymity should clear. Anonymity can adversely impact the public interest in open justice (a fair trial) and should only be permitted when it is considered that non-disclosure is necessary to secure the proper administration of justice and is in the interests of that party or witness.[4] The Civil Procedure Rules, for example, require the court to consider the interests of both the administration of justice and the party or witness seeking anonymity. The adverse impact can be felt by the applicant (from whom the identity of an objector is kept), as well as an impediment to the decision-makers (sub-committee) when weighing the evidence.

A recent case and a cautionary tale.

In a recent appeal, *Greaves v Craven District Council* (North Yorkshire Magistrates' sitting at Scarborough Magistrates' Court, 21 January 2022), the issue of anonymity of interested parties' objections became a central issue in the case (although not the only issue).

1 https://www.cps.gov.uk/legal-guidance/witness-protection-and-anonymity.

2 Revised guidance issued under s 182 of the Licensing Act 2003 (April 2018), para 9.26 – 9.30.

3 *Neil Charles Money (as Liquidator of CSL Global Solutions Limited (in Creditors Voluntary Liquidation), David Dyett Limited (in Creditors Voluntary Liquidation)) v AB (by his Litigation Friend, the Official Solicitor)* [2021] EWHC 2999 (Ch).

4 Civil Procedure Rules 1998/3132 rule 39.2(4) General rule—hearing to be in public.

In this case, the anonymised objections were all from interested parties who claimed the operation of the premises would adversely impact upon their homes.

While representations may be made by any persons within the local authority's area (or indeed from any geographical location) the Court of Appeal confirms the importance of the particular location for decision making: *Licensing decisions … … … involve an evaluation of what is to be regarded as reasonably acceptable in a particular location*.)See *Hope & Glory.*[5]: also the s 182 Guidance, para 8.42).

The particular location of a person making representations, and the likely impact of the operation of a premises in that location vis-à-vis the likely effects of that impact generally in that location and specifically to the person making the representation, will have a direct impact on the weight to be attached to a representation.

During the public consultation period for what is a modest micro bar with a capacity in the region of 20 patrons, no representations were received from any of the responsible authorities but a small number of anonymous interested parties did oppose the grant. No interested party appeared at the licensing sub-committee hearing, but they did nominate a local councillor to speak on their behalf.

There was therefore no opportunity for the applicant in the first instance to properly test the evidence. It is my view that the advice at paragraph 9.12 of the s 182 Guidance, namely that responsible authorities should ensure their representations can withstand the scrutiny to which they would be subject at a hearing, is equally valid for those other persons making representations.

The sub-committee resolved to refuse the application. An appeal was lodged and was listed before the Scarborough Magistrates' Court (although it was not a decision of the Scarborough licensing authority which was being appealed). The respondent chose to rely upon no witnesses in the appeal, other than the licensing officer who presented the decision of their licensing authority and the committee's agenda papers. The licensing officer entered these items into evidence as exhibits to their own witness statement. No other witnesses appeared on behalf of the respondent. This is not uncommon but is unsatisfactory for many reasons, some of which the court articulated in its decision notice.

The magistrates were ostensibly presented with the same evidence as had been considered by the sub-committee save that they did not have the benefit of an advocate speaking on behalf of the anonymised interested parties.

Curiously, the licensing authority chose not to observe the operation of the premises in the interim between the premises licence application refusal and appeal. The premises had operated under the authority of TENs in this period, but the licensing authority chose not to observe the site in action. This was surprising, especially, as in common with many applications for new licences, the friction came from what the operator claimed would be the operating reality and what objectors portrayed this to be. Real life experience, in the opinion of the appellant, was seen as very relevant evidence.

At the conclusion of the case, the magistrates allowed the appeal and remitted the case to the sub-committee to reconsider the case subject to their directions which included a direction that "the licensing authority should allow disclosure of personal details of persons making representations in order to allow for mediation as outlined in s 182".

The respondent was also ordered to pay the appellant costs of £19,182.38 in full.

In their decision notice, the magistrates made the following comments on the issue of anonymity in this case:

> *The exceptional reasons for redacting the contact details from the correspondence of objectors had not been justified. The decision was taken to anonymise without corroborative evidence. Those representations could therefore not be subject to scrutiny by the applicant. (Para 9.26 of the s 182 regulations requires the licencing authority to provide the applicant with copies of the relevant representations and only under exceptional circumstances should they be anonymised.)*
>
> *Engagement and mediation with local people and groups had not been undertaken (para 9.34) this was due to the anonymisation of the objections.*
>
> *We were not satisfied that the evidence amassed and assessed and then presented to the licensing authority was sufficient and had not been subject to robust scrutiny to enable the licensing authority to make a decision or come to the decision it did.*
>
> *The decision to remove the identification on the correspondence from other objectors had prevented the applicant from addressing their concerns. The reasons for redacting these details was not in our opinion sufficiently justified by the licencing authority (S9.27*

5 *R (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court & Ors* [2011] EWCA Civ 31 [42].

and 9.28). We did not feel that the FB post and notice in the window amounted to exceptional circumstances where persons making representations would have a genuine and well-founded fear of intimidation. This frustrated the interests of natural justice tests in that the testing of evidence to assist the hearing was denied.

From our experience, the magistrates rarely remit successful appeals to the sub-committee. A more common outcome in such cases is for the magistrates to substitute their own decision for that of the sub-committee; in this instance this would have been the grant of the premises licence.

The decision of the magistrates appeared to acknowledge the impact of anonymisation on the appellant and the court and / or the licensing sub-committee itself. It is important to recognise that all parties are disadvantaged by anonymity, not just the premises licence holder and / or applicant.

The appellant was denied the opportunity to test the evidence, but so was the court. In addition, the weight given to the interested parties must reasonably be diminished by some measure. There is a toll to pay for anonymity by all sides. An objector who is anonymised may be ill served by this decision.

The court's decision was therefore to remit the matter to the sub-committee with direction to lift the veil of anonymity, thus allowing the sub-committee and potentially, on appeal, a future bench of magistrates a clearer understanding of evidence and allow them to assess the evidence fully.

Should, therefore, one party be allowed to make their comments from behind a veil of anonymity which cannot be tested by the other? The answer appears to be yes, but only under exceptional circumstances and not as a matter of course.

Anonymity - the legal test

The issue of anonymity is not dealt with in either in the Licensing Act 2003 or the Hearing Regulations 2005 but it is in the s 182 Guidance. The notice of hearing given by the licensing authority to the applicant must give the applicant copies of the relevant representations received (Reg 7(2) and Sch 3). These representations should be disclosed in full. In my view that ought to include the address and the contact details of the person making representations. I acknowledge and accept that these details ought to be redacted in the public agenda packs. The starting point ought to be that relevant representations received should be provided in full to the applicant. It is important to recognise that the disclosure of the address to the applicant, and in certain circumstances to the members of a licensing sub-committee determining an application, will be of the upmost necessity when responding to the issues contained therein or weighing their worth. Equally, contact details (or some other facility) to aid mediation are of vital importance.

The importance of full disclosure to the applicant in accordance with the Hearings Regulations 2005 is made clear in paras 9.26 – 9.30 of the s 182 Guidance, which state that withholding personal details should only be had in "exceptional circumstances" such as where there is a "genuine and well-founded fear of intimidation" and where the "circumstances justify such action". The court found that circumstances of this case did not raise exceptional circumstances.

Disclosure of personal details of persons making representations

The s 182 Guidance states:

9.26 Where a notice of a hearing is given to an applicant, the licensing authority is required under the Licensing Act 2003 (Hearings) Regulations 2005 to provide the applicant with copies of the relevant representations that have been made.

9.27 In exceptional circumstances, persons making representations to the licensing authority may be reluctant to do so because of fears of intimidation or violence if their personal details, such as name and address, are divulged to the applicant.

9.28 Where licensing authorities consider that the person has a genuine and well-founded fear of intimidation and may be deterred from making a representation on this basis, they may wish to consider alternative approaches.

9.29 For instance, they could advise the persons to provide the relevant responsible authority with details of how they consider that the licensing objectives are being undermined so that the responsible authority can make representations if appropriate and justified.

9.30 The licensing authority may also decide to withhold some or all of the person's personal details from the applicant, giving only minimal details (such as street name or general location within a street). However, withholding such details should only be considered where the circumstances justify such action.

The guidance suggests a two-limb test before action is taken to anonymise representations in any way:

1. The party can demonstrate to the licensing authority's satisfaction "that the person has a genuine and well-founded fear of intimidation" and

2. [as a result of the fear of intimidation] may be deterred from making a representation on this basis.

A party who has therefore already submitted a representation openly including their name and address would appear to fall outside the terms of the guidance.

Generously, this may be interpreted to include parties who may express their objection to the representation being shared openly with the applicant.

In either case, the licensing authority must be satisfied "that the person has a genuine and well-founded fear of intimidation". In order to reach a conclusion on this issue the licensing authority must assess evidence provided by the interested party to establish and justify their "well-founded fear". Simply to offer it carte blanche is not supported by the s 182 Guidance or the application of anonymity in any other field of law.

Case specific

In this specific case the issue of anonymisation of the objections was flagged throughout and raised with members of the sub-committee. In the committee agenda it was noted "Requests have been made by objectors for their personal information to be withheld". No further justification was outlined in the body of the agenda. When questioned by members of the sub-committee whether anonymisation was a usual practice, the licensing officer responded as follows:

> *Yes, under the Licensing Act, they've got to provide a name and address to the licensing authority anyway so we can verify the location and that it's a relevant objection etc. It's unheard of really for them to remain anonymous throughout the whole process. There's got to be substantial grounds for it normally.*

This demonstrated a clear understanding of the issue at hand. However, the Magistrates' Court ultimately disagreed that the evidence cited in support of the decision was sufficient.

Although not justified in the initial agenda the respondents did address their decision to anonymise the representations in more detail during the appeal. In their supporting statement, the licensing officer stated:

> *Following the determination of* [previous proceedings] *complaints were made to Licensing alleging 'The Applicant' publicly posted* [the FB post referenced above] *and named one of the residents who had made an objection against the premise. ….. It was alleged 'The Applicant' had also been seen* [allegedly] *giving the 'one finger salute' to residents and placing a notice on the premise directed at those who at made representations. It was due mainly to these events that those making representations wanted their objections to remain anonymous during the application for <name of premises - redacted>, in order to safeguard themselves from being publicly named and possibly being subject to abuse.*

As stated previously, although the local authority chose not to visit the premises between the refusal and appeal, they did cavass opinion from local residents and submitted a supplementary statement to summarise these views. Again, the licensing authority chose to anonymise the source of the comments this time stating:

> *The 13 residents were named on the email and verified by myself, by previous involvement during the history of the premises but requested to remain anonymous due to the hostilities and belief of there being further hostilities towards these residents.*

No additional evidence of hostility towards the residents originating from the appellant was cited to justify this decision.

The "evidence" was tested by counsel at the appeal hearing and the magistrates agreed it failed to reach the necessary level.

The appellant called during the appeal an expert witness to comment upon the trading of the premises under the aforementioned TENs. A recognised expert in crime and disorder he characterised, when questioned, the nature of the evidence relied upon to justify anonymisation as a symptomatic of "neighbour dispute".

Conclusion

This case provides a timely reminder that anonymisation in the licensing regime is the exception and not the norm.

Chris Grunert
Partner, John Gaunt & Partners

Alerting residents to licensing applications

The local community must be made aware of a new licensing application but the process of communicating relevant details is not always straightforward. **Richard Brown** explains the pitfalls

When I placed my metaphorical quill carefully down and the ink dried on the concluding sentence of my article for (2021) 30 JoL, I breathed a sigh of relief in the certain knowledge that – though I had committed to paper what were a couple of thousand words of worthy prose on the subject of remote hearings which may even be read by a handful of insomniacs desperate for a temporary cure - the necessary contrivance of remote hearings was coming to an end. Indeed, my article for (2021) 31 JoL was notable (perhaps only notable) for its omission of any references to remote hearings.

My article for (2021) 30 JoL opened with the words "Public participation in and access to local authority meetings are a fundamental part of the local democratic process." The cynic may echo Christine Keeler's famous *bon mot* – "Well, he would say that, wouldn't he"– but it is axiomatic. As I warmed to my theme, I mused on the relative merits of remote hearings *v* in person hearings. It is fair to say that I used to be indecisive about whether remote hearings were a net positive or a net negative. Now, I'm not so sure.

Anyhow, this set my grey cells aquiver as to the building blocks of public participation in licensing. The foundation stone is, of course, having knowledge of an application – the right to attend / be represented at a hearing under Licensing Act 2003 (LA03) being conferred only on those who have made a relevant representation within the 28 days consultation period.

The ways in which members of the public become aware of an application under LA03 will be familiar. The legislative machinery is thus: s 17(5)3 requires the Secretary of State to publish regulations which require an applicant to advertise an application (my emphasis):

> *s 17(5)(a)(ii) in a manner which is prescribed and is **likely** to bring the application to the attention of persons who are **likely** to be affected by it;…*

Section 18 LA03 (determination of application for premises licence) only applies where the relevant licensing authority:

> *s 18(1)(b) is satisfied that the applicant has complied with any requirement imposed on him under subsection (5) of that section (i.e. s 17(5)).*

The same provisions apply *mutatis mutandis* to variation applications.

The requirements are set out in Licensing Act 2003 (Premises licences and Club premises certificates) Regulations 2005 (the LA03 Regulations), and are mandatory. Regulation 4 states that "a person applying for…shall comply with the appropriate provisions of Parts 2 and 4". Unfortunately, and unlike the equivalent Gambling Act 2005 (GA05) Regulations, Parliament's intention as to the consequences of non-compliance are not set out.

The "appropriate provisions" essentially comprise the way in which an applicant must advertise an application (Regulation 25(a) - the famous "blue notice"); Regulation 25(b) (advertisement in newspaper or similar); and the content of the blue notice (Regulation 26).[1] Note also that Regulation 26B requires the local authority to advertise applications on its website.

Local authorities can also take their own extra-statutory steps to encourage public participation / spread awareness. This can be done via, eg, news letters, emailing councillors, email alerts and individual letters (but note if this form of consultation is carried it must be done properly).[2]

1 In order not to over complicate matters, I am not considering Regulation 26A, regarding advertisement of 'minor variations' under s 41A and 86A LA03.

2 See *Corporation of the Hall of Arts and Sciences v The Albert Court Residents' Association* [2011] EWCA Civ 430.

Such extra-statutory measures were thrown into sharper focus by "Lockdown 1" beginning in March 2020, when there was concern, not least from the Institute of Licensing, that licence applications may fall to the bottom of the local authority to-do list and efforts should be made to ensure that licensing processes continued (and this included resident participation). The upshot was the Institute's Protocol,[3] which recommended that "consideration should be given to emailing the details of all new applications to local ward councillors, parish councils, local residential and civic amenity groups, and organisations representing local operators and businesses."In my experience, the blue notice remains the most common statutory requirement by which means an application may come to the attention of residents. After 13 years I am yet to receive a single enquiry from someone who has seen a newspaper advertisement.

Unsurprisingly given the importance of the blue notice for public participation, I receive regular queries regarding blue notices and whether the notice has complied with the statutory requirements. Some of these enquiries are *ex post facto,* which makes it more difficult to assess compliance.

It is worth scrutinising Regulations 25 and 26 to see exactly how prescriptive are the requirements in respect of the blue notice; what can go wrong; and, where it does go wrong, whether it matters, and to what extent:

> *25. In the case of an application for a premises licence… the person making the application shall advertise the application, in both cases containing the appropriate information set out in regulation 26—*
>
> *(a) for a period of no less than 28 consecutive days starting on the day after the day on which the application was given to the relevant licensing authority, by displaying a notice,*
>
> *(i) which is—*
>
> *(aa) of a size equal or larger than A4,*
>
> *(bb) of a pale blue colour,*
>
> *(cc) printed legibly in black ink or typed in black in a font of a size equal to or larger than 16;*
>
> *(ii) in all cases, prominently at or on the premises to which the application relates where it can be conveniently read from the exterior of the premises and in the case of a premises covering an area of more than 50 metres square, a further notice in the same form and subject to the same requirements every fifty metres along the external perimeter of the premises abutting any highway; and [ ].*

Regulation 26(4) then goes on to specify the content of the blue notice, eg, name of applicant, postal address and date by which representations must be made.

From this, it is apparent that the ways in which advertisement of the blue notice may be non-compliant (or, at least, open to challenge) are legion. The following is a non-exhaustive list of points which can arise, whether by accident or design, along with my italicised example for each of how non-compliance could be alleged:

1. The notice is not displayed for 28 days; and / or not for 28 consecutive days. *A resident who has been away on holiday misses the notice.*

2. The notice is smaller than A4 (or indeed larger). *A residents' association member is used to spotting A4 notices so does not spot a different size.*

3. The notice is not pale blue. *A resident next door to the premises is partially-sighted. The notice is on white paper, against a white background, and so not seen.*

4. The notice does not use black ink. *The contrast between the ink and the paper is insufficient to catch attention of passers-by.*

5. The font is smaller than 16 point. *It cannot be "conveniently" read by passers-by.*

These points are essentially questions of fact. The following are more subjective:

6. Is the notice "prominently" displayed? *The notice complies fully with 1-5 above, but is placed two feet above ground level.*

7. Is the notice "at" or "on" the premises to which the application relates? *The highway is 10 metres from the curtilage of the premises. The notice is placed on the highway so it can be "conveniently read".*

8. Can the notice be "conveniently" read from the "exterior of the premises"? *The highway is 10 metres from the curtilage of the premises. The notice is placed at or on the curtilage of the premises, but*

3 https://www.instituteoflicensing.org/news/covid-10-licensing-issues-iol-protocol-updated-20-april-2020/.

cannot be "conveniently read".

9. The notice is not placed every 50 metres. *An open air site to be used for a festival covers a large area but the notice is not placed every 50 metres.*

10. The blue notice specifies the wrong date by which representations have to be made. *Residents submit representations before the date specified but after the actual last date.*

The eagle-eyed will note some real-life examples in the above. In each case and in totality, the question is, is the advertisement "likely" to bring the application to the attention of persons who are "likely" to be affected by it?

The equivalent provisions of the Gambling Act 2005 are different in important respects. While the requirement to publish a notice of the application in a local newspaper etc is broadly similar, the provisions in respect of the public notice are drafted with fewer loopholes.

Regulation 12 of the Gambling Act 2005 (Premises Licences and Provisional Statements) Regulations 2007 (the GA05 Regulations) states that:

> *(6) Where this paragraph applies the applicant must publish notice of his application—*
>
> > *(b) by displaying a notice on the premises to which the application relates—*
> >
> > > *(i) in a place at which it can conveniently be read by members of the public from the exterior of the premises;*
> > >
> > > *(ii) for a period of no less than 28 consecutive days starting on the day on which the application is made to the licensing authority.There is no reference to "prominently".*

There is no requirement for notice colour, font size, or black ink – all of which could seed grounds of challenge under the LA03 Regulations. Confusingly, the 28 days consultation period starts on the day the application is made, rather than the day after as in the LA03 Regulations.

More fundamentally, Regulation 14 of the GA05 Regulations heads off potential legal challenges for non-compliance by specifying the consequences of failure to "publish a proper notice", defined as one which "does not comply with the requirements of these Regulations as to the form or manner in which it is to be published": the 28 day consultation period is reset and any decision made is a nullity (Regulation 14(4) and (5)).

Thus, challenge as to non-compliance is greatly reduced. Importantly, the effect of a failure to comply set out at Regulation 5 means that it has retrospective effect – any purported grant has no effect (subject to Regulation 6, where the licensing authority may disregard any irregularity in relation to the publication of the notice).

Had a similar provision made its way into the LA03 Regulations, it may have saved a great deal of time and money for applicants, interested parties and licensing authorities in challenging / resisting challenges to the legitimacy of decisions due to non-compliance.

Following a number of Magistrates' Court decisions which perhaps followed an overly prescriptive and technical approach, two High Court cases in 2014 gave short shrift to challenges over non-compliance where the alleged defects were technical and minor, and there was no significant prejudice caused.[4]

Both of these cases in fact stemmed from alleged non-compliance on the part of the licensing authority with its advertising obligations, although the principles are equally applicable to Regulation 25 and Regulation 26 defects. Regulation 38 requires a licensing authority to advertise a review of a premises licence. The requirements as to display of the blue notice are the same *mutatis mutandis* as Regulation 25. Instead of a statement of the relevant licensable activities (or qualifying club activities), the notice shall state the grounds of the application for review (Regulation 39(c)).

The alleged defects in *Funky Mojoe* concerned a failure (by the licensing authority) to include the grounds for review on the blue notice (as required by Regulation 39(c), and that the font size of part of the notice was 14 not 16. The alleged defects in *Akin* concerned a similar failure regarding the grounds for review. The learned judges in each case followed the "substance over form" approach set out in *R v Secretary of State for the Home Department, ex p Jeyeanthan*[5] rather than a forensic examination of whether every single box had been ticked, "i" dotted and "t" crossed.

The *Funky Mojoe* and *Akin* cases both involved challenges by the licence holder to the advertisement of review proceedings in circumstances where any defects in advertising the application may reasonably have been

4 See *R (D&D Bar Services Ltd) v LB of Redbridge* [2014] EWHC 344 ("Funky Mojoe"); *R (Akin (t/a Efes Snooker Club) v Stratford Magistrates' Court* [2014] EWHC 4633.

5 [1999] EWCA Civ 1465.

expected to have caused the licence holder no realistic prejudice, and if anything been of benefit.

For a much more recent case which examined non-compliance by an applicant for a licence where objectors had complained of prejudice, *R (Wrotham Parish Council) v Tonbridge & Malling Borough Council*, see CO/2637/2021 order of Cheema-Grubb J refusing permission to judicial review dated 2 August 2021. The claimant alleged non-compliance with Regulation 25(a)(ii) of the LA03 Regulations, viz that the blue notice had not been placed every 50 meters along the perimeter of the sight. In the Wrotham case, three notices were placed when in order to comply fully, 30 notices should have been placed. Nevertheless, the High Court followed the approach in Jeyeanthan.[6]

It must be stressed that each of these cases is fact-specific. There will clearly be times when on the facts and circumstances of any given case, non-compliance is substantial and does cause prejudice, leading to more serious consequences. It is good practice, if not perhaps tactically advantageous, to raise any queries about the blue notice in a timely manner.

For completeness, an applicant for a sex establishment licence under Schedule 3 Local Government (Miscellaneous Provisions) Act 1982 is required to advertise in a local newspaper "circulating in the appropriate authority's area" (para 10(8)) and for 21 days beginning with the date of the application (my emphasis) "on or near the premises **and** in a place where the notice can conveniently be read by the public" (para 10(10)), with the form of such notice to be prescribed by the appropriate authority (para 10(13).

Each piece of legislation enables residents to make their views known. The public policy reasons for LA03 and GA05 include facilitating public engagement. The reason why the 1982 Act was amended was to give local people more of a say on applications for lap-dancing clubs. As will be apparent, there are subtle but important differences in the wording of the various provisions. LA03 takes a micromanagement approach, and leaves the consequences of non-compliance uncertain. GA05 takes a less prescriptive approach, and specifies the consequences of non-compliance. The 1982 Act is still less prescriptive, and does not specify the consequences of non-compliance.

In practice, in cases under each of these pieces of legislation the courts remain unlikely to interfere where there has been "substantial compliance" and no obvious prejudice has been caused, as in the *Funky Mojoe, Akin* and *Wrotham* cases.

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

6 See https://www.localgovernmentlawyer.co.uk/licensing/316-licensing-features/47866-licensing-committees-and-procedural-defects.

Countdown to calorie counting – new regulations to reduce obesity

Food retailers have new administrative burdens to shoulder as **Hannah Burton** explains

From 6 April 2022, English cafes, restaurants, takeaways and bakeries will be among the businesses required to display information about the calorie content of the food they are selling, under The Calorie Labelling (Out of Home Sector) (England) Regulations 2021. Part of the UK government's strategy to cut obesity levels and equip people to make better food choices. Businesses affected should make preparations to ensure compliance now.

Who will it effect?

The regulations are only effective in England – with the other devolved nations likely to follow. The requirement to calorie label extends to any "qualifying business", defined as a business with 250 or more employees which offers for sale non-prepacked food or drink suitable for immediate consumption by the person who buys it.

Given the prevalence of franchises in the out-of-home sector, individual franchisees with fewer than 250 employees will be treated as part of the larger franchisor's business if the franchisor controls the specific food products sold, the appearance of the premises and business model. This does not include franchise agreements that are limited to the sale of alcohol (and where the franchisee can determine what other food is provided).

Third-party takeaway platforms, irrespective of the size of their business, will also be required to display calorie information on food and drink items sold by businesses in scope of the regulations.

Further education and military establishments, criminal justice accommodation, hospitals or other medical institutions, care homes or other institutions providing social care where the food is provided solely for patients or residents and workplace canteens where the food and drink on sale is solely for the employees of the workplace are exempt, unless their catering function is outsourced to a business with more than 250 employees.

What food is in scope of the regulations?

Calorie labelling will be required on all items prepared and sold for immediate consumption on the premises or for consumption off the premises, provided further preparation is not required by the consumer before it is consumed. Preparation includes, peeling, hulling, washing, cooking, thawing frozen food and heating or reheating pre-cooked food.

This includes: a meal at a restaurant or cafe; prepacked food for direct sale such as a sandwich made and packaged on-site at a cafe (which will also require to display allergen information compliant with Natasha's Law); and food packaged at a consumer's request, such as a sausage roll at a bakery. Soft drinks, sides and toppings on a menu will also be required to display calorie labels.

Items which typically require further preparation, such as uncooked meat, fish and eggs are exempt under the regulations, as are drinks with over 1.2% alcohol by volume, bread and baguettes (but not rolls or buns), loose fruit or vegetables and condiments added by the consumer. However, when fish, meat or cheese is sold as an ingredient in food, such as fish as part of a sushi platter or chicken as an ingredient in a 'build your own' sandwich, and fresh fruit prepared as part of a fruit salad, for example, calorie information must be displayed.

Similarly, food for specified audiences is excluded, which covers food provided in schools, by charities as part of their activities for free or not for profit, food provided (not for payment) to patients at a hospital or other medical establishment, or to residents of a care home or other social care institution.

Other exemptions apply to give flexibility for businesses to make use of temporary menu items to help reduce their food waste, use seasonal produce, and offer special menu items at certain points of the year. An item is exempt from the regulations if it is included on a menu for less than 30 consecutive days and a total of 30 days in any calendar year.

What calorie information is required and where must it be displayed?

Businesses will be required to calculate the calorie content per portion of in-scope food or drink item sold (eg, per item or scoop) and not per weight or measure, making clear to the consumer what a standard portion is. This must be displayed at the point of choice for the consumer – in essence any place where customers choose what food to buy. Where food is

chosen from a menu, the energy content and size of portion must be displayed on the menu, next to the description or the price of the food and, where food is selected from items on display on a label identifying the food, next to, or in close proximity to, each item of food which may be chosen and displayed in a position which ensures that the label can be read by anyone choosing that food.

While in many situations these requirements will be readily achievable, in others this will be more complex – for example for "build your own" items, coffee menu boards or meal deals, and other customisable items where there are mutliple combinations. Businesses must ensure that they display the required information where the consumer chooses from a menu, or from items on display, as they apply in the particular circumstances. For example, information could be provided on a variety of combinations in meal deals, or for coffee shops using the standard milk offer (eg, semi-skimmed milk), referring customers to a menu which displays the calorie content of coffees with the different milk varieties on offer.

Required information must be easily visible, clearly legible, and not in any way hidden or obscured by other written or pictorial matter, or any other intervening material. Businesses are also required to display the statement "adults need around 2,000 kcal a day" on their menus where food is chosen from a menu, or otherwise on a label where it can be seen by customers when making their food choices.

Under the regulations, a business can provide an alternative menu to a customer, at their request, which does not have the required information on it. But they must have only given them the compliant menu in the first instance, and it must be at the request of the customer to change the menu.

Accuracy of the calorie information

Government guidance suggests that while businesses should develop and implement processes to ensure that calorie information is as accurate as possible to ensure the food can be reproduced consistently each time it is made, in view of the inherent variation in ingredients, processing of foods, and exact portion size a tolerance of plus or minus 20% would be considered an acceptable margin of difference between actual and declared calorie values. Best practice will be to ensure records explaining the methodology for calorie calculation are kept and can be provided if required.

Enforcement procedures

Local authority enforcement officers will be able to issue improvement notices in the event of non-compliance, giving businesses an opportunity to take remedial steps prior to issuing any monetary penalty. Non-compliance with an improvement notice is a criminal offence and punishable by an unlimited fine (under the Food Safety Act 1990). However, enforcement officers may impose a fixed monetary penalty of £2,500 as an alternative to criminal prosecution. Enforcement action taken will be published by local authorities.

Local authorities are required to publish guidance on their approach to fixed monetary penalties, including on the circumstances of the imposition and calculation of their amount. Detail on rights of appeal must also be given. A phased and proportionate approach to enforcement is to be expected.

An improvement notice should only be issued where there are "reasonable grounds to believe" that the business is not complying with the regulations. While there is no right to appeal against the issue of a notice itself, it is possible to challenge proceedings for failure to comply, as well as against any imposition of a fixed monetary penalty. It is worth noting that the standard for imposition of a fixed monetary penalty is that the enforcement officer is "satisfied beyond reasonable doubt that the person has committed the offence" – they must in other words be sure. This is a much higher test and allows for more opportunity to challenge in appropriate circumstances.

Enforcement difficulties

As matters stand, implementation of the regulations looks likely to be a complex task. For example, information to determine whether a business falls within scope and is a "qualifying business" may not be readily available.

Even if this determination can be made, assessment of calorific information displayed can be a difficult task. Businesses will be encouraged to keep copies of their methodology for review, without scientific testing, and the consequent expense and delays associated with that. But it would seem difficult for any enforcement officer to challenge whatever information is given, unless that is clearly wildly inaccurate or simply missing altogether. It is also difficult to see how an enforcement officer can demonstrate the necessary "reasonable grounds to believe" non-compliance without such testing, except in the most extreme examples of noncompliance.

Local authorities will be concerned to ensure that the regulations do not simply become another burden on already stretched resources. With the UK government committing to consult on similar labelling requirements for the sale of alcoholic drinks, stakeholders in that sector too will be keen to hear from local authorities on their enforcement strategy.

Hannah Burton
Associate Solicitor, Pinsent Masons

Law, regulations and guidance during coronavirus

The impact on Scottish licensing of the founding acts of Parliament, the regulations and the important role of guidance over the past two years of the pandemic are assessed by **Caroline Loudon**

It's hard to believe we are nearing the two-year anniversary of life impacted by coronavirus. I am very aware that those reading this article will all have very personal stories to tell about just how enormous that impact has been. We continue to live through "certainly uncertain" times. As a specialist licensing lawyer of circa 15 years, I have worked for a smorgasbord of fantastic clients within the hospitality sector. My role prior to the pandemic has predominantly been to achieve the grant of licences under relevant pieces of legislation regulating liquor licensing, gambling and civic licensing. I have advised on legislation affecting licensing through bodies such as the Law Society of Scotland and, when requested to do so, by clients and sought to influence policy through consultation response and judicial review.

Throughout the pandemic, in addition to ongoing client work and advisory matters, I have been part of a task force group advising on licensing matters (and now other things) with the Scottish Government and member groups representing the hospitality sector. Like many others, I have worked to try to assist the sector in its dialogue with the Scottish Government, challenge where necessary and inform where possible.

As in England, Wales and Northern Ireland, Scotland in December 2021 saw the imposition of further restrictions as a result of the emerging Omicron variant, the "Christmas measures". These restrictions, while unimaginable pre-pandemic, are in fact less severe than the restrictions introduced in December 2020. One can hope that we will – as the First Minister told the Scottish Parliament at the turn of this new year – be entering a phase where we look at solutions that are "more proportionate, sustainable and less restrictive" in 2022 onwards.[1] Therefore, it may be apt timing to reflect now on the various measures that have been put in place at various junctures over the past two years and how they came to be.

The UK Government originally set out its ambition to "turn the tide" against coronavirus within three months using testing, new medicines, digital technology and reducing "unnecessary" social contact. The night of that televised statement, 20 March, was a particularly sombre one when, on a four nations approach, the Prime Minister Boris Johnson told cafes / bars / pubs / restaurants to "close tonight as soon as they reasonably can, and not to open tomorrow". Nightclubs, theatres, cinemas, gyms and leisure centres were also requested to close - all with near immediate effect. The promise given was that the situation would be reviewed each month, with a view to whether relaxing measures would be possible.

Although this statement wasn't completely unexpected by our clients – we had been advising on the limits to gatherings or mass events from the beginning of that week and looking at the contractual implications of cancellations / postponements – we, with our clients, suddenly had to morph and advise on the security of premises, boarding up, insurance risks and then if, and how quickly, businesses could pivot to providing takeaway food and drink. Routes to market were mandated closed.[2] The speed of this immediate required change was unprecedented, and frankly terrifying.

Since that first month, the sector has had to deal with the following: closure; move to takeaway where possible; looking at how to re-open premises, with outdoor areas opening before indoor; physical distancing limits; household limitations on the number of people who can meet; curfews on hours; a ban on the playing of music; only cafes in certain areas being allowed to remain open to trade; local "levels" restrictions, and what those levels meant in terms of operation; removal of physical distancing and household restrictions; Covid vaccination passports and now further restrictions due to the Omicron variant.

The full financial impact of all of this must be verging on incalculable, but the exhaustion levels and personal impact

1 Coronavirus (COVID-19) update: First Minister's statement – 5 January 2022 - gov.scot (www.gov.scot).

2 These original emergency provisions which required businesses to close were held in: The Health Protection (Coronavirus) (Scotland) Regulations 2020, made on 26 March, laid before the Scottish Parliament on 27 March 2020, in force on the same day, (and revoked on 2 November 2020).

for all involved are plain to see. Yet the sector continues to fight and challenge and seek better outcomes. It will not give up.

As a Scottish solicitor I am living (in the main) through the Scottish coronavirus legislation and thus I will refer to the Scottish regime. The legislative framework around coronavirus has become a tangled web of foundation acts still partly in force; Scottish statutory instruments / secondary regulations and amending legislation. These secondary regulations sit in addition to the founding acts of the Scottish Parliament which relate to the protection of public health.

The first of these founding acts is the Scotland Act of 1998, which devolved the protection and promotion of public health, and suppression of threats to the Scottish Ministers; and the second is the Public Health (Scotland) Act 2008, which contains the duty on Scottish Ministers, health boards and local authorities to protect public health. In terms of this pandemic, the Coronavirus (Scotland) Act 2020 which was introduced under Emergency Bill Procedure,[3] passed all three Parliamentary stages on 1 April 2020, and received Royal Assent on 6 April. It was a wide-ranging piece of emergency legislation addressing matters such as evictions, protection for debtors, justice, children and vulnerable adults, alcohol licensing, functioning of public bodies and other measures. Parts of both this Act and the subsequent Coronavirus (Scotland) (No.2) Act 2020[4] (covering protection of the individual, operation of the justice system, reports / accounts and other documents and other measures) remain in force. These provisions were extended under and in terms of the Coronavirus (Extension and Expiry) (Scotland) Act 2021 and are set to expire on 31 March 2022, although it is entirely probable that these may be further extended to 30 September 2022.[5] These powers of extension derive from the Henry VIII clauses – which are clauses that enable Ministers to amend or repeal an Act of Parliament using secondary legislation – avoiding in some cases full Parliamentary scrutiny. This is said to reference the King's preferred way of making law through "proclamation rather than through Parliament".[6] These acts, in addition to the UK Parliament's Coronavirus Act 2020,[7] allow the Scottish Ministers[8] to make the secondary regulations to which we have become so accustomed.

But is it correct that we should have become so accustomed on all sides of the borders? The use of emergency process for the passing of legislation, or to give it a formal name, the "made affirmative procedure", allows governments to react to times of crisis swiftly and to legislate without full Parliamentary scrutiny of regulations. In Scotland this means that a Scottish statutory instrument (SSI) made under this procedure will come into force automatically and remain so for a period of 28 days. During this time, committees report and if the SSI is not approved within that time period, it will fall.

This procedure had previously been used sparingly: in war time, in response to terrorism, or financial crises, ie, extreme circumstances and not for prolonged periods, as we have seen in the case of this pandemic. To date, there have been 140 SSIs made under paras 2 and 3 of Schedule 19 of the 2020 Act. In essence, under this procedure law is made without any Parliamentary scrutiny and open analyses of evidence papers supporting the regulation. Ministers are sidetracked and fundamental questions regarding constitutional protections, accountability and the principles of legality are set aside for another day. All too often, cries from the sector for evidence papers to be produced have gone seemingly unheard, and business regulatory impact assessments have appeared well after the virtual ink has dried on the new regulation.

The UK Government's use of "made affirmative procedure" has been examined by the House of Lords Select Committee on the Constitution[9] in its 3rd Report of Session 2021–22 HL Paper 15, "Covid-19 and the use and scrutiny of emergency powers" and criticisms levied and recommendations made. Much will be made of this (I hope) in the public inquiry announced by the Prime Minister on 12 May 2021 to commence in spring this year. However, the Select Committee stated at para 209 of its report:

> *We recommend that a review of the use of emergency powers by the Government, and the scrutiny of those powers by Parliament, should take place in advance of the public inquiry. We believe this review could be completed in time to inform the public inquiry and planning for any future emergencies. 210. The approach adopted in response to the pandemic must not be used to justify weakened parliamentary*

3 Official Report - Parliamentary Business: Scottish Parliament.

4 Introduced to the Scottish Parliament 11 May 2020 and Royal Assent 26 May 2020.

5 Coronavirus Acts: tenth report to Scottish Parliament.

6 https://www.parliament.uk/site-information/glossary/henry-viii-clauses/.

7 Section 49 and Schedule 19. Introduced to Westminster 19/3/20; consented to by Scottish Parliament 24/3/20 and Royal Assent 25/3/20.

8 Scottish Ministers have the power to make regulations imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health.

9 https://publications.parliament.uk/pa/ld5802/ldselect/ldconst/15/15.pdf: "Our first report, on the effect on the courts, was published on 30 March 2021, followed by our second report, on the impact on Parliament, on 13 May 2021.2 3. In this third and final report on our inquiry, we consider the use and scrutiny of emergency powers during the COVID-19 pandemic."

scrutiny of Government action in response to any future emergencies.

North of the border, the Scottish Parliament's Delegated Powers and Law Reform Committee has begun an inquiry into the use by the Scottish Government of these powers. The committee, which is convened by Stuart McMillan MSP, "hopes to help the Parliament ensure an appropriate balance between flexibility for the Government in responding to an emergency situation while still ensuring proper parliamentary scrutiny and oversight." Consultation responses were to have been returned by the end of December 2021 so the work of the inquiry is very much in its early days.

The use of emergency procedure and the potential for abuse of power has been the subject of many papers on constitutional law. There is much more to come on this, with questions as to what constitutes circumstances of governments being "above the law" needing to be answered, as well as examination of erosion of the fundamental principle of accountability.

Despite the vast array of regulations, we have also seen the Scottish Government use guidance pages on the Scottish Government website to enshrine much of its expectations around how businesses are to operate.[10] This, coupled with FAQs, is how the Government has sought to explain and inform business about how it is expected to operate. Usually legislation speaks for itself, and where things are opaque, the courts are asked to step in. But throughout the pandemic, we have had "quick law" made which has needed much explaining. Guidance has been used as a way to bridge gaps and that has created fundamental difficulties for us in advising clients and businesses. Further, enforcement agencies have differing opinions as to what guidance has actually meant, and what legal footing it may have. The answer to "can guidance become law without an SSI?" is that it depends.

Taking a particular case study, just a year or so ago Scottish hospitality celebrated the lifting of "the music ban". This was a "ban" which was contained in "statutory guidance": it stated that from 14 August 2020, there was to be no background music and televisions were to be on mute and subtitled in hospitality premises. This approach was being taken on a public health basis to avoid people having to raise voices to be heard, or to lean in to others, which could increase the risk of transmission of the virus.

The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 had the following to say on statutory guidance:

Reg 7 - Guidance on minimising exposure to coronavirus

(1) A person who is responsible for a place of worship, carrying on a business or providing a service must have regard to guidance issued by the Scottish Ministers about measures which should be taken in accordance with regulation 5(1)(b) relating to its premises, business or service.

(2) Guidance issued by the Scottish Ministers may— (a) make different provision for different cases or descriptions of case, (b) incorporate (by reference or transposition) guidance, codes of practice or other documents published by another person (for example, a trade association, a body representing members of an industry or a trade union).

(3) Regulation 14 (enforcement of requirements) does not apply to a contravention of the requirement in paragraph (1).

The regulations made it clear (as above) that the operator must "have regard" to the guidance. However, all of this would lead an operator to believe that if they produced an evidence-based risk assessment, and that risk assessment concluded that they could play background music safely, then they could do so. But for a four-month period in Scotland, that was not the case. The Scottish Government in its guidance said that no background music should be played and asked that enforcement steps be taken (where necessary) through environmental health and licensing standards officers, if they found music being played or televisions with the sound up. This was all despite the terms of Regulation 7(3) which confirmed that a further Regulation 14 (enforcement of requirements) did not apply to non-compliance with the requirement to have regard to the guidance. Regulation 14 itself is the basis for the power to issue enforcement notices.

With the lacuna in terms of enforcement, the Scottish Government legislated again and produced the Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020. The purpose of these regulations was to give local authorities the power to (in certain circumstances) close individual premises where they believed "that the direction is necessary for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection by coronavirus in the local authority's area".

However, these regulations did not contain appeal provisions. This was quickly pointed out and amendments

10 Coronavirus (COVID-19): tourism and hospitality sector - gov.scot (www.gov.scot)

requested. The position was extremely unsatisfactory, not just on a legal basis but on a purely practical basis too as the local authority could not serve a direction because they could not satisfy the requirements of the statutory form that required to be completed.

The point about lack of appeal against one of these directions was then apparently "plugged" by further guidance[11] which identified that the appeal process would be by way of summary application to the sheriff clerk within 21 days and that lodging an appeal did not suspend the direction; that remained in force throughout the timespan of lodging an appeal in the sheriff court, waiting for court process to be served and finally getting to a hearing and persuading a sheriff that the direction was unreasonable and disproportionate and costly.

The sector remains essentially paralysed by what is a "direction" of sorts contained in guidance, that was then undermined by the terms of the regulations themselves, backed up by what could only be referred to as "bad law". But because of the risk, businesses did desist from playing background music or having volume up on the television screens in order to comply with this request. Again, the financial impact of this in terms of trade losses ran to hundreds of thousands of pounds across Scotland.

I am aware of only two directions ever being served and these were to do with the sound on televisions being up during a Scotland football game. As I recall, the premises were asked to remove the televisions from their walls for a period of time. Much time and energy was spent trying to rid the country of this "ban". An expert advisory group was established to consider how low-level background sound might be managed in a safe manner, to allow the music to be turned back on. The report of this group and recommendations were eventually accepted and the music was turned back on on 12 December 2020.

This was an example of guidance essentially becoming law, and can be contrasted with the situation that we found ourselves in just last month. Again, with the threat of Omicron, the sector expected the worst and talk of "circuit breaker" lockdowns, curfews and perhaps even another ban on inside consumption began. But the Scottish Government legislated "lightly" with the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 5) Regulations 2021 (SSI 2021/475). The regulations created a new legal requirement for businesses once again to "have regard" to guidance and thereafter take "such of those measures as are reasonably practicable to minimise the incidence and spread of coronavirus on its premises". Examples of actions that could be taken, following a full risk assessment, were given in the updated guidance. In addition, helpfully, the guidance also confirmed that any enforcement in relation to "having regard" to and updating risk assessments would be done on a "Four E's approach" – engage, explain, encourage and enforce. Specific guidance for hospitality such as the collection of contact details, encouragement of table service and compliance with the covid vaccination passport scheme (where applicable) was stated, as well as updated guidance for the retail sector. Proceeding in this way, rather than trying to legislate for each business, allowed the sector discretion in deciding, within mandated legal obligations, how best to risk assess their own business. This was a softer touch approach than we had seen for months, and the guidance was a welcome and useful tool. In my view, it was used in the correct way.

As Omicron surged, so the legislative picture changed again and further restrictions came in time for Boxing Day. These were made via regulations and included the closure of nightclubs (those who could not re-purpose as pubs); table service for consumption being "formally" required again; physical distancing of 1m between groups of people; capacity limitations on live events (inside and out); and the prohibition of dancing (excepting at wedding receptions). Again, guidance has played a role in additional measures, with the First Minister advising, for example, that no more than three households should meet together, and that advice making its way into guidance rather than regulation.

This has been a whistle-stop tour through the founding Acts of Parliament, the regulations and the important role of guidance over the last two years. The schedule of regulations will let you see at a glance how many twists and turns we have all lived through – with more to come no doubt. The final outcomes of the inquiries into the use and continued use of the "made affirmative" procedure by both the UK and Scottish governments will certainly be interesting and legal history is undoubtedly being made, whether we like it or not. Constitutional hindsight here, I hope, will be a wonderful thing.

Caroline Loudon WS
Partner, TLT Solicitors

11 https://www.gov.scot/publications/coronavirus-covid-19-local-authority-directions/pages/appeals/

Pubwatch - a valuable institution

Pubwatches play an important role in safeguarding customers from ASB and serve as an important conduit between the trade and responsible authorities, explains **Mark Worthington**

There is no general or common definition of a Pubwatch scheme. The current edition of the *National Pubwatch Good Practice Guide* states:

> *In simple terms, Pubwatch may be described as the licensed trade's equivalent of Neighbourhood Watch with distinct aims and objectives which are shared by other private business or community initiatives founded on the principle of collective action. However National Pubwatch believes that a well-organised Pubwatch scheme is capable of having a much greater impact in a community than most Neighbourhood Watch schemes. Pubwatch schemes have been in existence, in various forms, throughout the UK for over 40 years. Today, there are significant variations in size and scope, with some large city schemes having over 200 participants and other rural schemes having only a handful of participants.*
>
> *At the heart of most Pubwatch schemes is the following basic concept. Members decide on a common standard of behaviour that is expected from people using their premises. They then agree that any individual falling below that standard will be denied access to all premises participating in the scheme. This principle is often referred to by the shorthand "banned from one, banned from all". If properly applied, it prevents a person who is banned from one premises from simply migrating elsewhere.*
>
> *It is important to emphasise that those who operate licensed premises have always had a common law right to decide whom they will and will not admit to their premises. Provided there is no unlawful discrimination on the grounds of sex, race, disability, etc.) admission can be refused to any person, for any reason or no reason at all. At its simplest level, a Pubwatch scheme is a group of licensees who voluntarily agree to exercise their individual rights to refuse admission collectively.*

In practical terms a Pubwatch scheme is a local partnership where a group of like-minded licensees form a partnership as an independent group to pre-empt crime, disorder and anti-social behaviour in licensed premises to create a safer drinking environment for customers and staff, and in addition, act as a forum to discuss issues affecting the licensed trade.

A Pubwatch scheme is run by licensees for licensees. It tends to succeed when supported by the police, local authorities, local partnership schemes and in some circumstances the courts. It thrives when it has representation in other forums associated with the prevention of crime, disorder and anti-social behaviour and town and city centre improvement.

The licensed trade is a key stakeholder in our villages, towns and cities and Pubwatch is a suitable platform for its members to have a voice in decisions impacting upon the local area. Pubwatch chairs are often board members of the local BID and often sit on working parties of the local community safety partnerships.

Being a member of Pubwatch can demonstrate a willingness to promote all four of the licensing objectives: preventing crime and disorder and preventing public nuisance, mainly through banning orders; and also public safety and protecting children from harm by sharing best practice. Other initiatives impact upon the licensing objectives in other ways too numerous to mention here.

In this article I will look to address some potential pitfalls with Pubwatch schemes and answer some of the burning questions that National Pubwatch, the organising body for Pubwatch, regularly fields.

Who runs Pubwatch?

Historically, Pubwatch schemes across the country are often initiated by police and / or local councils. This persists today. There is no doubt that without the intervention of these authorities many Pubwatches would never get off the ground as the police and councils have the contacts and infrastructure to assist in forming a Pubwatch. However, the degree of involvement of police and councils in how Pubwatches are run has changed over the years, mainly owing to legal challenges which have ended up in the High Court.

Pubwatches are akin to retail crime initiatives in that both schemes identify individuals who pose a risk of committing crime in member premises or are involved in antisocial

behaviour; and both schemes have banning procedures to keep these identified individuals out of the premises, using common law powers. For some reason, Pubwatch schemes have been challenged on this under the umbrella of human rights, where as far as I am aware, retail crime initiatives have not. It could be inferred that people are not that bothered if they cannot go to a local shop to buy a loaf of bread but "get the hump" if they can't visit their local pub for a pint!

These legal challenges are exemplified in two cases: *R (on the application of Proud) v Buckingham Pubwatch* [2008] EWHC 2224 (Admin), and *R (on the application of Boyle) v Haverhill Pubwatch* [2009] EWHC 2441 (Admin). The key question in these cases was whether decisions by local community schemes such as Pubwatch which involve the participation of private individuals and also public bodies are decisions of a public body that are amenable to judicial review. Without going into the cases in depth they failed in application for judicial review at the High Court mainly on the grounds of whether or not the Pubwatch was "exercising a public function" under S 6(3)(b) Human Rights Act 1988: in each case it was held that Pubwatch was not exercising public functions.

In *Boyle*, Mackie J reiterated that licensees had an unrestricted right to exclude persons from their premises and in particular those they considered troublemakers. Licensees were entitled to form groups or associations to poll information and discuss matters of common interest and to make the exclusion of troublemakers more organised and systematic. In the case of a Pubwatch scheme, the power to ban an individual lies in licensees' right at common law to exclude whomever they please. The judge said that "the only basis for an argument that these banning decisions are amenable to judicial review lies in the degree of involvement of the public authority and the police" [54].

On the facts of the case, the imposition of a condition by the licensing authority on certain licensed premises to be a member of a Pubwatch scheme did not convert the exercise of the private function into a public one. It was held that the Haverhill scheme lacked sufficient public element, flavour or character to bring it within the purview of public law [56].

As a result of these cases the *National Pubwatch Good Practice Guide* gives the following advice:

> *Securing the involvement of the police and/or local authority can be very advantageou's for a Pubwatch scheme. Police and local authority licensing officers have knowledge and experience which can help make Pubwatch activity more targeted and effective. It is also often in their interests to offer encouragement and assistance to Pubwatch schemes, given the positive impact that a well-run scheme can have on crime and disorder in an area. In principle, therefore, maintaining a good working relationship with the police and local authority should be beneficial for all involved.*
>
> *It is important to ensure however that the involvement of public bodies is kept within certain limits. As emphasised above, the essence of Pubwatch is that it is a voluntary activity, which is undertaken primarily for the benefit of its members, with incidental benefit to the wider community. While helpful input from the police and local authority should be welcomed therefore, National Pubwatch believes that this should never be at the expense of a scheme's independence and voluntariness.*

This is not just a point of principle but is also important practical advice, since the more extensive the involvement of the police and other agencies in a Pubwatch scheme, the greater the risk that the decisions of the Pubwatch will be vulnerable to challenge in the courts.

This is a key reason why Pubwatch membership should always be voluntary and not a condition of licence. It is accepted that with many premises licences, especially those of managed houses, when conversions were submitted back in 2005, it was thought to be a good idea to offer a condition on a licence such as "Will be a member of a local Pubwatch" or similar. Due to the aforementioned cases, this should be avoided as it may blur the lines when determining if the Pubwatch is "exercising a public function" if there is a legally binding condition imposed by the licensing authority that it is a member of Pubwatch. It is my recommendation that if an opportunity arises (eg, full or minor variation) any such condition should be removed at that time.

Pubwatch banning orders

In 2013 the National Pubwatch Committee commissioned Leeds Metropolitan University to conduct an evaluation of the effectiveness of local Pubwatch schemes and of the contribution of the National Pubwatch Committee itself. Although this was several years ago, its findings are still regarded as relevant.

Over 90% of licensees, police and councils thought that local Pubwatch banning orders were effective and more than 70% thought that they act as a deterrent.

There are well-proven links between the consumption of alcohol and violence and disorder. A local Pubwatch ban is a cost-effective way to address the problems and reduce crime, disorder and anti-social behaviour. The Leeds study

confirmed that about two thirds of licensees, police and councils felt that Pubwatch schemes with effective banning systems contributed to a reduction in crime, disorder and anti-social behaviour within licensed premises and the local environs.

A Pubwatch ban is not a punishment for offences committed, as it is for the criminal justice system to punish offenders. A Pubwatch ban withdraws the implied licence or permission that a person has to enter specific premises. It protects licensees, staff and customers and the property from the anti-social and /or criminal behaviour by the person(s) concerned.

The types of behaviour that the *National Pubwatch Good Practice Guide* suggests could trigger a banning order are:

- Assaulting, threatening, or using abusive language towards a member of staff or another customer.
- Causing damage to the premises or to property owned by the premises.
- Selling, supplying or misusing illegal drugs.
- Involvement in disorderly or violent conduct in or around the premises.
- Purchasing alcohol on behalf of someone who is under the age of 18 (other than in circumstances where it is lawful to do so); and
- Theft of property from the premises.

How long should a ban be? This is a decision for the local Pubwatch scheme. Some Pubwatch schemes prefer a three-month ban, others have a more austere attitude and impose bans of five years and in some cases full lifetime bans. There is no right or wrong approach. Having said that, one of the objectives of a ban could be to change offending behaviour, and sometimes the "short sharp shock" can be very effective as the subject of the ban will be allowed to get back into pubs and clubs if they change their behaviour. A lifetime ban offers no such incentive, but for some very serious cases may be appropriate. One thing that is desirable is a consistent approach within the individual Pubwatch scheme: a local banning matrix may assist in that outcome.

Barred from one - Barred from all

The most important point for an effective ban is enforcement by every member. "Barred from one - Barred from all" is the rule. If one member decides to repeatedly allow a banned person into their premises, this completely undermines the integrity of the banning process and hence the scheme itself. It is far better to have a smaller watch of active members who will robustly uphold bans, than a larger membership which does not. This is another reason to support the concept that membership should be voluntary and not a condition of licence. If a pub has a condition to be a member of the local Pubwatch, and its licensee attends meetings only because there is that condition on the licence, and maybe disrupts the meeting or allows banned individuals into their premises, this will undermine the whole scheme.

Any breach of a ban should be recorded in a timely fashion. Repeated breaches if associated with crime, disorder or anti-social behaviour should be properly evidenced as this could assist the police in an application for a more formal intervention against the individual. This again demonstrates a true partnership approach to reducing crime, disorder and antisocial behaviour within the night- time economy, and to the promotion of the licensing objectives.

Data sharing and GDPR

National Pubwatch has a number of protocols and generalised templates that are provided for Pubwatches across the country to use and adapt to their schemes. These are available to download from the National Pubwatch website. They are all in Word format so can be adapted to the local context if necessary. (Note that the banning notice has DPA access information on it.)

When GDPR came into effect, National Pubwatch commissioned independent legal advisors to review all our protocols and our *Good Practice Guide* to ensure they were GDPR compliant. All the documents available on the website are the updated versions. In essence the purpose of the GDPR is to deal with large corporations and bodies which have data officers to look after such issues. Many Pubwatches have nowhere near that level of support, but are still required to comply. However, the risk of falling foul of the Information Commissioner's Office (ICO) is low, and the advice we have been given is that so long as an effort has been made to be compliant then this should reduce that risk further.

Pubwatches should register with the ICO; and it is advisable, but not essential, that they seek professional indemnity insurance (providers are listed on our website).

In my experience since GDPR came in, police data officers have become nervous about sharing of information, especially custody photos, with Pubwatches. Only a few weeks ago I had a meeting with police data officers, and they were (thankfully) reassured once I had explained how a Pubwatch works. This resulted in an information sharing agreement based upon the National Pubwatch template,

with a few local context tweaks being signed off by the chief officers of that police force.

One thing assisted in reassuring them was how the Pubwatch would deal with the images once shared. The Pubwatch in question uses an on-line solution to administer the scheme, which may have gone a long way to getting the information sharing agreement signed. This means that:

- Access to the site is password protected with a DPA Disclaimer to be acknowledged by whoever logs on.
- Any photos, if printed, are uniquely watermarked so they could be traced back to the originating member should they be misused.
- The site has an auto-weeding system so the photo is automatically deleted from the gallery once a ban is completed.
- The police could control access to the site, eg. if a DPS changes at a venue the police can isolate that account until the incoming DPS has signed up to all the protocols etc.

This assisted Pubwatch in demonstrating due diligence and showed it took its responsibilities under data protection and GDPR seriously.

Social media and data protection

On the subject of DPA / GDPR, care must be exercised over what information is shared over WhatsApp groups, which are becoming more and more popular. No personal information (including photos) should be shared as there is no control over what the recipient does with that information. If it gets uploaded to social media by the recipient, there could be a GDPR breach.

Similarly, the use of Facebook profiles as images should also be avoided. It was commonplace for this to happen, but the latest advice from the ICO is that these images have been uploaded to a platform by individuals for use on social media and not for the pictures to be used by pubs for banning purposes. The ICO has advised that the use of such images to support a ban may not meet the “fairness test” for GDPR and suggests that the use of police photos under an information sharing agreement (ISA) is probably a better solution.

Improved partnership working

The Leeds Met evaluation we commissioned showed that an effective Pubwatch improved relationships with the trade and police and councils, but also interestingly it improved relationships with police and council licensing teams.

An effective Pubwatch scheme is a great forum for the exchange of information between licensees; and it also improves relationships and communication between licensees and partner agencies. It allows police and partners to provide updates on initiatives and in some case enforcement programmes. It allows for updates in legislation: the almost daily changes in the Covid regulations during 2020/21 are a classic example of how Pubwatches facilitated police and councils to get updates across to the industry in a timely and effective manner.

It is also a forum for police to speak with licensees on an informal basis and often valuable intelligence can be shared.

There is also the opportunity for informal and formal training to take place, but maybe most importantly a Pubwatch allows the sharing of best practice, on all manner of subjects from operational issues to crime prevention techniques, not only locally but also nationally.

National Pubwatch

The principal objective of National Pubwatch is to promote and support the development of local Pubwatch schemes. National Pubwatch believes that a well-run and effective Pubwatch scheme promotes the licensing objectives and furthers the interests of its members, by helping to create a safe and secure drinking environment and reducing alcohol-related crime.

To this end, National Pubwatch aims to do the following:

- Administer a comprehensive database of UK Pubwatch schemes.
- Gather information to encourage good practice for existing Pubwatch schemes, and support and encourage the formation of Pubwatch schemes where they do not already exist.
- Promote the interests of Pubwatch schemes nationally, through liaison with government and other bodies.
- Support all Pubwatch schemes by the provision of information packs, window stickers, posters and good practice guidance.

National Pubwatch committee members and regional representatives are all volunteers. They are drawn from a variety of roles within the industry, from retired police officers, licensing consultants and lawyers and licensees

themselves. They have a vast experience in the industry and are there to help and support Pubwatches in England, Scotland and Wales.

National Pubwatch is not a trade body, and it does not represent the pub and hospitality industry on commercial issues. However, it will raise issues with bodies such as the Home Office, NPCC and others or respond to public consultations where it is felt that legislation or operational practices might damage partnership working and disrupt the aim of creating safer drinking environments.

The National Pubwatch annual conference is a key event of the year, bringing together Pubwatch members, police and other stakeholders to discuss issues affecting the Pubwatch movement and to showcase best practice.

National Pubwatch has an extensive resource library on its website https://www.nationalpubwatch.org.uk/. It is all free to the end-user. It offers an evaluation toolkit for Pubwatches, and *The Good Practice Pub* giving advice on several topics such as drugs, door supervision and duty of care to name but a few. There is an extensive range of posters to download and window stickers are available free of charge upon request.

National Pubwatch also has an extensive library of educational / training films on its YouTube channel, again covering a myriad of subjects including vulnerability, knife and acid attacks and crime scene preservation.

In addition, National Pubwatch makes a number of annual awards:

- National Pubwatch Award – recognising good practice and innovation of a Pubwatch.
- Malcolm Eidmans Award – recognising the outstanding contribution made by a police officer or member of police staff in supporting the work of their local Pubwatch scheme.
- Award of Merit – recognising the valuable contributions that an individual has made to the success of a Pubwatch scheme(s).
- Bravery and Meritorious Conduct Award – in recognition of individuals, whose actions have either saved life or minimised physical harm in the night-time economy.

Full details are on our website: www.nationalpubwatch.org.uk.

National Pubwatch has a number of regional reps covering the whole country. They are there to provide advice and guidance on issues affecting local Pubwatch schemes, from setting up a new Pubwatch, to helping rejuvenate a faltering Pubwatch and advice on dealing with responsible authorities etc. National Pubwatch regional representatives can also make “Star Awards” for locally recognised good practice. Contact details for the regional reps are on the website.

Conclusion

There is increasing evidence that a well-run Pubwatch scheme can have a positive impact on the area in which it functions, helping to create a safer and more secure drinking environment and reducing crime and disorder. This is plainly of benefit not only to members of the drinking public but also to the licensees themselves, who have an interest in maintaining orderly premises which are pleasant for customers to visit.

Mark Worthington
National Pubwatch Committee Member

Institute of Licensing News

Are we nearly there yet?

Two years on from the initial impact of Covid-19, it's a pertinent question. The answer is still not clear at this stage, although England are now operating under 'Plan A', Wales is at 'Alert Level 0', Scotland has relaxed requirements on face masks and reduced distancing requirements from two metres to one, and Northern Ireland has also relaxed many restrictions. That said, Scotland is making provision for continued remote hearings, while Wales and Northern Ireland continue to operate Covid PASS schemes in certain settings including nightclubs and large events.

So, we aren't quite there yet, but we're going in the right direction for the moment and hoping to avoid future derailments of any kind.

Meetings, Training & Events

National Training Conference 2021

The timing of the National Training Conference (17-19 November 2021) was extremely fortuitous, with announcements of strengthening restrictions as a result of the Omicron variant following soon after the conference at the end of November.

It was a joy to be back at Stratford-upon-Avon, and to be joined by so many people, both seasoned delegates and those attending for the first time. In total, we had well over 250 people attending the event either as delegates, speakers or sponsors, and feedback throughout the event was extremely positive. Overall, everyone seemed relieved to be back in the building, meeting colleagues and acquaintances they had not seen face-to-face for far too long and benefiting from a much better level of professional engagement than is ever possible online.

It was also great to see our sponsors again, and to have the opportunity to thank them for their continued support throughout the pandemic, especially those who supported our online activities where the opportunity for engagement with delegates is dramatically reduced. Our sponsors are an essential part of the NTC, adding to the event's vibrancy with fantastic stands, engaging representatives and of course, their knowledge and interest in different areas of licensing, processes and functions.

Online vs Face-to-Face

The movement to online training courses has been extremely successful, due to a great extent to Covid. The time and travel savings are significant, and we have had many comments from delegates who would not (even in normal times) be permitted to travel for training. That said, there is a need for face-to-face training as well – some courses simply don't work online, and the professional networking opportunities at larger conference-style events and regional meetings in particular are completely lost.

Going forward, the IoL will continue to deliver many courses online, but we are also starting to phase in a gradual return to face-to-face events for some meetings, including our popular Zoo Licensing course which we are delighted to say will return to Bristol Zoo on 17 & 18 May this year. It's a very practical two-day course, aimed at those who carry out zoo inspections and / or administer the applications. The course covers all elements of zoo licensing from application to inspection and the licensing process.

Summer Training Conference 2022, Nottingham

We have a fantastic programme lined up for our Summer Training Conference, which will be held in Nottingham on 15 June We are looking forward to hearing from expert speakers on a host of issues including updates on vulnerability, counter terrorism, beauty and aesthetics and more.

Other events

Plans for further face-to-face events include our Gambling Conference which we hope to host in a London casino in May, and our Taxi Conference in the autumn. Ahead of that we will host an online Taxi Conference on 27 April 2022.

More information on our current schedule of events can be found on our website www.instituteoflicensing.org/events.

BTEC Level 3 Certificate for Animal Inspectors (SRF)

Our BTEC Level 3 Certificate for Animal Inspectors has been well received with 10 cohort groups already started and some delegates nearing completion of their portfolios, ready for verification.

The course involves six modules in total with training sessions delivered online, followed by the practical assignments which are then assessed and verified. We offer additional tutoring sessions where necessary and through our online learning platform (Moodle), we are able to maintain contact with delegates throughout the course, provide feedback ahead of assignments being submitted and offer additional support where required.

The recent changes to the statutory guidance announced by DEFRA and effective from 1 February have been reviewed and the course materials have been updated as a result, and we were pleased to provide update sessions to our existing cohorts to talk them through the changes.

The BTEC is the first course which IoL has run in partnership with an awarding body, and as such provides us with a blueprint for future course development.

Awards

We covered awards in more detail in the Winter edition of our LINK magazine, but we were delighted to award the following during the National Training Conference in November 2021:

- **Andy Parsons** - Jeremy Allen Award
- **Gary Grant** – Fellowship
- **Sarah Clover** – Fellowship
- **Margaret O'Donnell** – Chairman's Special Recognition
- **Joanne Moran** – Chairman's Special Recognition
- **Kate Roberts** – Chairman's Special Recognition

External engagement

Local Alcohol Partnerships Group

The Local Alcohol Partnerships Group (LAPG) is an existing group originally set up and supported by the Portman Group. As its name suggests, LAPG exists to bring together partnership groups including National Pubwatch, Best Bar None, CAP, PASS, Purple Flag and others to enable the groups to work together raising awareness of the various partnership schemes, all of which bring benefits to local areas. We are delighted to have joined the group to lend support and we look forward to more developments within the group going forward.

National Licensing Forum

The IoL continues to chair and support the National Licensing Forum (NLF), which was established as a means to bring together stakeholders with an interest in the licensed alcohol and entertainment industry, including government departments, police, professional and industry associations to discuss current issues and forthcoming changes affecting the alcohol and entertainment industry and regulators.

NLF members have met regularly since the start of the pandemic, enabling continuous dialogue concerning current topics including the changing regulatory landscape with the various stages of the Covid restrictions, alongside the emerging issues around security and hospitality resources, and post lockdown challenges.

National Taxi and Private Hire Licensing Group

We have instigated discussion about the merits of establishing a group similar to the National Licensing Forum for taxi and private hire licensing, and an initial exploratory meeting has taken place with all those in attendance supportive of the idea.

The next meeting will hopefully establish the group, and set out its key priorities for discussion, which will certainly include the Levelling Up White Paper and potential implications for taxi and private hire licensing.

National Licensing Week 2022

National Licensing Week (NLW) this year will run from 13-17 June 2022, providing another opportunity for all licensing practitioners to celebrate the role that licensing plays in business, home and leisure, providing transport, personal and family enrichment, entertainment and social activities while keeping people safe and enabling them to enjoy their social and leisure time with confidence.

Our NLW daily themes remain the same, with the underlying message that **"Licensing is Everywhere"**:

Day 1: Positive partnerships

Day 2: Tourism and leisure

Day 3: Home and family

Day 4: Night-time

Day 5: Business and licensing

National Licensing Week is an opportunity to highlight just how many daily activities are linked to licensing and why. Celebrate your role, your organisation and your work and share it through social media, or other means.

It doesn't take much to be involved. A simple blog about an aspect of your daily role in licensing gives others the opportunity to see the role through your eyes – why is it important, who does it make a difference to and what are the challenges and rewards?

NLW2022 will soon be here, and we hope to see plenty of social media engagement, showcasing organisations in all sectors. We welcome your ideas and more importantly your contribution in whatever form suits you to help us fly the flag for licensing practitioners in every sector across the UK.

To find out more and get involved please email NLW@instituteoflicensing.org. We look forward to hearing from you! #NLW2022 #getinvolved #licensingiseverywhere.

Membership - it's time to renew

It's that time of year again, and memberships will be due for renewal from 1 April. IoL members will be invited to renew when the online renewal function goes live on 1 April.

Existing members with full year memberships (both personal and organisation) will be able to renew memberships online by logging in and going to "Manage Account" and following the instructions under "Renew membership".

As ever, the IoL team are keen to help members to renew promptly, and this is also an excellent opportunity to ensure that your IoL records (named contacts, address, etc) are all up to date.

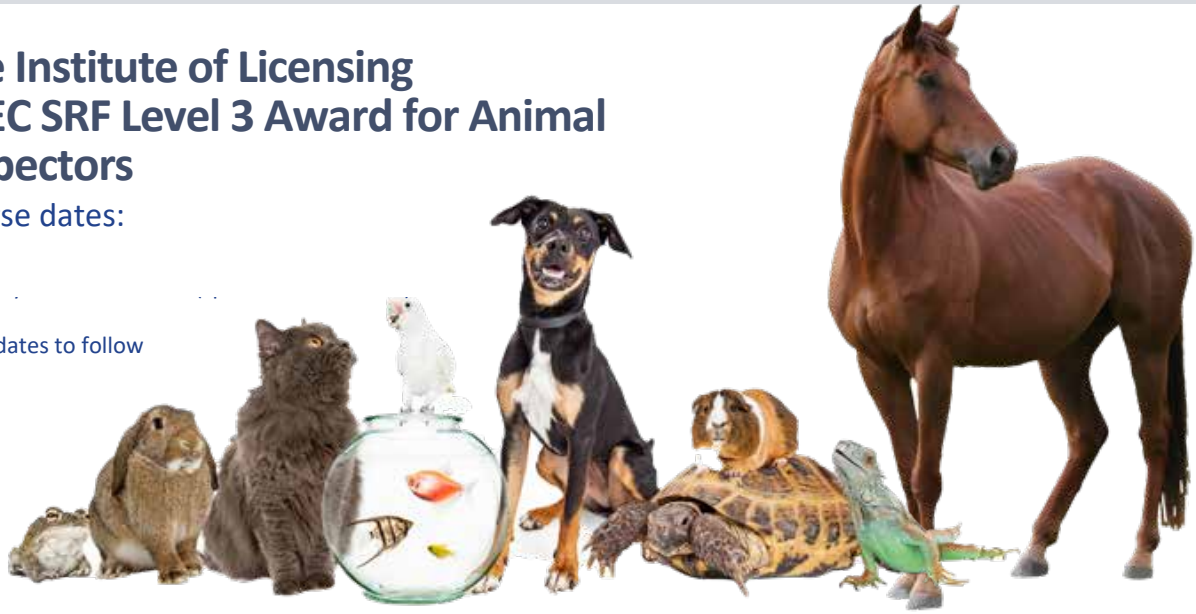
We will be contacting all members who have signed up for direct debit, as well as members who joined part way through the previous membership year to assist with the renewal process. Please let us know if you have any queries - the team can be contacted via membership@instituteoflicensing.org or on 01749 987 333.

Sue Nelson
Executive Officer, Insitutite of Licensing

The Institute of Licensing BTEC SRF Level 3 Award for Animal Inspectors

Course dates:

More dates to follow



The IoL is delighted to confirm that we have developed a BTEC SRF level 3 qualification for animal inspectors. The qualification is accredited by Pearson an OFQUAL provider and meets Defra requirements outlined in the Regulations. We have seven cohorts already undertaking the course and a further fully booked course for January. This course is proving to be very popular.

It will provide learners will all the knowledge and skills they require to be able to competently carry out their duties under The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018.

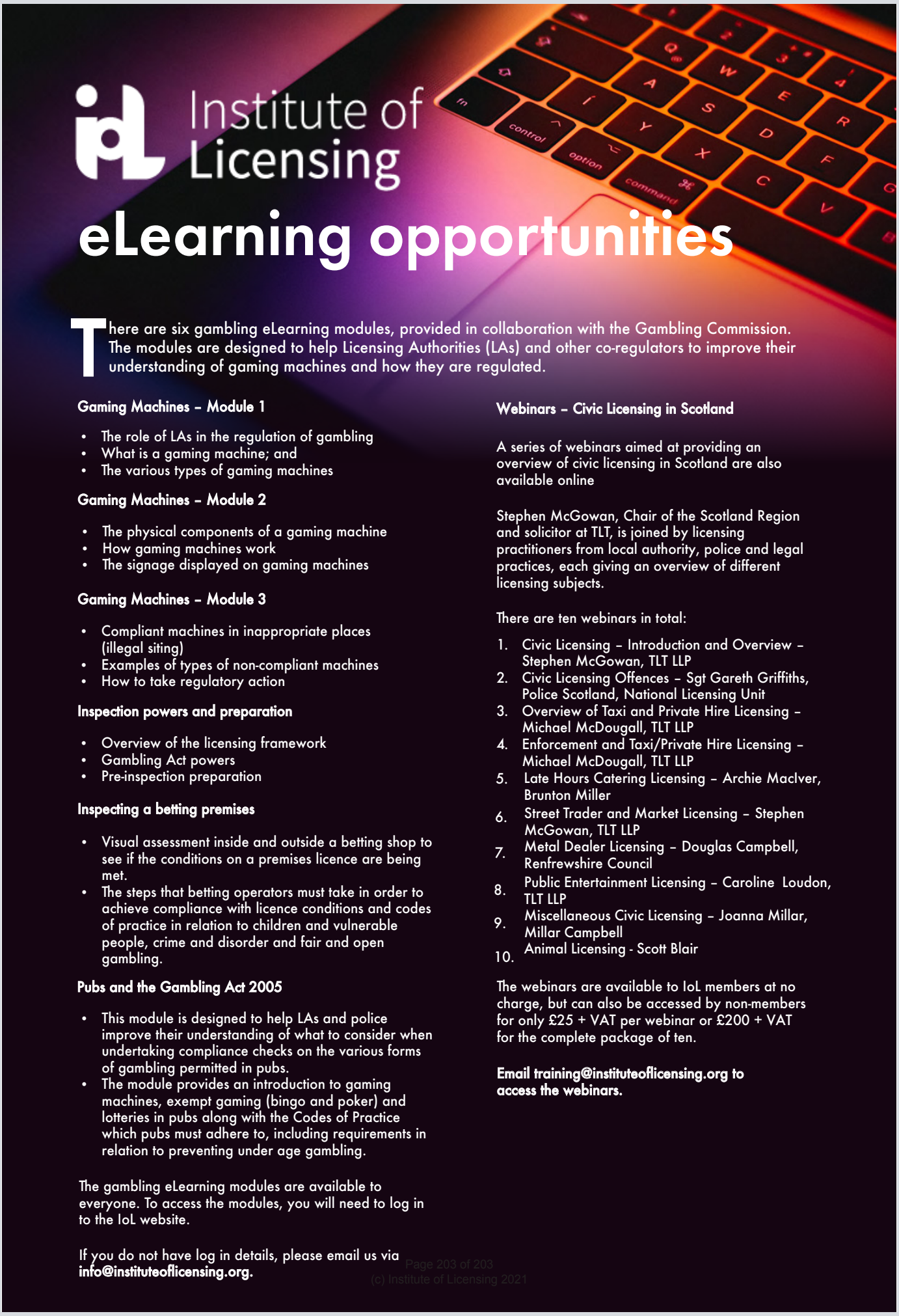
The course is 5-days in duration and will include an assessed practical session, online exam and a portfolio to be submitted within a specified time period after the course.

Course Modules

Course content includes:

- Legislative overview
- Dog breeding
- Premises that hire out horses
- Home Boarding
- Kennel Boarding
- Day care (dogs)
- Premises that sell animals as pets
- Premises keeping or training animals for exhibition and dangerous wild animals

For more information on course dates and to book a course please contact the team via events@instituteoflicensing.org or call us on 01749 987 333



Institute of Licensing

eLearning opportunities

There are six gambling eLearning modules, provided in collaboration with the Gambling Commission. The modules are designed to help Licensing Authorities (LAs) and other co-regulators to improve their understanding of gaming machines and how they are regulated.

Gaming Machines – Module 1

- The role of LAs in the regulation of gambling
- What is a gaming machine; and
- The various types of gaming machines

Gaming Machines – Module 2

- The physical components of a gaming machine
- How gaming machines work
- The signage displayed on gaming machines

Gaming Machines – Module 3

- Compliant machines in inappropriate places (illegal siting)
- Examples of types of non-compliant machines
- How to take regulatory action

Inspection powers and preparation

- Overview of the licensing framework
- Gambling Act powers
- Pre-inspection preparation

Inspecting a betting premises

- Visual assessment inside and outside a betting shop to see if the conditions on a premises licence are being met.
- The steps that betting operators must take in order to achieve compliance with licence conditions and codes of practice in relation to children and vulnerable people, crime and disorder and fair and open gambling.

Pubs and the Gambling Act 2005

- This module is designed to help LAs and police improve their understanding of what to consider when undertaking compliance checks on the various forms of gambling permitted in pubs.
- The module provides an introduction to gaming machines, exempt gaming (bingo and poker) and lotteries in pubs along with the Codes of Practice which pubs must adhere to, including requirements in relation to preventing under age gambling.

The gambling eLearning modules are available to everyone. To access the modules, you will need to log in to the IoL website.

If you do not have log in details, please email us via **info@instituteoflicensing.org.**

Webinars – Civic Licensing in Scotland

A series of webinars aimed at providing an overview of civic licensing in Scotland are also available online

Stephen McGowan, Chair of the Scotland Region and solicitor at TLT, is joined by licensing practitioners from local authority, police and legal practices, each giving an overview of different licensing subjects.

There are ten webinars in total:

1. Civic Licensing – Introduction and Overview – Stephen McGowan, TLT LLP
2. Civic Licensing Offences – Sgt Gareth Griffiths, Police Scotland, National Licensing Unit
3. Overview of Taxi and Private Hire Licensing – Michael McDougall, TLT LLP
4. Enforcement and Taxi/Private Hire Licensing – Michael McDougall, TLT LLP
5. Late Hours Catering Licensing – Archie MacIver, Brunton Miller
6. Street Trader and Market Licensing – Stephen McGowan, TLT LLP
7. Metal Dealer Licensing – Douglas Campbell, Renfrewshire Council
8. Public Entertainment Licensing – Caroline Loudon, TLT LLP
9. Miscellaneous Civic Licensing – Joanna Millar, Millar Campbell
10. Animal Licensing - Scott Blair

The webinars are available to IoL members at no charge, but can also be accessed by non-members for only £25 + VAT per webinar or £200 + VAT for the complete package of ten.

Email training@instituteoflicensing.org to access the webinars.

Time to regulate non-surgical cosmetic procedures properly

The legislative regime for high-street cosmetic treatment is not safeguarding the public and badly needs updating says **Sarah Clover**

The beauty and aesthetics industry contributes significantly to the UK employment economy, and the range of treatments available to the public is changing all the time.

Our current legal regulatory regime in this field is woefully inadequate to control and regulate practitioners and service providers in the market now, let alone in the future.

In England, outside London, acupuncture, skin colouring, cosmetic piercing and electrolysis are capable of being regulated by adoptive registration under the Local Government (Miscellaneous Provisions) Act 1982. In London, a wider range of treatments can be licensed by London-centric legislation. In Wales, the Public Health (Wales) Act 2017 applies, which does not extend the range of treatments, but provides more flexibility. Local authorities also have the option to introduce local acts and byelaws covering hygiene, and model byelaws to address infection control.

There are other ways of penalising harmful practices, ranging from Health and Safety at Work etc. Act 1974 offences, to trading standards offences, to regulations controlling hazardous substances, and even prosecution for assault. But the complexity of procedure, and the difficulty in understanding the suitability of the legal options available to regulators, means that, too often, good practice is not enforced. Many troubling cases go unreported in the first place because the victims did not know where to turn to make their complaint.

The legislative regime is manifestly confusing, and the wide variation in approach upon a purely geographical basis is unhelpful. Even where adopted, the level of control that local authorities can exert over practice and training under the legislation is low. It hardly seems too dramatic to describe the current legal landscape as the "Wild West". This is particularly concerning in an industry that is growing exponentially, driven increasingly by social media and cultural expectations, and which has the capacity to cause great harm.

Current legislation does not even touch upon the wide range of treatments and services that the public now access on a regular basis. These include treatments such as Botox and dermal fillers and electrical skin treatments involving high heat or lasers. Legal definitions are too narrow to encompass many of these modern treatments, which are capable of causing significant damage if incorrectly applied. At a time when enforcement and protection need to be at their optimum level, the experience of professionals and the public is quite the opposite. The variability of the quality of practitioners in the market place is alarming. It is entirely possible to obtain an online "qualification" and establish a business offering risky treatments to the public with minimal scrutiny and no insurance. The plethora of informal policy and guidance simply makes matters more confusing, not least because much of it is inconsistent or contradictory.

The vast majority agree that the current regulatory landscape is not fit for purpose. Recently, the calls for a comprehensive overhaul of this worrying area of the law have become louder.

In May 2019 the All-Party Parliamentary Group for Beauty, Aesthetics and Well-being was formed, and was welcomed by Government. It seems likely that the timely formation of this APPG will prove a catalyst for a complete review of the regulation of this industry, which will need to be as thorough and fundamental as reforms of the alcohol, entertainment, gambling and animal licensing regimes have been.

The latest exciting development has come as an opportunity has been presented to amend the Health and Care Bill, currently passing through Parliament. At the instigation of the Chartered Institute of Environmental Health, the Institute of Licensing, the Joint Council for Cosmetic Practitioners and many other key stakeholders,[1] an amendment to the bill has been tabled:

1 Including, in no particular order, the Royal Society for Public Health; the Association of Directors of Public Health; Save Face; the Royal Society for the Prevention of Accidents; the British Beauty Council; the Hair and Beauty Industry Authority; the National Hair and Beauty Federation; the Beauty Industry Group; the Faculty of Public Health; the Tattoo and Piercing Industry Union; and others.

The Health and Care Bill Amendment

Licensing of aesthetic non-surgical cosmetic procedures

(1) No person may carry on an activity to which this subsection applies—

(a) except under the authority of a licence for the purposes of this section, and

(b) other than in accordance with specified training.

(2) Subsection (1) applies to an activity relating to the provision of aesthetic non-surgical procedures which is specified for the purposes of that subsection by regulations made by the Secretary of State.

(3) A person commits an offence if that person contravenes subsection (1).

(4) The Secretary of State may by regulations make provision about licences and conditions for the purposes of this section.

(5) Before making regulations under this section, the Secretary of State must consult the representatives of any interests concerned which the Secretary of State considers appropriate.

(6) Regulations may, in particular—

(a) require a licensing authority not to grant a licence unless satisfied as to a matter specified in the regulations; and

(b) require a licensing authority to have regard, in deciding whether to grant a licence, to a matter specified in the regulations.This amendment was tabled by Baroness Merron and co-sponsored by Baroness Finlay, ex-Health Secretary Lord Lansley and Baroness Brinton, a strong and high-profile group of cross-party peers.

In the House of Commons, the amendment enjoyed widespread cross-party support, with 20 MPs putting their name to it at Report Stage.

In the House of Lords, the amendment was tabled by Baroness Merron and co-sponsored by Baroness Finlay, ex-Health Secretary Lord Lansley and Baroness Brinton. This is a strong and high-profile group of cross-party peers.

The amendment has been be debated at the bill's committee stage in the Lords, and has already received some positive noises from within Government, although the final outcome remains to be seen.

Lord Kamall, Minister for Technology, Innovation and Life Sciences, has been broadly receptive to the amendment, and it is clear that the Government has acknowledged that a strong case has been made for further regulation in this area and is considering the recommendation for a licensing scheme.

In the event that the need for a new licensing regime is accepted and implemented by the Government, how would it work?

Much in the same way as with the animal licensing regime, the primary legislation would contain the "hook" upon which later regulations could be hung. All of the detail of the licensable activities and the modes of control would be set out in the more detailed regulations, which would be more flexible and capable of being updated to take account of future treatments, not currently within purview.

Licensing regimes work upon the basis that the state regulates activities, which are otherwise lawful, to control impacts that can arise when those activities are conducted inappropriately in some respect. This catches unacceptable extremes within a spectrum that is otherwise acceptable.

The proposed amendment provides the power to the Secretary of State to introduce the control required in the future, which affords sufficient time to design the necessary regulations carefully, and with wide ranging consensus. Broad stakeholder support is important, particularly when it comes to introducing qualification, training and entry requirements into this large and competitive industry. The regulations would address everything from premises to expertise, and would be worded in such a way as to be as future-proof as possible.

To design a licensing scheme it is necessary to undertake three steps:

1. Identify the categories of activities which require regulating. In this case, that would comprise non-surgical beauty, aesthetic and similar treatments. These are the "licensable activities".

2. Identify: (a) the way in which those activities might be conducted which would cause unacceptable impact; and (b) identify those who might be impacted.

3. Identify the way in which the activities might be limited or regulated to mitigate to an acceptable standard the impacts identified.

In the beauty and non-surgical aesthetic arena, it can be seen that some treatments have a potential for direct harmful impact to the body if done incorrectly; some will have infection / sterilisation issues because of the equipment used; while some have little immediate impact but the potential for long term harm or impact if done repeatedly. Appropriate interventions will depend upon the nature of the potential impact. Some treatments might be quite safe in the hands of someone well trained, but dangerous when conducted by an amateur. Some treatments might be very safe to administer, but clean equipment is essential. Others might be suitable only for informed adults because of the inherent risk, and other examples will, no doubt, emerge.

By analogy with the Licensing Act 2003 licensing objectives, alcohol gives rise to very different harms and impacts than music does. It makes sense to distinguish them into different licensable activities. Similarly, under the Animal Licensing Regulations 2018, dog breeding is a very different activity from horse riding schools and the potential harms and impacts are very different.

Licensing objectives define in wide terms the standards and criteria that premises and practitioners must meet. There is one clear licensing objective for beauty and aesthetics, and that is the promotion of public safety. Public health, by contrast, is a complicated objective, which would have to be considered very carefully in the context of the issues that have arisen around promoting public health through the licensing of alcohol.

It is also arguable that there should be a licensing objective that a treatment should be effective or of a minimum level of quality, but that may be too difficult to measure. What is effective for one person, or something that they appreciate, might be disappointing for someone else, through no fault of the practitioner. Training and quality of application of the treatment is, perhaps, not so much a licensing objective as a matter for conditions either for the premises licence or the practitioner. This probably needs to be expressed as a specific training qualification for a specific treatment, rather than a broad-brush overarching objective that tries to encapsulate a wide range of treatments.

One of the key failings identified in the current deficient regulatory system is the lack of public awareness and education about operators who are safe and suitable to provide aesthetic treatments. To address this in any future scheme, licences should be issued and displayed, for transparency to the general public, and a public licence register should be maintained by the local authority for public scrutiny.

In terms of the enforcement regime, once again, although perhaps counter-intuitively, the animal licensing regime probably offers a workable model for the beauty industry. The applicant should apply for a premises licence, which should result in an inspection of the premises which need to meet certain standards to provide the services on offer. Minimum conditions should be met for the provision of specific treatments, and additional conditions can be met for higher quality which would result in a higher star rating for the premises.

Enforcement thereafter typically proceeds upon the basis of public whistleblowing against those who are not licensed (a simple, binary assessment that the public can clearly understand: licensed vs unlicensed); and proactive enforcement by the authority in their area, by way of spot checks. This is effective in other licensing regimes, and local authority officers are experienced in this type of exercise.

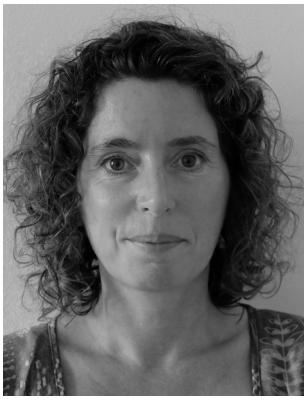
Local authorities should have the power, as with all licensing regimes, to revoke or vary the licences at their discretion, in accordance with criteria set out in regulations. For the unlicensed, there would be the power of prosecution and penalty, usually in the form of fines, with imprisonment as an option for the most serious examples of offending.

The recognisable pattern of a licensing regime would work well in the beauty and aesthetics arena, and bring welcome consistency for consumers, regulators and operators alike. This long overdue reform appears finally to be on the table, and this is an area to watch with increasing interest.

Sarah Clover FIoL
Barrister, Kings Chambers

Assessing the correct medical cover for your event

How much medical provision should be made for an event, and what stages of the event it should cover, are explained by **Julia Sawyer**



The Health and Safety at Work etc. Act 1974 (HASWA) places general duties on employers, the self-employed and people in control of premises to ensure, so far as is reasonably practicable, the health and safety of their employees and anyone else who may be harmed by their work activities or the workplace. One part of ensuring everyone's wellbeing in the workplace is to have an adequate medical provision in place. To assist an employer, further detail on the medical provision that should be provided in the workplace is given in the Health and Safety (First Aid) Regulations 1981. Here, it states:

> *An employer shall provide, or ensure that there are provided, such equipment and facilities as are adequate and appropriate in the circumstances for enabling first-aid to be rendered to his employees if they are injured or become ill at work.*

It can be confusing at times deciding what is adequate and appropriate. These regulations do not require employers to provide first aid for anyone other than their own employees. However, many places of entertainment, sporting events, festivals and licensed events provide a service for others, and the Health and Safety Executive (HSE) strongly recommends that employers include non-employees in their assessment of first aid / medical needs and make provision for them.

Specific events have legislation which detail the level of medical cover that must be provided, such as regulations for cycling, motorsport and rugby and safety at football grounds. The various legislations provide information to be considered when deciding the appropriate medical facilities.

Guidance detailing the medical provision expected is also in place for a range of events, such as the *Event Safety Guide*, the *Green Guide*, *Managing Health and Safety at Motorsports Events*, the *UK Athletic Code of Practice, British Horse Racing Rules*, and *Guidance on Running an Amateur Sports Club.* An employer / organiser or promoter of an event would have to have a good reason to not follow the guidance specific to their event.

There are various guidance documents and risk calculators available for assessing suitable first aid / medical-needs assessment for an event, but when does an event stop being an event and revert to a workplace? As the requirements of specific sporting regulations can be far more stringent than the First Aid at Work regulations, at what point does the medical provision for a sporting event or a festival stop being that? Is it as soon as the final race is finished, is it when the final whistle is blown, is it when the public have all gone home, and is it the first day of the get-out-of-an-event process when many of the contractors are still on site? To answer those questions, this article considers what medical provision should be in place at different stages of an event in the UK.

First aid / medical needs assessment

Every event should have a medical plan based on a comprehensive risk assessment. That risk assessment and medical plan should be carried out by a medically competent person with experience of the event that the medical plan is being written for.

When the medical plan is being written it should aim to provide a safe, effective and resilient service on the event site while also helping to minimise the impact on NHS resources.

The medical plan should include the staffing levels and where staff will be deployed. This should include the full duration of the event, including the build-up and break-down.

The medical plan should include provision to safeguard those who may be vulnerable. There may be some events that need to have a wide range of medical, trauma and mental health teams. Special consideration may need to be given to drug and alcohol issues and long-term conditions at some types of events, depending on the duration and audience profile.

The information that would be required to complete a medical plan:

- An understanding of the event
- The size of the event and expected audience
- Profile of the expected audience
- Any identified high-risk activities on site
- Location of the nearest NHS referral facility, travel times and distances
- Name(s) and roles of the medical provider(s)
- Named manager - individual with responsibility for coordinating medical provision and normally available on-site during the event
- Type of event
- Event location with sterile access and egress routes
- Start and finish times of contracted cover
- Intended receiving hospital(s) for casualties from the event, along with confirmation that they have been advised of the event (if appropriate)
- Site plans showing sterile access routes (blue routes for emergency access)
- Helicopter landing zone (if applicable)
- Queuing welfare in adverse weather
- Staff numbers and skill-mix
- Medical vehicles provided / four-wheel drive capability
- Arrangements for medical staff – accommodation, catering, showers, toilets, parking
- Insurance documentation, public and employers' liability, medical indemnity, fleet insurance, as well as details of other medical defence documentation for specialised staff
- Communications plan with command-and-control structure
- Records policy and GDPR arrangements for information sharing
- Safeguarding (adult and child) and deprivation of liberty policies
- Infection prevention and control policy
- Contingency plans for large-scale, multiple casualty incidents
- Contingency plans for known hazards
- Escalation plans for critical incidents and memorandum of understanding (MOU) with the local public health authority and local services, when required
- Resilience planning – threat to life or terrorist-related incidents
- Medical service infrastructure and support requirements
- Map delineating the medical provider's area of responsibility (agreed with NHS ambulance service)
- The physical factors and the management factors to be considered
- The size, location and number of permanent, temporary or mobile first aid rooms and facilities
- All medical equipment and materials and their source
- The role, number and location of ambulances, plus their capabilities and the crew competencies
- The duties, number and location of crowd doctors, nurses, paramedics and first aid personnel
- The communication links to the members of the medical team inside the ground and with other agencies outside the ground
- Procedure for the investigation and management of critical incidents
- The time and duration of the event
- The need to respond in particular weather conditions
- The response to a major incident
- Major incident triage procedures
- Major incident casualty clearing location and procedures
- Procedures for dealing with fatalities
- The necessary welfare facilities for all medical service personnel.

Additional considerations when pulling together the medical plan:

- If an ambulance is required on site and may be used to transport patients to hospital, the provider of the ambulance must be registered with the Care Quality Commission
- Those driving in an emergency situation around an event site must have received specific training to drive under these conditions
- Ambulances used to transport patients to a hospital should not be used as a treatment centre / area
- Engagement with the public health authority and local ambulance service
- The type of rescue unit to be used; is a buggy with a stretcher adequate, does the vehicle need to be four-wheel drive?
- Are the medical team carrying out extraction, and if so, what tools will be required?
- The medical team should remain operational for a period of time after the event closes to cover the site egress
- Previous event debriefs – what went well and what could have been done a bit better
- Provision of suitable and secure storage for the agreed medical materials and equipment
- Arrangements should be put in place for the safe disposal of clinical (including sharp items) and non-clinical waste
- Where first-aid provision is intended to cover both employees and non- employees, employers should check the correct liability insurance cover is in place for the service provided.

Medical terms as defined by the *Event Safety Guide (Purple Guide)* for the UK

Doctor

A person currently registered as a doctor with the General Medical Council:

- Pre-hospital experience and acute care qualifications are desirable
- Retired or honorary unregistered clinicians are ineligible
- Registrations can be checked by visiting the GMC website: www.gmc-uk.org

Paramedic / Specialist Practitioner

A person currently registered as a paramedic with the Health & Care Professions Council:

- A pre-hospital specialist who will be accustomed to providing unscheduled care in difficult environments
- Registrations can be checked by visiting the HCPC website: www.hcpc-uk.org

Nurse / Emergency Nurse Practitioner (ENP / ANP)

A person currently registered as a nurse with the Nursing and Midwifery Council:

- A&E experience is desirable
- Many useful sub-specialties such as minor injury and illness, wound care, prescribing, substance misuse, mental health and sexual health
- Registrations can be checked by visiting the NMC website: https://www.nmc.org.uk

Emergency Medical Technician (EMT)

A person trained (usually) by the NHS using the previous Institute of Health & Care Development (IHCD) framework or current equivalent (eg, FutureQuals) or by a private provider using a similar structure, ie, First Response Emergency Care QCF (FREC 4), St John Ambulance Qualification etc.:

- Can autonomously manage moderate trauma and medical cases
- Can administer fewer drugs and perform fewer invasive procedures than paramedics.

First Responder

A person who has the following awards: First Response Emergency Care (FREC3) or First Person on Scene (FPOS):

- First aider with training in practical aspects of pre-hospital care. Can manage minor injuries, assist higher clinician grades and use medical gases and defibrillators.

NB: The first aid at work (FAW) and emergency first aid at work (EFAW) **are** suitable qualifications for a general work environment but may not be appropriate for the event environment.

The get-in and get-out

It is important for the medical plan to determine what level of medical facilities are required for the get-in and the get-out; this is often overlooked. These are times when people working on the event may be tired and could be rushing, and there is a higher risk of an accident occurring, with less medical infrastructure in place. In many cases the same level of medical facilities is not required but the medical plan should determine at what point this will be and that it is communicated to all the relevant people at the event. This way, it is clear at every stage of the event who can be called on in an emergency and what facilities are available on site.

Reliable communications need to be in place with the medical provider. For the larger events a co-ordinated control facility is usually in place, but it needs to be clear how long this operates for and when this will change from the “build” to the live event and from the live event to the get-out. This must be communicated to all the relevant people working on the event site. Contact information must be distributed to all the relevant people on site throughout the event if personnel change or cover different shifts.

RIDDOR

The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) place an obligation on employers, the self-employed and people in control of work premises to report a specified list of injuries and occurrences to the Health and Safety Executive.

Agreement should be reached between the medical provider and the event organiser as to how such cases will be identified and reported. Data protection legislation allows for such information-sharing as “appropriate use”.

Any accident affecting an event worker, whether or not RIDDOR reportable, should be recorded in their employer’s accident records and the worker should be reminded of this responsibility.

Julia Sawyer
Director, JS Consultancy

Gambling laws in Northern Ireland are set to change

A Bill passing through the Northern Ireland Assembly aims to bring gambling laws into line with the rest of the UK, as **Eoin Devlin** explains

In September 2021, the Betting, Gaming, Lotteries and Amusements (Amendment) Bill was introduced into the Northern Ireland Assembly. This is the first major change to gambling law in the jurisdiction for over three decades.

At present, gambling in Northern Ireland (NI), with the exception of the National Lottery, is regulated under the Betting, Gaming, Lotteries & Amusements (NI) Order 1985. This legislation has been described by the Department for Communities as "outdated and has not kept pace with industry and technological changes, while also being complex and inflexible." As such, the introduction of the Bill is a welcome step towards modernising gambling law in NI to ensure that it is fit for purpose in the current era.

Communities Minister Deirdre Hargey has said that "change is long overdue" and has outlined reform to take place in a two-phased approach. The first phase is the introduction of the Bill, which aims to deliver important changes in key areas such as relaxing operating hours while improving protection for children and young people.

The second phase will include a completely new regulatory framework to regulate online gambling. This is expected to require a much longer timescale, to ensure that this complex area is given the time and consideration it needs.

With this change on the horizon, it is important to highlight the key areas of reform proposed by the bill and whether it brings NI more in line with other jurisdictions in the United Kingdom.

Key proposals

The key changes proposed by the Bill will:

- Permit bookmakers and bingo clubs to open on Sundays and Good Friday.
- Remove some of the restrictions on promotional prize competitions.Remove the £1 ticket limit for society lotteries and alter the rules on deductible expenses.
- Establish a mandatory code of practice for those holding gambling licences. This is to include a ban on the use of credit cards in gambling transactions and the location of ATMs in gambling premises.
- Reduce the lower age limit from 21 to 18 years, and remove the residency restrictions for grant of a bookmaker's licence, bingo club licence, gaming machine certificate/permit and lottery certificate.
- Allow certain corporate bodies to hold a bookmaker's licence, bingo club licence, gaming machine certificate / permit and lottery certificate.
- Allow a corporate body to be granted an amusement permit and pleasure permit.
- Create new offences in relation to inviting, causing or permitting a person under the age of 18 to play anything other than low stakes gaming machines.
- Create powers to impose a statutory levy on gambling operators.
- Broaden the definition of cheating to include attempted cheating.
- Make gambling contracts enforceable in law.

Comparison to other jurisdictions

Currently, gambling law in NI is more restrictive than any other part of the UK as bookmakers and bingo clubs are prohibited from opening on a Sunday and Good Friday, unlike their UK counterparts. However, though individuals cannot gamble in licensed premises on Sundays they can bet online. This is just one example of how the current legislation does not take into account technological changes since 1985, and why it is unfair to the longer established sector of the industry.

In addition, the only commercial gaming permitted in NI is bingo and low-stake machine gaming. The current law does not permit high-stake commercial gaming in NI, which

includes casinos. Casinos are not permitted in NI but are a dominant feature in cities throughout the UK and a key component of the gambling industry.

In contrast to NI, reform was introduced nearly two decades ago in the rest of the UK, with the implementation of the Gambling Act 2005. This modernised the law and strengthened regulation with enhanced controls and stricter enforcement measures, and placed more emphasis on social responsibility. For example, the act introduced new categories of casino and applied a new and less restrictive regime for gaming machine stakes and prizes.

Next steps

Overall, the proposals will bring NI onto a more equal footing with the law in rest of the UK. However, some members of the Assembly and industry have expressed views that the Bill does not go far enough, and that more radical reform is need. For example, the Bill does not include any proposals for casinos to be brought forward.

In response to this, the Communities Minister has said that the Bill cannot tackle gambling in its entirety and this is the reason why she has decided to approach the reform in a two-phased approach. She believes that "the Bill offers a balance between what needs to be done now and what is realistic in the remaining time of the assembly".

The Bill is currently being examined by the Northern Ireland Department for Communities' Committee and we await with interest the outcome of any additional amendments.

Eoin Devlin
Legal Director, TLT Solicitors

Gambling Commission looks to get tougher on operators

Nick Arron and **Richard Bradley** provide their thoughts on two important new policy documents issued recently by the Gambling Commission

This article provides an update on two key documents published recently by the Gambling Commission: firstly, the *Raising Standards for Consumers – Compliance and Enforcement Report 2020-2021,* and secondly, consultation on changes to the Commission's licensing, compliance and enforcement policy.

Raising Standards for Consumers: 2020 / 21 Compliance and Enforcement Report

On 9 December 2021, the Gambling Commission published its annual compliance and enforcement report. The report provides a summary of the casework and formal regulatory action undertaken by the Commission, including details of action taken against operators which failed to meet the standards required by the Commission.

During 2020-2021 the Commission suspended five operator licences, and revoked one operating licence and nine personal management licences. Approximately £32,000 was paid by 15 gambling businesses as the result of fines or regulatory settlements – more than any previous year since the Commission regulated the gambling industry.

During the year the Commission undertook 25 full assessments of online operators and five targeted assessments of land-based operators. They also completed 83 website reviews, 262 security audits and 57 personal licence reviews and began 29 personal licence reviews.

The Commission describes the same two weaknesses in almost every case of regulatory action they undertake:

1. operators failing to adhere to social responsibility; and

2. operators failing to adhere to anti-money laundering rules.

The Commission suggests that its casework reveals that operators are either not making suitable resources available or are putting commercial objectives ahead of regulatory objectives.

The report documents common poor practices within the industry, with repeated instances of inadequate customer due diligence and inadequate enhanced due diligence, along with insufficient "know your customer" checks.

Details are provided of some of those failings, including an organised criminal gang which targeted at least 28 online operators using various identities, with significant amounts being deposited including a deposit of over half a million pounds, which was accepted by one online betting operator. Other examples are given of varying degrees of deposits, and failures to obtain source of funds until customers had deposited large sums of money.

Examples are also provided of good practice, with one example being an online casino operator whose newly registered customer had their account blocked when they reached total deposits of £250 on the day of the account opening. The customer provided basic occupation and salary information, which was then used by the operator to set a monthly net loss limit based on the perceived discretionary income of that customer.

The majority of the report (24 of the 28 pages) refers to enforcement and compliance in relation to licensed operators. The report includes reference to the Commission's role in preventing illegal gambling. The report outlines the cease and desist letters the Commission sends wherever it finds potentially illegal gambling sites. Where this action does not prove successful, the Commission uses disruption techniques which include utilising their relationships with web-hosting companies to suspend or IP block British consumers from accessing the sites, contacting payment providers to remove payment services, and liaising with social media sites to prevent websites appearing on search engines or being hosted.

The Commission identified 99 unlicensed remote operators transacting with British customers during the financial year. The Commission refers to illegal lotteries on social media, with 823 instances identified in response to allegations of a social media platform either hosting or advertising illegal gambling.

Consultation on the Commission's licensing, compliance and enforcement policy

The Commission consultation on changes to its licensing, compliance and enforcement policy closed on February. The proposals include:

Dual regulation

The Commission is considering its regulatory approach to gambling activities that contain elements of a financial product or service, such as specific language, imagery or presentation. It has proposed that these products should be regulated solely by the Financial Conduct Authority (FCA). While legislative change would be required to formalise this approach, the Commission has suggested that any new operating licence applications for gambling activities that incorporate elements that it considers should be FCA regulated will be refused. The Commission has stated that existing licensee's products and licensed status would not be affected by the proposal.

The Commission has suggested that terminology and presentation that defines the nature of the product may be misleading to consumers, with operators comparing their products to stocks, shares or investments.

Incomplete applications

The Commission's approach is to refuse operating licence applications which it considers do not contain complete or sufficient information. Where applications are deemed inadequate, they will be refused and no fee refund provided. This simplified approach attempts to provide a one size fits all application process.

However, in our view, the approach fails to consider the inadequacies of the Commission's current online application process or the significant variations in operator structure, financing, or the variety of innovative products under development.

Innovators and entrepreneurs are always striving to develop new products and services. We believe that Commission should seek to carry out its activities in a way that supports those they regulate to comply and grow, as required by the Regulators' Code.

Use of a licence within a reasonable time

In the Commission's *Statement of Principles for Licensing and Regulation*, it says that licences will only be issued where applicants need them and expect them to be used within a reasonable timeframe.

New proposals in the enforcement policy suggests that in order to provide clarity to operators and personal licence applicants, the initial process will include an assessment of whether an applicant is likely to provide facilities within a reasonable period or a personal licence holder is likely to be employed within a reasonable period. The Commission suggests that the purpose of this revised strategy is to ensure that licence reviews and subsequent revocation are not required to remove unused licences.

The Commission does not identify the risk or evidence of harm or detriment of an effectively dormant licence. Licensees are subject to the same regulatory regime and reporting requirements even where a licence is not actively used. Any substantial change affecting an individual or corporate licensee would require notification to the Commission as would any changes to investment, corporate structure, management, governance or material changes to the business proposition.

Suitability

Suitability forms part of the Commission's fundamental review of any new applicant or existing licensee's continued operation. The Commission suggests that some applicants do not appreciate the extent of the Commission's enquiries into entities and individuals that are connected to the proposed licensee, which may include beneficial owners through a nominee or other individuals that may be able to exert a level of control over the licensed entity. The Commission will also assess an applicant's willingness to comply with its responsibilities and cooperation with the regulator.

Financing arrangements

The Commission has confirmed that a key part of assessing any new licence application is the assessment of any financing arrangement to ensure that proceeds of crime are not used to finance licensed entities or that profits will not be used to support criminal activity. This obligation is incumbent on applicants not only at the initial application stage but also throughout the period a Commission-issued licence is held. Many of the principal offences under proceeds of crime apply to both licensed and non-licensed entities.

The Commission wishes to include a statement within its revised policy which states that an operating licence will not be granted until it is fully satisfied with all financial details and that operators must provide evidence as to both the source and availability of funding and identify any entities or individuals connected to it.

These new requirements do provide some clarity to the potential extent of Commission enquiries, which is beneficial for prospective applicants. However, we believe the Gambling Commission must acknowledge that evaluation of business financing can be a complex area with many

financial transactions regulated, whether directly by or via entities which are themselves regulated by the FCA or another regulator such as the US Securities and Exchange Commission. The Regulators' Code is clear that UK regulators should seek to avoid duplication, so it would help operators if the Commission accepts that a one size fits all approach to financial assessment is not always relevant or appropriate.

Assessment framework, special measures and starting a review of an individual licence

The existing policy provides a framework that compliance officers use to judge levels of operator compliance. The proposed changes provide further clarity as to how the Commission will assess and determine outcomes and any actions required, such as where serious failings are identified, improvement is required or where operators are not deemed compliant.

Over the past 12 months the Commission has been piloting a new "special measures" status to bring operators to compliance at pace. This process has been used where failings have been identified and used as an alternative to s 116 review enforcement procedures. Further guidance is provided regarding the special measures process, which requires operators to agree an urgent action plan and work with the Commission to rectify failings.

In principle, we believe the above is a positive step and it is encouraging to see that the Commission is looking to work with those it regulates and provide assistance and guidance for improvements that are deemed necessary before initiating formal licence review proceedings.

Financial penalties

The Commission has proposed to identify that where a financial penalty is imposed, it will take into account the financial resources available to the licensee and any parent or group company or ultimate beneficial owner. Where such information is not provided, the Commission will infer that the licensee has sufficient resources to pay such financial penalty as is appropriate to the circumstances of the case.

It is our view that the Commission must be clear on the basis for such evaluation. If financial resources are used to mitigate and possibly reduce the level of a potential fine, such an assessment may be a proportionate approach. However, fines should not necessarily be inflated because of the resources available to group companies or ultimate beneficial owners, as this suggests that those entities will always have direct influence or control over the subsidiary or involvement in its operation, which may often not be the case.

Suspension

The Commission has acknowledged that the impact of licence suspension can have a significant negative impact upon operators and has proposed that they are provided with a clear and expedited process to challenge an interim suspension at a regulatory panel hearing. Whilst timescales are not prescribed, hearings to evaluate interim measures will be listed as soon as reasonably practicable.

Regulatory settlements

The Commission states that settlement proposals are often made by licensees at the later stages of its investigation process or that approaches are sometimes made as if a licence review should be treated as a commercial dispute to be negotiated.

The Commission's view is that settlements are only suitable where a licensee is open and transparent and works with the Commission's investigation. Settlements can be used to expedite an investigation and are intended to produce a rapid and fair disposal of a case. New proposals identify that regulatory settlement should be offered at an early stage of the process and that the Commission will not normally accept offers after the licensee has made representations on the Commission's preliminary findings.

Nick Arron
Solicitor, Poppleston Allen

Richard Bradley
Associate Solicitor, Poppleston Allen

Is it really unlawful to conduct licensing sub-committee hearings remotely?

The thorny issue of the legality of remote licensing hearings is examined by **Charles Holland**, who concludes that, whether in hybrid or entirely virtual form, they should continue

In his article in the last issue of the *Journal*, my colleague Michael Rhimes poured cold water over the suggestion that Licensing Act 2003 sub-committee hearings could be conducted remotely, given the provisions of the Licensing Act 2003 (Hearings) Regulations 2005 ("the Hearings Regulations") as viewed through the lens of the Divisional Court's decision in *R (Hertfordshire CC)* v *SSHL*G.

His article will have given many practitioners, including myself, pause for thought. But is there still a case to the contrary? I think so. I set it out here. In so doing, I observe in passing that:

- The provision construed by the Court in *R (Hertfordshire CC)* v *SSHLG* does not apply to committees or sub-committees (licensing or otherwise) of principal councils, giving scope to argue that remote *committee and sub-committee* meetings of principal councils are still lawful under the Local Government Act 1972 - this would encompass, for instance, meetings concerning taxi and PHV matters.

- There is a question mark over the *vires* of regulations made by the Welsh Ministers amending the Hearings Regulations as they apply in Wales.

Local Government Act 1972

R (Hertfordshire CC) v *SSHLG* concerned the Local Government Act 1972. This Act applies to a wide range of authorities. In England, it applies to principal councils (county councils, district councils and London boroughs), parish councils, ten combined authorities and some other categories of authority, such as joint authorities. In Wales, it applies to counties, county boroughs and community councils.

Section 99 of the Local Government Act 1972 provides:

> *The provisions of Schedule 12 to this Act shall have effect with respect to the meetings and proceedings of local authorities … and their committees …*

Schedule 12 is split into seven parts. These contain provisions relating to principal councils (Part I), joint authorities (Part IA), parish councils (Part II), parish meetings (Part III), community councils (Part IV), community meetings (Part V) and general matters applicable to local authorities and joint authorities (Part VI).

Each of Parts I, IA, II and IV refers to local authorities having "meetings" at a "place" at which the participants are "present" or which they "attend".

Paragraph 4 of Part I concerns principal councils. It provides:

> *(1) Meetings of a principal council shall be held at such place, either within or without their area, as they may direct.*
>
> *(1A) Five clear days at least before a meeting of a principal council in England—*
>
> *(a) notice of the time and place of the intended meeting shall be published at the council's offices and, where the meeting is called by members of the council, the notice shall be signed by those members and shall specify the business proposed to be transacted at the meeting; and*
>
> *(b) a summons to attend the meeting, specifying the business proposed to be transacted at the meeting, and authenticated by the proper officer of the council, shall be sent to every member of the council by an appropriate method.*

Materially similar provision is made in relation to parish councils (paras 10(1) and (2)) and community councils (paras 26(1) and (2)). The provision concerning parish councils in para 10(1) is subject to the proviso that the meeting "shall not be held in premises which at the time of such a meeting may, by virtue of a premises licence or temporary event notice under the Licensing Act 2003 be used for the supply of alcohol (within the meaning of section 14 of that Act) unless no other suitable room is available either free of charge or at reasonable cost".

The Divisional Court in *R (Hertfordshire CC)* v *SSHLG (No 1)* [2021] 1 W.L.R. 3714 held that, in the context of Schedule 12 [75], a "place … with or without the area" "is most naturally interpreted as a reference to a particular geographical location and would not naturally encompass an online location" [76], and a requirement to send out "notice of the time and place of the intended meeting" is "inconsistent with the idea of a meeting taking place in multiple locations (e.g. in the homes of all participants)" [76].

The court held that, in the context of Schedule 12, a "meeting" "must take place at a single, specified geographical location; attending a meeting at such a location means physically going to it; and being "present" at such a meeting involves physical presence at that location" [89].

In rejecting a submission [56-64] that Schedule 12 should be given an "updating construction", the Divisional Court placed significant weight on the statutory context of Schedule 12 [78]:

> *The meetings provided for by Schedule 12 of the 1972 Act are an important part of the mechanism of government of the country. The decisions taking at these meetings may have significant legal consequences for third parties. It will often be necessary to decide whether a meeting is quorate or whether a majority of those present has voted in favour of a particular resolution. Questions of this kind can give rise to acrimonious disputes. This makes it important to have certainty about what constitutes attendance or presence at a meeting. Without such certainty, it may be unclear whether a particular decision has been validly taken or not.*

The court observed that the differences of the conditions for remote attendance in the Local Government (Wales) Measure 2011, the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 ("the Flexibility Regulations"), and the Local Government and Elections (Wales) Act 2021, "provide a vivid illustration of the different ways of deciding what counts as remote attendance". It held it was legitimate to construe the 1972 Act "in a way which promotes certainty in its application", and a construction according to which meetings have to take place in person at a physical location better promoted certainty than a construction in which remote meetings were permissible in some situations, but not others, with the dividing line not being spelled out.

The *in pari materia* principle

In *R (Hertfordshire CC) v SSHLG (No 2)* [2021] 1 W.L.R. 3742 (judgment in which was handed down after written submissions following the circulation of the draft judgment in *No 1*) the Divisional Court went on to find that the phrases "open to the public" and "held in public" in various legislative provisions that govern access to meetings and documents were descriptive phrases. Their meaning depended on the meaning of what is being described [6]. The court went on:

> *Here, it is a "meeting". If, as we have found, a meeting involves participants gathering to meet face-to-face at a designated physical location and "attending" a meeting involves physically going to that location, a requirement that this meeting is to be "open to the public" or "held in public" means that members of the public must be admitted in person to the place where the meeting is being held.*

The court observed [7]:

> *The current requirements to hold meetings are imposed by the 1972 Act, but there were similar requirements in the predecessor legislation. As we have said, requirements that meetings be "open to the public" or "held in public" are imposed by several different statutory provisions, but they all deal with the same subject matter and may therefore be described as in pari materia. They are therefore "to be taken together as forming one system, and as interpreting and enforcing each other: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 21.5.*

The principle of *in pari materia* is that the principle that an Act needs to be read as a whole[1] should also be applied to groups of Acts which are *in pari materia* (ie, on the same subject matters). Two or more Acts may be described as *in pari materia* if:

(1) they have been given a collective title;

(2) they are required to be construed as one;

1 See, eg, *Customs and Excise Commissioners v Zielinksi Baker & Partners* [2004] UKHL 7 at [39].

(3) they have identical short titles (apart from the year); or

(4) they otherwise deal with the same subject matter on similar lines.

Acts that are *in pari materia* are sometimes described as forming a single code on a particular matter in the sense that they deal with the same or a similar subject matter and are to be construed as one, with continuity of legislative approach and uniformity in the use of language.

The limits of *R (Hertfordshire CC) v SSHLG*

In *R (Hertfordshire CC) v SSHLG (No 2)* the court concluded [10]:

> *As we made clear in our main judgment (see esp at para 75), the conclusions we have reached depend on the construction of these phrases in the particular statutory context in which they arise. Nothing we say here should be taken as settling the interpretation of the phrase "open to the public" or other similar phrases in different statutory contexts.*

Despite the initially wide wording of s 99 of the 1972 Act, the provision in Schedule 12 relating to the place where meetings of a principal council are to be held, namely para 4, only relates to the meetings of the full council. It does not apply to meetings of that council's committees or sub-committees. This is a conclusion that can be properly arrived at because:

- The opening of paragraph 4 of Schedule 12 ("Meetings of a principal council shall be held at such place…") can be contrasted with the opening of paragraph 26(1) ("Meetings of the community council *and its committees and sub-committees* are to be held at such place…").

- Paragraph 44(1) of Schedule 12 specifically provides that other provisions of the schedule (but *not* paragraph 4) "apply in relation to a committee of a local authority (including a joint committee) or a sub-committee of any such committee as they apply in relation to a local authority".

So far as I am aware, principal councils have treated the effect of *R (Hertfordshire) v SSHLG* as requiring all council meetings, whether they be of full council or committees or sub-committees, to be "in person" meetings. However, the case does not go this far, because the provision the court interpreted does not extend to committees or sub-committees.

For licensing practitioners, the more pertinent limitation is that a 2003 Act licensing committee, or a sub-committee of that licensing committee is *not* a committee or sub-committee established under the 1972 Act. Section 101(1) of the 1972 Act provides:

> *Subject to any express provision contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of their functions:*
>
> *(a) by a committee, a sub-committee or an officer of the authority; or*
>
> *(b) by any other local authority.*

Section 101(15) of the 1972 Act (which was inserted by the 2003 Act) provides that nothing in s 101 "applies in relation to any function under the Licensing Act 2003 of a licensing authority (within the meaning of that Act)".

Instead, a licensing committee is established under s 6(1) of the 2003 Act, which provides that "Each licensing authority must establish a licensing committee consisting of at least ten, but not more than fifteen, members of the authority".

Section 9(1) of the 2003 Act then permits the licensing committee to establish one or more sub-committees consisting of three members of the committee.

Even if para 4 of Schedule 12 of the 1972 Act related to the committees and sub-committees of principal councils arranged under s 101 of the Act, then a licensing committee or a licensing sub-committee is not such a committee. It follows that the rulings in *R (Hertfordshire) v SSHLG* are *obiter* when it comes to construction of the legislation concerning licensing hearings.

Licensing Act 2003 and the Hearings Regulations

The 2003 Act makes repeated provision for the holding of a "hearing" to consider relevant representations in relation to the different types of applications licensing authorities consider (see e.g. s 18(3)). It is clear that a "hearing" is something different from a "meeting" of a committee or sub-commitee, because the Act provides separate powers for regulations to be made to make regulations for "hearings" (s 183(1)) and "meetings" (s 9(2)).

Section 183(1) provides that regulations may prescribe the procedure to be followed in relation to a "hearing" held by a licensing authority, and in particular may:

(a) require a licensing authority to give notice of

hearings to such persons as may be prescribed;

(b) make provision for expedited procedures in urgent cases;

(c) make provision about the rules of evidence which are to apply to hearings;

(d) make provision about the legal representation at hearings of the parties to it;

(e) prescribe the period within which an application, in relation to which a hearing, has been held, must be determined or any other step in the procedure must be taken.

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

(a) the proceedings of licensing committees and their sub-committees (including provision about the validity of proceedings and the quorum for meetings);

(b) public access to the meetings of those committees and sub-committees;

(c) the publicity to be given to those meetings;

(d) the agendas and records to be produced in respect of those meetings; and

(e) public access to such agendas and records and other information about those meetings.

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

Although the Hearings Regulations state on their face that they made under ss 9(2) and 183(1), they do not use the word "meeting" at all, and regulation 3 provides as to their "Scope" that they "make provision for the procedure to be followed in relation to hearings held by the licensing authority".

Regulation 4 provides (my emphasis):

> *The authority shall arrange for* ***the date on which and the time and place at which a hearing*** *is to be held in accordance with regulation 5 and shall give notice of a hearing in accordance with regulations 6 and 7.*

Regulations 6 (notice) and 12 (adjournment) make further reference to "place". Regulations 7, 8, 15 and 18 speak of parties who "attend" the hearing, and regulation 17 to a person "appearing" at the hearing. Regulation 14 provides that the "hearing shall take place in public".

The case for remote hearings continuing under the Licensing Act 2003

I have already observed that the rulings in *R (Hertfordshire) v SSHLG* are *obiter* in relation to the conduct of meetings of licensing sub-committees (and quite possibly in relation to the conduct of other committees and sub-committees of a principal authority).

The Licensing Act 2003 and the Local Government Act 1972 cannot be described as *in pari materia*: they are expressed to be separate and distinct, and they use a different vocabulary: the 1972 Act has no concept of "hearings".

Whilst the Hearings Regulations refer to a "place" at which a hearing is to be held, this is to be contrasted with the reference to "such place, either within or without their area, as [the principal council] may direct" for the holding of meeting of a principal council in para 4 of Schedule 12. The Divisional Court said that a reference to a "place within or without the area" was most naturally interpreted as a reference to a particular geographical area and would not naturally encompass an online meeting [76]. That feature does not apply in the Hearings Regulations.

As the Divisional Court observed [77], the terms "meeting", "place", "present" and "attend" are relatively general and, as Leggatt J. said in *R (N) v Walsall MBC* [2014] PTSR 1356, (in the words of the Divisional Court) "this could indicate that Parliament intended the meaning of the terms to be capable of evolving as technology evolved". I suggest that the term "hearing" is similarly general.

The factor in *R (Hertfordshire) v SSHLG* which weighed against the application of an "updating construction" in the context of the 1972 Act was the need for certainty in local democracy, with its potential for issues as to quorum and voting on particular resolutions. These matters do not cause difficulties in licensing hearings. A licensing sub-committee is usually small, the quorum with either be two or three depending on the licensing authority's constitution, all members the committee are visible in a remote hearing, and - in any event - decisions are typically taken in private session rather than being the subject of a public vote. It is the practice of some licensing authorities to make the decision after the hearing and to circulate it in writing.

Licensing committee and sub-committee meetings and licensing hearings have further distinguishing features:

- The duties relating to political balance on local authority committees found in ss 15-16 of the Local Government and Housing Act 1989 do not apply to committees established under the 2003 Act.
- A licensing hearing is an administrative function (*R (oao Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] PTSR 868 at [41]). Rather than an exercise in local democracy, it is the exercise of a power delegated by the people as a whole to decide where the public interest lies.
- With the exception of hearings relating to reviews, any licensing hearing can be dispensed with completely if the licensing authority and the participants consider it to be unnecessary (see, eg, s 18(3) of the 2003 Act, and, - in general - regulation 9 of the Hearings Regulations).

Whilst a licensing sub-committee is not performing a quasi-judicial function at a hearing, it does have a duty to behave fairly in the decision-making process (*Hope and Glory* at [41]). In *Attorney General of the Turks and Caicos Islands v Misick* [2020] UKPC 30 the Privy Council rejected a submission that giving evidence by video link *in a criminal trial* was "second best" evidence that would create unfairness or a perception of unfairness. Lord Hamblen and Lord Stephens (with whom the rest of the Judicial Committee agreed) said at [69]:

> *It cannot be said that it would be unfair for any part of the trial to be conducted remotely. Covid-19 has necessarily required court procedures in many countries to be adapted so as to enable courts to continue sitting, and the use of audio visual links has been of great assistance in enabling them to do so. In the UK, for example, many trials have been successfully conducted either wholly or mainly by video link. Whilst jury trials raise distinct issues in relation to the use of such links, there is no intrinsic reason why video links cannot be used in criminal proceedings, and indeed in the UK video evidence has long been used for vulnerable and child witnesses in criminal proceedings.*

If the remote conduct of a trial does not offend fairness in judicial proceedings of the utmost severity, then it seems hard consider how it would offend fairness in administrative proceedings, particularly when regulation 23 of the Hearings Regulations provides that the hearing "shall take the form of a discussion led by the authority", and that cross-examination is not permitted unless the authority considers that it is required. On appeal in the magistrates, where there are no procedural rules for licensing hearings, some Magistrates' Courts have exercised their procedural discretion to hear licensing appeals remotely. It would be a curious outcome if the Hearings Regulations were interpreted to debar a procedure that could be adopted on appeal.

What of the Local Government and Elections (Wales) Act 2021 (Consequential Amendments and Miscellaneous Provisions) Regulations 2021 ("the Welsh Regulations")? These amended the Hearings Regulations in so far as they apply in Wales, making specific provision for remote hearings and removing the references to "place" in relation to such hearings.

I do not consider that Welsh Regulations can provide any assistance to the construction of the Hearings Regulations as they apply in England. Whilst delegated legislation may be used to construe a parent Act, the subordinate legislation needs to be roughly contemporaneous with the Act in question to be persuasive (see, eg, *Deposit Protection Board v Barclays Bank plc* [1994] 2 A.C. 367 *per* Lord Browne-Wilkinson at 397). The Welsh Regulations were made over 16 years after the making of the Hearings Regulations. Furthermore, they were made by a different executive (the Welsh Ministers) than the promulgator of the Hearings Regulations (the Secretary of State).

There is also something of a question mark over whether the Welsh Regulations were within the competence of the Welsh Ministers to make. Matters relating the licensing of the provision of entertainment and late night refreshment, and to the sale and supply of alcohol (including, I suggest, the licensing of that sale and supply)[2] are not within the legislative competence of the Senedd: s 108A(2)(c) of and paras 57 and 58 of Schedule 7A to the Government of Wales Act 2006. It is worthy of note that the enabling provision in the relevant Act of the Senedd, s 50 of the Local Government and Elections (Wales) Act 2021, did not expressly include licensing hearings in the relevant definition of "local authority meeting" (s 50(5)), whereas licensing hearings were expressly included in a different definition of the same phrase elsewhere in the Act where no express regulatory power is granted (s 47(6)). It might be said that in imposing a duty on Welsh local authorities to make and publish arrangements for the purpose of ensuring that local authority meetings including licensing hearings are able to be held remotely (s 47(1)), but in not expressly including licensing hearings within the category of local authority meetings which Welsh Ministers could make regulations providing for their conduct (s 50(1)), the Senedd not only recognised the limitation on its legislative competence, but also considered that remote licensing hearings were already lawful under the Hearings Regulations.

2 This was also the view of the House of Lords Select Committee on the Licensing Act 2003, HL paper 146 at [7]: https://publications.parliament.uk/pa/ld201617/ldselect/ldlicact/146/14604.htm.

By contrast, a modicum of support for recognition by Parliament of the lawfulness of remote licensing hearings can be found in the approach of s 78 of the Coronavirus Act 2020. This section enables the making of regulations to make provision relating to local authority meetings, including the places at which such meetings are held. A "local authority meeting" includes meeting a committee or sub-committee of a local authority: s 78(6)(d). The section makes no reference to "hearings" (or indeed to committees or sub-committees established under the 2003 Act). Given that the 2003 Act treats "meetings" and "hearings" as separate concepts, these omissions suggest that s 78 of the 2020 Act and regulations made under it could not extend to licensing hearings. Nothing within the Flexibility Regulations (made unders 78) purported to deal with 2003 Act committees, sub-committees, or any sort of "hearing" (as opposed to ("meeting"). One possible inference is that Parliament did not consider it necessary to legislate for remote licensing hearings because it considered that remote hearings were already within the scope of the 2003 Act and the Hearings Regulations.

If a "place" cannot be a virtual place with a virtual address (such as the weblink for a Zoom meeting), then an alternative solution would be to satisfy the requirement in the Hearing Regulations for a "place" by nominating a particular physical location to be the location where the meeting takes place.

In *Byng v London Life Association Ltd* [1990] Ch. 170 the question was whether a company meeting called for a room (Cinema 1 of the Barbican Centre) with overflow rooms with audio / visual links could constitute a meeting held at a place of which notice was given, namely Cinema 1. The Court of Appeal held that it could, Mustill LJ (as he then was) saying the place of the meeting was Cinema 1 "since this was where the centre of gravity of the meeting was to be found". This approach could, in my view, be taken in licensing hearings: a licensing authority nominating a physical location (a committee room for instance) as the place of the hearing, but permitting remote attendance by parties, whether some or all parties. An arrangement of this nature would allow attendance by members of the public or parties without computer access; the licensing authority could provide a computer terminal equipped with camera and microphone for their use.

The 2003 Act may not provide a power to conduct hearings remotely but nor does it expressly prohibit the conduct of remote hearings. Matters of procedure are left to regulations and, in the absence of regulations, to the licensing committee itself: s 9(3) of the Act, regulation 21 of the Hearing Regulations and para 9.34 of the s 182 Guidance. It is hard to see what objection there would be to a licensing committee exercising this procedural discretion to permit remote attendance. There may be circumstances (the illness or absence abroad of a participant) where it be manifestly unjust *not* to allow remote attendance.

Finally, it is worth bearing in mind that even if the Hearings Regulations are construed as requiring in-person hearings, then Regulation 31 provides that any irregularity resulting from a failure to comply with any provision of the Regulations before the authority has made a determination shall not of itself render the proceedings void, and Regulation 32 only requires the licensing authority to "cure" the irregularity if it considers that any person may have been prejudiced as a result. Where the parties agree to a remote hearing, it seems difficult to see what prejudice might arise. Further, if the 2003 Act permits a lawful licensing determination to be reached without any hearing at all (see e.g. s 18(3)), why would a determination reached with a hearing (albeit a remote one) be unlawful, where all the parties agree?

Conclusion

The Divisional Court in *R (Hertfordshire) v SSHLG* was at pains to stress that it was only construing Schedule 12 of the Local Government Act 1972. That construction was highly dependent on the need for certainty at *meetings* in the often politically contentious field of local democracy. Those considerations do not apply to licensing hearings, which are administrative proceedings without thorny issues of quorum, resolution and voting. There is no good reason why an updating construction can be given so that references to "place", "attend", "appearing" and "in public" can all be satisfied by their virtual equivalents.

A belt and braces solution can be supplied by a "hybrid" hearing, where the "seat" of the hearing is a physical place within the local authority premises, with some or indeed all of the participants attending remotely.

Remote hearings have revolutionised licensing. They enable the authority and the parties to draw on national expertise in terms of expert evidence and representation without the economic and environmental costs of individuals travelling to and from hearings. They enable parties and witness to attend in circumstances where physical attendance would be inconvenient, expensive or impossible. They have increased openness, transparency and public participation in the system.

Clarity in terms of an amendment to the Hearings Regulations (whether that applies in England or in England and Wales) may be no bad thing: but in the meantime, there are strong arguments that remote hearings, whether hybrid or entirely virtual, can continue.

Charles Holland
Barrister, Francis Taylor Building and Trinity Chambers

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

Uber

JOURNAL OF LICENSING - CONTRIBUTOR PROFILES

NICK ARRON
Solicitor, Poppleston Allen Solicitors

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

RICHARD BRADLEY
Associate Solicitor, Poppleston Allen

Richard is a member of the gambling team at Poppleston Allen and advises clients on various aspects of licensing law including operating, personal and premises licences. He has assisted in the development of bespoke compliance regimes for operators under GA2005 and has prepared cases for review proceedings, hearings determined by the GC Regulatory Panel and appeal proceedings at the first-tier Tribunal for gambling cases.

RICHARD BROWN
Solicitor, Licensing Advice Centre, Westminster CAB

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

HANNAH BURTON
Associate Solicitor, Pincent Masons

Hannah Burton is an Associate Solicitor in the Regulatory and Licensing team at Pinsent Masons. Hannah has over 10 years' experience in both private practice and local authority licensing work.

JAMES BUTTON
Principal, James Button & Co

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

LEO CHARALAMBIDES
Barrister, Francis Taylor Building & Kings Chambers

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

SARAH CLOVER
Barrister, Kings Chambers

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

DANIEL DAVIES
Chairman, Institute of Licensing

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

EOIN DEVLIN
Solicitor, TLT Solicitors

Eoin is a Legal Director with TLT in Belfast and has worked with TLT since 2015. Eoin advises supermarkets, restaurant businesses, catering companies and hoteliers on a range of licensing matters. In addition to handling liquor licensing and any subsequent hearings, he also advises on entertainment and associated licensing with local Councils.

ANDY EATON
FIoL

Andy is an experienced licensing professional, who worked for Trafford Metropolitan Borough Council in the 1990s and then Rother and Wealden District Council. At Manchester, he pioneered the development of the penalty point scheme for licensed drivers and operators. He was appointed a Fellow of the Institute of Licensing in 2017.

CHRIS GRUNERT
Partner, John Gaunt & Partners

Chris specialises in alcohol, gaming, sexual entertainment and taxi law at John Gaunt & Partners. He is recognised as a next-generation partner in the Legal 500, being described as a "power partner". He works regularly in Scotland and has appeared before over 20 Scottish licensing boards. As is also part of the firm's training team.

CHARLES HOLLAND
Barrister, Trinity Chambers & Francis Taylor Building

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

CAROLINE LOUDEN
Partner, TLT Solicitors

Caroline is a specialist licensing and gambling practitioner with over 18 years' experience in front of Scottish licensing boards. A Band 1 Individual (Chambers and Partners) and a Leading Individual (Legal 500), she is one of the very few Scottish specialists who has significant experience in not only liquor licensing, but civic and gambling law as well. She has been a Partner with TLT LLP since February 2017.

JAMIE MACKENZIE
Managing Director, Unified Transport Systems

Jamie is Founder and Managing Director of Unified Transport Systems, a specialist training organisation he set up in August 2015 to deliver bespoke training for the taxi and private hire trade, other independent transport providers, licensing professionals and local / national government. Prior to that, he worked for 14 years as Business Compliance Officer for Watford BC.

JULIA SAWYER
Director, JS Consultancy

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

MARK WORTHINGTON
Director, Worthingtons Consultancy

After 30 years' service as a policeman and detective, Mark set up his own consultancy in 2014, providing advice, support guidance and training to the licensed trade. He has served on the National Pubwatch committee since 2005 but helped set up and has been involved in his local Northampton Pubwatch scheme since 2001, serving as one of the regional representatives in the East Midlands.

Institute of Licensing

www.instituteoflicensing.org

9 772048 911006 03

INSTITUTE OF LICENSING

NUMBER 32 MARCH 2022

JOURNAL OF LICENSING