

● ● ●
● ● ● cornerstone
● ● ● barristers

Statutory Taxi and Private Hire Vehicle Standards

Philip Kolvin QC



A NEW APPROACH

The underlying philosophy



“TAXIS AND
PRIVATE HIRE
VEHICLES ARE A
HIGH RISK
ENVIRONMENT”

- The risks involved are life-changing or life-ending, including for children and vulnerable people.
- This is not a tedious administrative exercise for members and officers.
- It is among the most important jobs in the building.

A radical change of tone



Taxi and Private Hire Vehicle Licensing: Best Practice Guidance (2010)

- Aim is public protection
- But public should have reasonable access to taxis
- Unduly stringent requirements will restrict supply
- So authorities should carefully consider whether the burdens they are imposing are commensurate with the benefits they seek to achieve.



ORIGINS AND STATUS

Statutory origin:

Section 177 Policing and Crime Act 2017



(1)The Secretary of State may issue guidance to public authorities as to how their licensing functions under taxi and private hire vehicle legislation may be exercised so as to protect children, and vulnerable individuals who are 18 or over, from harm.

(4)Any public authority which has licensing functions under taxi and private hire vehicle legislation must have regard to any guidance issued under this section.



When must
the authority
have
regard?

NOW



What if it
does not
have
regard?



What does “have regard” mean?



1. An authority must take it into account.
2. An authority cannot depart from it just because it does not agree with it.
3. It must give clear reasons for departing from it.

R (Khatun) v London Borough of Newham [2004]
EWCA Civ 55

How do the Standards put it?



Wording

- “Having regard” means more than having a cursory glance before reaching a preconceived conclusion.
- Failure to adhere could harm authority’s position in court
- Authorities should publish their consideration of the Guidance and the policies or plans stemming from these.

Kolvin assessment

- Obviously
- Depending on whether reasons for departure can be shown
- Good idea, good practice.

And also ...



- “ ... greater deference still would need to be paid to guidance which had, through consultation and Parliamentary sanction, the force of statutory guidance.”
- Departure only for proper, i.e. clear and legitimate, reasons.
- Authority must demonstrate that it has considered and engaged with the Guidance, not ignored it, or merely paid lip-service to it.
- The reasons do not need to be documented, but it is preferable if they are.
- The authority must have a proper evidential basis for its decision to depart from the Guidance.
- It must be clear from the decision that proper consideration has been given to it.

R (London Oratory School Governors) v Schools Adjudicator [2015] EWHC 1012 (Admin).

Can the Standards self-aggrandise?



Standards

- Standards say:

“The Department therefore expects these recommendations to be implemented unless there is a compelling local reason not to.”

Kolvin view

- The “compelling reasons” test is not endorsed by the Courts.
- Guidance cannot levitate itself using its own boot straps.
- But the clarity of its expression would be noted by a Court in any future challenge to an authority which disregarded it.

And the Standards are not law



1. The Guidance is not a source of law

Khatun

2. “It is importance to remember that, whilst regard must be had to the guidance, it should not be allowed to usurp the clear language in the statute.”

R (4 Wins Leisure) v Blackpool Council [2007] EWHC 2213 (Admin)

3. “The Statutory Taxi and Private Hire Vehicle Standards do not purport to give a definitive statement of the law.”

Para 2.9



The Standards state:

- The Standards replace “relevant sections” of Best Practice Guidance.
- Where there is a conflict the Standards have precedence.

Meaning?



- Where the Guidance is silent, the Standards apply
- Where “relevant sections” are replaced, Standards apply.
- Where there is conflict, the Standards apply.
- Where there is no conflict, they co-exist.
- Where there is doubt, work it out for yourself.

In reality



- There is little actual conflict.
- In most cases where they cover the same ground, the Standards strengthen the Guidance.
- Remember, the Guidance is general, while Standards are particular to protection of children and vulnerable people.
- So they both have their place.

Relationship with wider licensing issues



- The Standards have a limited purpose.
- They are not a cure-all.
- E.g. they do not deal, or purport to deal, with cross-bordering, location of office, need for server in district or vehicle standards.
- If, however, Councils review their policies in the light of the Standards, it is recommended they use the opportunity to revisit their policies in general.



IMPLEMENTATION

(1) Implications for policy



- Standards recommend cohesive policy document bringing together all taxi/phv licensing procedures, including
 - Fit and proper test
 - Licence conditions
 - Vehicle standards

Broader consultation on policy



- Standards suggest:
 - Disabled groups
 - Chambers of Commerce
 - Transport providers and campaigners
 - Women's groups
 - Local traders
 - Local multi-agency safeguarding groups
 - Night time economy groups where appropriate
 - Neighbouring areas where impacted. (Liaison groups should be in operation anyway.)

Frequency of review of policy



Standards

- Review every five years
- Consider interim reviews if there are “significant issues arising in their area.”
- Review performance annually.

Kolvin view

- In most cases, policies should now be reviewed in the light of the Standards.
- In many (perhaps most) cases, this may involve at least limited upgrading.
- Then follow the Standards re frequency of review, interim review and annual performance review.

(2) Implications for licences



Standards

- “Any changes in licensing requirements should be followed by a review of the licences already issued.”

Kolvin view

- Only review licences if there are relevant policy changes.
- Provide licensee ample opportunity to raise standards, e.g. adaptation of vehicle or training courses.

What if authority implements a tighter convictions policy?



- If someone has held a licence for many years but would not be granted one now under a new policy, what should be done?
- Standards say:
 - Each case on merits.
 - Where “exceptional, clear and compelling” reasons to deviate from a policy, should consider doing so.
- PK says:
 - Bar set far too high (either way).
 - Authority should consider risk to public in light of new policy, and come to proportionate decision on merits.

New information may come to light



- Standards state drivers should be subject to:
 - Enhanced DBS Check
 - Check of Barred List
- Currently, 10% of authorities don't do Barred List checks
- If a Barred List check reveals concerns, these should be taken into account.
- **“In the interests of public safety, licensing authorities should not, as part of their policies, issue a licence to any individual that appears on either barred list.”**

Licence duration



- Licences should be for the maximum duration permitted except when the authority thinks a shorter licence “appropriate”.
- (This just repeats the law.)
- But Standards strongly advocate interim checks and set out means of achieving this.

(3) Implications for scrutiny



- DBS Update Service (clear recommendation)
- Whistleblowing policy
- Common law Police Disclosure (through information sharing protocols)
- Licensee notification (with failure calling into question honesty / suitability)

(4) Creating a web of knowledge



- Referrals through DBS
- Knowledge sharing with Police
- Sharing licence information with other authorities
- Use of NR3
- Multi-agency Safeguarding Hubs
- Messaging passengers about how to complain
- Robust system for recording complaints and analysing data and trends.
- Drivers (who should receive safeguarding awareness training. In general, drivers should be expected to report concerns, even if they are wary of doing so. It goes with the territory.)
- (PK would add conditions that operators report complaints and complaints data)

(5) Implications for training



- All decision makers should be trained.
- Commendably, the Standards say training on licensing is not enough. It should include:
 - Natural justice
 - Risks of CSAE
 - Disability and equality awareness
 - “The making of difficult and potentially controversial decision” (!)
- Should include case study material
- Training to be formally recorded

(6) Implications for decision-making



Level of decision-making

- Standards recommend:
 - Members for contentious matters
 - Officers for “less contentious matters” via a “transparent scheme of delegation.”
- Why?
 - Separation between investigator and decision-maker
 - Oversight of licensing service
 - Enabling licensing officers to continue relationships without being seen as the decision-maker.

Also...



Standards

- Whether the structure proposed is introduced or an alternative model is more appropriate in local circumstances, the objective should remain the same – to separate the investigation of licensing concerns and the management of the licence process.

Kolvin comment

- This seems to countenance the possibility of an alternative model, although reasons would be needed for this.
- PK thinks it possible that the intended separation was intended to be between determination and investigation.

But what if it is urgent?



- Regardless of which approach is adopted, authorities should make arrangements for dealing with serious matters that may require the immediate revocation of a licence.
- Recommended this is delegated to a senior officer with responsibility for the licensing service.

PK comment



- Some authorities have too much work to feed to members.
- There is no legal harm in having contentious matters, including revocations, decided by officers.
- But having a senior, independent officer dealing with it, and operating due process, avoids allegations of malice on appeal.
- Suggestion: Council may also decide to provide that only committees may revoke or suspend, so that if officer considers that appropriate, and it is contested, it is referred up.
- In any event, delegations should be reviewed in the light of the Guidance.

Some basic rules re decision-making



Standards

- Members' code of conduct
- Human Rights Act considered
- Natural justice observed
- Decisions to be reasonable and proportionate
- Hearing to be fairly conducted
- All relevant factors to be considered
- Avoid actual and apparent bias
- Avoid predetermination
- Data protection legislation

PK view





THE FIT AND PROPER TEST

The fit and proper test



- The statute: Authority shall not grant a licence
“unless they are satisfied that the applicant is a fit and proper person...”
- The Act does not set out the standard of proof
- Does it mean “just about satisfied” or “satisfied on balance” or “fully satisfied?”
- There is binding authority that it means satisfied on the balance of probabilities:
McCool v Rushcliffe (1998)

A proxy test



- There is often an element of danger in proxy tests which seek to gloss statutory language.
- The Standards do not adopt a proxy test, but suggest a way of approaching the statutory test:



Standards

- Authorities have a duty to ensure applicant is fit and proper.
- They might consider:
... would you allow a person for whom you care ... to travel alone in this driver's vehicle day or night?
- If on balance of probabilities the answer is no, don't licence.
- Can consider conduct which did not result in conviction.

Kolvin view

- This is wrong. They must make a finding on balance of probabilities.
- If there was a 10% chance he was a dangerous criminal, the answer must be no. But how to reconcile this with the balance of probabilities?
- But what must be decided on balance? Would I entrust my maiden aunt to his care? Or is he a dangerous criminal?

Rehabilitation



- The previous debate plays out here too.
- Standards say authorities should take particularly cautious view of offences against children and vulnerable people, sexual offences and organized crime.
- Does that mean that for such offences a lower standard is required before refusing licence?
- Or does it mean that where such offences are established on balance, the authority should be particularly careful before licensing?
- It is not clear, but having regard to McCool it can only mean the latter.
- Time to revisit McCool?

Convictions policies



- Should be 3 categories:
 - Offences so serious that applicant should not be licensed except in “truly exceptional circumstances.
 - Offences where a number of years should elapse.
 - Offences which would not by themselves normally justify refusal (e.g. single minor motoring offences), but might if a pattern is shown.

Comparison with IOL Guidance



Standards

- Crimes resulting in death: never
- Exploitation: never
- Violence: 10 years since completion of sentence
- Weapon: 7 years
- Sexual: never
- Dishonesty: 7 years
- Drugs supply: 10 years
- Possession: 5 years
- Discrimination: 7 years
- Drink/drugs drive: 7 years
- Using hand-held: 5 years since end of sentence or ban.

IOL

- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓

What of multiple convictions?



IOL

Where an applicant has more than one conviction showing a pattern or tendency irrespective of time since the convictions serious consideration will need to be given as to whether they are a safe and suitable person.

PK comment: IOL should be adopted.

Standards



IOL standards on “other motoring convictions”



- See IOL 4.42 – 4.45
- Not replicated in Standards
- Standards set out general guidance p 36
- PK view: it is open to a Council to go with IOL, but it should acknowledge it has done so with reasons

How rigid are the Standards?



- Never means never “in all but truly exceptional circumstances”

Lapsed periods



Standards

- Lapsed periods should be a starting point, which prioritises passenger safety while allowing for offenders to evidence rehabilitation

BUT ALSO:

- Authorities to consider each case on merits
- Applicants entitled to fair and impartial consideration
- Periods given should be a minimum

Kolvin view

- The underlined words are irreconcilable
- Authorities should take their pick in their policy



DRIVERS

Driver conditions



- Safeguarding awareness training:
 - CSAE
 - County Lines
- Language proficiency
 - Oral (to identify safeguarding issues)
 - Written (to understand policy and guidance)

PK comment: the proportionality of the language requirement is established by R (Uber) v TFL [2017] EWHC 435 (Admin)



Question

- What of a driver who is already licensed but struggles to communicate?

Kolvin view

- Council must take a view.
- If communication is key it may be reasonable to give driver a period (months/years?) to bring their communication up to scratch.

Other conditions to consider (Kolvin suggestions)



- Security checks:
 - Presently, 90% of authorities require enhanced DBS and barred list checks
 - 10% require enhanced DBS only
- Disability awareness training (only 41% of authorities require this)
- Medical examinations
- Local knowledge
- Based in district (See *R (Delta) v Knowsley MBC [2018] EWHC 757 (Admin)* para [56])
- Display of information
- Drivers to notify authority of arrest, charge or conviction for relevant offences.



CCTV

CCTV in vehicles

A cautious endorsement



A bit more guarded than 2010 Guidance:

- CCTV can:
 - Deter crime
 - Reduce fear of crime
 - Assist police
 - Assist insurance companies
- Authorities should consult.
- Experience of authorities mandating it has been positive.
- But crimes still occur with CCTV (which would also be an argument against having a police force)

Continuous recording



- Should be possible to switch off when not being used for hire.

What about audio?



- Should be:
 - Overt
 - Targeted, not continuous
 - Operable by driver or passenger
 - Recognise passenger privacy

PK view re CCTV



- CCTV is an important deterrent and detection device, protecting the public and drivers, reducing the fear of crime and assisting insurance companies investigating incidents.
- It is a cost, but a justifiable one.
- But only 4% of authorities require it.
- Requirement needs to be justified in data protection terms.
- See:
 - LGA Guidance:
https://www.local.gov.uk/sites/default/files/documents/5.42%20LGA%20Guidance%20developing%20an%20approach%20to%20mandatory%20CCTV%20in%20taxis%20and%20PHVs_WEB.pdf
 - Al Haq recommendation 17.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745516/taxi-and-phv-working-group-report.pdf

Privacy



- Customers to be informed of CCTV:
 - On website
 - Automated messages on phone
 - In car



OPERATORS

Operators



- Fit and proper test to be applied to all directors and partners.
- Operators should notify changes in such personnel.
- Authorities should be satisfied that customer-facing staff do not pose risk.
- Authorities should require a register of staff taking bookings / despatching vehicles.
- Operators should provide policy on employment of ex-offenders.

PK view re operators (1)



- Standards very skeletal. Consider conditions re:
 - More advanced corporate compliance systems, as are required in gambling regulation. E.g.
 - Board oversight of compliance systems.
 - Documented risk assessments, e.g. driver hours (22% of drivers work 7 days p.w.), safeguarding, ride-sharing, hot-spots.
 - Appointment of compliance and/or police liaison officer.
 - Independent audit of compliance (and supply to regulator).
 - Complaints:
 - Recording and reporting of complaints, anonymised if necessary
 - to licensing authority and/or Police
 - where complaint occurred and/or in district licence is held.
 - Regulator access to complaints records / law enforcement portal.
 - Complaints data reporting, with outcomes.

/contd

PK view re operators (2)



- Reporting of key events as defined, e.g. systems changes, systems faults (e.g. ability to drive without insurance or licence), serious offences, suspensions, data breaches or losses, investigations by other regulators.
- Co-operation with investigations, remotely or on-site.
- Co-operation with enforcement officers in other areas. (See Al Haq recommendation 9).

PK view re operators (3)



- Wheelchair accessibility: only 5% of authorities require all or part of PHV fleet to be accessible. All should require some part of fleet, or some part once x vehicles are reached, to be accessible.
- 24 hour emergency phone lines.
- Office in district (see Delta para 28).
- Requirement for local phone numbers: see *R (Blue Line) v Newcastle CC* [2012] EWHC 2599 (Admin)
- Supply of trip, geographic and hotspot data to regulator. (As in New York.)
- Clean air plans.
- Restriction of driver hours. This should be hours on the app, not actually driving.
- Risk assessment of drivers, e.g. regarding what other jobs they have and hours they are working, to reduce the number of hours they are working on the app.
- Supply of data on driver hourly/weekly earnings. See London Assembly, *Raising the Bar* p 18
- Ability for passengers to register concerns about those with whom they have ride-shared.
- Eventually, driver verification: biometric or face-recognition log-on technology.



ENFORCEMENT

Standards recommendations



- Joint authorisation of enforcement officers: see LGA Councillors' Handbook for model
- Ensure drivers understand policies they must adhere to
- Possible use of points based system, to aid consistency
- Clear, simple, well-publicised system for public complaints
- Use of suspension pending additional training (where appropriate)

PK comments re enforcement (1)



- The system depends on effective regulation
- Wakefield allows you to raise fees to cover the entire compliance function: use it.
- Don't be the latest Rotherham.
- How much compliance monitoring and enforcement is required is a professional judgment, not a political decision.

PK comments re enforcement (2)



- Regulate smart.
- Require operators to provide you the data you need for efficient monitoring, using conditions. E.g. trip and hotspot data.
- Use body worn cameras.
- Use social messaging aimed at drivers, reinforcing key messages.
- Joint working: authorities, DVSA, police, trading standards, EH.
- Joint operations:
 - Councillors' Handbook makes point that joint licensing/police ops are important because only police have powers to stop and search vehicles.
 - Intel sharing protocols.
- Prosecute and suspend/revoke for deliberate, serious or repeated non-compliance.
- Consider penalty points system.
- NR3 is a great tool. Use it.
- Monitor complaints. Don't be another Rotherham.
- Increased clarity for public on complaining.
- The above produces a culture of compliance.
- The public, including vulnerable people, benefit.

PK comments re enforcement (3)



Out of district enforcement

- Joint enforcement operations between home and away authorities.
- Protocol for reports of non-compliance by away authority to home authority, using body worn footage, e.g. illegal parking, vehicle defects.
- Authorise officers from other authorities to use enforcement powers on your behalf. Useful protocol in Councillors' Handbook p 25.

Passengers are part of the safety framework



- Authorities should help to educate the public. E.g.
 - How to tell if vehicle is licensed.
 - Difference between taxi and private hire vehicle
 - Danger of using a private hire vehicle that has not been pre-booked.
 - Arrange to be picked up from safe place.
 - Note the licence number.
 - Sit in the back
 - Inform third party of journey
 - Use taxi rank for taxi journeys.



CONCLUSION



- In throwing focus on children and vulnerable people and raising the status of licensing, this is a huge leap forward.
- And it has been a long time coming.
- But despite the long gestation, the Standards are not always clear, lack detail in several areas, and in others tell authorities what they already know.
- However, they are minimum standards.
- It is up to authorities to raise their standards to protect their communities both through their policy work and member/officer training.
- If they do raise their standards, the Courts will support them.



THANK YOU FOR LISTENING

Philip Kolvin QC

philipk@cornerstonebarristers.com