

## STATUTORY TAXI AND PRIVATE HIRE VEHICLE STANDARDS

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### Introduction

The long-awaited *Statutory Taxi and Private Hire Vehicle Standards* (“the Standards”) which were published on 21<sup>st</sup> July 2020 represent a milestone in transportation regulation, because for the first time the safeguarding of children and vulnerable people have been put right at the heart of the taxi licensing system. In this article, I examine the statutory and philosophical underpinning of the Standards, together with their implications for licensing regulation. This article sits alongside a free webinar on the Standards, which is also available on this site.

### The underlying philosophy

The Standards set out their stall early, explaining that taxis and private hire vehicles are a high risk environment. When they speak of risks, they are clearly talking about risks which are life-changing or even life-ending for victims.

This represents a radical change of tone from *Taxi and Private Hire Vehicle Licensing: Best Practice Guidance* of 2010 (“the Guidance”) which, while pointing out that the aim of the system was public protection, exhorted authorities to take a proportionate approach to the burdens they might otherwise seek to impose, lest the public’s access to taxis be unreasonably impeded. That there are now enough vehicles in this country is perfectly clear: the priority has become protection.

### Origins

The founding instrument of the Standards is section 177 of the Policing and Crime Act 2017, which enables the Secretary of State to issue guidance to authorities as to how their taxi and PHV licensing functions may be exercised so as to protect children and vulnerable people and then requires authorities exercising their licensing functions to have regard to it.

### Timing

Most statutes provide for a commencement date some way hence, while most modern guidance provides a date for implementation. Not section 177.

This means that the Standards are operative now. This does not mean that authorities have to adapt their policies tomorrow. It does mean that when exercising any relevant functions, they have to have regard to the Standards. If they don’t, they act unlawfully.

### The duty

The duty is a “have regard” duty. This means that the authority must take the Standards into account and must give clear reasons for departing from them: Khatun v LB Newham [2004] Civ 55. Authorities would be well-advised to document reasons for departure and to make it clear in their decision that proper consideration has been given to them, see R (London Oratory School Governors) v Schools Adjudicator [2015] EWHC 1012 (Admin).

However, there is a limit to this. First, while the Standards say that authorities should implement them “*unless there is a compelling local reason not to*”, this goes too far. There needs to be a reason, but the reason just needs to be rational, not compelling. Furthermore, as the Standards correctly remind the reader, they are not law or a source of law. For that, lawyers remain useful.

### **Relationships**

How do the Standards interact with the Guidance? The Standards say that they replace “relevant sections” of the Guidance and where there is a conflict the Standards have precedence. Unfortunately, which sections fall to be replaced, and which sections are in conflict, remains unexplained. It is not easy to understand why, since it may give rise to arguments which with a little work could have been avoided.

In reality, however, comparing the two documents reveals little conflict, so much as a strengthening of the regulatory approach in the Standards.

As for wider licensing issues, it is important to remember that the Standards have a limited purpose. They are not a licensing cure-all, and don’t deal, or purport to deal, with the usual litany of concerns, including cross-bordering or vehicle standards. However, if authorities review their policies in the light of the Standards, they should take the opportunity to revisit their approach in general.

### **Implications for policy**

The Standards recommend a cohesive policy document bringing together all taxi and PHV licensing procedures including the fitness and propriety test, licence conditions and vehicle standards. They also suggest a wide cohort of stakeholders, including for example disabled groups, women’s groups, local multi-agency safeguarding groups and neighbouring areas.

They also recommend five yearly reviews, with interim reviews if significant issues have arisen, together with annual performance reviews.

### **Implications for licences**

The Standards say that any changes in licensing requirements should be followed by a review of the licences already issued.

This might simply be a paper analysis to find out whether licences have been granted and conditioned in line with the Standards or, in cases where the licence would not be granted under the current Standards and policy, a formal review of individual licences. To take one example, the Standards recommend that all drivers should be subject not only to Enhanced DBS checks but also to Barred List checks. They go on to say that in the interests of public safety, licensing authorities should not issue a licence to any individual who appears on either barred list. In such a case, there would be a clear case for a formal review.

While the Standards acknowledge the default period for licences set out in legislation, they strongly recommend ongoing scrutiny during the life of the licence. They contemplate a flow of information coming into the authority from the DBS Update Service, whistleblowing, Common Law Police Disclosure, notification by the licensee, the NR3 register, Multi-Agency Safeguarding Hubs, passengers (who should be educated in how to complain), operators and drivers themselves. This is one of the

most important facets of the Standards, since they contemplate a much more thorough system of oversight of current licences.

### **Implications for training**

The Standards recommend that all decision-makers are trained, and even go on to explain what they should be trained in. Just teaching about the statutory licensing system is not enough. There should be education in natural justice, the risks of child sexual abuse and exploitation, and disability and equality awareness, amongst other things. Trainees should be given case study material to make it real. And training should be formally recorded: if it is recorded, experience shows that authorities fare better when facing judicial review.

### **Implications for decision-making**

The basic position in the Standards is that contentious matters should be decided by members, with the less contentious work reserved to officers. The rationale is that that way there will be separation between the investigator and decision-maker, better oversight of the licensing service and the ability for licensing officers to continue relationships with licensees, without being seen as the decision-maker.

There is a lot in this, but the reality is that busy authorities will not always have members available for regular hearings, so the Standards do contemplate alternative models, while emphasising the core objective of separating out investigation and determination functions. Whichever model is adopted, however, provision must also be made for dealing with urgent cases, which may be by a senior officer with responsibility for the licensing service.

### **The fit and proper test**

The Standards provide a useful service in exposing a difficulty with the case law regarding fitness and propriety. The legislation regarding drivers and operators states that authorities should not grant a licence unless they are satisfied that the applicant is a fit and proper person. But how satisfied do they have to be? 100%? 51%? Would one allow a loved one into a taxi late at night if one thought there was a 49% chance they were sex offender? Presumably not. But the case law indicates that in the context of licensing legislation, “satisfied” means satisfied on the balance of probabilities: see [McCool v Rushcliffe \(1998\)](#).

The Standards do not resolve this dilemma, or even seem to recognise it.

They start by saying that authorities have a duty to ensure that the applicant is fit and proper, which sets the bar higher than the balance of probabilities test. They then ask whether you would allow a person for whom you care to travel alone in the driver’s vehicle late at night. Again, if one thought there was a 49% chance they were dangerous, clearly one wouldn’t. But then they state that if the answer is no on the balance of probabilities, then a licence should not be issued. The corollary of that is that the Standards are saying that if an authority thinks there is a 51% chance that the driver is not dangerous, they should licence him. In common parlance, that is playing the odds.

In fairness to the draftsman, while the Standards do not resolve this dilemma, nor did they create it. The solution to this is for McCool itself to be reviewed by an appellate court, and for the court to

be asked to rule that satisfied means satisfied. When one says that one is satisfied that a driver is fit to transport vulnerable people, one does not mean satisfied on the flip of a coin.

### **Convictions policies**

The Standards largely replicate the Institute of Licensing's guidance *Safe and Suitable* in relation to periods of disqualification following conviction. There remain lacunae in relation to multiple convictions and convictions for driving offences, where the IOL guidance has something to say but the Standards don't. The Standards do not specifically reject the guidance, and there seems to be no reason why, in these regards, the guidance should not just be adopted.

More contentiously, the Standards say that the periods should be a starting point and then in the next breath says that they should be a minimum. These appear internally contradictory unless one "starts" and then travels upwards. I believe that it would be acceptable for authorities to interpret the Standards as imposing a starting point which could then be varied up or down depending on the merits of the case.

### **Drivers**

The Standards recommend that drivers have training regarding child sexual abuse and exploitation as well as County Lines. They advocate language proficiency tests, both oral and written, the former to enable drivers to identify safeguarding issues and the latter to understand policy and guidance.

Clearly, there are many other aspects of a driver's experience and behaviour which could be conditioned, e.g. regarding disability awareness training, medical examinations, local knowledge, intended use and notification duties. The fact that they are not mentioned in the Standards is because the Standards are focussed on safeguarding and in any case they are not purporting to be an encyclopaedia of potential conditions. Rather they are minimum standards. However, all of these further matters may fall for consideration as part of a licence review.

### **CCTV**

The Standards give a cautious endorsement to CCTV in cars, subject to compliance with data protection requirements. This is because of its function in deterring crime, reducing the fear of crime and assisting police. They do, however, lean against continuous recording and advocate audio only when triggered by driver or customer. The reason for caution is not immediately apparent, but certainly nothing in the Standards prevents an authority from requiring CCTV if it considers it proportionate to do so.

### **Operators**

The Standards advocate application of the fit and proper test to all directors and partners, as well as scrutiny of customer-facing staff and a register of staff taking bookings and despatching vehicles.

Again, the Standards are very skeletal in relation to operators. Certainly, in a world in which data can easily be saved and analysed, there is room to require corporate compliance systems to be put to the service of the regulator. For example, conditions might require: board oversight of compliance systems; documented risk assessments in relation to driver hours on the app, safeguarding, ride-sharing and hot-spots; the appointment of compliance and/or police liaison officers; independent

audits of compliance; systems for complaints recording, reporting and sharing; reporting of key events such as systems changes or faults, data breaches, driver ability to drive without insurance or licence or investigations by other regulators, and co-operation with regulators in other areas.

In addition, conditions might cover: wheelchair accessibility; 24 hour emergency phone lines; supply of trip, geographic and hotspot data; restriction of driver hours on the app and, in due course, driver verification with biometric or face-recognition technology.

These Standards therefore provide, not so much the means as the occasion for a root and branch review of operators' licences so as better to protect the public. If this is done in tandem with other authorities in the region, a far higher degree of regulation and control will eventuate.

### **Enforcement**

The Standards recommend joint authorisation of enforcement officers within and outside the area, to respond to the issue of cross-bordering. They also advocate that authorities ensure that drivers understand the policies they are to adhere to, the possibility of a point-based system to aid consistency, a well-publicised system for public complaints and the use of suspension pending additional training where appropriate.

Again, there is much more that can be said on this topic, including concerning conditions to require a higher degree of compliance as set out above, joint licensing/police operations, and the use of reporting protocols between authorities.

It is fair to say that authorities do sometimes complain that they are insufficiently resourced to carry out their compliance functions as thoroughly as they would wish. The answer to that is that the amount of enforcement activity needed is a matter of professional judgment, not political calculus. In reality, enforcement costs are passed to operators who may pay them out of their income or pass them on to customers. The objective of this is to keep the public safe, and to skimp is to endanger.

### **Conclusion**

In throwing focus on children and vulnerable people, the Standards represent a huge leap forward, and one which is long overdue. But, despite the long gestation period, the Standards are not always entirely clear, lack detail in several areas and in others tell authorities what they already know.

However, it is important to recall that they are only minimum standards. It is up to authorities to raise the bar to the right local level both through their policy and licensing work. If they do so, and fully explain their reasons for doing so, they will be supported by the Courts, for the very reason that the purpose of the exercise – protecting those who can't protect themselves – is the first objective of a civilised society.

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