

Executive

26 September 2019

Report of the Corporate Director of Economy and Place
Portfolio of the Executive Member for Transport

Interpretation of law - 'Out of town' licences

Summary

1. This report concerns the council's interpretation of the law relating to the ability of private hire operators and drivers to work their vehicles outside of the area within which they are licensed (often referred to as 'out of town' operators/drivers/vehicles).
2. Please note, there has been suggestion made that Members are being asked to make a decision to 'prosecute Uber'. This is not the case, any decision to take formal enforcement action – of which prosecution is only one option – would only occur following an investigation and proper application of our enforcement policy to the situation. Members are being asked to consider whether they wish to change the Council's current stance and make a statement to the effect that 'out of town operators/drivers/vehicles working in York' are not considered lawful unless certain conditions are met (which would need to be determined) in the Taxi Licensing Policy.
3. In summary, the council's legal position is that provided the three licences required in relation to a private hire vehicle (operator, driver and vehicle) have all been licensed by the same authority then the private hire vehicle can undertake journeys anywhere in England and Wales. That is irrespective of where the journey commences, areas through which the journey passes and, ultimately, the area where the journey ends. This has become known as the 'triple licensing rule' (or similar) and this interpretation has been confirmed in external legal advice.
4. The situation in York is similar to that in many other towns and cities in the country. For example, Medway Council have a statement on their website in relation to Uber which says 'As the law stands, at present the Council do not believe that Uber is acting unlawfully within the council's area'. Furthermore, Uber are not the only firm who work under the 'triple

licensing rule' and it is said that other firms work to this model on race days in York for example.

5. The 'Taxi Licensing Policy' sets out the policy that the Council will apply when making decisions about new applications and licences currently in force' and as such is not currently concerned with 'out of town' operators/vehicles/drivers. Neither is it intended as a comprehensive list of the wider rules that private hire drivers must comply with such as 'plying for hire' and 'parking on ranks'.
6. At the Gambling Licensing and Regulatory Committee (GLRC) meeting on 18 March 2019, it was recommended to Members that 'the conclusions of the Legal Advice at Annex 2 are accepted and that it be recommended to the Executive that there is no requirement for a change in Taxi Licensing Policy as a consequence'.
7. Members resolved that 'it be recommended to the Executive that in order to make an informed decision further investigation be undertaken regarding the requirement for a change in licensing policy'.
8. There was also concern at the GLRC on 18th March about the lack of information in the original report presented to them. Members of GLRC considered this, more detailed report, on 4th September 2019. They recommended that you follow Option one in the report and in doing so consider that:
 - There is a need for increased enforcement
 - An assessment of the climate change implications from out of town taxis be made
 - The Department for Transport be lobbied to bring in legislation
 - There are concerns about out of town drivers not having local knowledge of the roads

Recommendations

9. That Executive Members follow Option 1 within this report, namely that the legal position remains with no changes required to the Taxi Licensing policy.
10. Reason: To provide clarity for the public in relation to the council's interpretation of the law. If the Council changes its position in relation to 'out of town' operators and vehicles it creates a score of 19 (orange risk) on the Council's risk matrix. This is because there would at least be a 'possible' risk of a 'major' impact to our service i.e. national media

coverage/action in a national court and which could cost over 10% of the Public Protection budget. Retaining the status quo keeps the likelihood to 'remote' thereby reducing the score to 12 on the risk matrix (yellow risk).

Background

11. The council's settled legal position is as stated in paragraph 3 above, the principle arising from *Adur District Council v Fry* [1997] RTR 257.
12. In this case, a private hire operator, driver and vehicle were licensed by Hove Borough Council. The situation concerned a booking for a journey that commenced, ended and throughout its entire length was within the district of Adur District Council. The High Court determined that no offence was committed, and it was lawful for the vehicle to undertake a journey that is wholly outside the district in which it is licensed. This is due to the limited meaning of the term "operate" contained in the Local Government (Miscellaneous Provisions) Act 1976, section 80(1), which meant "in the course of business to make *provision* for the invitation or acceptance of booking for a private hire vehicle and could not be construed more widely" [emphasis added]
13. 'Provision' has subsequently been held to refer to the 'antecedent arrangements' around the invitation/acceptance of a booking.
14. On the 19 November 2018, the Private Hire Association shared a legal opinion it had obtained from Queen's Counsel that argues operators of 'out of town vehicles' and their drivers are illegally operating in York by virtue of displaying their vehicles on the app (Annex 1).
15. The Council instructed separate Counsel (Leo Charalambides) to advise, and a comprehensive advice note is attached at Annex 2. Our Counsel had the benefit of the outcome of a case earlier this year concerning an Uber driver working in Reading who was prosecuted (unsuccessfully) for 'plying for hire' simply by virtue of his presence on the Uber app. Although this case concerns a different offence to that which the Private Hire Association's counsel alleges is occurring in York, it provides a useful insight as to how the courts – in particular the High Court - may interpret the situation as in reaching their decision they had consideration of the Uber business model. Lord Justice Flaux found the app:

'is simply the use of modern technology to effect a similar transaction to those which have been carried out by PHV operators over the telephone for many years'

16. As a result, our Counsel concludes that the Private Hire Association's position is 'untenable and self evidently wrong'.
17. The York Private Hire Association have since circulated a further opinion to Councillors which is attached as Appendix 3 (please note – we have been asked by those who sought this opinion not to put it into the public domain). The opinion says that the Reading case 'may be significant' because of 'its implicit acceptance of Uber's business model... throughout the judgment' and that 'one must take it into account [the Reading case] when considering if Uber could be successfully prosecuted for operating without a licence'.
18. Finally, a Department of Transport 'Task Finish Group' (TFG) was commissioned last year to review current taxi licensing laws. They recommended the following:-

'TFG Recommendation 11

Government should legislate that all taxi and [Private Hire Vehicle] journeys should start and/or end within the area for which the driver, vehicle and operator... are licensed. Appropriate measures should be in place to allow specialist services such as chauffeur and disability transport services to continue to operate cross border.

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

19. In their response, the Department for Transport recognise that

'Currently, a PHV journey can take place anywhere in England provided that the driver, vehicle and operator are licensed by the same licensing authority.'

The Department for Transport go on to say that they

'agree with the principle of this recommendation, and will consider further (with a view to legislation) how it might best work in detail. In particular, Government will need to consider what size of area is appropriate. We will also consider what flexibilities or exemptions might be needed to reduce or avoid negative impacts on any particular business models,

types of transport or passenger, and businesses or localities that are close to (perhaps multiple) licensing authority borders.'

20. That the Department of Transport are considering 'legislation' to prevent private hire journeys taking place 'anywhere in England' implies that the Government agrees with the City of York Council's current interpretation.
21. As outlined in the summary above (at paragraph 5), the Council's Taxi Licensing Policy does not currently deal with 'out of town' operators, drivers or vehicles as it is only concerned with those we do licence or those who are seeking to be licensed by the City of York Council. Licences held in other Authorities will be covered by the licensing policies of those areas. Please also note that the case of R (Uber Britannia Ltd & Delta Merseyside Ltd) v Knowsley Metropolitan Borough Council [2018] EWHC 757 (Admin) prevents other licensing authorities restricting the areas in which drivers can work i.e. it prevents other authorities from introducing licensing conditions which prohibit their drivers from working in York.

Consultation

22. As this matter concerns legal opinion, wider public consultation with the passengers who use taxis including 'out of town' vehicles, the local trade who are in competition with those drivers or the wider public is not appropriate.

Options

Option 1

23. Follow the Council's legal advice and agree the legal position as outlined in paragraph 3 with no change to the Taxi Licensing Policy. The situation could be reviewed in the event of a change in the law as a result of new legislation or a binding court judgement.

Option 2

24. Disregard the council's legal advice and adopt the position that 'out of town' operators and/or their drivers work in York illegally (unless certain conditions are met) and make a statement in the Taxi Licensing Policy to this effect. Members would need to advise on what statement is appropriate.

25. Enforcement action would only be taken after an investigation had been conducted and the findings considered in accordance with the Council's enforcement policy. This would include there being a reasonable prospect of a conviction on the evidence obtained and it being considered in the public interest to take such action.

Analysis

26. Option 1 maintains the status quo. It is consistent with the Council's independent legal advice, but enables the council to review its position in light of new legislation or a binding court judgement. It provides certainty to the public on the council's interpretation of the law. The risk of a *successful* legal challenge to this position by an aggrieved party is low.
27. Option 2 will mean we disregard our own independent legal advice in preference to one of the opinions supplied by the local taxi trade. Any change to the Taxi Licensing Policy which considers 'out of town' operators and drivers to be working in York illegally (unless certain conditions are met – to be determined) risks successful legal challenge and/or simply being ignored.
28. Formal enforcement action – particularly a prosecution – would only be possible under our enforcement policy on consideration of the evidence gathered during the investigation and it being in the public interest to take such action. We would need to establish that an operator is 'making provision' for the invitation or acceptance of bookings in York i.e. that 'antecedent arrangements' are taking place here. The Reading case suggests that the High Court is unlikely to consider the image of a vehicle on an app being the 'provision' for invitation/acceptance of booking, since they considered the app to be nothing more than a modern day manifestation of the telephone.
29. What is more, even before we reach court, we may be subject to challenge on the basis that we have been advised by independent Counsel that the situation is unlikely to be considered unlawful. In the event of losing the case we risk having costs awarded against us. It is difficult to estimate the cost of legal action, but discussions with Counsel Chambers suggest that the cost of a successful prosecution could be in the region of £30k (although there could of course be an order made that our costs are repaid). In the event of an unsuccessful prosecution we will incur the estimated £30k cost, plus there is a potential claim for a further £60- £80k if costs were awarded against us. Any such action is likely to be vigorously defended given that it strikes at the heart of the business model of some operators. Legal costs will rise if the case is taken to

higher courts. Similar costs are likely to arise in the event of a judicial review. These costs do not include those of council officers and in-house legal services.

30. Officers consider that Option 2 is not a credible option.

Council Plan

31. This report helps ensure the council is meeting its statutory duties.

Implications

32. **Financial** – As highlighted in paragraph 28, there are significant financial implications to the council in the event that the Members decision to alter the position/policy (and any subsequent formal enforcement action) is successfully challenged. It is important to note that the costs of taking a case to court are by their very nature uncertain.

33. **Human Resources (HR)** - There are no HR implications. An investigation into a breach of the law is likely to be fairly straightforward. There is however likely to take hundreds of officer hours in defending the decision to over-ride our independent legal advice.

34. **Equalities** – Taxis are a preferred method of transport for many residents and visitors to the city with a disability.

35. **Legal** – Legal opinion is the subject of this report. The Council is satisfied that the opinion set out in Annex 2 is accurate and robust. Any decision of the council to act/not to act may be the subject of judicial review.

36. **Crime and Disorder** – The Taxi Licensing team receive complaints about 'out of town drivers' and the local trade. Complaints are similar in nature in both areas, the biggest cause of complaints being the standard of driving. Complaints about the behaviour of out of town drivers are dealt with by the local licensing authority. The number of serious complaints about taxi drivers either local drivers or out of town are low, particularly in relation to the number of journeys taken.

37. **Information Technology (IT)** – There are no IT implications.

38. **Property** – There are no property implications.

39. **Other** – There are no other implications.

Risk Management

40. If the Council changes its position in relation to 'out of town' operators and vehicles it creates a score of 19 (orange risk) on the Council's risk matrix. This is because there would at least be a 'possible' risk of a 'major' impact to our service i.e. national media coverage/action in a national court and which could cost over 10% of the Public Protection budget. Retaining the status quo keeps the likelihood to 'remote' thereby reducing the score to 12 on the risk matrix (yellow risk).

Contact Details

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Report **Date** 19.09.2019
Approved

Specialist Implications Officer(s) List information for all

N/A

Wards Affected: List wards or tick box to indicate all **All**

For further information please contact the author of the report

Annexes

Annex 1 – Gerald Gouriet QC 'Opinion' for the York Private Hire Association, 16.11.18

Annex 2 – Leo Charalambides 'Advice Note' for City of York Council, 05.03.19

Annex 3 – Further opinion, salmon paper

List of Abbreviations Used in this Report

GLRC - Gambling Licensing and Regulatory Committee

PHV – Private Hire Vehicle

TFG - Department of Transport 'Task Finish Group'