

CONTINGENCY

Temporary updates to Statutory Documents No. 2, 3, 4, 9 & 14

Background

- a) The following interim guidance is issued during a period where the country faces the extraordinary challenges of the coronavirus (COVID-19) pandemic. The initial version was drafted in anticipation of the impact on personnel and economic activity. It therefore included the support services offered to traffic commissioners and the capability to hold tribunal hearings.
- b) It is still not possible to envisage every situation which might occur during the current outbreak. The Statutory Documents describe the application of legal discretions and seek consistent application of the regulatory requirements. The Department for Transport decides what exemptions might apply to the application of commercial road transport rules such as drivers' hours. The traffic commissioners retain their core focus on road safety. However, during this period, the Senior Traffic Commissioner recognises there may be challenges for operators in meeting the operator licence requirements.
- c) The Senior Traffic Commissioner for Great Britain issues the following Guidance and Directions under section 4C(1) of the Public Passenger Vehicles Act 1981 (as amended) to provide information as to the way in which the Senior Traffic Commissioner believes that traffic commissioners should interpret the law relating to the application of the Statutory Documents. This Guidance may be subject to decisions of the higher courts and describes powers and discretions to be exercised by traffic commissioners (including deputies) only. The Directions are addressed to the traffic commissioners in respect of the approach to be taken by staff acting on behalf of individual traffic commissioners and dictate the operation of delegated functions during the relevant period only. In addition, the Senior Traffic Commissioner may deploy traffic commissioners to address exceptional needs using powers under section 4B.
- d) Separate arrangements are made through OTC management in respect of the support services provided to traffic commissioners.

Contingency Powers

Standard Operators

1. Article 13 of Regulation (EC) 1071/2009 provides a procedure for the suspension and withdrawal of authorisations, i.e. for Periods of Grace:

1. Where a competent authority establishes that an undertaking runs the risk of no longer fulfilling the requirements laid down in Article 3, it shall notify the undertaking thereof. Where a competent authority establishes that one or more of those requirements is no longer satisfied, it may set one of the following time limits for the undertaking to rectify the situation:

(a) a time limit not exceeding 6 months, which may be extended by 3 months in the event of the death or physical incapacity of the transport manager, for the recruitment of a replacement transport manager where the transport manager no longer satisfies the requirement as to good repute or professional competence;

(b) a time limit not exceeding 6 months where the undertaking has to rectify the situation by demonstrating that it has an effective and stable establishment;

(c)where the requirement of financial standing is not satisfied, in order to demonstrate that that requirement will again be satisfied on a permanent basis.

2. The competent authority may require an undertaking whose authorisation has been suspended or withdrawn to ensure that its transport managers have passed the examinations referred to in Article 8(1) prior to any rehabilitation measure being taken.

3. If the competent authority establishes that the undertaking no longer satisfies one or more of the requirements laid down in Article 3, it shall suspend or withdraw the authorisation to engage in the occupation of road transport operator within the time limits referred to in paragraph 1 of this Article.

2. An **effective and stable establishment** (Article 5 and Statutory Document No. 4) is the premises, which allow the operator to conduct its operations effectively and continuously to meet with the requirements of the licence, including i) any administration necessary for complying with those requirements and ii) appropriate technical equipment and facilities for an operating centre. The Senior Traffic Commissioner has interpreted this requirement to allow several sites, for instance an office and a separate Operating Centre, which go to meet this requirement. An operating centre must be specified on a licence and criminal proceedings may result from use of another place without authority.
3. Where a standard operator *temporarily* loses access to an Operating Centre, as a result of restrictions imposed during the outbreak, traffic commissioners should give serious consideration to the grant of a Period of Grace. The Senior Traffic Commissioner has set a starting point of 4 months Period of Grace for qualifying operators. That starting point is intended to allow an extension to the maximum period of 6 months should circumstances require that. A traffic commissioner may wish to be satisfied as to where the vehicles will be parked in the alternative. It is recognised that during the period of the outbreak it may not be practicable to

lodge an application for a new Operating Centre, which may only be required for temporary use.

4. **Financial Standing** (Article 7 and Statutory Document No. 2) is an important means by which a transport business becomes established and is intended to support the maintenance of vehicles and trailers during operation. It is a condition of an operator's licence that changes in financial standing or professional competence are notified to the traffic commissioner.
5. Regulation (EU) 2020/698 extends the maximum time limit established for financial standing from six to twelve months, with regard to financial assessments covering all or part of the period between 1 March 2020 and 30 September 2020. Where that adverse finding has already been made, and the time limit set by a PoG has not yet expired, it can be extended to a total of 12 months to allow for the above. A traffic commissioner will wish to be satisfied that:
 - the operator is not insolvent;
 - there are no outstanding maintenance or other issues, which might impact on road safety;
 - that this is not an attempted device to avoid responsibility for alleged failures in compliance.
6. A traffic commissioner would normally require tangible evidence to show that financial standing can be met in the future but, given the exceptional and short-term circumstances referred to above, the Senior Traffic Commissioner has directed that a traffic commissioner may rely on a previous satisfactory financial check which meets the new prescribed sum, no older than the last 12 months, as evidence to support the granting of a Period of Grace. A traffic commissioner may also accept internet or copy documents, with a check of original documents to be made at a later date. A traffic commissioner retains their discretion in respect of all standard operators. However, if the qualifying circumstances are met between 1 March 2020 and 30 September 2020, then the Senior Traffic Commissioner has set a starting point of 6 months Period of Grace for qualifying operators. That starting point is intended to allow for the traffic commissioner to make an assessment of the impact on road safety before extending to a maximum period of 12 months, should circumstances require that.
7. **Professional competence** (Article 4 and Statutory Document No. 3) requires at least one natural person with a genuine link to the operator and who is qualified with a Certificate of Professional Competence to act as Transport Manager. Traffic commissioners are aware of the duties summarised in paragraph 54 of Statutory Document No. 4 and may have to take a view on what is practicable in all the circumstances to meet the statutory duty. The conditions on the operator's licence require the operator to notify the traffic commissioner of matters which might impact for instance on the ability to show professional competence. Traffic commissioners would not normally expect to be notified of periods of short illness such as the general symptoms described in the current public health guidance. Where a person develops more acute symptoms, it may be necessary to grant a Period of Grace. Recognising the additional challenges of recruitment during the period of the outbreak, the Senior Traffic Commissioner has set a starting point of 4 months Period of Grace for qualifying operators. That starting point is intended to allow for an extension to the maximum period of 6 months should circumstances require that.

Process for Periods of Grace

8. A standard operator seeking a Period of Grace must proactively apply. That application in effect invites a traffic commissioner to make an adverse finding that the operator cannot demonstrate that it meets the mandatory and continuing requirement for a stable and effective establishment, financial standing or professional competence. Members of staff within the Office of Traffic Commissioner are expected to assist all standard operators with regard to applications for Period of Grace and to advise them of these Directions.
9. Operators must understand that if, upon expiry of a Period of Grace, the requirement has still not been demonstrated then the operator's licence will have to be revoked. For financial standing there is always the alternative of relying on additional sources of finance which might be secured or a voluntary reduction in authority to a level which can be supported.
10. In order to grant a period of grace the traffic commissioner or staff acting under delegation must first establish that one or more of the requirements is no longer satisfied. The traffic commissioner may then allow a period of grace to rectify the situation to be granted from the date of determination that the mandatory requirement is no longer met. The Upper Tribunal decision in 2014/008 Duncan McKee suggests that traffic commissioners will wish to see *reasonable prospects for a good outcome*. Where the reasons for the adverse decision are connected to the outbreak, traffic commissioners are entitled to infer that the situation will be time-limited, and that the McKee test is therefore met.
11. Traffic commissioners should recognise the exceptional nature of the operating environment during this period of uncertainty. Traffic commissioners are expected to give serious consideration to the grant of a Period of Grace to those standard operators who require it. In exercising their discretion, a traffic commissioner will include those factors whilst ensuring road safety.
12. Existing restricted goods operators do not have facility to request a Period of Grace but, for instance, might offer an undertaking to the traffic commissioner for a financial check to be carried out in the future and on a specified date. Use might also be made of temporary exemptions as below.

Goods – Interim licences

13. As more fully set out in Statutory Document No. 9, interim licences give temporary authority to applicants for a goods vehicle operator's licence. To grant, a traffic commissioner requires *prima facie* that the requirements of professional competence, financial standing and good repute are met before granting interim authority for a standard licence. As a matter of consistency this has been interpreted to include fitness and the availability of finance for a restricted licence. A traffic commissioner may issue an interim licence/variation in the same terms as those applied for or on different terms.
14. Regulation (EC) 1071/2009 allows existing operators to submit annually their audited accounts to demonstrate that the continuing and mandatory requirement for financial standing. That allows for any variations in the coming year to be assessed as against those certified accounts as opposed to supplying additional financial evidence at the point of every application. During the period of the

outbreak a traffic commissioner may, exceptionally, rely on an assessment of financial standing within the last 12 months as prima facie evidence to support grant of any interim goods licence. A traffic commissioner will wish to be satisfied that:

- the operator is not insolvent;
- there are no outstanding maintenance or other issues, which might impact on road safety;
- that this is not an attempted device to avoid responsibility for alleged failures in compliance.

15. This recognises that the operator would still be under an obligation to notify the traffic commissioner if, the required level of finance was not subsequently available. A traffic commissioner may grant a time-limited interim licence under the terms of section 24(6) for a new application and 25(4) for a variation application. This may allow a traffic commissioner to grant interim authority during the period where restrictions apply.

Goods – temporary exemptions

16. Section 4 of the Goods Vehicle (Licensing of Operators) Act 1995 sets out:

Temporary exemptions

(1) A traffic commissioner may, for the purpose of—

(a) enabling an emergency to be dealt with, or

(b) enabling some other special need to be met,

by notice in writing grant to any person falling within subsection (2) a temporary exemption from any requirement to hold a standard licence which would otherwise be imposed on him by sections 2 and 3 in respect of any vehicle specified in the notice or any vehicle of a class so specified.

(2) A person falls within this subsection if he is engaged exclusively in national transport operations which have only a minor impact on the transport market because of the nature of the goods carried or the short distances over which goods are carried.

(3) A temporary exemption granted under subsection (1) permits the person to whom it is granted to use the specified vehicle or (as the case may be) any vehicle of the specified class for the carriage of goods for hire or reward for the purposes of transport operations of his such as are referred to in subsection (2) (and, accordingly, sections 2(1) and 3(6) shall not to that extent apply to that person's use of goods vehicles).

17. A traffic commissioner retains a general discretion to deal with an emergency by granting temporary exemptions from any requirement to hold a standard goods licence.
18. If granted, the temporary exemption will allow the person to use a specified vehicle or any vehicle of the specified class for the carriage of goods for hire or reward for the purposes of transport operations.
19. This can be granted to any person, including an existing restricted licence holder.
20. The temporary exemption must be communicated in writing and that notice should specify the period of the exemption with the last day to which the exemption applies. The exemption relieves the applicant of the requirement to

hold an operator's licence for a) hire or reward, or b) for or in connection with any trade or business carried on by him.

21. Due to the exceptional circumstances required and the potential impact on the level playing field established under the Goods Vehicle (Licensing of Operators) Act 1995, a traffic commissioner must first be satisfied that an applicant is not unfit to engage in road transport. Additionally, a traffic commissioner may wish to be satisfied that:
 - the operator is not insolvent;
 - there are no outstanding maintenance or other issues, which might impact on road safety;
 - that this is not an attempted device to avoid responsibility for alleged failures in compliance;
 - that the applicant has satisfactory facilities and arrangements for maintaining the vehicles used under the exemption in a fit and serviceable condition.
22. The traffic commissioner must be satisfied that the grant of the exemption is necessary for the purpose of enabling an emergency to be dealt with (in this case the current outbreak) or enabling some other special need to be met (arising from the outbreak).
23. The traffic commissioner must be satisfied that the applicant is engaged exclusively in national transport operations, which will/have only a minor impact on the transport market because of the nature of the goods carried or the short distance the goods are carried. In the exceptional circumstances of the outbreak the Senior Traffic Commissioner advises that traffic commissioners are entitled to rely on a declaration to that effect signed by the person or officer of the corporate entity (Statutory Document No. 5).

Bus Registrations

24. To operate a local service, operators must meet the requirements of the Transport Acts 1985 and 2000 and the Public Service Vehicles (Registration of Local Services) Regulations 1986 and the Public Service Vehicles (Registrations of Local Services) (Amendment) Regulations 2018 and hold either an unconditional PSV operator's licence or a section 22 permit.
25. Current legislation already allows operators to seek short notice dispensation from a traffic commissioner in certain emergencies. Traffic commissioners have a discretionary power (Regulation 7) to accept short notice applications for services and in particular:
 - h) where the operator, due to circumstances he could not reasonably have foreseen, failed to make an application in sufficient time for the period of notice applicable;*
 - i) where an operator applies to register or vary a registration to meet an urgent or exceptional public passenger transport requirement.*
26. Following the implementation of widespread restrictions, operators were encouraged to change their local bus service registrations under the above provisions. The majority of relevant operators applied for a temporary variation of

services on the basis of circumstances that could not reasonably have been foreseen or to meet an urgent and exceptional public passenger transport requirement. The temporary variation was treated as akin to a holiday service, where the registration automatically reverts back to the original route timetable at the expiry of the given period.

- 27.** The 2018 Regulations amended the 1986 Regulations, introducing a new requirement in England only, to notify the relevant local authorities 28 days in advance of any application to a traffic commissioner to introduce, vary or cancel a local bus service. The period of notice provided by Regulation 5 has reverted to 42 days. In Wales the notice period under Regulation 5 of the 1986 Regulations remains at 56 days' notice but there is no requirement to notify the relevant local authority. The schedule to the Regulations specifies the particulars, that need to be provided, including the name of the operator and the times of individual services at principal points on the route. Regulation 3(3) provides that an application shall not be accepted by the traffic commissioner unless the applicant gives the traffic commissioner such information as the traffic commissioner may reasonably require in connection with the application. This allows a traffic commissioner discretion to accept electronic documents and application forms during the period of the outbreak, where ready access to originals and/or printing facilities may be limited.
- 28.** It was agreed in Scotland and then followed in England, that the local authority notice period would be reduced to 24 hours. This period has now been extended to 72 hours. Traffic commissioners took account of that arrangement between operators and local authorities. Those temporary variations were originally made for a period up to 31 August 2020, but due to the continued restrictions on the bus industry, this date has been extended until 4 January 2021. Operators should be planning for the services which follow. The relevant Governments are making arrangements to pay grants to operators. However, reduced vehicle capacity to meet social distancing requirements may impact on the services to be offered. Traffic commissioners will continue to consider each case on its merits.
- 29.** The need to maintain social distancing measures, adopted in response to the COVID-19 pandemic, could not have been reasonably foreseen. The requirements to take special measures to protect the travelling public, particularly those most vulnerable to COVID-19, has changed the way that society must travel. Those social distancing requirements are set out in Government advice and will be required for a limited timeframe. During that period, traffic commissioners should regard the current situation as a 'special circumstance', which allows for operators to rely upon duplicate services that provides additional capacity for the travelling public.
- 30.** In this exceptional period it will be permissible for an operator to run a duplicate vehicle on a normal stopping service, which is reserved only for school children only. This is on condition that the vehicles align to the registered timetable as closely as possible and that the vehicles are clearly marked to assist the service users. It is expected that operators work closely with the Local Authorities on the provision of services during this period.

Community Passenger Transport

- 31.** A PSV operator's licence is generally required for hire or reward but section 18 of the Transport Act 1985 allows for alternative operation under a Section 19 or Section 22 permit. The starting point is whether an exemption from Regulation (EC) 1071/2009 applies.
- 32.** Domestic legislation sets out the eligibility criteria for a permit. The vehicle cannot be used with a view to profit, nor incidentally to an activity that is itself carried in with a view to profit. However, Regulation 1071/2009 applies to all passenger transport undertakings which use a vehicle adapted to carry nine or more passengers in return for payment. Permit operations therefore fall within this definition and are subject to the provisions except for undertakings which:
- are engaged in road passenger transport services exclusively for non-commercial purposes; or
 - have a main occupation other than that of road passenger transport operator; or
 - have a minor impact on the transport market because of the short distances involved.
- 33.** Section 19 permits come in two types, standard permits for vehicles of 16 or fewer passenger seats and large bus permits for vehicles with 17 or more passenger seats. Standard permits can be issued by traffic commissioners, local authorities and designated bodies. Large permits can only be issued by traffic commissioners. Section 22 community bus permits allow organisations that operate in Great Britain without a view to profit to provide local bus services. They are available for vehicles with nine or more passenger seats and can only be issued by the traffic commissioner. Unlike operator licensing, bodies do not hold one permit (licence) that authorises them to operate x number of vehicles. Instead, permits are issued individually, and a body could hold as many permits that they wish to.
- 34.** A Section 19 permit can be issued to bodies concerned with: - education; religion; social welfare; recreation (standard permit only); or other activities of benefit to the community. Only the following classes of passengers may be carried on the vehicle:
- A. Members of the body holding the permit.
 - B. Persons whom the body exists to benefit, and persons assisting them.
 - C. Disabled persons or persons who are seriously ill, and persons assisting them.
 - D. Pupils or students of any school, college, university or other educational establishment and staff or other helpers accompanying them.
 - E. Persons living within a geographically defined local community, or group of such communities, whose public transport needs are not met other than by the virtue of services provided by the body holding the permit.
 - F. Any other class of persons specified in the permit.
- 35.** An organisation must stipulate the class of passenger on application. Members of the general public cannot be carried on a vehicle being used under a Section 19 permit.

- 36.** There are few criteria for the traffic commissioner to consider once they are satisfied that the operation is non-commercial (as per Regulation (EC) 1071/2009). These are:
- the organisation is an exempt Body in accordance with section 18 of the Transport Act 1985;
 - the organisation must be established not for profit;
 - the organisation must meet the activity criteria;
 - for large bus permits the traffic commissioner must be satisfied of adequate arrangements to maintain vehicles in a fit and serviceable manner.
 - There are no further financial or reputational requirements.
- 37.** On grant the traffic commissioner can impose conditions relating to the class of passengers that can be carried. These are indicated on the application form by the applicant and cover those indicated above. No further classes can be carried without prior approval. A traffic commissioner can vary or revoke a permit at any time, but no grounds are stated in the legislation. If the traffic commissioner did not issue the permit, they must first consult the issuing body.
- 38.** Section 22 permits can only be granted by a traffic commissioner. Applicants must satisfy the not-for-profit requirement and be concerned with the social and welfare needs of one or more communities. They are primarily issued to allow an organisation to run a local bus service and, unlike Section 19, can carry the general public. A local bus service must be registered for a vehicle to be used under a Section 22 permit.
- 39.** The legislation allows a traffic commissioner to issue a permit for up to a maximum of five years. On expiry of the permit the holder is required to apply for a new one. This allows the traffic commissioner to issue a permit for a much shorter period designed to cover the period of the outbreak only. On that basis and having identified the need to deal with an emergency or other special need arising from the outbreak, the traffic commissioner may be satisfied that the criteria are met on the basis of declaration to that effect signed by the person or officer of the corporate body (Statutory Document No. 5).

Deployment

- 40.** Section 4 of the Public Passenger Vehicles Act 1981 allows the Secretary of State to appoint any number of commissioners for England and Wales as the Secretary of State considers appropriate; and to appoint a single commissioner for the Scottish Traffic Area, together with deputies. The appointment processes for Wales and Scotland may be the subject of additional protocols with the respective devolved Governments. That section allows for a traffic commissioner to be responsible for issuing operator licences and for other functions under the relevant legislation.
- 41.** A traffic commissioner for England and Wales may exercise the functions of a traffic commissioner in any traffic area in England and Wales; and may exercise any reserved matters (see the Scotland Act 1998) in the Scottish Traffic Area. The Scottish traffic commissioner may exercise the same functions of a traffic commissioner in relation to the Scottish Traffic Area, and England and Wales, in addition to which the Scottish traffic commissioner may exercise devolved functions allocated under devolved legislation.

42. The Senior Traffic Commissioner has power to deploy the other traffic commissioners and deputy traffic commissioners in England and Wales; and the Scottish traffic commissioner and deputy, in respect of any reserved matters, throughout the jurisdiction. The Senior Traffic Commissioner may require any traffic commissioner to carry out such of the reserved functions of traffic commissioner as the Senior Traffic Commissioner may determine and at any place in the jurisdiction. The Senior Traffic Commissioner may similarly determine the extent to which a deputy traffic commissioner will carry out those functions, and where. Section 4(4) provides that any traffic commissioner must act under the statutory directions of and have regard to any statutory guidance given by, the Senior Traffic Commissioner (subject to the provisions of Scotland Act 1998 and the Government of Wales Act 2006).
43. The Senior Traffic Commissioner has deployed individual traffic commissioners to take responsibility for respective traffic areas in England and Wales. The Scottish traffic commissioner similarly has responsibility for reserved matters in the Scottish traffic area. Those responsibilities include assuming the position as controller for the relevant data arising from the exercise of the statutory functions. Deputy traffic commissioners act as data controllers in a very limited sense, and only during the exercise of tribunal functions. They have not been deployed to take responsibility for a specified traffic area but have been allocated an office for administrative purposes. They have no role in the delegation of functions to members of support staff.
44. An individual deputy traffic commissioner can be engaged to undertake such reserved functions as may be delegated by the traffic commissioner for the relevant traffic area and, whilst acting under the same statutory guidance and statutory directions as the traffic commissioner may be subject to general direction by the traffic commissioner deployed to that traffic area. For instance, a deputy traffic commissioner may receive directions relating to the use of time and resources in application of the overriding principle.
45. Traffic commissioners may also be requested to give priority to box work. In making decisions on the papers traffic commissioners must now consider the listing of the case by reference to the priorities set out below and make appropriate directions to allow a hearing to proceed, when required. Traffic commissioners should record whether the DVSA's and/or other evidence is largely accepted and/or admissions have been made in interview under caution and/or the operator's response. Where statutory time limits apply, such as in impounding cases, the interests of justice may require the traffic commissioner to disapply the timetable so that parties and witnesses can attend, in due course. Traffic commissioners retain their ability to require records to be produced and may consider the use of alternative disposal methods and the benefit of Remote Enforcement Office assessments in appropriate cases. This will require operators and other parties to comply with directions in advance of a hearing.

Hearings

46. Traffic commissioners will be aware of the guidance outlined by the senior judiciary. The current Government Covid-19 emergency measures must be respected and, as the Lord Chief Justice has said, it is important that the administration of justice continues to function whenever it is possible in an environment which is consistent with the safety of all those involved.

- 47.** Traffic commissioners will consider the priority of each case and decide on a case by case basis the practicality of hearing part or all of a case in person or by other means. Listing remains a judicial responsibility and function. Listing decisions will be made by traffic commissioners in the usual way, on a case-by-case basis by reference to all relevant factors and considerations and subject to the direction and deployment of the Senior Traffic Commissioner. The core concern of road safety and the fairness of proceedings should inform that decision. Where it is not possible for a hearing to be delayed or heard remotely, DVSA must ensure that the tribunal facilities are safe for people who use them. Hearings will take place only where it is safe for them to do so.
- 48.** This Statutory Document has allowed traffic commissioners to take a proportionate approach to existing licences and to grant temporary or time limited authorisations to goods operators and particularly where connected to the national effort. Traffic commissioners should continue to give priority to any operator or applicant who is carrying out essential transport services involved in the delivery of food, non-food (personal care and household paper and cleaning), door-to-door refuse collection and disposal services, health services and over the counter pharmaceuticals, fuel (transport and heating) or essential utility services (water, gas, electricity, telecommunications, road maintenance, etc).
- 49.** In addition, the following priorities have been extracted from Statutory Document No. 9:
- any serious concerns regarding the safety of the transport operation;
 - application for interim authority or PSV application (linked to the above);
 - cases of serious non-compliance (see Statutory Document 10, Annex 4);
 - cases of particular age.
- 50.** Impounding cases may require specific case management given current restrictions but must be referred to the traffic commissioner as per Statutory Document No. 7.
- 51.** Traffic commissioners are expected to deal with applications by an Administrator e.g. under regulation 31, on the papers wherever possible. A traffic commissioner might consider a video hearing as an alternative.
- 52.** When making listing decisions traffic commissioners will consider carefully whether suitable practical arrangements can be made to ensure that the hearing can, in fact, take place safely. This will involve consideration of a variety of factors including the type of case, the venue (i.e. whether there are suitable rooms available where proper social distancing can take place), the length of hearing, the number of witness and witness handling facilities and available technology.
- 53.** None of the above priorities should be interpreted as to override the Government guidance on restricting the spread of Covid-19. It is not in the interests of justice or public safety for parties to avoid responsibility by failing to comply with those directions. Due to the need to ensure that risks are controlled, traffic commissioners will wish to avoid unnecessary adjournments. However, traffic commissioners and OTC staff must be aware of the instructions on self-isolation and shielding, which apply to persons who:

- are over 70;
- have an underlying health condition;
- are pregnant.

Control measures at the tribunal

54. Staff members and traffic commissioners are permitted to travel for work purposes, provided they are not showing coronavirus symptoms and none of the household are self-isolating. At all times, OTC staff and traffic commissioners should follow the guidance on self-isolation if they or anyone in their household shows symptoms.
55. DVSA is responsible for ensuring that there are suitable and sufficient control measures in place at the tribunal facilities. It is required to share those working arrangements and retains responsibility for ensuring safety.
56. Social distancing involves reducing day-to-day contact with other people as much as possible, in order to reduce the spread of coronavirus (COVID-19). The advice on social distancing measures applies to everyone and should be followed wherever possible. DVSA needs to ensure that the OTC clerks and traffic commissioners are able to follow the government guidelines, maintaining a 2 metre distance from others, and washing their hands with soap and water often for at least 20 seconds (or using hand sanitiser gel if soap and water is not available). This advice applies both to inside the workplace, and to where staff may need to interact with customers.

Remote Hearings

57. One control measure is to consider remote hearings. The trial of remote hearings has established that they are suitable in limited circumstances. In all cases the overriding principle has been one of fairness to both applicants and operators. This requires careful consideration when considering whether a case could be listed for remote hearing by video. It may be possible for traffic commissioners to dispose of non-complex regulatory cases through remote video hearings. The following indicate potential suitability:
 - the case should not be complex (preferably single issue) with an expectation that the anticipated duration of a hearing should not exceed 1 hour;
 - the number of required attendees from the operator should be limited to a maximum of three people;
 - operator must be cooperative and must have complied with all directions particularly to have documents provided in advance of the hearing;
 - hearings may be particularly beneficial for those applications where a preliminary hearing was to be held;
 - it may be beneficial for the applicant to be represented by a lawyer, although this cannot be mandated;
 - a preliminary view is that a significant adverse decision is not the most likely outcome.
58. Given the limited number of suitable cases, the Senior Traffic Commissioner has indicated that those cases should, in the first instance, be deployed to full-time traffic commissioners.

In-person Hearings

59. The relaxation of some Government restrictions does not mean that all cases must be listed for hearing at the tribunal facility. Traffic commissioners retain the discretion to hear cases remotely, subject to the above considerations.
60. The Office of the Traffic Commissioner has always sought to list public inquiries within twelve weeks of the Traffic Commissioner calling the inquiry. The period has always been subject to the interests of justice including the availability of resources and the traffic commissioner's diary. In the short-term restrictions may limit flexibility in the listing of cases and the involvement of some deputy traffic commissioners.

Case Management

61. It will often be appropriate to make Directions at the point of listing. Consideration will need be given to the need for official witnesses. Early contact with the witness when reviewing a case may establish their availability. The number of records required prior to the hearing should be considered. Where there is concern that a case should be heard but may require a lot of documentation it should be discussed with the Traffic Commissioner at the review stage.
62. Failure to comply with Case Management Directions may result in an application being adjourned to the end of the current list. In regulatory cases it may form the basis of a finding that the party is unable or unwilling to cooperate.

Adjournments

63. In considering a request, the purpose of the adjournment should be clear as the traffic commissioner will properly be concerned with the potential impact on road safety. The age of the case may assume less importance as the outbreak continues. Parties should not be permitted to use an adjournment as a device to postpone the impact of a decision. Traffic commissioners should be aware that there may not be any evidence in support of an adjournment application when self-isolating. However, traffic commissioners may look to compliance with case management directions as evidence of whether the interests of justice require an adjournment.
64. Traffic commissioners are aware of the use of powers to ensure rapid action where protection of the public is required and of the legal protections to consider when exercising those powers. A traffic commissioner will consider and record reasons in each case.

General Discretion

65. Proportionality lies at the heart of the jurisdiction and traffic commissioners are well acquainted with the need to consider what is practicable for operators to deliver. As paragraph 24 of Statutory Document 10 advises: *the legal principle of proportionality requires a traffic commissioner when exercising a statutory function, to make decisions which are commensurate with the circumstances of each individual case and the purposes of the legislation.*
66. There are two clear principles to be drawn from the case law: i) there must be a fair balance between the right of the operator and the interests which the licensing

regime seeks to protect, and ii) that a fair balance can only be struck by having regard to what the regime is seeking to protect or achieve, the way in which it seeks to do that and the extent to which the operator can put forward relevant matters. That does not prevent operators from notifying the Office of the Traffic Commissioner of relevant changes, for instance in maintenance arrangements.

67. Each case must be dealt with on its own facts. As Statutory Document 10 indicates, a case may involve many variables including different variations of alleged breaches, negative and positive features. What appears on the face of the papers to be very serious may not in fact warrant severe regulatory action. Annex 4 cannot be used to predict the outcome of a public inquiry or give rise to a legitimate expectation. It allows for consistency by suggesting starting points for regulatory action. However, the presiding traffic commissioner retains discretion to move up or down from the suggested starting points.

68. What is physically possible may change during the course of the outbreak, but the Office of the Traffic Commissioner has issued additional guidance to operators throughout the course of the restrictions to date:

<https://www.gov.uk/government/publications/advice-heavy-goods-and-public-service-vehicle-operators-covid-19>

69. The Senior Traffic Commissioners directs that this must now form part of the decision-making process. In considering the positive and negative aspects of an operator's approach during the lockdown and subsequent restrictions, traffic commissioners may also have regard to:

- the employment of effective management based on sound risk analysis for instance in the management of maintenance;
- a risk-based approach to the testing of vehicles in prioritising the inspection of older and/or historically problematic vehicles in the transition back to business as usual;
- the utilisation of online resources in order to ensure driver or maintenance training, including Driver CPC (as permitted within furlough provisions);
- proactive completion of a remote audit to support improvements during the Coronavirus restrictions;
- proactive completion of online Operator Licensing Awareness Training and/or Transport Manager CPC refresher training during the coronavirus restrictions;
- use of the operation or resources in support of the national effort to tackle the coronavirus.

These should be supported by evidence.

70. In the alternative, traffic commissioners will be concerned by evidence, which shows:

- misuse of the Government furlough scheme for commercial or other advantage, including continued operations using furloughed drivers or where operations have continued using alternative driver resources where employees have been furloughed;
- furlough of the Transport Manager without notifying the Office of the Traffic Commissioner resulting in continued operation without continuous and effective management;

- use of coronavirus as a device to evade specific operator's licence requirements and undertakings, without first notifying the Office of the Traffic Commissioner;
- failure to cooperate with DVSA;
- failure to comply with directions made by a traffic commissioner, particularly where a hearing has been requested;
- misuse of the coronavirus drivers' hours exemptions, for commercial advantage (no evidence of requirement for exemption);
- misuse of the coronavirus annual test exemptions, without additional maintenance safeguards being put in place;
- abuse of temporary exemptions issued under section 4 of the Goods (Licensing of Operators) Act 1995;
- lack of metred brake performance testing for vehicles in use during the coronavirus restrictions;
- failure to obtain/retain documentary maintenance record that non-safety critical (but prohibitable) repairs were not conducted due to the exceptional coronavirus restrictions;
- failure to complete an effective first-use inspection or equivalent in accordance with the coronavirus maintenance guidance.

71. Where regulatory action is deemed necessary, traffic commissioners have a further discretion as to the date when that direction might take effect.

72. Conduct may be limited to matters which are relevant to the management of an operator's licence but includes the trust placed in that operator. That may include conduct, such as a failure to heed instructions from enforcement agencies or police officers, recurring civil penalties and breaches of other enforcement regimes. That may include a failure to follow the guidance at:

https://www.gov.uk/government/publications/coronavirus-covid-19-safer-transport-guidance-for-operators?utm_source=govdelivery&utm_medium=email&utm_campaign=coronavirus-hse&utm_content=dft-hse-29-may-20

73. The Department for Transport and the Health and Safety Executive have jointly issued a letter to business regarding access to toilet and washing facilities for drivers making deliveries.

74. Traffic commissioners are not an enforcing authority. For other regimes, such as health and safety, they must rely on evidence provided by the relevant authorities. The Health and Safety Executive is responsible for investigating breaches of that legislation but may refer any relevant incidents including workplace transport for consideration by the traffic commissioner. Paragraph 68 of Statutory Document No. 1 refers to convictions under the Health and Safety at Work etc. Act 1974. In addition, the Senior Traffic Commissioner has indicated that, where there is intervention by the Health and Safety Executive, traffic commissioners only need to be notified of formal enforcement rather than a Fee for Intervention (FFI).