# SENIOR TRAFFIC COMMISSIONER

## Statutory Document No. 9

# CASE MANAGEMENT

This document is issued pursuant to section 4C of the Public Passenger Vehicles Act 1981 (as amended). Representative organisations have been consulted in accordance with that provision.

**Commencement:**

**Contents:**




R Turfitt
Senior Traffic Commissioner

# GUIDANCE

**1.** The Senior Traffic Commissioner for Great Britain issues the following Guidance under section 4C(1) of the Public Passenger Vehicles Act 1981 (as amended) as to the way in which the Senior Traffic Commissioner believes that traffic commissioners should interpret the law in relation to case management.

## Basis of Guidance

**2.** This Guidance may be subject to decisions of the higher courts and to subsequent legislation. The Senior Traffic Commissioner has extracted the following principles and examples from existing legislation and case law and applies it to both operator licence and vocational driver cases. As such the Senior Traffic Commissioner has deliberately adopted the generic terms: 'party' or 'parties' and 'hearings'.

## Legislation and Case Law

**3.** The responsibility for taking action under the relevant legislation is vested in the individual traffic commissioner dealing with a case. That responsibility cannot be properly fettered, and the Public Passenger Vehicles Act 1981 and the Goods Vehicles (Licensing of Operators) Act 1995 both make it clear that a presiding commissioner may hold such an inquiry as he or she thinks necessary for the proper exercise of his or her functions[1]. Similarly a traffic commissioner may call applicants *for* or holders *of* a vocational entitlement to a driver conduct hearing where they can consider whether the conduct of the driver calls into question their fitness to hold or obtain a vocational entitlement.[2]

**4.** Whilst there is a strong argument in favour of consistency of approach this should not be mistaken for uniformity of decisions and consistency must not be pursued at the expense of the merits of individual cases. Traffic commissioners act as a single person tribunal. They therefore exercise their discretion with regard to the principle of proportionality as enshrined in British, European and human rights law.[3] The independence and impartiality of traffic commissioners is guaranteed as part of the obligations on the State.[4]

**5.** "*The role of any traffic commissioner is essentially a judicial one, but a public inquiry is an inquiry and a traffic commissioner has a public duty, as regulator, to inquire carefully and diligently. It is a pro-active role, although the traffic commissioner must always be careful to maintain an open mind until the conclusion of evidence and submissions, and must never assume the role of prosecutor. Nevertheless, the duty of the traffic commissioner will often involve*

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[1] 2011/060 Nolan Transport & Others: *While the strict rules of evidence do not apply before the traffic commissioner…the 'relevance test' for the admissibility of evidence remains important*. See also 2012/037 F & M Refrigerated Transport Ltd *we accept, of course, that hearsay evidence is admissible before traffic commissioners but there are difficulties in assessing it and dangers in coming to conclusions based on it.* The Upper Tribunal indicated that weight might however be placed on a contemporaneous note.

[2] For further assistance see Statutory Guidance and Statutory Directions on Vocational Driver Conduct

[3] Human Rights Act 1998 and the legal Framework Document signed by the Minister and the Senior Traffic Commissioner, See also the Statutory Guidance and Statutory Directions Introduction and the Statutory Guidance and Statutory Directions on the Principles of Decision Making & the Concept of Proportionality

[4] Al-Le Logistics Limited etc [2010] EWHC 134 (Admin) paragraph 92, Nolan Transport & Others (as above), and 2000/065 AM Richardson

*ascertaining the true facts, which means exploring and testing the evidence, and resisting so far as practicable those witnesses who attempt to pull the wool over his or her eyes*".[5] The combination of an inquisitorial function[6] with a judicial process requires fairness and objectivity.[7] Traffic commissioners will also be alive to the master/servant relationship existing between some of the witnesses and parties to proceedings.

**6.** Whilst witnesses do not give evidence to the presiding traffic commissioner under oath they are nevertheless under an obligation to tell the truth and not to mislead the traffic commissioner in any way. The presiding traffic commissioner and clerk should ensure that there is a proper note of the oral evidence and representations. Witnesses should be aware that where there are concerns that they might not have told the truth or where they might have produced false documents, either to DVSA or to the traffic commissioner, that the presiding commissioner will cause full enquiry to be made by DVSA and where necessary the police. In the event that the witness is found to have lied to the traffic commissioner or DVSA, or to have produced false documents, the matter will be referred to the police with a request that they be prosecuted for conspiracy to pervert the course of justice. Witnesses should note that there have been previous instances of such prosecutions and that the courts have imposed terms of imprisonment upon such witnesses. However, the obligations go further than simply telling the truth. As the Upper Tribunal has stressed, the Office of the Traffic Commissioner cannot proactively oversee every detail of the many thousands of operator's licences which are in existence. The regulatory regime relies to a very significant degree upon the integrity and honesty of those who hold operator's licences and CPC qualifications to proactively keep the traffic commissioner informed of any change in circumstances.[8]

**7.** Any interlocutory decision (i.e. a decision which is ancillary to the actual final decision, but which is so closely linked to that final decision so that it cannot be considered 'procedural' or merely administrative) must also meet these requirements as it might impact on the fairness of the final disposal of a case. In reaching those ancillary decisions the traffic commissioner must also act in the interests of justice[9]. They are therefore judicial functions.[10] Like any tribunal, traffic commissioners must comply with the Article 6 right to a fair hearing in deciding issues of civil law. The jurisdiction of traffic commissioners includes granting applications, curtailment of authorisation, suspension of licences to operate, revocation of licences to operate and personal disqualification of operators and directors, as well as taking action against transport managers who do not work to the requisite standard. Traffic commissioners also consider the conduct of drivers who hold or apply for licences to drive large goods and passenger-carrying vehicles.[11] In considering those PSV operators who fail to operate in accordance with registered timetables traffic commissioners are required to follow a correct judicial approach[12] which might also result in the

[5] 2011/025 Asset 2 Asset Ltd. A similar approach was adopted in 2014/077 Leedale Ltd
[6] Witnesses are not required to swear an oath or to make a formal affirmation. Cases such as R v Abdul Majid [2009] EWCA Crim 2563, R v Mehbrban [2001] EWCA Crim 2627, and R v Naaem Saddiq [2010] EWCA Crim 1962 illustrate that the primary consideration is what binds the conscience of the individual.
[7] 2012/036 Patrick O'Keefe t/a O'Keefe Building
[8] 2014/053 & 54 Carmel Coaches Ltd & Anthony Grove Hazel
[9] Al-Le Logistics Limited etc. paragraph 100 and by way of example: 2012/014 ATEC Scaffolding (Preston) Ltd
[10] 2011/364 Heart of Wales Bus & Coach Co Ltd & C Jones
[11] See Statutory Guidance and Statutory Directions on Vocational Driver Conduct.
[12] 2009/030 Pilkington

imposition of financial penalties and/or the restriction of current and/or future registrations.

**8.** The jurisdiction is often described as a practical one. The legislation is concerned with road safety and fair competition[13] but traffic commissioners must have regard to the decisions of the higher courts and the principle of proportionality in deciding what is commensurate with the circumstances of each individual case.[14] Where there has been non-compliance, traffic commissioners must have regard to the potential impact on an operator and/or driver of any regulatory action and make an assessment of the operator and/or driver as at the date of the decision. Case management plays an important part in ensuring the traffic commissioner has all the necessary evidence available to inform that final decision.

**9.** Case management may, for instance, involve providing time to consider and prepare evidence, to seek representation and providing an interpreter when required.[15] Traffic commissioners should be careful about the language used in communicating case management decisions and must explain the use of technical terms such as 'adjourn' or 'reconvene'.[16] Any request to record the hearing or send live text based communications during the hearing must be referred to the presiding traffic commissioner for directions to be issued on a case by case basis. Where a traffic commissioner has reserved their decision any further evidence or documentation received thereafter must be referred to the traffic commissioner who will then decide if it is necessary to reconvene the public inquiry and/or driver conduct hearing.

**10.** There is no requirement on traffic commissioners to engage with applicants, operators or drivers prior to or during proceedings except within the protections allowed at a public inquiry or a driver conduct hearing. Traffic commissioners should be wary of being drawn into any process of consultation prior to taking statutory action, in view of their wider duty to the public at large and to the fairness of proceedings.

*Interim Licences and Variations*

**11.** Authority to operate on an interim basis is only available to applicants for a goods vehicle operator's licence and is at the discretion of the traffic commissioner.

**12.** An operator's licence is defined under Section 58 of the 1995 Act as having the meaning given in Section 2(1) of the Act - a licence which authorises the use of a goods vehicle on a public road for the carriage of goods:-

- for hire or reward; or
- for or in connection with any trade or business carried on by the operator.

[13] By way of example, in Cleansing Service Group Ltd v VOSA [2006] EWHC 662, Sullivan J adopted the ordinary and natural meaning in construing provisions relating to the exceptions. He observed that as the regulation was required to protect public safety Parliament would have decided the limits placed upon the exceptions with some care.

[14] 2002/217 Bryan Haulage (No 2) (Transport Tribunal Appeal), Muck It Limited and Others v Secretary of State for Transport [2005] EWCA Civ 1124 and Crompton v Department for Transport North West Area [2003] EWCA Civ 64, Priority Freight Limited and Paul Williams (Transport Tribunal appeal 2009/225) and Statutory Guidance and Statutory Directions on the Principles of Decision Making.

[15] Including the Welsh Language Act 1993, 2015/040 Tacsi Gwynedd Ltd

[16] 2006/111 Kent Coach Travel Ltd

**13.** Section 24(2) states that an interim licence is an operator's licence. A traffic commissioner therefore needs prima facie to be satisfied that the requirements of professional competence, financial standing[17] and good repute have been considered before interim authority is issued 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.

**14.** A traffic commissioner may issue an interim licence/variation in the same terms as those applied for or in different terms in respect of:

- the number of vehicles authorised;
- different motor vehicles specified;
- weight restrictions on the vehicle(s) and/or trailer(s);
- that no trailers are authorised to be used;
- that all vehicle to be used must be specified;
- the maximum number of vehicles and/or trailers whose relevant weight exceeds a specified weight;
- fewer places are specified as operating centres;
- conditions which restrict the use of an operating centre;
- limited to a period of time.[18]

**15.** The traffic commissioner may take account of any undertakings given when reaching a decision on interim authority.

**16.** A full licence can have no effect before the interim licence terminates. Sections 24(8) and 25(6) provide that a decision to refuse an interim licence/variation cannot be appealed. The interim licence/variation terminates when any of the following occur:

- the date on which the full licence comes into force or the traffic commissioner takes action to revoke the interim licence under section 26 and/or 27 as appropriate;
- the time at which the application is withdrawn;
- the date on which the application is finally disposed or such earlier date as is specified.

**17.** An application is finally disposed of at the earliest date by which the application and any appeal to the Upper Tribunal arising out of the application have been determined, or any time for bringing such an appeal has expired, or the date on which the application or appeal is withdrawn.

*Listing of Cases*

**18.** The listing of cases for hearing can often be complicated and will inevitably require an estimation of how long a case will require.[19] Other factors might also impact on listing such as the availability of a traffic commissioner and/or tribunal room. Traffic commissioners have a number of different judicially related tasks where the administration and interests of justice require an individual traffic commissioner to devote time, for instance to submissions so that new businesses

[17] 1984/V2 Michael John Mortimer
[18] 2011/050 A Tucker & Son Ltd
[19] 2016/050 Lorraine Baldwin, Andrew Skelton, Wayne Baldwin

can start operating or to the preparation of written decisions where parties may be anxious to learn the outcome of a hearing. Generally, whilst the interests of justice must be considered, there are no specific time requirements for the listing of cases, although impounding hearings must take place within 28 days of the receipt of the application[20] (subject to the power of the traffic commissioner to extend this period[21]). In the uncommon event of a party objecting to a particular traffic commissioner hearing the case, the reasons must be put in writing and the individual traffic commissioner will respond with reasons for their determination and must be allowed opportunity to respond.[22]

**19.** Where there are obvious issues in common, it would clearly be unsatisfactory for the traffic commissioner(s) to come to what might be seen as inconsistent conclusions. The Upper Tribunal has indicated that it is perfectly proper to list related cases together.[23] This also applies where there is the possibility of conflicting evidence so that a driver's conduct hearing might be held at the same time as an operator's inquiry.[24] Where a traffic commissioner makes this type of listing decision, the reasons should be recorded for future reference.[25]

**20.** The effect of concurrent criminal proceedings needs to be considered carefully by a traffic commissioner. The Court of Appeal has considered the potential impact of regulatory proceedings on the fairness of other proceedings:

> "*When assessing the weight of the considerations… the intrinsic importance of the disciplinary process is clearly a very significant but not an overriding factor; it will also be necessary to evaluate the degree of public importance of the case under consideration, the seriousness of the allegation of professional incompetence and/or professional misconduct, and the urgency of their resolution in the disciplinary context. Thus, for example, allegations of dishonesty or other professional malpractice which, if proved, would be likely to lead to the striking off of a member, must clearly weigh heavily or perhaps even overwhelmingly on the institute's side of the scale*".[26]

**21.** Traffic commissioners, however, must also consider road safety, which lies at the heart of the legislation. There may be an urgent public interest in resolving the issues before criminal proceedings.[27] Traffic commissioners can face a difficult decision in which advocates are expected to assist the tribunal. If the traffic commissioner decides to proceed in advance of criminal proceedings steps

[20] Regulation 11 of the Goods Vehicles (Enforcement Powers) Regulations 2001 as amended by the Goods Vehicles (Enforcement Powers) (Amendment) Regulations 2009, and regulation 12 of the Public Service Vehicle (Enforcement Powers) Regulations 2009.
[21] Regulation 23 of the Goods Vehicles (Enforcement Powers) Regulations 2001 as amended, and regulation 25 the Public Service Vehicles (Enforcement Powers) Regulations 2009.
[22] For guidance see the Upper Tribunal approach in 2014/072 Ian Russel Nicholas t/a Wigan Container Services. An allegation of bias is a serious matter and should not be made lightly. In this case the Tribunal noted with approval the decision of the traffic commissioner to refer the case herself. The maker of any such allegation needs to prove more than that the traffic commissioner came to the wrong conclusion and must specifically show that the traffic commissioner was prejudiced and/or predisposed to find against the party irrespective of the evidence. For that reason no complaint can be considered until after the final appeal.
[23] 2001/041 Tate Fuel Oils, 2009/240 AM Kydd t/a Sandy Kydd Road Transport, 2010/030-32 Canalside UK Ltd & Lewis Robly Horn t/a LR Horn, Stay Decision Jarson Ltd t/a Rob Jones Tractor Hire
[24] 2001/68 Dukes Transport (Craigavon) Ltd, and 2002/025 H J Lea Oakes Ltd
[25] ATEC Scaffolding (Preston) Ltd (as above)
[26] R v. Institute of Chartered Accountants in England & Wales and Others, ex parte Brindle and Others (1994 BCC 297) at 310
[27] 2004/255 M Oliver

should be taken to protect the fairness of those proceedings. If the traffic commissioner decides to wait it may, in the end, prove impossible to deal with other aspects of the hearing fairly, in advance of the evidence, which is to be given at the criminal trial. The inevitable consequence is delay, which carries with it other issues such as witness memory and the need for a more up to date assessment of compliance.

**22.** Where a traffic commissioner concludes that a hearing must await the outcome of criminal proceedings it is important that steps are taken to keep the delay to a minimum. It is acceptable for a traffic commissioner to inform the Crown Prosecution Service or Procurator Fiscal and the relevant courts pending a regulatory hearing, and ask for regular information about the progress of the criminal proceedings. Where the traffic commissioner decides that a hearing must await the conclusion of the criminal case steps should be taken to ensure that the traffic commissioner's hearing is resumed as soon as possible thereafter[28].

**23.** In deciding where to hold a hearing traffic commissioners will wish to ensure that the objects of the legislation are met so that relevant information might be taken in to account and the fairness of proceedings ensured (allowing a party the opportunity to test the evidence). There may be other factors, including Welsh language compliance[29] which also needs to be taken into account.[30] In some cases[31] evidence might be heard in closed session (i.e. in private) so that regulatory action is not delayed but the risk of prejudice to future proceedings is minimised.

*Adjournments*

**24.** "*The decision whether to grant an adjournment does not depend upon a mechanical exercise of comparing previous delays in other cases with the delay in the instant application. It is not possible or desirable to identify hard and fast rules as to when an adjournment should or should not be granted. The guiding principle must be that (traffic commissioners) should fully examine the circumstances leading to applications for delay, the reasons for those applications and the consequences to (the parties). Ultimately, they must decide what is fair in the light of all those circumstances. The court will only interfere with the exercise of …discretion … in cases where it is plain that a refusal will cause substantial unfairness to one of the parties*".[32]

**25.** In considering a request for an adjournment, the purpose of the adjournment should be clear as the traffic commissioner will properly be concerned with the potential impact on road safety.[33] An adjournment may have to be balanced against the age of the case but the pressure to get a case to a hearing can lead to a far greater delay than a limited adjournment if justice cannot be done. Traffic

[28] 2006/149 A & C Nowell, 2010/049 Aspey Trucks Ltd
[29] One of the key principles of the Welsh Language Act 1993 and the Welsh Language (Measure) 2011 is that in the administration of justice in Wales, the English and Welsh languages should be treated on the basis of equality.
[30] 2001/056 Paul Williams t/a Garden Materials Landscaping regarding a traffic commissioner's inspection of the relevant site.
[31] Regulation 7 of the Public Service Vehicles (Traffic Commissioners: Publication and Inquiries) Regulations 1986, only allows traffic commissioners to restrict attendance so far as the inquiry relates to the financial position, whereas the discretion is wider in goods cases.
[32] Per Lord Bingham in R. v. Hereford Magistrates (1998) 163 JP 433; (1997) 2 Cr App R 340 at p.353
[33] As per the Upper Tribunal in the stay decision in Patrick O'Keefe t/a O'Keefe Building

commissioners have been urged to think very carefully when asked to adjourn stale cases.[34] There may be occasions when the adjournment is simply a device to postpone the impact of a decision and the correct course may be to refuse but there may also be other cases where a relatively short adjournment of a hearing will avoid a real risk of a much greater delay if it later appears either during the hearing or on appeal that the interests of justice and fairness require an adjournment. A traffic commissioner is entitled to take into account the alleged conduct of the operator and/or driver in relation to any DVSA or police investigations.[35] Any tribunal will be concerned so as to ensure fairness, for example, where an interpreter is required[36] or so that all the relevant documentation is available to the parties so that they can properly answer all matters that may be addressed to it/them in respect of the possible conduct. The situation might well change in the course of a hearing and there is therefore a need to be aware of the requirement to keep a request for an adjournment under constant review.[37]

**26.** There is a considerable public interest in hearings taking place on the date set and so hearings should not be adjourned unless there is a good and compelling reason to do so. In considering the competing interests of the parties, traffic commissioners should examine the likely consequences of the proposed adjournment and its likely length. The reason that the adjournment is required should be examined and if it arises through the fault of the party seeking the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. Parties who wait until the last moment to apply for an adjournment will justifiably arouse suspicion as to their motives[38]. The reason for the adjournment should also relate to the party called to the hearing and not a third party.[39] The administration of an effective and efficient system will bring about great benefits to users of the traffic commissioners' tribunals.[40] Requests for adjournments on medical grounds should be supported by medical evidence which states if and why a party cannot attend a hearing.[41] Any court is not automatically bound by a medical certificate and may exercise its discretion to disregard a certificate[42], which it finds unsatisfactory and in particular where:

- the certificate indicates that the party is unfit to work (rather than to attend the hearing);
- the nature of the ailment (e.g. a broken arm) does not appear to be capable of preventing attendance at a hearing;
- the party is certified as suffering from stress/anxiety/depression and there is no indication of the party recovering within a realistic timetable.

**27.** Any application for an adjournment requires a decision and must be referred to a traffic commissioner[43] and similarly the decision must be communicated to the

[34] 2008/413 Al-Le Logistics Ltd and others, for an example see 2013/066 VST Building & Mantenance Ltd
[35] 2010/064 JWF (UK) Ltd
[36] 2013/062 Sukhvir Kaur t/a Major Cars, 2017/002 Mohammed Akbar t/a Choudhury Transport
[37] Al-Le Logistics Limited etc. [2010] EWHC 134 (Admin) paragraph 48
[38] 2013/066 VST Building & Maintenance Ltd
[39] NT/2014/079 Melvin Murray t/a Melvin Murray Transport
[40] Visvaratnam (2010) 174 JP 61; (2009) EWHC 3017 Admin
[41] 2012/013 Russet Red Ltd, 2010/024 Hedley Simcock, Stay Decision in 2013/010 Barrie Mark Boyes, 2015/029 Daniel Stephen Price t/a Danny Price Haulage
[42] R v Ealing Magistrates' Court (ex parte Burgess) (2011) 165 JP 82
[43] 2000/002 Grifpack

party.[44] If the traffic commissioner accepts that a party's absence from the hearing is not the fault of that party the general rule is to not proceed in absence unless there is a compelling reason to proceed.[45] If the traffic commissioner does not believe the explanation, reasons should be given.[46] Where an operator and/or driver has opportunity to engage in a professional and cooperative way but fails to do so then repeated avoidance may result in the loss of that operator licence[47] (or vocational licence).

**28.** Section 54(4) of the Public Passenger Vehicles Act 1981 and schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995 set out the provisions relating to the giving of notice of a public inquiry. The date, time and place may be varied, but, if so, the full notice period may have to be recalculated. An irregularity, however, in the notice can be cured and the hearing can proceed if the traffic commissioner is satisfied that no injustice or inconvenience will be caused.[48] Where the operator has been properly alerted to the hearing date and fails to attend, in the absence of medical evidence[49] or a good reason, then the traffic commissioner is entitled to proceed in absence[50]. There are no legislative provisions regarding the period of notice that must be given to a vocational licence holder or applicant when being called to a driver conduct hearing but the traffic commissioner will wish to ensure the fairness of those proceedings.

**29.** In line with most tribunals there is a rebuttable presumption that a hearing will proceed as listed even in the absence of parties[51]: provided that the traffic commissioner is satisfied that the party has been given the required notice, has been served with sufficient evidence, and that there are no other factors where the interests of justice require an adjournment.

*Notice*

**30.** Each Traffic Area produces publications which contain details of all applications during a given period. Inspection of licence applications only can be requested under the provisions of Regulation 9 of the Goods Vehicles (Licensing of Operators) Regulations 1995 or regulation 4 of the Public Service Vehicles (Operators' Licences) Regulations 1995. Where full notice has not been provided it might still be possible to see the operator. At times it may be appropriate for an operator to be seen without the full notice period having expired. Section 27 of the Goods Vehicles (Licensing of Operators) Act 1985 and regulation 9 of the Public Service Vehicles (Operators' Licences) Regulations 1995 require notice of the grounds upon which the traffic commissioner might take action, with time to make representations. The party must first have the opportunity to present a case and there is no scope for the equivalent of an interim injunction based on a one-sided view of the evidence.[52] This does not prevent a traffic commissioner from

[44] 2005/110 G DEM
[45] R (on the application of M) v Burnley, Pendle and Rossendale Magistrates' Court 174 JPR 102 , 2004/362 Britannia Hotels
[46] 2006/192 S Shirley
[47] JWF (UK) Ltd (as above)
[48] 2009/524 Ocean Transport Ltd
[49] 2010/023 Taj the Grocer Ltd
[50] 2010/69 John Francis Donnelly, 2015/077 Hurley G & B Ltd
[51] 2009/524 Ocean Transport Ltd approved the decision of the traffic commissioner who had waited for nearly an hour before proceeding with a public inquiry when the operator had not been in contact with the Office of the Traffic Commissioner at all
[52] 2006/487 D & H Travel

considering preliminary matters such as interim authority[53] without a full hearing. A preliminary or case management hearing can be beneficial in narrowing or crystallising the issues[54]. Where a party is called to a preliminary hearing[55] to resolve a particular matter the Human Rights Act 1998 still applies.

**31.** Driver conduct hearings are public hearings. Decisions are a matter of public record and copies may be requested from the office of the relevant traffic commissioner.

*Disclosure*

**32.** A traffic commissioner is required to give notice in writing of what action might be in contemplation. A notice must state the grounds on which the traffic commissioner is considering that action and invite the party to make representations[56]. The party should know the case it has to meet but there is no obligation to set all of this out in the call up letter, it can equally be communicated through disclosure of reports.[57] "*It would be impracticable for a traffic commissioner to be expected to disclose everything which that commissioner has ever seen. The traffic commissioner's staff should identify the evidence which is to be considered at the hearing"* to ensure that the party is given proper notice so that the party can prepare for the hearing.[58] Where it emerges that the evidence has not been disclosed the traffic commissioner should order an adjournment to allow time for preparation.[59] This may impact on the conduct of hearings where a party chooses not to attend.[60] The length of the adjournment will depend on the particular case. The deliberate tactic of waiting to see what evidence the traffic commissioner has before making admissions or representations has been deprecated and may impact on repute.[61]

**33.** Call-up letters are not to be viewed as pleadings. The essential requirement is one of fairness but there should be no doubt as to the issues being raised. Some matters are so obviously relevant that they can be included without further justification; others are so obviously irrelevant that they must be excluded. In between there are two categories that require more care: 1) material the relevance of which only becomes apparent when some explanation is given; 2) material where a decision on whether or not it is relevant requires further investigation in the course of the hearing. A call-up letter may have to be drafted with these distinctions in mind.[62]

**34.** "*In a fluid jurisdiction such as this, where operators continue to operate after the preparation of initial evidence and a call-up letter, it is entirely appropriate that there be scope for raising additional matters, subject to ensuring that an operator has proper notice*".[63] Where new issues emerge during the hearing that have not been raised in the call-up letter this is not fatal to the fairness of the proceedings

[53] Only available under section 24 Goods Vehicles (Licensing of Operators) Act 1985
[54] 2003/300 Andrews (Sheffield)
[55] It was previously custom to refer to these hearings as 'In Chambers' but because of the connotations from other jurisdictions that these hearings are not in public that term is no longer to be used.
[56] 2001/072 AR Brooks
[57] 2010/025 Skip It (Kent) Ltd and others
[58] 2001/039 BKG Transport, 2001/072 AR Brooks, 2017/038 Liliana Manole
[59] 2000/005 M Williams, 2005/357 John Bayne & Sons
[60] 2011/502 Tubular Solutions UK Ltd
[61] 2006/313 D Lloyd, see Statutory Guidance and Statutory Directions on Good Repute and Fitness
[62] 2007/104 S Lloyd
[63] 2011/359 Paul Coleman t/a Coach UK Travel

as long as the relevant party is given time to consider those issues and any new material. It may not be necessary to adjourn to another date.[64] The position is essentially one of fairness and the Upper Tribunal has held that there is no unfairness in circumstances where it is abundantly clear to the parties what the issues are in the case, despite any omission in the call up letter.[65] Once a traffic commissioner has received answers which suggest a relevant line of enquiry then it is legitimate for the traffic commissioner to pursue the issue because it raises the question of whether the traffic commissioner should have jurisdiction over the party in the future. The traffic commissioner will consider whether there needs to be a full adjournment to allow time to consider the new material and fresh notification sent to clarify which matters are at issue.[66]

**35.** In line with the useful guidance from the Senior President of Tribunals in May 2013, there is no obligation on the traffic commissioner to provide a transcript of the audio recording of a tribunal hearing: "*where a recording of a hearing has been made and a copy is requested, it is for the judge to decide whether the reasons for the request are sufficient to justify its release and to ensure that the restrictions on its use are understood*".[67] A party can apply for a copy of the transcript at their own expense but this may be subject to redaction of any sensitive material.[68]

*Representation*

**36.** The traffic commissioner is entitled to expect that the operator, applicant and/or driver will attend a hearing. Where a company or other corporate body is called to a hearing a director is expected to attend. If the traffic commissioner cannot be satisfied that the person before them has the requisite authority to speak on its behalf and to make binding undertakings then the traffic commissioner is entitled to ask for authority to be produced[69] or to find that the company is not present. The company or other corporate body should therefore seek permission from the traffic commissioner to substitute a director before any hearing.

**37.** As indicated above, a traffic commissioner has a wide discretion as to the manner in which s/he conducts a hearing. Any person entitled or permitted to appear may do so on his or her own behalf or can be represented by counsel (barrister) and/or a solicitor. There is no provision for free representation before a traffic commissioner's tribunal. If a party wishes to be represented then that it is a matter for the party. There are no active costs provisions in relation to public inquiries or driver conduct hearings to pay for attendance or representation so those costs must be borne by the relevant party.

**38.** Legally qualified representatives with rights of audience conferred upon them are authorised and regulated[70] to carry out reserved legal activities. Advocates are reminded of their professional duties not only to their client but also to the tribunal. It is particularly important for representatives to be alive to any potential conflict

[64] AR Brooks (as above), 2009/516 Ahmed & Ahmed.
[65] 2013/013 SNE Hire & Sale Ltd
[66] 2006/405 Transclara
[67] See also for guidance the Practice Direction issued by the Lord Chief Justice dated 14th February 2014 on Access to Audio Recordings of Proceedings.
[68] Third parties can request copies of decisions via the Traffic Commissioner Information Access Team - tcfoi@otc.gsi.gov.uk.
[69] Upper Tribunal stay decision in Eurofast (Europe) Ltd
[70] Solicitors Regulation Authority, Bar Standards Board, Law Society of Scotland and Faculty of Advocates

of interest. A legal representative of an employer is under a professional obligation to communicate any relevant information. If they were to attempt to also represent an employee there is a risk of a conflict of interest. If a conflict were to arise in that situation it would be difficult to envisage the representatives being able to continue to act for either party. It is the representative's responsibility to ensure they meet the outcomes of their regulating body's rules and guidance. Whilst operators may not be blamed for acting on legal advice[71] traffic commissioners are entitled to infer that a party has received proper legal advice from a legally qualified representative.[72]

**39.** Other potential representatives such as transport consultants have historically been allowed to appear before traffic commissioners. The approach of the courts has crystallised: litigants have a right to reasonable assistance however; the person assisting[73] has no right of audience unless granted by the court. This type of application is considered on a case by case basis[74] but leave for a "McKenzie Friend" to address the court is only granted in exceptional circumstances[75]. Whilst traffic commissioners have generally allowed unqualified advocates to appear before them, this is always at the discretion of the presiding traffic commissioner. As with the courts an unqualified representative must first seek permission to appear from a traffic commissioner. The courts require McKenzie Friends to produce a curriculum vitae or other statement setting out relevant experience and confirmation that they have no interest in the case and understand the duty of confidentiality. In appropriate cases traffic commissioners may refuse to hear representatives other than from counsel or solicitors.[76] This distinction is based on the fact that unlike that of other representatives the conduct of counsel and solicitors is regulated in England and Wales by the Bar Standards Board or the Solicitors Regulation Authority and in Scotland by the Law Society of Scotland or the Faculty of Advocates, and therefore the submissions from counsel and solicitors carry more weight than those from other representatives[77]. Transport consultants and representatives who are not counsel or solicitors are nevertheless expected to display a degree of competence and openness with the tribunal[78] and if they fail in that regard it is open to the traffic commissioner to indicate that the person will not be acceptable to act as an advocate at public inquiry in the future.[79] The Upper Tribunal has warned against tying in the provision of a transport manager with a consultancy service.[80] Nor can they expect to be permitted to act as both an advocate and a witness in the same proceedings.[81] Union representatives often appear to assist vocational drivers and traffic commissioners; whilst they may have limited experience of this type of

[71] 2002/022 Garforth
[72] Patrick O'Keefe t/a O'Keefe Building (As above)
[73] Referred to as a McKenzie Friend following the case of McKenzie v McKenzie [1970] 3 All ER 1034
[74] Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 WLR 1881
[75] R v Conaghan [2017] EWCA 618
[76] The senior judiciary has identified the risks to litigants from unregulated and uninsured individuals of varying and generally unverifiable competence who seek to carry out the equivalent of reserved activities. Recommendations have been brought forward by the judicial working group chaired by Asplin J with the purpose of protecting parties from unregulated representatives. The proposals seek to clarify the courts' ability to refuse unqualified individuals to act as McKenzie friends. The proposals are similar to existing traffic commissioner powers to consider a right of audience on a case by case basis and specifically refer to poor quality assistance and allow a bar to the individual from acting in this capacity in future.
[77] 2005/385 K Grant, see also 2013/040 Southwaterstreet Ltd t/a S W Transport and Thomas McKinney
[78] 2006/252 A Hayden trading as Trans Consult, 2014/063 Pilkington Asbestos Services Ltd & Others
[79] 2006/252 Alex Hayden t/a Trans Consult
[80] 2012/013 Russet Red Ltd (as above), see also 2014/046 Marshland Logistics Ltd & McGuiness on the quality of audits
[81] 2010/001 Denise & Peter Walsh trading as Walsh Skip Hire

hearing they are expected to demonstrate the same level of openness. In every case a representative is expected to clearly identify whether they are legally qualified and to correct any possible misapprehension.[82]

**40.** Paragraph 3(5) of Schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995 gives the traffic commissioner discretion to allow any person to appear at a hearing and if s/he does so, that person may be permitted to be represented by counsel or solicitor, including DVSA. That representative may participate and make submissions to the degree permitted by the presiding traffic commissioner and that kind of assistance should generally be encouraged.[83] The provisions relating to PSV licences are less specific but general comments from the then Transport Tribunal in respect of hearings make it clear that representation on behalf of DVSA has the effect of making the traffic commissioner and indeed the Upper Tribunal better able to understand the issues and that assistance of this sort is generally to be encouraged. More recent case law suggests that DVSA may take an active role but this does not preclude the traffic commissioner from acting as 'devil's advocate' and, even where DVSA is represented the inquiry remains an inquiry, with a duty on the traffic commissioner to inquire.[84] The extent to which assistance is required is a matter for the traffic commissioner in the individual case[85], not another party. Traffic commissioners have successfully adopted a practice in some cases where the advocate representing DVSA suggests areas or topics, which might be put to an operator's witness. There is a risk that this might become too artificial and in some cases the traffic commissioner has allowed direct cross-examination, similar to other inquisitorial processes.[86] It is for the traffic commissioner to decide what is most appropriate, in the interests of justice.

**41.** In the case of any representative, where they cease to act for an operator, applicant and/or driver during the course of proceedings, they should notify the relevant Office of the Traffic Commissioner immediately. Failure to do so may result in unnecessary adjournments where a party has not been informed of a hearing or relevant evidence. A failure to inform the traffic commissioner is not only discourteous but may result in legal representatives being reported to their professional body or a direction that the particular transport consultant may no longer act in that or all traffic areas. Similarly where representatives no longer act they are expected to pass any papers served on behalf of the traffic commissioner to their former client as soon as is reasonably practicable.

**42.** The Upper Tribunal has indicated its view about the late service of documents by parties to proceedings: bundles must be *served sufficiently far in advance of a public inquiry to enable them to be considered and assessed.*[87] The Upper Tribunal is clear that simply leaving a bundle of documents to the traffic commissioner is not acceptable; they should be scheduled or indexed. The Upper Tribunal went as far as to describe it as the advocate's *duty* to introduce them properly and any *which may contradict what a witness is saying must be put to the witness*. The service of documents is a matter of professional conduct. The

[82] There are various criminal offences covering impersonation of a solicitor, attempts to carry out a reserved legal activity when not entitled and willfully pretending to be a person with a right of audience.
[83] 2001/049 Norbert Dentressangle
[84] Asset 2 Asset Ltd (as above)
[85] 2001/068 Dukes Transport
[86] Interested persons may cross examine witnesses during an inquest.
[87] Nolan & Others (as above) paragraphs 101-102

call up letter normally requests documents to be served in advance of the hearing date and, having given notice, if documents are not produced the traffic commissioner may proceed to make a direction.[88]

**43.** In deciding on an application for an adjournment based on an advocate's unavailability the practice of the higher courts is that "counsel's convenience" will rarely be the sole basis for granting an adjournment. The above public interest must be balanced against a party's right to representation by an advocate of choice. The interests of justice may be equally served by the instruction of one of the number of alternative advocates who appear before a traffic commissioner.

**44.** The majority of hearings before traffic commissioners are inquisitorial in nature with parties present in order to assist a traffic commissioner in reaching a determination[89]. Impounding hearings, however, are adversarial and therefore both parties are likely to be represented.

*Location of Public Inquiries and Driver Conduct Hearings*

**45.** One of the great strengths of the traffic commissioner system is the "intimate knowledge of their areas".[90] Section 54 of the Public Passenger Vehicles Act 1981 allows a traffic commissioner to hold a hearing at any place that the traffic commissioner considers convenient. Paragraph 1(2) of Schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995 allows the traffic commissioner to vary the location of a hearing at his or her discretion. Whilst there may be a public interest argument for local justice there are few other formal considerations beyond the attendance of witnesses.[91] In environmental public inquiry cases it will usually be necessary for the traffic commissioner to conduct a site visit of the actual premises in question, which may also influence the choice of location.[92]

**46.** The legislation is silent on the location of driver conduct hearings; whilst on most occasions it will be appropriate to call the vocational licence holder or applicant to the relevant Traffic Area Office, there will be cases where it may be appropriate to convene the hearing elsewhere, for instance where there are a number of cases where the drivers and applicants live in the same locality. That decision remains a matter for the presiding traffic commissioner who will balance the cost of travel and venue against the interests of justice, which include the need to ensure a fair hearing.

*Attendance of Witnesses & Hearsay*

**47.** As suggested above the traffic commissioner has a wide discretion as to the witnesses and evidence which he or she may call. The Upper Tribunal has consistently stressed the advantage for traffic commissioners in seeing and

[88] 2012/005 AND Haulage Ltd, The Upper Tribunal, whilst urging caution, did not criticise a decision to suspend a licence pending receipt of financial evidence where an operator might be *dragging his or her feet* or there are real concerns as to road safety. Section 54(5) of the Public Passenger Vehicles Act 1981 as prescribed in the Public Service Vehicles (Traffic Commissioners: Publication and Inquiries) Regulations 1986 allows traffic commissioners to make a costs order, on notice of up to £125 in respect of a party who is found to have been frivolous, vexatious, improper or unreasonable in their conduct at an inquiry.

[89] See Statutory Guidance and Statutory Directions on Principles of Decision Making.

[90] 2010/067 Pemberton Transport Ltd

[91] 2004/364 Pallas Transport Ltd

[92] 2001/056 Paul Williams t/a Garden Materials Landscaping

hearing from witnesses[93] but subject to the above guidance on disclosure, a traffic commissioner is entitled to take hearsay evidence into account.[94] The Upper Tribunal recognises that the steps, which a traffic commissioner can expect a party to take, must be proportionate to the importance of the point at issue. Ideally the person should be called to give evidence, or, at the very least should have made a statement, exhibiting for instance any file note that he or she made at the time[95] As with other courts and tribunals where physical attendance is increasingly avoided, traffic commissioners will need to exercise their professional judgement and skills. In preparing a case for hearing staff may look at the response to any investigation to determine whether, for instance, a particular Examiner is in fact required. Traffic commissioners will be aware of the pitfalls of hearsay evidence and in particular from unreported conversations[96]. Hearsay evidence can be difficult to assess as the traffic commissioner cannot see and judge the demeanour of the person giving the primary account. It may also be difficult to clarify matters or to seek further information. The non-attendance of a witness may reduce the weight which can be attached to the evidence but does not render it inadmissible. Where hearsay evidence is offered there should be 'sensible steps' to ensure that it presents a full, fair and reliable picture. Where a witness is called the parties should be permitted to put relevant questions to that witness[97]

**48.** If a serious point of conflict arises it is incumbent on the party to raise it so that the traffic commissioner can then decide whether to adjourn to enable the witness to attend.[98] The party must be able to show real prejudice if the witness does not attend and it may be that the traffic commissioner chooses to proceed on the basis of edited evidence which is largely or wholly accepted.[99] The traffic commissioner should be alive to the significance of evidence and may proactively decide to adjourn a case to secure the attendance of a witness (such as a DVSA Examiner), even where that evidence is agreed, where the interests of justice require it.[100] Where additional material comes to light after the hearing, it is likely that the presiding commissioner will either reconvene the hearing or give the opportunity to comment in writing before reaching a decision.[101]

*Hearings 'In Private' or 'Closed Session'*

**49.** Paragraph 2(2) of Schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995 and the general discretions referred to above give a traffic commissioner power to exclude certain persons from proceedings. Hearings or parts of hearings where the public and others are excluded used to be referred to as 'in camera'. The courts in general have moved away from using Latin terms and traffic commissioners now refer to them as 'in private' or a 'closed session'. Any hearing will usually be open to the public unless the case involves evidence where the traffic commissioner is of the opinion that the interests of justice demand that all or part of the proceedings should be heard in private such as

[93] e.g. VST Building & Maintenance Ltd (As above)
[94] 2014/073 Skyway Travel (UK) Ltd , Fazal Karim Ali, Farmida Akhtar, 2017/038 Liliana Manole
[95] 2012/037 F & M Refrigerated Transport Ltd
[96] 2017/016 Damien Toner
[97] 2014/043 Lee Mayfield t/a LDF Recycling
[98] 2001/053 M Williams
[99] 2003/147 W C Hockin
[100] Skip It (Kent) Ltd and others (as above)
[101] 2013/022 David James Root t/a Orange Coach Travel, see also Southwaterstreet Ltd (As above), which makes clear the obligations on the party to draw relevant matters to the attention of the presiding commissioner.

financial and/or commercially sensitive information. In addition, legislation requires traffic commissioners to process personal data (within the meaning of the Data Protection Act 1998). The processing[102] of personal data[103] should be only what is required for the lawful exercise of the traffic commissioner's functions. Regulation 7 of the Public Service Vehicles (Traffic Commissioners: Publication and Inquiries) Regulations 1986 only allows traffic commissioners to restrict attendance at a PSV inquiry when considering the financial position of any person.

*Stay of Decisions*

**50.** Traffic commissioners have discretion to direct that certain decisions, usually relating to suspension or revocation of an operator's licence, shall not take effect until an appeal is lodged and dealt with by the Upper Tribunal (previously the Transport Tribunal).[104] The relevant provisions are to be found at section 29 of the Goods Vehicles (Licensing of Operators) Act 1995 and section 50 of the Public Passenger Vehicles Act 1981 (as substituted by section 31 of the Transport Act 1985). Commissioners should be careful to note that Section 50(7) of the 1981 Act enables a traffic commissioner to withdraw a stay at any time. However commissioners should carefully consider the implications of such a direction. There is no similar provision in the 1995 Act.

**51.** The Transport Tribunal has indicated that any application for a stay which is supported by new material which was not before the presiding traffic commissioner at the time of a public inquiry should only be considered if it could not have been obtained, with reasonable diligence, for use at the public inquiry.[105] The previous approach risked the impression of an unfettered right of appeal but where an appeal is without merit and therefore bound to fail the Upper Tribunal has upheld a decision to refuse a stay on the basis that allowing an operator to continue to operate pending the hearing *would mislead other operators into thinking that responding to reasonable requests and providing evidence of finance is not considered to be particularly important.*[106] The Upper Tribunal has gone on to say that: *the prospects of a successful appeal are an important factor in considering whether or not to grant a stay. The reason is that if the prospects of success appear to be good the refusal of a stay may mean that the appellant is put out of business before the merits of the appeal can be tested. On the other hand if the prospects of success are poor the grant of a stay may simply enable an operator to postpone the inevitable, in circumstances where public safety and/or fair competition are put at risk.*[107] If it is clear that no grounds have been advanced which might lead to the conclusion that the traffic commissioner was plainly wrong then the conclusion will be that the appeal is likely to fail. In those

[102] "Processing" is defined, under Article 4 of the General Data Protection Regulation (EU) 2016/679, as including "collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".
[103] "Personal data" is defined under the General Data Protection Regulation (EU) 2016/679 as "any information relating to an identified or identifiable natural person …; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier … or to one or more factors specific to the … identity of that natural person".
[104] See Statutory Guidance and Statutory Directions on Appeals
[105] 2002/040 Thames Materials
[106] Upper Tribunal stay decision in Tubular Solutions UK Ltd, see also John Heath t/a John Heath Transport
[107] Upper Tribunal stay decision in Truckit 24/7 Ltd

circumstances other factors, especially safety and fair competition, are likely to carry greater weight.[108]

**52.** Where a traffic commissioner's decision is due to come into effect very shortly after a stay has been refused, it will be appropriate for a traffic commissioner to consider whether to defer the coming into effect of his or her decision. The party will need to decide whether they wish to appeal. In relevant cases, even where a stay is refused, deferred application of a decision may enable a further application to be lodged with the Upper Tribunal. A judge of the Upper Tribunal has 14 days in which to make a decision (section 29(4) of the Goods Vehicles (Licensing of Operators) Act 1995, section 50(8) of the Public Passenger Vehicles Act 1981). Rule 20(A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, states that a traffic commissioner has 7 days to supply a copy of a decision relating to a stay to the Upper Tribunal. In practice the timescale may be much shorter.

**53.** There are no specific provisions for a stay in relation to vocational drivers. If a driver lodges a complaint in the magistrates' or Sheriff Court by way of appeal then any stay application must in the first instance be directed to them and not the traffic commissioner. A right of appeal is provided by section 119 of the Road Traffic Act 1988. There is no equivalent power in the Road Traffic Act 1988 to that provided for by section 29(2) of the Goods Vehicle (Licensing of Operator's) Act 1995 to stay decisions pending appeal but the Magistrates or Sheriff are given power to make "such order as it thinks fit"… "on any appeal" in section 119(3).[109]

*Active Case Management*

**54.** The Upper Tribunal has made clear that the public inquiry process cannot function where a party fails to adhere to the process and timescales as determined by the traffic commissioner but substitutes his/her own timeframe for the submission of evidence and the determination of matters. *In this day and age, and especially in the essentially inquisitorial framework of the public inquiry system, there is in our view a clear duty on operators to help the traffic commissioner deal with cases fairly and justly – and to avoid delay, so far as compatible with the proper consideration of the material issues. The modern trend is to expect parties to tribunal proceedings (and, by analogy, operators) to co-operate generally. This will be especially important, and in the interests of the compliant operator, if it emerges that their operation is under scrutiny by DVSA or the traffic commissioner. A wise operator will take whatever steps are required to ensure that he takes advantage of every opportunity to submit relevant and helpful evidence before, and not after, matters come to a head, and well before a traffic commissioner sits down to make his or her final decisions.*[110]

**55.** The Senior Traffic Commissioner is aware that in practice most public inquiry hearings are dealt with expeditiously and efficiently and that invariably they will not be listed for longer than half a day and that this time frame will be sufficient. Indeed traffic commissioners are accustomed to dealing with cases to conclusion (including delivery of the decision) within that time scale and this is generally regarded as best and normal practice. Commissioners do not adopt an "overly

[108] Upper Tribunal stay decisions in Wendy Dina Kerr
[109] An appeal falls within the civil jurisdiction.
[110] 2010/043 Stephen Mcvinnie t/a Knight Rider

legalistic" approach to their jurisdiction and are keen to adopt an approach at public inquiry that will have the effect of achieving operator licence compliance. This will often involve a clear engagement with the operator at both the evidence stage and the decision stage. This type of approach is to be encouraged.

**56.** However there will always be cases where it is clear that a particular public inquiry will be complex and time consuming and the presiding commissioner will have to become involved in "case management" at an early stage. In these cases traffic commissioners are reminded that useful guidance as to the principles of case management is available from the 'overriding objectives' referred to in the Procedure Rules in both the civil and criminal jurisdictions. By analogy the Senior Traffic Commissioner considers that in these cases traffic commissioners will be able to actively manage the case whilst ensuring that cases are dealt with justly and expeditiously, so far as is practicable by:

(a) ensuring that all evidence is served by the Office of the Traffic Commissioner in a timely manner;
(b) ensuring that any written evidence and representations from the operator and/or its representative is provided to the presiding traffic commissioner sufficiently in advance of the hearing so that it can be read and considered by the commissioner in advance;
(c) ensuring that operators provide the documents requested by the Office of the Traffic Commissioner in advance of the public inquiry where requested to do so;
(d) identifying the issues for determination by the traffic commissioner at an early stage;
(e) ensuring value for money in the use of time and resources (including considering the need to call witnesses whose evidence may be agreed);
(f) dealing with the case in ways which are proportionate to:

- the size and type of licence/s involved;
- the nature and scale of the breaches;
- the complexity of the issues;
- the likely orders and directions to be made;
- the likely effect upon the operator of the proposed orders and directions; and

(g) ensuring that the public inquiry is listed expeditiously and that an appropriate time estimate is allocated.

**57.** Where a traffic commissioner requires more information the correct approach is to make that request and to wait and see what is produced. When setting time limits within which specified steps must be taken it is best to express the requirements as a date by which the steps must be taken rather than as a period of time with a potentially uncertain start/end date.[111] Traffic commissioners will be aware of what is required in order to ensure a fair hearing and the requirements for disclosure. Where that additional information is not forthcoming it may be appropriate for the traffic commissioner to instigate their own enquiries provided that, should there be any doubt as to the contents, the operator or other party is given the opportunity to consider that content and to comment upon it.[112]

[111] 2013/076 City Sprinter Ltd
[112] 2012/034 Martin Joseph Formby t/a G&G Transport

**58.** In managing a case it may be useful for a traffic commissioner to make case management directions for the parties to follow so that the case is in state to be heard and that parties are not disadvantaged. Examples of case management directions might include:

- for a party to indicate whether a DVSA witness is required to attend by indicating what is at issue;
- in impounding cases to serve documentary evidence of ownership;
- to confirm that evidence is in a form which can be relied upon at a hearing;
- to supply a time estimate and/or an indication of the names and number of witnesses to be called by that party;
- to supply dates to avoid for listing;
- to serve specified documents Including skeleton arguments on a point of law[113].

The above is not an exhaustive list. The Upper Tribunal has criticised representatives for not supplying material in a timely manner. Parties are frequently requested to disclose documentary evidence such as original bank statements or maintenance records in advance of the hearing date. Compliance with directions allows for proper preparation, a more efficient use of tribunal time and therefore the interests of justice.

**59.** As indicated above, there are no formal rules of procedure which govern proceedings before a traffic commissioner; consequently there are no specific powers related to failures to comply with directions. An unfortunate practice has developed whereby parties and/or their representatives ignore the given timetable for compliance. A failure to comply with the timetable given may result in the traffic commissioner being unable to hear the case that day and, for instance, an application being put back into the list for another day. However it should not be used as a device to avoid an adverse finding. The Upper Tribunal declined to criticise a traffic commissioner for suspending a licence pending receipt of appropriate financial evidence.[114] The Upper Tribunal observed that this type of order might be *a "powerful spur to rapid action on the part of an* operator *who may, up to that point, have appeared to be dragging his or her feet. We can also see how it can provide a measure of protection to the public in cases where it appears, on paper, that there are real concerns as to road safety"*. However the Upper Tribunal urged caution and that the power should be used sparingly and on occasions in which it is essential in order to achieve a just result. Traffic commissioners should ask: (i) is it necessary to compel the party to do something? (ii) is the threat to road safety so serious that suspension pending action on the part of the party is essential? (iii) is suspension to prompt the party to do something proportionate to the situation? Alternatively it may be appropriate to proceed to hear the case and to draw adverse inferences from the failure to comply with directions.

**60.** In certain circumstances during the course of a public inquiry it may be appropriate for the traffic commissioner to indicate that it is no longer necessary

[113] As per Tchenguiz v SFO [2014] EWCA Civ 1333, the purpose of a skeleton argument is to assist the traffic commissioner be setting out as concisely as practicable the arguments upon which a party intends to rely. The skeleton should be concise; it should both define and confine the areas of controversy and not include extensive quotations from documents or authorities

[114] 2012/005 AND Haulage Ltd

to consider a particular issue raised in the call up letter, for instance the recent availability of financial evidence or the recent employment of a transport manager may incline the traffic commissioner to indicate that there is no need to be addressed on the matter. Whilst this type of indication has frequently been found to be useful in tribunals across the jurisdictions traffic commissioners are advised to exercise caution. Often the nature of a case can change as the various witnesses give evidence during the course of the inquiry and if the traffic commissioner has given such an indication too early it can then be difficult to explain to the operator that the matter is once again under consideration. That said, the Upper Tribunal has indicated that whilst maintaining a fair and objective approach it is "*far better that a traffic commissioner be open about their concerns and suspicions, rather than for the first suggestion of something contentious to appear in a written decision sometime later. Nor does a traffic commissioner have to meekly accept everything that they are told without probing and testing, and it is often necessary for the traffic commissioner to put the contrary point of view (sometimes more than once) and to highlight the evidence that undermines the assertion being put forward. This allows a witness to have a chance of responding".*[115]

**61.** The higher courts are clear that the more serious the allegation the more cogent the evidence should be in order to base a finding. The same can be said for the structure of a hearing. Traffic commissioners should seek to minimise any potential for confusion or doubt as to what action might still be under consideration but should be careful to avoid the perception that they have already reached a conclusion.[116] An early neutral evaluation may identify the *possibility* of revocation (without prejudging the conclusion of any proceedings) and therefore the need to ensure that proceedings are properly structured. There will therefore be occasions when a traffic commissioner needs to be explicit that particular action is still very much in contemplation.[117]



[115] 2014/013 MM Telford Ltd & RMT Transport Ltd
[116] In 2003/350 Al Madina Transport Ltd the Transport Tribunal highlighted the difference between an indication that the traffic commissioner 'cannot exclude the possibility' and where the traffic commissioner is 'minded to revoke'.
[117] 2016/007 W Meikle t/a MBS Transport

# DIRECTIONS

## Basis of Directions

**62.** The Senior Traffic Commissioner for Great Britain issues the following Directions to traffic commissioners under section 4C(1) of the Public Passenger Vehicles Act 1981 (as amended). These 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 in relation to case management.

## Interim Licences / Variations

**63.** Authority to operate on an interim basis is only available to applicants for a goods vehicle operator's licence. There is no absolute right to operate under interim authority. The application form makes clear an interim licence/variation can only be granted where the application is complete and all supporting documents have been supplied.

**64.** The exact wording of the legislation suggests a discretion and the higher courts have been reluctant to intervene to restrict this. For instance a traffic commissioner may allow an interim licence for fewer vehicles than the total authority sought. A commentary to the preceding 1968 Act indicates that the equivalent provision was to enable grants on a temporary or trial basis and that interim licences would not normally be granted until the period for representations on environmental grounds had expired. It goes on to refer to special reasons why the applicant needs a licence earlier than the statutory timetable or where there may be unavoidable delays in processing the application. The example given is where accounts are provided as evidence of financial standing or possibly more on point where objections and/or representations have been lodged and need to be considered.

**65.** Interim licences may only be granted under delegated powers where all mandatory requirements such as repute, financial standing and professional competence are met and the criteria set out in Statutory Guidance on the Delegation of Authority (Annex 2, sections 2c) or d)) are satisfied.

**66.** Where interim requests cannot be granted under current delegations the application must be referred to a traffic commissioner who may require to be satisfied as to the reasons for allowing the applicant to enter the industry early or increase authority ahead of the full application process (e.g. the award of a new contract or the need to increase vehicle/fleet size for commercial reasons and the like). Where interim authority has previously been refused by a traffic commissioner any resubmission should in the normal course be made to the same traffic commissioner and only where there has been a material difference in the application from the first submission.

**67.** It is a condition of the licence that traffic commissioners are informed of any material changes within 28 days. This includes any changes to the mandatory requirements for a standard licence as set out in Article 3; whilst those changes may not attract a fee it is important that the operator is given an opportunity to apply for a period of grace.[118] This may then require submission to the traffic commissioner for a decision on the time to be allowed, within the maximums allowed under Article 13.

**Late Payment of Fees**

**68.** The provision to accept a late fee is contained within section 45(5) of the Goods Vehicles (Licensing of Operators) Act 1995 and section 52(2E) of the Public Passenger Vehicles Act 1981. These provisions give traffic commissioners discretion to determine that a licence does not terminate at the time when the fee is due by and not paid but continues in force if a fee is received or has been received after the due date but only on a finding that there have been exceptional circumstances. Non-receipt of the fee request, forgetting to pay by the required date or overlooking the need to pay do not amount to exceptional circumstances which would allow a traffic commissioner to accept late payment[119]. There is no legal requirement for a reminder to be sent[120]. An applicant cannot ask for a late payment to be accepted on the basis that they have not received a reminder[121]. Similarly where the late payment is due to mere oversight, more is required before exceptional circumstances may properly be found.[122] The obligation is on the operator to pay the fee on time.

**69.** Any submission regarding an application to make a late payment should outline the circumstances which led to the late payment and attempt to address the above factors as well as identifying any other fact which might persuade the traffic commissioner to find that there are exceptional circumstances.Claims that the fee was posted need to be supported by corroborating evidence[123] The Upper Tribunal has made clear that the responsibility for paying the continuation fee, by the prescribed time, falls on the operator. Operators are expected to devise a reliable means of identifying the prescribed time for payment and then ensuring that they remind themselves of the need to pay before that date. That might be by reference to a regular diary entry, via the self-service system administered by DVSA, from a fee request or by reference to the operator's licence discs which display the payment date.The consequence of non-payment by the prescribed time is the automatic termination of the licence. Non-receipt of the fee request, forgetting to pay or overlooking the need to pay do not amount to exceptional circumstances which justify disregarding that automatic termination. The date on the vehicle licence disc is a reliable reminder of the date by which the continuation fee must be paid. Consequently there can be no general discretion or delegation to accept late payments received within so many days of the due date.

[118] See Statutory Guidance and Statutory Directions on Repute & Fitness, Statutory Guidance and Statutory Directions on Finance, Statutory Guidance and Statutory Directions on Operating Centres Stable Establishments and Service of Documents, and Statutory Guidance and Statutory Directions on Principles of Decision Making
[119] 2014/020 Seamus Joseph Patterson t/a Patterson Plant
[120] 2008/569 David Collingwood t/a Construction & Services, 2009/492 Clemente Fanciulli t/a PB Haulage
[121] 2013/017 Francis Edward Walter Cantle which corrects 2013/058 & 075 Patrick Ward t/a Allshires Landscapes and Overbrook Recovery Services Ltd
[122] 2001/062 T S G Smith t/a Western International, 2010/018 Horsebox Mobile Repairs Ltd
[123] 2013/069 Irene Clark

## Submissions - Whether to Call to a Hearing

**70.** The decision on whether to call to a hearing falls within the traffic commissioner's discretion.[124] *The decision to call to a public inquiry falls to the traffic commissioner, not to officials, and it is part of the traffic commissioner's independent judicial function. The traffic commissioner may have regard to recommendations from his staff or others…*[125] In reaching that decision traffic commissioners are assisted by the case submissions prepared by Office of the Traffic Commissioner and Central Licensing Office staff. A submission should refer the traffic commissioner to the operator's history and size of fleet. A submission might follow contact with the particular party either in writing, by email, by telephone or in person (for instance by a Senior Team Leader). This type of contact clearly does not equate to a judicial hearing and cannot be treated as such.[126] Any staff member discussing substantive issues must make a proper note of that contact.

**71.** The Upper Tribunal (and its predecessor) has made clear on many occasions that each case must be considered on its own merits. Consistency of approach should not be mistaken for uniformity of decisions.[127] Inevitably the concept of proportionality requires that interventions be graduated but each case will involve a collection of different and variable factors such that it is impossible to set anything more than starting points. Caseworkers should refer to appropriate Statutory Guidance and Statutory Directions (including those on the Principles of Decision Making) as to the potential outcome.

## Submissions

**72.** As the case law makes clear there is no requirement on traffic commissioners to engage in discussions with applicants and/or operators before reaching a preliminary decision on whether to call to a hearing. Operators are usually provided with an opportunity to comment in response to the findings of a DVSA investigation. It may, however, be appropriate to request further comments on the first occasion when operators are found to have incurred a small number of prohibitions; minor failings in their maintenance system; a small number of tachograph errors; vehicle excise duty offences; minor convictions and any other offences not proceeded with. In these cases a letter can be sent to the operator requesting an explanation within a given timetable as to the reasons for the shortcomings and the steps being taken to overcome them, and to seek further assurances. In the event of convictions the operator will be asked to confirm whether any further offences are outstanding. A satisfactory reply might result in a recommendation for an alternative disposal.

**73.** Even the best organised operator may occasionally make a genuine mistake and, unless this is serious, action may not be required. It is expected, however, that an operator will learn from an incident and take prompt corrective action. A more serious view will be taken of repeated failings or a combination of apparent infringements.

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[124] See Statutory Guidance and Statutory Directions of Delegations and Multiple Licence Holders.
[125] 2011/364 Heart of Wales Bus & Coach Co. Ltd & C Jones
[126] See also Statutory Guidance on Delegations
[127] 2003/327 The Fox (A1) Ltd

**74.** Where one or more warning letters have been issued in the past five years, it is anticipated that the traffic commissioner will wish to consider regulatory action. The traffic commissioner, however, might also consider a 'final' warning letter. In appropriate cases the traffic commissioner may request DVSA Enforcement Officers to carry out a routine check to ensure compliance.

**75.** Members of staff should anticipate in preparing written submissions that the traffic commissioner will wish to consider regulatory action if:

- the operator and/or driver does not appear to heed the warning letter and non-compliance continues;
- the initial report is so serious that a public inquiry is immediately justified by an apparent risk to road safety, fair competition or where the operator appears to have set out to flout the law deliberately.

**76.** If the measures imposed at an earlier public inquiry appear to have been effective and/or the relevant suspension or curtailment has expired, it will not normally be appropriate to call a further public inquiry if the operator applies for the licence to be restored to the previous authorisation, or even further increased after an appropriate period, provided the traffic commissioner is satisfied that standards have been restored and maintained. If appropriate, DVSA will be asked to carry out checks to establish suitability. A case submission should be made to the traffic commissioner to this effect.

**77.** Allegations on matters of fact relating to potential exercise of powers under section 17 of the Public Passenger Vehicles Act 1981, the Road Traffic Act 1988, and/or sections 26 and 27 of the Goods Vehicles (Licensing of Operators) Act 1995 will need to be considered by the traffic commissioner. Reference should be made to the relevant Statutory Guidance and Statutory Directions.

**Periods of Grace**

**78.** For standard licences Regulation (EC) 1071/2009 (Annex 2) allows but does not require the traffic commissioner to provide a period of time to rectify the situation. The operator must be notified and should be given a limited time (because of the implications for fair competition), for instance 14 days, to make written representations before the traffic commissioner decides whether to allow time for rectification and for what period by way of a notice served under section 27(3A) of the Goods Vehicles (Licensing of Operators) Act 1995 and section 17(1A) of the Public Passenger Vehicles Act 1981. To quote the Upper Tribunal: "*In our view, when considering whether or not to grant a period of grace, Traffic Commissioners will need some tangible evidence, beyond mere hope and aspiration, that granting a period of grace will be worthwhile, and that there are reasonable prospects for a good outcome. Some sort of analysis along these lines will be necessary because, amongst other reasons, Traffic Commissioners have to decide how long to grant. Moreover, as with a stay, there is no point in granting a period of grace if the likely effect is just to put off the evil day when regulatory action will have to be taken.*[128] The maximum periods allowed under the legislation are as follows:

[128] 2014/008 Duncan McKee

| Shortcoming | | Maximum Period of Grace |
|---|---|---|
| Transport Manager | Departure | 6 months |
| | Death or physical incapacity | 6 + 3 months |
| Effective & Stable Establishment | | 6 months |
| Financial Standing | | 6 months to demonstrate that the requirement will be met *on a permanent basis* |

**79.** When a period of grace is granted to an operator, they are responsible for ensuring that they demonstrate the requirement is met prior to the expiry of any period of grace. An operator should therefore actively manage any dates and request an extension, when appropriate, whilst remembering that the grant and any extension is always at the discretion of the traffic commissioner.[129] If a period of grace expires without the mandatory requirement being met then the traffic commissioner is obliged to revoke the operator licence.

**Proposals to Revoke**

**80.** As with initial indications given by traffic commissioners at public inquiry and/or driver conduct hearing this type of correspondence, also referred to as 'minded to letters', is intended to put the operator on notice that information has come to the attention of the traffic commissioner which, if left unanswered, would require the traffic commissioner to take action against the licence. The letter sent on behalf of the traffic commissioner therefore affords that opportunity to make representations. It is important for staff to always check the record to ensure that a letter has not already been sent by another part of the Office of the Traffic Commissioner and that if it has, then there is reference made or the dates for response are properly explained, so as to avoid confusion on the part of the operator.[130]

**Listing of Cases**

**81.** Once a traffic commissioner has called a case to a hearing the case papers will be transferred to the staff in the relevant Office of the Traffic Commissioner for preparation and for the case to be listed. The Office of the Traffic Commissioner seeks to list public inquiries within twelve weeks of the traffic commissioner calling the inquiry. This is subject to available resources and includes consideration of the traffic commissioner's diary. The period may also be extended if the traffic commissioner believes that it is in the interests of the case to do so to allow proper consideration.

**82.** Case management decisions are important to ensuring the interests of justice. This includes the listing of cases. The Senior Traffic Commissioner has therefore identified the following principles to identify priority cases when listing:

- any serious concerns regarding the safety of the transport operation;

[129] 2018/011 Skyrider Ltd
[130] 2012/045 Goods 2 Go Ltd

- impounding (subject to the discretion to extend the time limits[131]);
- application by an Administrator etc under regulation 31[132];
- application for interim authority or PSV application (where interim authority is not available);
- cases of serious non-compliance[133];
- cases of particular age.

As indicated above, the availability of advocates is not a priority where alternative representation might be obtained. In ensuring that a case is ready for hearing it may be necessary to invite the traffic commissioner to make case management directions (see above).

**Welsh Language Cases**

**83.** In this document "Welsh case" means a case before the traffic commissioner in which all "individual parties"[134] are resident in Wales or which has been classified as a Welsh case by the traffic commissioner. Where not all of the "individual parties" are resident in Wales the traffic commissioner will decide whether the case should be classified as a Welsh case. In a Welsh case the Welsh language may be used by any party or witnesses or in any document placed before the traffic commissioner or at any hearing.

**84.** The call up letter must alert individual parties to the above. Letters from the Welsh Traffic Area Office therefore contain the following advice in both English and Welsh languages: "*The Welsh Traffic Area Office welcomes correspondence in Welsh or English. Public Inquiries can be held using the Welsh language, provided that notice, by way of a request, is given at least 21 days before the appointed date."*

**85.** A party or their representative should, unless it is not reasonably practicable to do so, inform the Traffic Area Office, in writing, no later than 14 days prior to the hearing date of a Welsh case that the Welsh language will be used by the party, their representative, any witness to be called by that party or in any document to be produced by the party. When the Welsh language is to be used at a public inquiry it must take place at a venue with simultaneous translation facilities. Whenever an interpreter is needed to translate evidence from English into Welsh or from Welsh into English, staff at the Office of the Traffic Commissioner acting under the delegation of the traffic commissioner for Wales must ensure that the attendance is secured of an interpreter whose name is included in the list of approved interpreters. Accordingly, whenever the papers are being assembled by the Office of the Traffic Commissioner for Wales they must be carefully checked so as to identify whether any of the documents contain evidence which is written in the Welsh language.

**Hearing Impaired Interpreters**

**86.** A hearing impaired party or their representative should, unless it is not reasonably practicable to do so, inform the Traffic Area Office, in writing, no later than 14

[131] See Statutory Guidance and Statutory Directions on Impounding.
[132] See Statutory Guidance and Statutory Directions on Legal Entities.
[133] See Statutory Guidance and Statutory Directions on the Principles of Decision Making and the Concept of Proportionality, and in particular Annex 3.
[134] i.e. other than a Government Department or Agency

days prior to the hearing that an interpreter will be required. The Office of the Traffic Commissioner should make the necessary arrangements and will meet the reasonable costs of interpreters for deaf and hearing impaired litigants for hearings. However, many people have a friend or relative who usually interprets for them. It is for the presiding commissioner to decide whether that friend or relative can exactly interpret what is being said to during the hearing.[135] Unless the relative or friend has a recognised qualification in relaying information between deaf and hearing impaired people, it may be advisable to use a qualified interpreter.[136]

**87.** All hearing rooms in the Traffic Area Offices should be equipped with a hearing loop facility. A hearing impaired party or their representative should inform the Traffic Area Office, in writing, no later than 14 days prior to any hearing held at a location other than a Traffic Area Office that a portable hearing loop facility will be required.[137]

**Foreign Language Interpreters**

**88.** A party (who cannot speak or understand the language of the tribunal well enough to take part in the hearing) or their representative should, unless it is not reasonably practicable to do so, inform the Traffic Area Office, in writing, no later than 14 days prior to the hearing that a language interpreter will be required.

**89.** Where a party attends, and the presiding commissioner concludes that the party does not have that level of understanding, then it is open to the presiding commissioner to proceed relying on a friend or relative.[138] The presiding commissioner should be satisfied that the proceedings will be properly interpreted, failing which the case will have to be adjourned in order that an interpreter can be booked to attend.[139]

**Pending Prosecutions**

**90.** Occasions will arise when the traffic commissioner has decided to call a case to a public inquiry and/or driver conduct hearing and information is received that a prosecution is pending against a potential party or an employee. Such cases will be referred to the traffic commissioner to decide whether the public inquiry and/or driver conduct hearing should proceed or be delayed until the court proceedings have been concluded. The submission should take account of the fact that:

- the traffic commissioner will be considering the operator's suitability to continue to hold an operator’s licence and/or a driver’s suitability to hold a vocational entitlement in the round, as opposed to the court making a finding on a specific offence(s);
- the likely time delay before the criminal proceedings are heard. In particular the traffic commissioner will want to consider the scale of the implications that this will have for road safety or fair competition in the interim;

[135] See Paragraph above on Active Case Management
[136] Approach consistent with that adopted by HM Courts and Tribunal Service - https://www.justice.gov.uk/newsite/courts/interpreter-guidance
[137] See Paragraph above on Listing of Cases
[138] See Paragraph above on Active Case Management
[139] https://www.justice.gov.uk/newsite/courts/interpreter-guidance

- the seriousness of the offence(s), and whether the outcome if determined before the public inquiry and/or driver conduct hearing is likely one way or the other to lead the traffic commissioner to reach a very different conclusion than he/she might otherwise expect to reach;
- the difference between Goods, PSV and driver conduct legislation.

**91.** In cases where a public inquiry and/or driver conduct hearing precedes court proceedings, the commissioner may need to consider whether the interests of justice require part or all of the evidence to be heard in private but this discretion is limited for PSV cases. They may also need to consider whether to exclude certain individuals who are giving evidence even if this evidence is being given in private. For example, if a DVSA prosecution is pending in the criminal courts it may be appropriate for the DVSA witnesses to be excluded after they have given their evidence and whilst the operator and/or driver is giving their evidence. This will always be a question of fact and degree according to the circumstances of each case and will often require very careful consideration by the presiding traffic commissioner who will want to seek a balance between the absolute requirement to ensure that the operator and/or driver has a fair hearing and the need of the commissioner to admit all relevant evidence.

**92.** Article 19 of EC Regulation 561/2006 seeks to guard against the risk of what is sometimes termed 'double jeopardy'. The Article specifically refers to penalties and in that context reference to "procedure" would mean a procedure aimed at imposing punitive measures. Traffic commissioners are not concerned with punishment but traffic commissioner hearings are regulatory in nature. The limited protection against double jeopardy does not therefore apply[140] but can, if necessary, be argued as part of any subsequent criminal proceedings.[141]

**Communication with Representatives**

**93.** As above, the position of transport consultants is different from that of counsel and solicitors, whose conduct is regulated by their professional bodies. It is therefore appropriate to seek written confirmation that a transport consultant is authorised to act by the party in person or authorised officer (if it is a corporate entity) before communicating with that transport consultant. If a particular lawyer is not known by a member of staff then they may request an email from a company address confirming authority. As the case law above indicates members of staff would be well advised to make a contemporaneous file note of any important conversation. The legislation gives a discretion to traffic commissioners to allow representatives other than solicitors and counsel to appear. They should seek permission from the traffic commissioner in advance of any hearing at which they wish to be allowed to appear.

**Adjournments**

**94.** Circumstances requiring adjournments can occur at any time leading up to or indeed during a public inquiry and/or driver conduct hearing. A traffic commissioner will adjourn the proceedings if he or she considers that it is required in the interests of justice (i.e. to ensure that the proceedings are fair to all parties). Parties can apply for an adjournment prior to the hearing by

[140] Regina v IK, Regina v AB, Regina v KA, Court of Appeal (Criminal Division), 16 May 2007.
[141] 2008/526 Kingman

submitting a written request to the traffic commissioner or by making a verbal application during a hearing. Any request must contain a detailed reason as to why an adjournment is appropriate and, where possible, corroborating evidence should be included with the request (this may include details of a scheduled hospital appointment or pre-booked holiday confirmation). The traffic commissioner will take all relevant factors into account when considering adjournment requests, including the effect on road safety of allowing an operator and/or driver to continue and whether the relevant party has complied with any directions.

**95.** Applications for adjournments are to be submitted to the traffic commissioner immediately and decisions taken on adjournment requests should be communicated to the party or their representative as soon as possible, with the aim of communicating the decision within 3 working days. If verbal notification of the decision is appropriate it is to be confirmed in writing at the earliest opportunity.

**Notification and Disclosure of Evidence**

*Publication*

**96.** Notification of pending public inquiries should be placed in Notices and Proceedings or Applications and Decisions in accordance with legislative requirements. The Office of the Traffic Commissioner may also send a list of all pending hearings to the relevant press officer who acts for the traffic commissioner.

*Call-up Letters*[142]

**97.** A letter inviting a party to attend a public inquiry will be sent in accordance with the legislative requirements. Schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995 provides that *"at least 21 days notice before the date so fixed"* shall be given. Regulations 8 & 9 of the Public Service Vehicles (Operators' Licences) Regulations 1995 provide that "*not less than 14 days notice"* shall be given. In many cases the Office of the Traffic Commissioner seeks to send call up letters between 28 and 35 days before the scheduled date for the public inquiry but this is not mandatory. The letter should detail the reasons for calling the public inquiry, the evidence that the traffic commissioner will consider and any further information that the traffic commissioner requires from the operator. The letter will also invite operators to make representations to the traffic commissioner prior to the inquiry.

**98.** Whilst the legislation is silent on the period of notice for a vocational driver conduct hearing, the Senior Traffic Commissioner directs that those individuals should normally receive 21 days written notice of the hearing, although this may not be possible in individual cases such as where an early hearing is requested.

[142] See Statutory Guidance and Statutory Directions on Operating Centres, Stable Establishments and Addresses for Service.

*Traffic Commissioner's Brief*

**99.** The Office of the Traffic Commissioner prepares a traffic commissioner's brief (or bundle of papers) which will include all information proposed to be considered by the traffic commissioner at the hearing. The traffic commissioner cannot and will not be bound by any recommendation or information received from officials. *Some of the information received may come from enforcement officers, for example traffic examiners or vehicle examiners employed by DVSA. Further information may come from the parties themselves, for example financial evidence and/or company records. It is open to a party to submit other documents and to make representations as to the scope of a hearing for the traffic commissioner to rule on.*[143] Any request for further material should therefore be referred to a traffic commissioner to apply the principles outlined in the attached Statutory Guidance (above) and the overriding objective and to then decide whether further directions are required and/or to seek further information as to potential relevance.

**100.** A practice has developed amongst some operators and representatives whereby traffic commissioners are served with documents on the day of a hearing or shortly before. This impedes a traffic commissioner's ability to prepare for a hearing and has been expressly disapproved of by the Upper Tribunal. Where the traffic commissioner has requested evidence to be served in advance, if a representative is unable to comply with the request that representative should inform the traffic commissioner well in advance of the hearing and explain why. It is not sufficient for a representative to take an inactive part in proceedings. Where a representative intends to rely on other evidence then it must be lodged with the traffic commissioner at least seven days in advance. It may be necessary to produce evidence such as maintenance records on the day but again notice should be given to the traffic commissioner seven days in advance. Any bundle to be relied upon should be scheduled or indexed. The documents should then be properly introduced by any representative. Representatives may also properly be asked to identify those matters at issue. Failure to properly prepare a case may be referred as a breach of professional standards. If documents are lodged which do not meet the above requirements then staff may refer them to a traffic commissioner in order to decide whether to accept them in that form. However traffic commissioners will be alive to any device to delay regulatory action being taken.

**Appeals Against Decisions Not to Issue an Acquired Rights Certificate**

**101.** Under paragraphs 5 and 14 of Schedule 3 of the Road Transport Operator Regulations 2011, where the Secretary of State refused an application for an exemption of the requirements of paragraph 6(1) of Schedule 3 of the Public Passenger Vehicles Act 1981 or paragraph 13(1) of Schedule 3 of Goods Vehicles (Licensing of Operators) Act 1995, the applicant may appeal to a traffic commissioner for a redetermination of that application (i.e. a de novo (completely new) consideration of the application). It will be for the individual traffic commissioner to decide on the process for any hearing, if required, and the evidence to be submitted. There is no requirement for the Secretary of State to be a party to that redetermination but may apply to make representations and/or appear.

[143] Al-Le Logistics Limited (as above) - paragraph 36

## Representations From Parties

**102.** As stated above, there is no requirement on traffic commissioners to engage with applicants, operators, drivers or other parties immediately prior to a hearing or during those proceedings. The Senior Traffic Commissioner recognises that at first sight some cases might appear to require the convening of a public inquiry or driver conduct hearing but they might in fact, be dealt with by an alternative disposal. Operators, applicants and/or drivers can submit written representations in response to reports of non-compliance or other adverse information. This helps to inform a decision on whether to take regulatory action thereby allowing resources to be targeted at those who present the greatest risk to road safety and/or fair competition.[144]

**103.** There may be occasions where it may be necessary for a senior member of staff (not below the grade of Senior Team Leader) to invite an operator to a formal meeting to seek a detailed explanation for the failings that have been identified. This may allow the operator opportunity to provide assurances as to the steps taken to avoid any reoccurrence. This type of interview will generally be offered where it is considered that an alternative method of disposal may be appropriate, such as, but not limited to, the giving of additional undertakings by the operator or a voluntary reduction in vehicle authority, but where this cannot be achieved through correspondence.

**104.** The purpose of the administrative interview is to inform any submission to the traffic commissioner so that s/he can determine whether or not to take regulatory action. The process will not apply to drivers and applicants for vocational licences.[145]

**105.** These interviews are <u>not</u> hearings but they do form part of the regulatory process and it is therefore important to ensure fairness to the operator. The operator is of course free to decline the invitation. The interviews will follow a consistent structure:

- prior to the interview (and at least 14 days in advance) the senior staff member will write to the operator identifying the operator licence failures either in summary form or by the inclusion of any reports that have been put before the traffic commissioner;
- the operator will be asked to attend with documentary evidence of current compliance such as maintenance records and tachograph or domestic hours' legislation compliance;
- the person attending may be asked for written confirmation of their authority to bind the operator to any undertakings etc;
- in the event that the operator does not attend or does not request an alternative interview date any initial recommendation for regulatory action will stand;
- the interviews shall be recorded and the senior member of staff must always be accompanied by another member of staff who will make notes of the matters

[144] Further assistance on the starting point for regulatory action is available in Statutory Guidance and Statutory Directions on the Principles of Decision Making and Statutory Guidance and Statutory Directions on Vocational Driver Conduct

[145] The processes are set out in Statutory Guidance and Statutory Directions on Vocational Driver Conduct

discussed and those at issue, together with offers of remedial action given by the operator;

- the parties who attend the interview are entitled to be accompanied by a legal or other representative as if they were attending a public inquiry or driver conduct hearing;
- within 14 days of the interview the senior member of staff will make a final recommendation to the traffic commissioner as to the type of regulatory action that they might like to consider.

**106.** The senior member of staff is not authorised to make any regulatory decisions on behalf of the traffic commissioner and has no powers to make any regulatory decisions associated with the interview. The decision on whether to call the operator to a hearing or to deal with the alleged failings in another way will always remain with the traffic commissioner. Depending on the actions taken and assurances received by the senior staff member, it might be possible for the traffic commissioner to deal with the matter by way of correspondence and without convening a public inquiry. This regulatory action might include, for example, accepting a voluntary reduction of the licence authority and/or the giving of additional undertakings that are intended to deal with the operator licence failings. These could include, for example, detailed driver, transport manager and/or maintenance staff training packages or the implementation of new and comprehensive tachograph analysis systems.

**Preliminary Hearings**

**107.** These are not public inquiries and there is therefore no requirement to publish a notice of the hearing. It was previously custom to refer to these hearings as 'In Chambers' but because of the connotations derived from other jurisdictions, namely that these hearings are closed to the public, that term is no longer to be used. The preliminary or case management hearing will be recorded in the same way as a public inquiry or driver conduct hearing.

**108.** In complex cases a preliminary or case management hearing can be beneficial in narrowing or crystallising the issues. It is a matter for the traffic commissioner to decide whether a case would benefit from this type of hearing. Where a party is called to any preliminary hearing the Human Rights Act 1998 still applies.

**Location of Inquiries**

**109.** The majority of all public inquiries, impounding appeals, and driver conduct hearings will be held in the tribunal room of the relevant Office of the Traffic Commissioner. It is, however, an established principle that public inquiries held on environmental grounds should be held as close as possible to the proposed operating centre as it is highly likely that the presiding traffic commissioner will conduct a site visit and it is important that the representors (who will be local residents) will be able to easily attend.

**110.** Where a public inquiry has been called to consider bus punctuality matters it may be in the public interest to hold the inquiry at a venue which is local to the operator's base because of the local interest that the case may have generated.

**111.** The traffic commissioner alone must make the decision on whether or not a public inquiry should be held locally to the operator. The decision shall not be delegated.

**112.** In cases that relate to an operator who holds a licence in more than one traffic area, the lead traffic commissioner[146] will normally hold the public inquiry in the tribunal room of the Office of the lead traffic commissioner. The lead traffic commissioner will usually decide to hear all matters together to consider all allegations of non-compliance which relate to that operator. Whilst the legislation enables an operator's licence to be subject to revocation, suspension or curtailment (or in the case of PSV operators, a reduction in the number of authorised vehicles) the traffic commissioner hearing the case will have regard to the evidence available at that hearing with the object of reaching a decision on licences which are the subject of the public inquiry.

**113.** A multiple licence holder may, therefore, face some action against one or more of its operator licences, and any determination which is made may only relate to those operator licences which fall to be considered by the traffic commissioner. Even if all of a multiple licence holder's operator licences are before a traffic commissioner at a single hearing, the traffic commissioner may decide to make a direction against some, rather than all of the licences. A revocation of one operator's licence will not necessarily lead to a revocation of all licences.[147]

**Stays**

**114.** Any request for a stay needs to be carefully considered and full written reasons should be given for the decision reached. Where a stay is refused the party has a right of appeal, either through oral argument or in writing, to a judge of the Administrative Appeals Chamber of the Upper Tribunal.[148]

**Cases Remitted for Rehearing by the Upper Tribunal**

**115.** The traffic commissioner for the relevant traffic area must always be made aware of any appeal in advance of the hearing and preferably upon first receipt of notification. Where the Upper Tribunal makes a direction or formal request the traffic commissioner must be informed as soon as possible. Where a case is remitted for rehearing the traffic commissioner must also be alerted to any directions before the staff who work on their behalf take any action.[149] If another traffic commissioner is required to hear the case it is important for an available traffic commissioner to be identified as soon as practicable to avoid unnecessary delays in relisting. If there are any difficulties assistance can be obtained from the Senior Traffic Commissioner.

**116.** Time is of the essence when a stay request has been received. Whilst a judge of the Upper Tribunal has 14 days in which to make a decision in practice the time period will often be much shorter due to the impending date of implementation of the traffic commissioner's decision. A traffic commissioner therefore has 7 days to supply a copy of a decision relating to a stay to the Upper Tribunal. On refusal of a stay, staff should arrange for the following to be forwarded to the Upper Tribunal as a matter of urgency:

[146] See Statutory Guidance and Statutory Directions on Delegations
[147] Subject to Statutory Directions and Statutory Directions on Good Repute and Fitness
[148] See Statutory Guidance and Statutory Directions on Appeals.
[149] By example: 2012/028 Shamrock (GB) Ltd.

- in the case of an oral decision, an immediate transcript of the decision, together with a summary of the background to the case;
- in the case of a written decision, a copy of the same with any additional comment as appropriate.
- a copy of the full written reasons for the refusal of the stay.

**117.** All relevant papers should be copied to the person lodging the Appeal.

# ANNEX 1: EU LEGISLATION

Regulation 5 of the Road Transport Operator Regulations 2011 states that a standard licence constitutes an authorisation to engage in the occupation of road transport operator for the purposes of:

**Regulation (EC) 1071/2009 establishing common rules concerning conditions to be complied with to pursue the occupation of road transport operator repealed Council Directive 96/26 EC and applicable from 4th December 2011**

**Article 3 - Requirements for engagement in the occupation of road transport operator**

1. Undertakings engaged in the occupation of road transport operator shall:

(a) have an effective and stable establishment in a member State;

(b) be of good repute;

(c) have appropriate financial standing; and

(d) have the requisite professional competence; and

2. Member States may decide to impose additional requirements, which shall be proportionate and non-discriminatory, to be satisfied by undertakings in order to engage in the occupation of road transport operator.

**Article 13 - Procedure for the suspension and withdrawal of authorisations** (i.e. to pursue the occupation of road transport operator)

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) a time limit not exceeding 6 months 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.