

CONTINGENCY AND EMERGENCY PLANNING

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

Background

a) The following interim guidance is issued during a period where the country faces an extraordinary challenge. The World Health Organisation has now categorised the coronavirus (COVID-19) outbreak as a pandemic. Current guidance anticipates that there may be a shortage of personnel and that economic activity will be affected. That may also include the support services offered to traffic commissioners and the capability to hold tribunal hearings.

b) It is not possible to envisage every situation which might occur during the current outbreak, but this may extend from a temporary shortage of drivers or Transport Managers to the possible loss of access to an Operating Centre. The Statutory Documents describe the application of legal discretions and seek consistent application of the regulatory requirements. The Department for Transport will decide what exemptions might apply to the application of commercial road transport rules such as drivers' hours. The traffic commissioners will retain their core focus on road safety. However, during this period, the Senior Traffic Commissioner recognises there may be challenges for operators in meeting the operator licence requirements.

c) The Senior Traffic Commissioner for Great Britain issues the following Guidance and Directions under section 4C(1) of the Public Passenger Vehicles Act 1981 (as amended) to provide information as to the way in which the Senior Traffic Commissioner believes that traffic commissioners should interpret the law relating to the application of the Statutory Documents. This Guidance may be subject to decisions of the higher courts and describes powers and discretions to be exercised by traffic commissioners (including deputies) only. The Directions are addressed to the traffic commissioners in respect of the approach to be taken by staff acting on behalf of individual traffic commissioners and dictate the operation of delegated functions during the relevant period only. In addition, the Senior Traffic Commissioner may deploy traffic commissioners to address exceptional needs using powers under section 4B.

d) Separate arrangements are being planned by OTC management in respect of the support services provided to traffic commissioners.

Contingency Powers

Standard Operators

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

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

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

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

(c) 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.

2. An **effective and stable establishment** (Article 5 and Statutory Document No. 4) are the premises, which allow the operator to conduct its operations effectively and continuously to meet with the requirements of the licence, including i) any administration necessary for complying with those requirements and ii) appropriate technical equipment and facilities for an operating centre. The Senior Traffic Commissioner has interpreted this requirement to allow several sites, for instance an office and a separate Operating Centre, which go to meet this requirement. An operating centre must be specified on a licence and criminal proceedings may result from use of another place without authority.

3. Where a standard operator *temporarily* loses access to an Operating Centre as a result of restrictions imposed during the outbreak, traffic commissioners should give serious consideration to the grant of a Period of Grace. The Senior Traffic Commissioner has set a starting point of 4 months Period of Grace for qualifying operators. That starting point is intended to allow an extension to the maximum period of 6 months should circumstances require that. A traffic commissioner may wish to be satisfied as to where the vehicles will be parked in the alternative. It is recognised that during the period of the outbreak it may not be practicable to lodge an application for a new Operating Centre, which may only be required for temporary use.

4. Financial standing (Article 7 and Statutory Document No. 2) is an important means by which a transport business becomes established and is intended to support the maintenance of vehicles and trailers during operation. It is a condition of an operator's licence that changes in financial standing or professional competence are notified to the traffic commissioner.

5. A traffic commissioner will wish to be satisfied that:

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

6. A traffic commissioner would normally require tangible evidence to show that financial standing can be met in the future but, given the exceptional and short-term circumstances referred to above, the Senior Traffic Commissioner has directed that a traffic commissioner may rely on a previous satisfactory financial check which meets the new prescribed sum, within the last 12 months, as evidence to support the granting of a Period of Grace. A traffic commissioner may also accept internet or copy documents, with a check of original documents to be made at a later date. A traffic commissioner retains their discretion in respect of all standard operators. However, if the qualifying circumstances are met, then the Senior Traffic Commissioner has set a starting point of 4 months Period of Grace for qualifying operators. That starting point is intended to allow for an extension to the maximum period of 6 months should circumstances require that.

7. Professional competence (Article 4 and Statutory Document No. 3) requires at least one natural person with a genuine link to the operator and who is qualified with a Certificate of Professional Competence to act as Transport Manager. Traffic commissioners are aware of the duties summarised in paragraph 54 of Statutory Document No. 4 and may have to take a view on what is practicable in all the circumstances to meet the statutory duty. The conditions on the operator's licence require the operator to notify the traffic commissioner of matters which might impact for instance on the ability to show professional competence. Traffic commissioners would not normally expect to be notified of periods of short illness such as the general symptoms described in the current public health guidance. Where a person develops more acute symptoms, it may be necessary to grant a Period of Grace. Recognising the additional challenges of recruitment during the period of the outbreak, the Senior Traffic Commissioner has set a starting point of 4 months Period of Grace for qualifying operators. That starting point is intended to allow for an extension to the maximum period of 6 months should circumstances require that.

Process for Periods of Grace

8. A standard operator seeking a Period of Grace must proactively apply. That application in effect invites a traffic commissioner to make an adverse finding that the operator cannot demonstrate that it meets the mandatory and continuing requirement for a stable and effective establishment, financial standing or professional competence. Members of staff within the Office of Traffic Commissioner are expected to assist all standard operators with regard to applications for Period of Grace and to advise them of these Directions.

9. Operators must understand that if, upon expiry of a Period of Grace, the requirement has still not been demonstrated then the operator's licence will have to be revoked. For financial standing there is always the alternative of relying on additional sources of finance

which might be secured or a voluntary reduction in authority to a level which can be supported.

10. In order to grant a period of grace the traffic commissioner or staff acting under delegation must first establish that one or more of the requirements is no longer satisfied. The traffic commissioner may then allow a period of grace to rectify the situation to be granted from the date of determination that the mandatory requirement is no longer met. The Upper Tribunal decision in 2014/008 Duncan McKee suggests that traffic commissioners will wish to see *reasonable prospects for a good outcome*. Where the reasons for the adverse decision are connected to the outbreak, traffic commissioners are entitled to infer that the situation will be time-limited, and that the McKee test is therefore met.

11. Traffic commissioners should recognise the exceptional nature of the operating environment during this period of uncertainty. Traffic commissioners are expected to give serious consideration to the grant of a Period of Grace to those standard operators who require it. In exercising their discretion, a traffic commissioner will include those factors whilst ensuring road safety.

12. Existing restricted goods operators do not have facility to request a Period of Grace but, for instance, might offer an undertaking to the traffic commissioner for a financial check to be carried out in the future and on a specified date. Use might also be made of temporary exemptions as below.

Goods – Interim licences

13. As more fully set out in Statutory Document No. 9, interim licences give temporary authority to applicants for a goods vehicle operator's licence. To grant, a traffic commissioner requires prima facie that the requirements of professional competence, financial standing and good repute are met before granting interim authority for a standard licence. As a matter of consistency this has been interpreted to include fitness and the availability of finance for a restricted licence. A traffic commissioner may issue an interim licence/variation in the same terms as those applied for or on different terms.

14. Regulation (EC) 1071/2009 allows existing operators to submit annually their audited accounts to demonstrate that the continuing and mandatory requirement for financial standing. That allows for any variations in the coming year to be assessed as against those certified accounts as opposed to supplying additional financial evidence at the point of every application. During the period of the outbreak a traffic commissioner may, exceptionally, rely on an assessment of financial standing within the last 12 months as prima facie evidence to support grant of any interim goods licence. A traffic commissioner will wish to be satisfied that:

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

15. This recognises that the operator would still be under an obligation to notify the traffic commissioner if, the required level of finance was not subsequently available. A traffic commissioner may take account of any undertakings given when reaching a decision on interim authority. That may include the novel use of time limits as utilised by the Upper Tribunal in 2011/050 A Tucker & Son Ltd. That may allow a traffic commissioner to grant

interim authority on receipt of an undertaking that it will be surrendered after a specified period, with a specific date to be set by the traffic commissioner.

Goods - temporary exemptions

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

Temporary exemptions

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

- (a) enabling an emergency to be dealt with, or*
- (b) enabling some other special need to be met,*

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

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

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

17. A traffic commissioner retains a general discretion to deal with an emergency by granting temporary exemptions from any requirement to hold a standard goods licence.

18. If granted the temporary exemption will allow the person to use a specified vehicle or any vehicle of the specified class for the carriage of goods for hire or reward for the purposes of transport operations.

19. This can be granted to any person, including an existing restricted licence holder.

20. The temporary exemption must be communicated in writing and that notice should specify the period of the exemption with the last day to which the exemption applies. The exemption relieves the applicant of the requirement to hold an operator's licence for a) hire or reward, or b) for or in connection with any trade or business carried on by him.

21. Due to the exceptional circumstances required and the potential impact on the level playing field established under the Goods Vehicle (Licensing of Operators) Act 1995, a traffic commissioner must first be satisfied that an applicant is not unfit to engage in road transport. Additionally, a traffic commissioner may wish to be satisfied that:

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

- that the applicant has satisfactory facilities and arrangements for maintaining the vehicles used under the exemption in a fit and serviceable condition.

22. The traffic commissioner must be satisfied that the grant of the exemption is necessary for the purpose of enabling an emergency to be dealt with (in this case the current outbreak) or enabling some other special need to be met (arising from the outbreak).

23. The traffic commissioner must be satisfied that the applicant is engaged exclusively in national transport operations, which will/have only a minor impact on the transport market because of the nature of the goods carried or the short distance the goods are carried. In the exceptional circumstances of the outbreak the Senior Traffic Commissioner advises that traffic commissioners are entitled to rely on a declaration to that effect signed by the person or officer of the corporate entity (Statutory Document No. 5).

Bus Registrations

24. To operate a local service, operators must meet the requirements of the Transport Acts 1985 and 2000 and the Public Service Vehicles (Registration of Local Services) Regulations 1986 and the Public Service Vehicles (Registrations of Local Services) (Amendment) Regulations 2018 and hold either an unconditional PSV operator's licence or a section 22 permit.

25. Current legislation already allows operators to seek short notice dispensation from a traffic commissioner in certain emergencies. Traffic commissioners have a discretionary power (Regulation 7) to accept short notice applications for services and in particular:

- h) where the operator, due to circumstances he could not reasonably have foreseen, failed to make an application in sufficient time for the period of notice applicable;
- i) where an operator applies to register or vary a registration to meet an urgent or exceptional public passenger transport requirement.

26. In the event of widespread disruption operators who need to change their local bus service registrations at short notice will be encouraged to apply using those provisions which allow for circumstances that could not reasonably have been foreseen or to meet an urgent and exceptional public passenger transport requirement. Operators who need to change their local bus service registrations at short notice to allow for a temporary variation of services will be encouraged to apply using those provisions which allow for circumstances that could not reasonably have been foreseen or to meet an urgent and exceptional public passenger transport requirement. The temporary variation might be treated as akin to a holiday service, where the registration automatically reverts back to the original route timetable at the expiry of the given period.

27. Traffic commissioners must consider each case on its own merits but will be alive to the challenging operating environment. In addition, the commissioners will work with the OTC management to ensure that there is enough capacity to process an increase in applications.

28. The traffic commissioners should look to support operators in short notice bus registration applications where they look to register or vary a registration to meet an urgent or exceptional public passenger transport requirement.

29. The 2018 Regulations amended the 1986 Regulations, introducing a new requirement in England only, to notify the relevant local authorities 28 days in advance of any application to a traffic commissioner to introduce, vary or cancel a local bus service. The period of notice provided by Regulation 5 has reverted to 42 days. In Wales the notice period under Regulation 5 of the 1986 Regulations remains at 56 days' notice but there is no requirement to notify the relevant local authority. The schedule to the Regulations specifies the particulars that need to be provided, including the name of the operator and the times of individual services at principal points on the route. Regulation 3(3) provides that an application shall not be accepted by the traffic commissioner unless the applicant gives the traffic commissioner such information as the traffic commissioner may reasonably require in connection with the application. This allows a traffic commissioner discretion to accept electronic documents and application forms during the period of the outbreak, where ready access to originals and/or printing facilities may be limited.

Community Passenger Transport

30. In the circumstances where there is exceptional demand for instance to transfer patients or a loss of capability, traffic commissioners may see applications to provide services through community transport arrangements.

31. A PSV operator's licence is generally required for hire or reward but section 18 of the Transport Act 1985 allows for alternative operation under a Section 19 or Section 22 permit. The starting point is whether an exemption from Regulation (EC) 1071/2009 applies.

32. Domestic legislation sets out the eligibility criteria for a permit. The vehicle cannot be used with a view to profit, nor incidentally to an activity that is itself carried in with a view to profit. However, Regulation 1071/2009 applies to all passenger transport undertakings which use a vehicle adapted to carry nine or more passengers in return for payment. Permit operations therefore fall within this definition and are subject to the provisions except for undertakings which:

- a) are engaged in road passenger transport services exclusively for non-commercial purposes; or
- b) have a main occupation other than that of road passenger transport operator; or
- c) have a minor impact on the transport market because of the short distances involved.

33. Section 19 permits come in two types, standard permits for vehicles of 16 or fewer passenger seats and large bus permits for vehicles with 17 or more passenger seats. Standard permits can be issued by traffic commissioners, local authorities and designated bodies. Large permits can only be issued by traffic commissioners. Section 22 community bus permits allow organisations that operate in Great Britain without a view to profit to provide local bus services. They are available for vehicles with nine or more passenger seats and can only be issued by the traffic commissioner. Unlike operator licensing, bodies do not hold one permit (licence) that authorises them to operate x number of vehicles. Instead, permits are issued individually, and a body could hold as many permits that they wish to.

34. A Section 19 permit can be issued to bodies concerned with: - education; religion; social welfare; recreation (standard permit only); or other activities of benefit to the community. Only the following classes of passengers may be carried on the vehicle:

- A Members of the body holding the permit.
- B Persons whom the body exists to benefit, and persons assisting them.
- C Disabled persons or persons who are seriously ill, and persons assisting them.
- D Pupils or students of any school, college, university or other educational establishment and staff or other helpers accompanying them.
- E Persons living within a geographically defined local community, or group of such communities, whose public transport needs are not met other than by the virtue of services provided by the body holding the permit.
- F Any other class of persons specified in the permit.

35. An organisation must stipulate the class of passenger on application. Members of the general public cannot be carried on a vehicle being used under a Section 19 permit.

36. There are few criteria for the traffic commissioner to consider once they are satisfied that the operation is non-commercial (as per Regulation (EC) 1071/2009). These are;

- the organisation is an exempt Body in accordance with section 18 of the Transport Act 1985;
- the organisation must be established not for profit;
- the organisation must meet the activity criteria;
- for large bus permits the traffic commissioner must be satisfied of adequate arrangements to maintain vehicles in a fit and serviceable manner.

There are no further financial or reputational requirements.

37. On grant the traffic commissioner can impose conditions relating to the class of passengers that can be carried. These are indicated on the application form by the applicant and cover those indicated above. No further classes can be carried without prior approval. A traffic commissioner can vary or revoke a permit at any time, but no grounds are stated in the legislation. If the traffic commissioner did not issue the permit, they must first consult the issuing body.

38. Section 22 permits can only be granted by a traffic commissioner. Applicants must satisfy the not-for-profit requirement and be concerned with the social and welfare needs of one or more communities. They are primarily issued to allow an organisation to run a local bus service and, unlike Section 19, can carry the general public. A local bus service must be registered for a vehicle to be used under a Section 22 permit.

39. The legislation allows a traffic commissioner to issue a permit for up to a maximum of five years. On expiry of the permit the holder is required to apply for a new one. This allows the traffic commissioner to issue a permit for a much shorter period designed to cover the period of the outbreak only. On that basis and having identified the need to deal with an emergency or other special need arising from the outbreak, the traffic commissioner may be satisfied that the criteria are met on the basis of declaration to that effect signed by the person or officer of the corporate body (Statutory Document No. 5).

Attendance at hearings

40. Nothing in this guidance or elsewhere should be taken to override the advice of the Chief Medical Officers. General guidance for individuals on Covid-19 is available at: <https://www.gov.uk/guidance/coronavirus-covid-19-information-for-the-public>

41. Anyone displaying flu-like symptoms, or has recently returned from an affected area, is advised to follow published advice on [NHS 111](#) (this number works in Wales and Scotland) for advice and use the [111 Coronavirus Online Service](#) for medical help (you can also refer to [NHS Direct in Wales](#) and [NHS Inform in Scotland](#)). Current advice requires those demonstrating symptoms to self-isolate for a period of 7 days.

42. The Government is currently considering provisions to allow greater use of telephone or video hearings for certain civil proceedings and in the magistrates' courts. The proposals envisage a means by which individuals who may be forced to self-isolate are still able to appear in court, while ensuring courts can continue to operate even in the height of an epidemic so that justice is delivered. The Senior Traffic Commissioner will continue to monitor announcements from Her Majesty's Courts and Tribunal Service and proposals in emergency legislation. Traffic commissioners will note that HM Courts & Tribunals Service has updated its security policy to allow hand sanitiser to be brought into courts, with visitors asked to use it 'to prove it's not harmful'.

43. When considering whether to call a case to a hearing the traffic commissioner will be aware that due to the ongoing situation, DVSA examiners and other witnesses may now not be able to travel. For the duration of the outbreak traffic commissioners are asked to replace the listing priorities as set out in paragraph 83 of Statutory Document No. 9 with the following principles to identify priority cases:

- any serious concerns regarding the safety of the transport operation;
- application for interim authority or PSV application (where interim authority is not available);
- application by an Administrator to continue operation;
- cases of serious non-compliance.

44. Traffic commissioners may also be requested to give priority to box work (submissions) in respect of the following:

- urgent interim direction requests on existing licences;
- urgent requirement for interim licences on new applications;
- urgent requirement for major variations as a result of a need for increased vehicles or new operating centres;
- temporary changes to licence type (restricted to standard) or as above;
- short notice changes to local bus services;
- Section 19/22 permit applications.

45. In making decisions on the papers traffic commissioners must now consider the listing of the case by reference to the above priorities and make appropriate directions to allow a hearing to proceed, when required. Traffic commissioners should record whether the DVSA's and/or other evidence is largely accepted and/or admissions have been made in interview under caution and/or the operator's response. Where statutory time limits apply, such as in impounding cases, the interests of justice may require the traffic commissioner to disapply the timetable so that parties and witnesses can attend, in due course.

46. The integrity of the process remains paramount and the traffic commissioner will need to be satisfied that any person appearing before them is the individual called.

47. In civil proceedings, video hearings have been tested to only a limited degree and traffic commissioners do not enjoy access to the secure video technology available to the courts. Traffic commissioners can consider audio or video links in limited circumstances. This reflects the HMCTS approach to hear case management or other interlocutory hearings remotely. An example might be single issue hearings such as finance cases, but traffic commissioners should note the priorities set out above

48. Traffic commissioners will consider the priority of each case and decide on a case by case basis the practicality of hearing part or all of a case remotely. The core concern of road safety and the fairness of proceedings should inform any listing decision. Traffic commissioner should note the restrictions on DVSA IT and external skype calls are rarely possible. However, the facility might assist in those cases where DVSA examiners are required to give evidence. Parties may be required to confirm in advance that the examiner is required.

49. It follows that traffic commissioners must retain their ability to require records to be produced. The traffic commissioners will also consider the use of alternative disposal methods and the benefit of Remote Enforcement Office assessments in appropriate cases, whilst noting that DVSA will no doubt face similar pressures. This will require operators and other parties to comply with directions in advance of a hearing.

50. It is not in the interests of justice or public safety for parties to avoid responsibility by failing to comply with directions. Traffic commissioners are aware of the use of powers to ensure rapid action where protection of the public is required and of the legal protections to consider when exercising those powers. A traffic commissioner will consider and record reasons in each case.

51. Similar concerns may arise in respect of applications for adjournments. In considering a request, the purpose of the adjournment should be clear as the traffic commissioner will properly be concerned with the potential impact on road safety. The age of the case may assume less as the outbreak continues. Parties should not be permitted to use an adjournment as a device to postpone the impact of a decision. Traffic commissioners are well acquainted with the processes for checking medical evidence and/or travel documentation. That might be particularly relevant to listed countries. Traffic commissioners should be aware that there may not be any evidence of a self-assessment carried out using the NHS 111 website although parties may be required to indicate precisely what was advised.

General Discretion

52. Proportionality lies at the heart of the jurisdiction and traffic commissioners are well acquainted with the need to consider what is practicable for operators to deliver. As paragraph 24 of Statutory Document 10 advises: *the legal principle of proportionality requires a traffic commissioner when exercising a statutory function, to make decisions which are commensurate with the circumstances of each individual case and the purposes of the legislation.*

53. There are two clear principles to be drawn from the case law: i) there must be a fair balance between the right of the operator and the interests which the licensing regime seeks to protect, and ii) that a fair balance can only be struck by having regard to what the regime is seeking to protect or achieve, the way in which it seeks to do that and the extent to which the operator can put forward relevant matters. That does not prevent operators from notifying the Office of the Traffic Commissioner of relevant changes, for instance in maintenance arrangements. What is physically possible may change during the course of the outbreak but the Senior Traffic Commissioners directs that it must now form part of the decision making process and in particular with reference to Statutory Document No. 10, Annexes 3 and 4. Where regulatory action is deemed necessary, traffic commissioners have a further discretion as to the date when that direction might take effect.

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