

## COMMUNITY TRANSPORT (CT) PERMITS

### Update for Local Authorities

We have been asked by a number of local authorities to clarify some of the issues raised by our letter of 31<sup>st</sup> July 2017. These are addressed in the Q&A below.

The most important point to stress is that we expect that many CT operators will remain unaffected by this clarification. It is most likely to be an issue for larger CT groups who undertake some work which is similar to that of bus companies. CT organisations will be entirely unaffected if they:

- are not primarily a passenger transport provider (such as a youth or social care body like the Scouts or Age UK); or
- Operate exclusively non-commercially.

### Will the section 19 and section 22 permit system end?

No.

### What does operating “non-commercially” mean?

A wide range of services operated by CT groups which could be considered “non-commercial”. In our view this includes situations where:

- Any charge made to passengers is substantially less than the cost of providing the service and no other payment is made by any other person in exchange for the service. This could include CT services whose fares are heavily subsidised by fund raising activity undertaken by the CT group concerned.
- The service consists of an occasional (rather than regular) activity, organised on a voluntary basis (with an unpaid driver) for a specific group of people - even if the passengers share the costs. This could include day trips undertaken on an ad hoc basis.
- Where the use of a vehicle is for the purpose of providing transport for persons who have paid charges for services other than transport and the transport provided is merely incidental to the provision of those other services. This could include transport provided as part of a day centre or lunch club.
- Where there is no commercial market for that service – even if the payment made by passengers or another party might exceed the costs of providing the service. This could include:
  - where there were no bids received for a local authority contract from commercial operators<sup>1</sup>; and

<sup>1</sup> Such as taxi or PHV firms or operators holding a PSV operating licence

- Where a CT group is running a registered bus service and there are no alternative providers who hold a PSV O licence for journeys to and from similar destinations.

### **What happens if some of an operator's CT services are non-commercial and others are not?**

The legal position is that the same "undertaking" can't undertake both commercial and non-commercial work. So CT operators may wish to consider establishing a separate undertaking to carry out commercial work which then applies for a PSV operator's licence, whilst keeping their non-commercial work in the existing organisation. A Traffic Commissioner has recently approved the grant of a PSV licence to a CT operator on this basis.

### **Is there a grace period for operators to comply?**

DVSA have not yet taken any immediate enforcement action (such as prosecution or referral to a Traffic Commissioner) against any CT operator who currently runs commercial services under a permit but has demonstrated that they are taking urgent steps to adjust their operating model. DVSA's proportionate approach is determined by each operator's individual circumstances.

### **Should a local authority cancel any current contracts it holds with CT operators?**

The Department's letter of 31<sup>st</sup> July was sent to local authorities as permit issuing bodies, not because of their role in awarding contracts. We have not asked any local authority to cancel any contracts and do not expect that they should have to do so.

There may be opportunities for unsuccessful bidders to challenge a decision to award any local authority contract at the point at which the award decision is taken. The avenues for further challenge from other operators during the life of a contract are likely to be limited and to focus on whether an authority is acting reasonably in deciding whether or not to continue with the contracts concerned.

All CT groups that are operating on a not-for-profit basis have, since 1985, been able to apply for permits to carry passengers in a bus or minibus without first holding the Public Service Vehicle (PSV) operator's licence that would otherwise be required. This has been the legal position that, until recently, was set out in all guidance to local authorities and operators. Both local authorities and operators have therefore been awarding and bidding for contracts in good faith.

Whilst it is ultimately for authorities to take their own advice, we do not expect authorities to be at significant risk of successful legal challenge if they continue with their existing contracts whilst affected operators transition to a new operating model. A template letter which authorities may wish to send to affected operators is attached at Annex A. The letter includes four questions which we suggest are asked of each CT operator (including any in-house operators) who may be running a contracted service using a permit.

On receipt of a response from a CT operator authorities should be able to continue with the relevant contracts if they satisfy themselves that:

- the responses received about the commercial or non-commercial nature of the organisation's services are accurate and consistent with the advice in this note; and
- The operator concerned is taking appropriate action to adjust their operating arrangements. Authorities should bear in mind: that DVSA expect operators who need

To do so to take urgent steps to become compliant; and the experience and resources available to the CT group involved.

In our view this would be a proportionate response, which recognises the potential impacts of alternative approaches on the passengers who rely on these important services.

**What are the road safety reasons for some CT operators needing to change their operating model?**

Under the previous legal understanding, two minibus or bus operators, one of which was a non-profit-making CT group using a permit and the other a profit-making PSV licence holder, would have been treated quite differently. Even if both operators won the same local authority transport contracts, used similar vehicles and employed their drivers (rather than using volunteers) the vehicle operated by a CT group may have had a less stringent MOT test and the driver needed fewer road safety qualifications.

**Why did the Department issue a letter on 31<sup>st</sup> July instead of just consulting this autumn?**

The timing of the letter was influenced by potential legal action against the Department, and the enforcement activity taken by DVSA. Our judgment was that it was better to explain the situation actively to permit issuers than for rumours of the DVSA action to circulate around the sector without any clarification from central Government.

## **Annex A – Draft letter to CT groups under contract to the authority who may be using permits to operate services**

### **COMMUNITY TRANSPORT PERMITS AND COMMERCIAL CONTRACTS**

I am writing to you in relation to the contracts that you hold with [name of authority] for providing transport [and related] services.

As you may be aware, the Department for Transport issued a letter to all issuers of section 19 and section 22 permits on 31<sup>st</sup> July 2017. This clarified that under existing law (which has been in force since 2011 but previously interpreted incorrectly in guidance) community transport (CT) operators undertaking commercial work will need to hold a PSV operator's licence, and use drivers who have specific driving entitlements and qualifications.

On 9<sup>th</sup> November 2017 the Department issued a further note to all permit issuers which addressed some of the most significant questions that had been raised on their earlier letter. This note provided further guidance on the handling of contracts with CT operators and the circumstances in which an operator's service might not be considered to be commercial (attached at Appendix 1).

*[If steps have already started to cancel contracts - Following receipt of DfT's latest note we are reconsidering our initial expectation that contracts could need to be cancelled].*

I should be grateful if you could provide answers to the four questions below for each of the contracts that you hold with us by *[insert date – suggest a minimum of 28 days]*. This will allow us to determine whether or not you are likely to need to adjust your operating model and, if so, satisfy ourselves that you are taking appropriate action.

1. Does the organisation which holds the contract use section 19 or 22 permits to provide the service?
2. If you answered “yes” to question 1, do you think all of those services are operated on a non-commercial basis (as defined in the appendix)?
3. If you answered “yes” to question 2 please explain why you think that is the case?
4. If you answered “no” to question 2, it is likely that you will need to make some changes to your operating model. Please explain what steps you have already taken, or plan to take, to adjust.

If you are unsure of your position, including what steps you might want to take to adjust your operating model in the most effective way, you may wish to seek independent advice. The Community Transport Association's Advice Service may be able to help and are available on: 0345 130 6195 between 10:00 - 16:00 Monday to Friday.

We recognise the vital important role that you, and other, CT operators in *[name of authority area]* and are committed, whilst ensuring fair competition for tenders, to working with you to minimise the impacts of any transition on your passengers, existing contracts and wider services.

#### **Appendix – Services that could be considered “non-commercial”**

A wide range of services operated by CT groups which could be considered “non-commercial”. The Department for Transport considers that this includes situations where:

- Any charge made to passengers is substantially less than the cost of providing the service and no other payment is made by any other person in exchange for the service. This could include CT services whose fares are heavily subsidised by fund raising activity undertaken by the CT group concerned.

- The service consists of an occasional (rather than regular) activity, organised on a voluntary basis (with an unpaid driver) for a specific group of people - even if the passengers share the costs. This could include day trips undertaken on an ad hoc basis.
- Where the use of a vehicle is for the purpose of providing transport for persons who have paid charges for services other than transport and the transport provided is merely incidental to the provision of those other services. This could include transport provided as part of a day centre or lunch club.
- Where there is no commercial market for that service – even if the payment made by passengers or another party might exceed the costs of providing the service. This could include:
  - where there were no bids received for a local authority contract from commercial operators<sup>2</sup>; and
  - Where a CT group is running a registered bus service and there are no alternative providers who hold a PSV O licence for journeys to and from similar destinations.

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<sup>2</sup> Such as taxi or PHV firms or operators holding a PSV operating licence