

DERBYSHIRE COUNTY COUNCIL

CABINET

16 November 2017

Report of the Strategic Director - Economy, Transport and Environment

**IMPACT OF NEW DEPARTMENT FOR TRANSPORT GUIDANCE ON THE
REGULATION OF SECTION 19 PERMITS ON THE COUNTY COUNCIL
AND COMMUNITY TRANSPORT ORGANISATIONS (HIGHWAYS,
TRANSPORT AND INFRASTRUCTURE)**

(1) **Purpose of Report** To update Cabinet on the recent guidance from the Department for Transport (DfT) on the interpretation of the Section 19 permit system relating to the operation of contracted transport services and the effect this will have on the various permit holders across Derbyshire, including Community Transport organisations, and to agree a proposed course of action in response to these changes.

(2) **Information and Analysis**

Background

Community Transport Organisations (CTOs) are a significant provider of specialised transport services to the County Council. They currently operate about half of the Adult Care transport services and around 5% of education transport. They also operate the 'Derbyshire Connect' shopping bus service across the County and provide some of the Derbyshire Connect access to health services.

Under the current arrangement, the majority of these services are provided under a permit in accordance with Section 19 of the Transport Act 1985 ("a Section 19 permit"). This exempts organisations from the need to hold an Operator's Licence (known as "O licence") which is the licence used by commercial bus companies.

The same Section 19 permit is also used by schools, care homes and centres, church groups, scout troops and other groups where transport is ancillary to their main activity. In all these cases, the County Council is a designated body to issue the permits and this is administered by the Fleet Services team in the Council's Economy, Transport and Environment (ETE) Department.

'O' licensing is widely viewed as a higher standard and more stringent regulatory regime than Section 19 permits. It requires each operator to have

designated transport managers with appropriate qualifications and all the drivers to have a Passenger Carrying Vehicle (PCV) licence and a Certificate of Professional Competence (CPC). Inspection schedules would be dictated by the Traffic Commissioner and operators would need to be tachograph compliant for Driver's Hours Regulations purposes. Companies must also be able to show that they are of good repute and financial standing.

Commercial operators have consistently argued that the same regulations should apply to all transport providers so that there can be a level playing field when competing for local authority contracts. However, the interpretation of the regulations has been unclear and open to interpretation for some time. For their part the CTOs nationally have argued that the charitable nature of their activities justifies a different regime to that of commercial bus operators.

Recent Developments

The Driver and Vehicle Standards Agency (DVSA) is responsible for vehicle and driver licensing and enforcement. Following long standing complaints by commercial transport operators, it has been investigating the operational status and activities of one of Derbyshire's CTOs. This is an on-going investigation, however, the DVSA has reported its initial findings and has made clear its expectation that the organisation should change its operating model.

The DVSA and DfT have come to the view that the charitable status of the CTOs is not sufficient, by itself, to justify a derogation of the O licence requirement that applies to other operators. A letter dated 31 July 2017, from the DfT, to all Section 19 permit issuing authorities indicated that if CTO's wish to compete for local authority contract work they will need to do so under an O licence and meet all the standards associated with this. If they do not wish to do this they remain free to pursue their non-contract related charitable objectives using Section 19 permits.

This revised guidance remains subject to a proposed consultation later in 2017, however, from the informal discussions officers have had with both DfT and DVSA officials, it seems unlikely that the position taken in the letter of 31 July 2017 will alter significantly. The consultation process will, instead, focus on the detailed aspects of implementation rather than the principle of applying O licensing to this type of operation. The DVSA has informally indicated that the Council needs to act with some urgency to bring its transport contracts into line with the revised guidance. Derbyshire is likely to be under particular scrutiny given the involvement of a local CTO and the legal challenge on State Aid dating back to 2012.

Implications

The change in guidance from the DfT will have far reaching implications for the Community Transport sector across Derbyshire and the County Council. Whilst some of the CTO's within Derbyshire already hold an O licence to operate a limited number of services such as the Derbyshire Connect

shopping bus, others do not currently have such licences in place. The impact on CTOs in Derbyshire is likely to be particularly significant as they are generally mature organisations and the sector is a significant provider of transport services to the County Council. The Authority will need to give further consideration to its future requirements for passenger transport services and the need to ensure the continuation of a healthy market for the provision of this type of service.

To become fully O licence compliant, and therefore able to continue to operate Council contract services, will require a considerable effort from the Community Transport operators. This will include:

- Seeking agreement within their Boards of Trustees on the future direction of their organisation.
- Training drivers and management to get the required licences, medicals and qualifications.
- Ensuring compliance with Traffic Commissioner's inspection schedules.
- Finding additional financial resources to fund these changes and to demonstrate good financial standing to the Traffic Commissioner.
- Seeking professional advice on setting up separate trading and charitable functions.

There are also significant changes which the Council needs to make to bring its contracts into line with the new guidance on the regulations. Whilst the DfT and DVSA understand that this is not something that can be achieved immediately, there is pressure to address the issues as a matter of urgency. Failure to do so may leave the Council exposed to legal challenge from commercial and/or trade bodies with potentially serious financial implications. The threat of legal action has already been formally indicated.

Derbyshire County Council officers have discussed the issue with a number of other local authorities which are in a similar situation. They too have been advised by the DVSA and DfT that they must take urgent action to ensure their contracts are in line with the new guidance. Some have already advised the CTOs in their areas that the services that they run on their behalf will need to move from Section 19 operation to O licence or other appropriate licence within a specified time frame.

In the event that the CTOs are unable to demonstrate compliance within a reasonable timescale, it may be necessary to re-tender contracts currently provided using Section 19 permits. This has implications for the services if no other operator is available and is likely to result in increased costs if the CTOs seek to recover their set up costs or if contracts have to be awarded at a significantly higher cost to a commercial operator. Re-tendering a large number of existing contracts at the same time would also be a major administrative burden.

Proposed Action

To ensure continuity of service, the following programme is proposed:

- 1) With effect from **1 December 2017**, all new contracts for Adult Care, Special Education Needs, and mainstream school transport services will no longer be open to operators using a Section 19 permit. Operators will require an O licence or other appropriate licence, such as a taxi licence. This will require a notifiable change to the requirements for all operators on both the Home to School Dynamic Purchasing System (DPS) and the Taxis and Small Vehicle DPS.
- 2) To identify services being operated using a Section 19 permit, and with effect from **1 April 2018**, to consider termination of these contracts and re-tendering them on an O licence or other appropriate licence basis.

Officers met representatives from the Derbyshire CTOs on 26 September 2017 to discuss the issues raised by the DfT letter and the outline programme. Reactions were mixed, although there were general concerns about the cost of the changes required, the timescales proposed and the actions and changes necessary for CTOs to move from charitable organisations to something closer to a conventional bus company. Some organisations were of the view that the Council should await the outcome of the consultation before taking action. Others, however, understood the Council's concern and wanted a clear programme to enable them to plan ahead. At the meeting officers offered to provide advice to the CTOs in managing the transition and individual meetings have taken place with some organisations. Officers are also liaising with neighbouring authorities to help ensure a consistent approach.

(3) **Financial Considerations** The Council currently has 109 contracts with the CTOs worth approximately £1.6m annually. It is anticipated that moving from Section 19 permit operation to an O licence arrangement will increase the costs of providing the service for the CTOs. This is likely to result in the Council having to pay a higher price for the contract services it currently provides. The cost will impact adversely on Adult Care budgets as the CTOs operate approximately 50% of this Department's services and, to a lesser extent, it will impact on Childrens' Services budgets.

(4) **Legal Considerations** Section 19 permits are issued under the Transport Act 1985. The DfT letter, dated 31 July 2017, clarified the DfT's interpretation of this part of the legislation. Section 19 permits had been used by CTOs across the country to provide contract services for local authorities for many years. The DfT letter acknowledged that there has *"historically been guidance that may have provided an inaccurate indication of the conditions and criteria for operating services under Section 19 and 22 permits and that, as a result, there may be some organisations that are relying on such permits inappropriately"*. However, the DfT makes it clear that *"Such operators will now need to take action to bring their services into compliance with legal requirements."*

Local authorities which issue tenders to operate services also need to take action to ensure these are compliant with the guidance provided in the letter. Failure to do so may leave the Council exposed to legal challenge with potential serious financial implications

(5) **Social Value Considerations** Community Transport operators are local charities that employ drivers and other staff living in Derbyshire. They also rely on other businesses in Derbyshire to help run their operations (e.g. vehicle maintenance). In addition some of the funding they receive from the contracts they operate helps to support their other activities which provide assistance to a variety of social and community groups across Derbyshire. The charities also provide opportunities for volunteers to gain valuable work experience in a number of different areas which further benefits the Derbyshire community.

Other Considerations

In preparing this report the relevance of the following factors has been considered: prevention of crime and disorder, equality and diversity, human resources, environmental, health, property and transport considerations.

(6) **Key Decision** No.

(7) **Call-In** Is it required that call-in be waived in respect of the decisions proposed in the report? No.

(8) **Background Papers** Held within the Economy, Transport and Environment Department. Officer contact details – Chris Hegarty, extension 36721.

(9) **OFFICER'S RECOMMENDATIONS** That Cabinet:

- 9.1 Notes the change in the interpretation of the Section 19 permit system relating to the operation of contracted transport services in the Department for Transport letter dated 31 July 2017, and the effect this will have on the various permit holders across Derbyshire including Community Transport Organisations.
- 9.2 Agrees to the proposed programme outlined in this report to move from the current Section 19 contractual arrangements.
- 9.3 Authorises the Strategic Director – Economy, Transport and Environment to respond to the forthcoming Department for Transport consultation on proposed changes in Department for Transport guidance on the use of Section 19 permits.

Mike Ashworth
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