



Hough, Barry. (2003). Licensed street trading and pedlars. *Mountbatten Journal of Legal Studies*, December 2003, 7 (1-2), pp. 5-32

Downloaded from: <http://ssudl.solent.ac.uk/982/>

Usage Guidelines

Please refer to usage guidelines at <http://ssudl.solent.ac.uk/policies.html> or alternatively contact ir.admin@solent.ac.uk.

Licensed Street Trading and Pedlars

Barry Hough

Introduction

There are many who will lament the passing of the ancient office of Lord Chancellor. It will shortly fall victim to the scythe of modernisation, which bears its victims, be they high or low, into the ever deepening shades of history. Keats' "hungry generation" usurps its predecessors, and a new order supplants the old. The highest state office has succumbed, which bodes ominously for some of the more vulnerable and constitutionally inferior. Amongst these are the pedlars. Some might express surprise that their occupation has not already become outmoded and reformed. Yet, somewhat at the margins of the popular awareness, these traders continue to ply their trade in the face of almost implacable hostility from town centre managers and local authorities. They have survived because, according to statute,¹ the status of pedlar normally places the trader outside the scope of the onerous and costly licensing schemes operated by local authorities.

Firstly, in contrast to street traders, properly so-called, pedlars can trade in almost any location,² because it is the essence of their business that they move from place to place. Street traders, who trade from a particular pitch, are strictly regulated as to when and where they can trade; for example, they are usually only individually licensed in respect of a particular pitch; and, by designating certain streets as "prohibited" streets, local authorities³ can control where street trading takes place. If permitted to trade, a street trader's licence or consent will often contain conditions as to the hours of trading and type of goods sold. These measures are intended in part to prevent unfair competition with rival shop-keepers.

¹ See further below.

² Pedlars are sometimes lawfully evicted under private law powers from shopping malls. Local authorities occasionally stop up any former highway that existed over the land occupied by the mall. Sometimes commercial investors require this.

³ These are local authorities that have resolved to adopt the licensing scheme under the Local Government (Miscellaneous Provisions) Act 1982. The scope of this Act is discussed further below.

A consent may not be issued in respect of goods that are already available to the public in a nearby shop. Moreover, street traders are required to pay a substantial fee for their annual trading licences/consents. In contrast, pedlars remain beyond local authority control.⁴ They trade with few restrictions both as to their goods⁵ and trading hours, and they can even trade lawfully in streets in which street trading is prohibited by the local authority.⁶ Above all, pedlars are not required to pay substantial fees for their pedlar's certificate.⁷

The present article examines the current legal regime for the control of the activities of pedlars. It not only considers arguments for the abolition of the status of pedlar but also evaluates the proposed reforms as well as suggesting possible alternatives.

Pedlars and Regulation

Background

The control of street trading has traditionally been considered to be a matter of local public management; there is no standard national scheme. This has meant that a pedlar's entitlement to trade in one district may be different from that in a neighbouring district.

However, this is not to say that schemes designed to achieve some harmonisation have not been attempted. Under the Local Government (Miscellaneous Provisions) Act 1982 Parliament provided an adoptive scheme which local authorities in England and Wales (outside of London) have a discretionary power to adopt by resolution.⁸ This scheme is

⁴ The pedlar's certificate, under which, by virtue of the Pedlars Act 1871, they must trade is granted by the police.

⁵ See n.28 below.

⁶ I.e., in a street designated as a "prohibited street" under the Local Government (Miscellaneous Provisions) Act 1982, s.3, Sched. 4.

⁷ £12.25 per annum: Pedlars Certificates (Variation of Fee) Order 1985, SI 1985/2027. This contrasts with the cost of a licence or consent that street traders are required to obtain, which varies from district to district, see n.77 below.

⁸ By virtue of s.3 of the 1982 Act local authorities may adopt the scheme contained in schedule 4 of that Act. In Scotland a similar scheme can be adopted by resolution under the Civic Government (Scotland) Act 1982, ss. 9. and 39.

sometimes known as the street trading code. Its purpose is essentially to provide local authorities in England and Wales with common powers to control street trading without each being required to incur the expense of promoting private legislation for their particular districts.⁹

This scheme exempts certain types of trading from local authority control which, but for the exemption, would otherwise fall within the definition of “street trading” and, so, constitute an activity requiring a licence or consent. One manner of exempt trading is *“trading by a person acting as a pedlar under the authority of a pedlar’s certificate under the Pedlars Act 1871”*.¹⁰

The street trading code suffers from a number of defects. The first of these is its notorious complexity, since its “zoning” provisions contemplate “licence”, “consent” and “prohibited streets”, which must each be separately regulated. A study of the detailed rules applicable to each kind of street is beyond the scope of this paper, suffice it to say that distinguishing three distinct types of street and having two separate “licences” (a street trading ‘licence’ permits trading in a ‘licence street’ and a street trading ‘consent’, in a consent street¹¹) seems to be unduly complex.

A further perceived problem is that there is a wide range of exemptions according to which certain types of trading are not deemed to be “street trading”. These, thus, fall entirely outside of the controls otherwise provided by the code. This causes the related difficulty that any attempt to designate a street as a “prohibited” street (i.e., one in which street trading is prohibited) can be fruitless as many exempt traders (such as pedlars) can continue to operate in that street.

A further significant weakness is that the 1982 Act does not confer powers of seizure and forfeiture of goods. As we shall see below, these powers, now available in the London Boroughs and Westminster, have had a significant effect in curtailing illegal street trading,

⁹ HC Debs 6th series vol, 13, cols 903-972. Previously trading was either regulated under local by-laws or under a local Act of Parliament.

¹⁰ Para 1 (2) (a) of Schedule 4 of the 1982 Act.

¹¹ Para 2 of Schedule 4 of the 1982 Act.

and their omission from the 1982 Act remains a serious concern for the local authorities which operate under that Act.

Trading in the London Boroughs, (with the exceptions of the City of London and Westminster, which have their own local legislation) is separately regulated. The London Boroughs have each chosen to adopt the scheme under the London (Local Authorities) Act 1990 which was later extensively revised by the London Local Authorities Act 1994. One of the key amendments in 1994 was the strengthening of the power of seizure which the earlier Act had introduced. The police or local authority enforcement officers in London now have a power to seize any “receptacle”, (in effect, any stall or stand) and any goods exposed for sale, as evidence of the illegal street trading; and they may apply for a court order that the items seized be forfeited. The power has been a useful one partly because it stops the illegal trading from the moment of its detection. This is an important weapon for local authorities which have found it difficult to prosecute pedlars, who have frequently refused to give their true name and address.

However, the exemption for pedlars (which is in identical terms to that in the street trading code) was not affected by the 1994 reforms. This position is now intended to be reformed. The London Local Authorities Bill 2003, clause 24 and Schedule 5,¹² will, if enacted, significantly curtail the scope of the pedlar’s exemption and remove much of its commercial value. One of its major effects of the Bill will be to confine the activities of pedlars to house-to-house sales throughout the London Boroughs.

Under the provisions of the City of London (Various Powers) Act 1987¹³ which applies in the City of London, there is no exemption for pedlars as such. However, trading by “itinerant traders” is not required to be licensed. An itinerant trader for the purposes of the 1987 Act is a trader “who is for the time being carrying on business with persons residing or employed in premises in, abutting on, a street”. This saving is intended to benefit rounds persons and

¹² The reform is achieved by amending the London Local Authorities Act 1990, s.21 (2) (a), which creates the pedlar’s exemption by inserting the additional words “, if the trading is carried out only by means of visits from house to house” at the end of paragraph (a).

¹³ Street trading is normally only permitted in Petticoat Lane Market, which is further regulated by local by-laws. However, following boundary changes special provision was made for a small number of traders whose pitches had formerly been outside the City of London.

house-to-house sales.¹⁴ Subject to a caveat concerning the use of a stall or stand, an itinerant trader need not obtain a licence in “respect of any street trading conducted by him in the course of that business...”. Pedlars who wish to operate in a commercial (as opposed to a residential area) must obtain a street trading licence, which is only available in respect of the Petticoat Lane market.

Trading in the City of Westminster is controlled under the provisions of the City of Westminster Act 1999, which resulted from a private Bill successfully promoted by the City of Westminster despite Home Office opposition. Under the terms of this legislation, and in common with the City of London scheme, the pedlars’ activities are ostensibly confined to house-to-house sales, as opposed to trading on foot in town centres. The 1999 Act, s.3, para (e) stipulates that street trading is not deemed to take place if “trading (is) by a person acting as a pedlar under the authority of a pedlar’s certificate under the Pedlars Act 1871, *if the trading is carried out only by means of visits from house to house*”. (Emphasis supplied).

Prior to the enactment of the 1999 Act there was evidence that the pedlars’ exception was being abused in the City of Westminster. The area had been flooded with excessive numbers of traders. Although many of these purported to act as pedlars, they actually sold fast food from fixed pitches. In a few cases it seems that traders lacked even the pedlar’s certificate. Moreover, many declined to register under the Food Safety Act 1990. The nature and extent of this illegal trading persuaded the authorities to adopt the severe measures enshrined in the City of Westminster Act 1999. These included more extensive powers of seizure and forfeiture of goods, including the power to seize stock that was not actually exposed for sale (for example stock that was merely placed in a bag awaiting exposure for sale).¹⁵ The scheme of the 1999 Act combined with more effective enforcement,¹⁶ proved to be highly successful in combating illegal street trading which, for

¹⁴ The exemption is narrowly construed. In *Borough of Islington v. Panico* (1973) 72 LGR 51 the same statutory words in s. 30(c) of the London CC (General Powers) Act 1947 were held not to exempt an ice cream salesman trading from a stationary van in a street notwithstanding that ice cream was sold to a number of residents of that street. The exemption was held to be available only to a trader who had recognised customers in that street with whom he was already carrying on business as a trader.

¹⁵ City of Westminster Act 1999, s.27 (5). On 10th September 2003, the House of Commons Opposed Bill Committee rejected a petition by pedlars against the proposed restrictions on street trading and, therefore, declined to amend the Bill.

¹⁶ It has been reported that civil injunctions have been much more effective than criminal prosecutions in restraining illegal traders.:Audit Commission Best Value Audit of Environmental Health & Trading Standards, February 2003, para 56.

example, has been “eradicated” from Oxford Street.¹⁷ This success has prompted Newcastle-upon-Tyne to promote private legislation, the City of Newcastle-upon-Tyne Act 2000,¹⁸ to adopt similar means. The 2000 Act also confines lawful peddling to house-to-house sales and enacts similar powers of forfeiture and seizure to those available in Westminster. This strategy is replicated in the London Local Authorities Bill 2003.¹⁹

In conclusion, in London, following the enactment and coming into force²⁰ of the London Local Authorities Bill 2003 the activities of pedlars will be restricted to house to house sales in residential areas.²¹ Moreover those trading illegally will be subject to payment of a fine by way of a fixed penalty notice.²²

However, the pedlar’s exemption in the street trading code is obviously unaffected by the proposed changes in the London Boroughs. This, as we shall see below, does permit pedlars, under certain conditions, to trade in commercial areas without a street trading licence.

But this does not conclude the survey of the applicable regulations controlling street trading. Some districts are, for example, still controlled under local enactments. This is so because the street trading code was not a mandatory part of the 1982 Act and local authorities in a few districts have not adopted the code. One possible reason for this may be that the local regime is more strict than the code. For example, in Chester, where street trading is regulated

¹⁷ For example, in 1998 there were 306 seizures of counterfeit goods, but none in 2000, 2001 and 2002: Audit Commission Best Value Audit of Environmental Health & Trading Standards, February 2003, para 56.

¹⁸ See also the Street Trading Act (Northern Ireland) 2001.

¹⁹ It has also been adopted in Northern Ireland under the Street Trading Act (Northern Ireland) 2001 where s. 2 (1)(e) also restricts the activities of pedlars to house to house sales.

²⁰ The provisions of the Act relating to street trading will come into force two months after it is enacted.

²¹ The Bill proposes a number of other important changes, including the power to issue a fixed penalty notice in respect of unlicensed street trading: s.19 and Schedule 3. It will also bring powers of seizure and forfeiture into line with those in the City of Westminster Act 1999 by permitting seizure of goods, including a stall, for other purposes than the gathering of evidence of an offence with the possibility of forfeiture upon conviction: clause 24 and para 5 (d) of Schedule 5 of the Bill.

²² London Local Authorities Bill 2003, clauses 19 & 20 and Schedule 3. The power will extend to the London Boroughs and to the City of Westminster.

under the Cheshire County Council Act 1980, pedlars are deemed to be street traders notwithstanding the possession of a pedlars certificate.²³

Although there have been important steps towards harmonisation, problems of divergence remain and these seem difficult to justify. These differences, which can appear to be arbitrary, serve to re-inforce the point that the lack of standardisation between the schemes may cause problems for pedlars seeking to trade in different districts who find that an activity which can lawfully be pursued in one district exposes them to the likelihood of prosecution in another. It could be asked whether the point has now been reached when Parliament should reform these divergent regimes and replace them with a uniform national code.

The requirements of the Pedlars Act 1871

All but one of the statutory exemptions for pedlars depends upon on the trader possessing, at the time of trading, a pedlar's certificate issued under the Pedlar's Act 1871. Trading without a certificate means that an offence of unlawful street trading is committed.²⁴ The position is uniquely different under the City of London (Various Powers) Act 1987. This exemption, it will be recalled, is designed for 'itinerant traders' which is a wider class of traders than mere pedlars. An itinerant trader is not required to have a pedlar's certificate in order to gain exemption under the 1987 Act. However, selling from house to house can constitute peddling for the purposes of the Pedlars Act 1871, and doing so without a certificate is an offence contrary to that Act.²⁵

Thus, with only one exception, each of the exemptions is conditional upon the intending pedlar having obtained a pedlar's certificate under the Pedlars Act 1871. We shall now consider the requirements of the 1871 Act and its relationship with the more modern statutes. In particular, we shall discover that whether the pedlar acts lawfully under the modern statutory licensing depends not only upon fulfilling the requirements of the Pedlars Act 1871, but also *acting as a pedlar* at the time of trading.

²³ S.30.

²⁴ Eg, under s.26 (6) of the 1982 Act and s.38 of the London Local Authorities Act 1990. Depending on the facts, the trader may alternatively be prosecuted under the s. 137 Highways Act 1980.

²⁵ *Sample v Hulme* [1956] 1 WLR 1319.

The need for a certificate

Section 4 of the 1871 Act states that no person shall act as a pedlar without the necessary certificate.²⁶ Breach of this requirement renders the offender liable to a penalty not exceeding level 1 on the standard scale.

It is not difficult to obtain a pedlar's certificate. By virtue of s.5 of the 1871 Act, the chief officer of police has a *duty* to grant the certificate provided that the applicant has resided in the district for at least a month and that the officer is satisfied that the applicant is over 17 years of age, of good character and "in good faith intends to carry on the trade of a pedlar." In some districts, criminal records are investigated before a certificate is issued, although this may not be a universal practice.

The duty to grant a certificate subject to the statutory criteria having been satisfied contrasts with the discretionary powers of the licensing authorities under the more modern street trading systems.

The holder of a certificate is not entitled to breach any by-law.

The benefits of a pedlar's certificate

The pedlar in possession of a certificate acquires the authority to trade anywhere in the United Kingdom.²⁷ This means that pedlars can acquire a certificate in one district and trade free of further cost in another. For example, it has been possible for a trader to acquire a certificate in Winchester and to trade as a pedlar in Lambeth. This is another characteristic of the licensing scheme that makes it difficult for the district in which trading takes place to control it.

In contrast, a street trading licence or consent will only be valid in the district in which it was granted. Street traders will therefore be required to pay substantial fees in each district

²⁶ Pedlar's Act 1871, s.4.

²⁷ Pedlars Act 1881, s.2. The United Kingdom means Great Britain and Northern Ireland.

in which they propose to trade.²⁸ Their licences/consents can also include conditions as to the kinds of goods they can sell, but there are no similar powers in relation to a pedlar's certificate, which means that, subject to certain exceptions,²⁹ a pedlar can trade in any goods. This gives peddling a significant advantage over street trading.

Finally, the holder of a pedlar's certificate may have a defence to a charge of obstructing the highway contrary to s.137 of the Highways Act 1980, since a certificate confers lawful authority to trade on the highway.³⁰

Pedlars who do not require a pedlar's certificate.

Traders such as commercial travellers seeking orders for goods, those who trade in lawful markets or fairs, and those dealing in vegetables, fish, fruit or victuals³¹ are not required to obtain a pedlar's certificate.³² This is in part to enable traders such as bakers and others to trade their loaves or other goods in the street without falling foul of the Pedlars Act 1871. It should not be forgotten, however, that food sellers are required to comply with the licensing and registration requirements of the Food Safety Act 1990.

²⁸ The annual fees are significant (see n.77 below) unless a pedlar obtains a temporary street trading consent, in which case a lesser fee will usually be payable. However, local authorities operating the street trading code have no duty to grant temporary consents. There is a specific provision governing temporary licences under the London Local Authorities Act 1990, s.31, but it merely confers a discretionary power and not a duty to grant such a licence. The City of London (Various Powers) Act 1987, s. 8 (9) stipulates that licence shall be valid until 31st December next following the grant or renewal. Accordingly, there is no power to grant a temporary licence to trade in Petticoat Lane.

²⁹ A pedlar is also not entitled to trade in certain goods including, gunpowder: Explosives Act 1875 ss 3, 39; and stamps: Stamp Duties Management Act 1891, (but excluding postage stamps: Finance Act 1966, s.48; Post Office Act 1969, s.141, Sch 11, pt II; Interpretation Act 1978, s.16 (1) sch.2. There is also some authority that pedlars should only trade in reasonably small goods: see e.g., *Chichester District Council v Wood* [1997] C O D 240.

³⁰ Because a pedlar acting as such is primarily a peripatetic trader, it is unlikely in practice that the authorities would seek to charge a pedlar with obstruction of the highway unless, perhaps, the pedlar traded for an unduly lengthy period from one spot.

³¹ Victuals includes any ingredient in food, such as, for example, yeast: *R v Hodgkinson* (1829) 10 B & C 74.

³² Pedlar's Act 1871, s.23.

Who may be a pedlar?

The Pedlars Act 1871, s.3 defines a pedlar as follows: “any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse, or other beast of bearing or drawing burden, travels and trades on foot and goes from town to town or to other men’s houses, carrying or selling or exposing for sale any goods, wares, merchandise immediately to be delivered, or selling or offering his skill in handicraft.”

The definition has given rise to particular complexities of interpretation partly because the word “pedlar” is included within it. This means that Parliament has not provided a complete definition of who is a pedlar, leaving much to be determined by the courts.

The relationship between the Pedlars Act 1871 and the modern licensing schemes

The drafting of the exemptions under the modern street trading schemes makes clear that it is insufficient merely to possess a pedlar’s certificate: the saving only exempts a trader who ‘acts as a pedlar’ at the material time. But this only poses the question: what does it mean to ‘act as a pedlar’? How is a pedlar functionally different from a street trader? This has been a difficult problem for the courts to resolve.

Acting as a pedlar

It has been decided that a trader may act as a pedlar even if he or she is not travelling from town to town on foot. Accordingly, where salesmen went by car to a town and then proceeded to sell from house-to-house, it was held they were acting as pedlars because, in passing along each street, they were “travelling”. Since the house-to-house sales were undertaken without a pedlar’s certificate, they had committed an offence contrary to the Pedlars Act 1871, s.4.³³

A trader, who barter goods for other goods, such as a rag and bone man and who otherwise fulfils the definition in s.3 of the 1871 Act, acts as a pedlar and so must acquire a certificate under the 1871 Act.³⁴

³³ *Sample v Hulme* [1956] 1 WLR 1319.

³⁴ *Druce v Gabb* (1858) 6 WR 497.

It is not necessary that the trader derive an entire living, or even a substantial part of it, from peddling provided that they trade as a pedlar.³⁵ In a case that perhaps reflected the social standing of the persons accused, it was held that the making and selling of goods house-to-house for charitable purposes was not peddling. This was so because, under the 1871 Act a pedlar, in order to be entitled to a certificate must “in good faith intend to carry on the trade of a pedlar”.³⁶

In practice, the modern controversy as to whether a trader is acting as a pedlar or a street trader generally occurs in the following circumstances:

- where the trader maintains a fixed position.
- where the trader calls out for sales or “cry his wares”, so that customers come to them.
- where goods are sold from a stand, trolley, cart or barrow.

Maintaining a fixed position

It is necessary to distinguish three types of case. The first is where the trader intends to conduct his or her business from a fixed position in a street, in effect taking up a “pitch”. The second is where the trader, who is otherwise progressing along a street, pauses to make a sale, and the third is where the trader pauses for a purpose not directly connected with trading, perhaps to rest for a moment, to put down any goods which are carried, to tie a shoelace, etc.

Occupying a pitch

Traders who use a vehicle to travel from town to town and who then sell on foot from a fixed position, or “pitch”, will not be acting as pedlars even if they are in possession of a pedlar’s certificate at the relevant time. This was decided by the Divisional Court in *Watson v Oldrey* and *Watson v Malloy*.³⁷ These decisions significantly qualify the statutory

³⁵ *Murphy v Duke* [1985] 2 All ER 274.

³⁶ *Gregg v Smith* (1873) LR 8 QB 302. But note, in England and Wales, the House to House Collections Act 1939 which is prospectively repealed by the Charities Act 1992 from a date to be appointed.

³⁷ [1988] 1 WLR 1026.

definition of a pedlar. In *Oldrey* the trader who held a pedlar's certificate sold wrapping paper from a portable stand which she stationed in a prohibited street after travelling to the town in a motor vehicle.

In *Malloy* the trader who, like *Oldrey*, travelled from town to town in a van, had been operating from a portable stand in a consent street without a street trading consent. There was no pedlar's certificate in force on the relevant day.

An information was laid against each of the traders alleging that they were guilty of an offence under Schedule 4 of the 1982 Act in so far as they had engaged in street trading without the authority of the City Council. The Justices dismissed the information, holding inter alia, that each benefited from the pedlars' exemption. Their trade, it was held, was generally of a peripatetic nature so it was unimportant that they operated from a pitch.

The prosecutor appealed.

In allowing the appeals, the Divisional Court held that the activities of the defendants were not, at the relevant time, those of pedlars. The 1871 Act required the pedlar to "travel and trade on foot". The effect of the conjunctive "and" was to confine the legal definition of "pedlar" to a trader who sells on the move. Hutchison J observed:

If the distinction is to be encapsulated in an aphorism, one might say that a pedlar is one who trades as he travels as distinct from one who merely travels to trade. I do not mean that he must not stop.....the chairmender stops in order to mend chairs: but the feature which makes him a pedlar is that he goes from place to place, mending a chair here and a chair there: '*He comes to the owners of distressed chairs, rather than setting up his pitch and allowing them to come to him.*'³⁸ (Emphasis supplied).

This means that the trader who stands by a portable stall, that is, who trades on foot in that more limited sense, is not a pedlar. The underlying principle, which the subsequent case-law has emphasised, is that a pedlar is required to go in search of customers. The italicised words in Hutchison J's judgment reveal that it is not permitted to set up a stall or pitch where the intention is simply to wait for customers to come to the pedlar. He or she must move along the street in search of them. However, as will be seen below, this does not

³⁸ *Ibid.* at p. 1032.

prevent pedlars from using some apparatus in order to assist them. The key criterion is that pedlars must go in search of their customers.³⁹

The activities of the trader in *Tunbridge Wells v Dunn*⁴⁰ provide an important illustration of the kind of trading which constitutes “acting as a pedlar”. This case concerned a balloon seller who possessed a current pedlar’s certificate and who traded from town to town. He was observed trading in a prohibited street in Tunbridge Wells. He traded on foot, walking up and down the street carrying his goods. He remained in the street (but always moving up and down it) for about twenty minutes. He sold his goods when approached by customers and did not “cry his wares” or call out for trade. The court was invited to conclude that he was not a pedlar because, it was argued, a pedlar must be going somewhere as opposed to walking about within one particular location. This submission was not accepted by the court which held that the justices had, on this evidence, properly acquitted the trader, who had at all times acted as a pedlar.

The above case demonstrates that those who maintain a stationary position, especially where they seek to attract business to them, will not be acting as pedlars and will be liable to conviction. However, as we shall see below, it is settled that a pedlar does not have to keep moving; he or she can stop. At what point is the exemption then lost? It is important to emphasise that it is not simply a question of how long the pedlar is stationary; it must also depend upon the purpose for which the stop was undertaken.

In *Stevenage BC v Wright*⁴¹ the trader who operated in a prohibited street (and who had a pedlar’s certificate) was held not to be acting as a pedlar. He was stationary for at least an hour selling wrapping paper to passers-by, calling out to them to attract their attention. It was also significant that he had a bag of goods at his feet. The court emphasised that trading from one position is not permitted:

If one is to act as a pedlar the trading itself must be conducted not whilst the seller is

³⁹ Similar rules apply in Scotland where *Watson v Malloy* has been followed and applied. Accordingly, a trader holding a pedlar’s certificate who traded from a stall inviting customers to come to him rather than moving from place to place was not within the statutory exemption because he was not acting as a pedlar: *Normand v Alexander* [1993] Scotsman, February 11th, a decision reached under the Civic Government (Scotland) Act 1982.

⁴⁰ (1996) 95 LGR 775.

⁴¹ (1997) 161 JP 13.

himself in motion, but without his occupying a particular position, such as might be regarded as a pitch, for any significant length of time.”⁴²

Similarly in *Croydon LBC v Burdon*⁴³ where a trader in possession of a pedlar’s certificate purported to act a pedlar whilst trading outside a shopping centre. He was at that site for about thirty minutes. He traded from a substantial barrow which was so large that it could not in practice be moved from street to street, although there was evidence that whilst trading he did move it a few yards. In essence, the evidence revealed that he did not keep moving, stopping only to make sales.

His honour Judge Wilkie observed:

‘Looking at the evidence which was before the magistrates, it is my judgment that someone who is habitually stationary for periods of certainly at least 15 minutes, often in excess of half an hour, and on occasion in excess of an hour, who during those stationary periods sells intermittently to members of the public, but has not stopped for the purpose of selling to a specific member of the public, is properly to be described as someone who is engaged in street trading and not being a pedlar. In other words, he is not someone carrying and selling goods as he moves around, stopping for the limited purpose of conducting a sale and then moving on, rather he is someone who is stationary in a succession of different places for longer than is necessary to effect a particular sale or sales.’⁴⁴

It is manifestly clear from the case law that the trader is not required to move continuously. It is, for example, permitted to stop to conduct a sale. This means that the pedlar does not cease to act as a pedlar where he or she pauses to transact with customers, even if a bag is then placed upon the ground. This was evident in *R v Taylor*⁴⁵ where His Honour Judge Proctor held that a trader operating in a shopping precinct- a “prohibited street”- was lawfully acting as a pedlar. The trader generally walked through towns selling as he went.

⁴² *Ibid.* per Leggatt LJ at p. 409. See also *R. v Westminster City Council Ex p. Elmasoglu* [1996] C.O.D. 357

⁴³ [2002] EWHC 1961.

⁴⁴ *Ibid.* at para. 18. The court declined to certify as a point of law whether a pedlar may be stationary whilst exposing goods for sale.

⁴⁵ Manchester Crown Court 7th July 1989, (unreported). I am indebted to Mr Barry Hudson for a note on this decision.

On the occasion in question he was going through the precinct, but it seems that had stopped in *one place to sell* for up to ten or fifteen minutes whilst members of the public bought goods from him. It was held that, although he was in a stationary position, he continued to act as a pedlar. Ultimately, it was a question of fact and “undue lingering” would have taken him outside the scope of the pedlar’s exemption.

Taylor’s case suggests that significant time may be spent in a stationary position if the trader’s goods are in strong demand and sales are made continuously during that period. But remaining in the same spot for a significant time after sales have ceased, or remaining there in order to gather more custom, could easily deprive the pedlar of the exemption.⁴⁶ But does a pedlar cease to act as such when the pause is for a purpose other than to make a sale? There have been conflicting judicial opinions on this point. In *Stevenage BC v Wright Leggatt LJ* appeared to suggest that a stop for any other purpose than making a sale could potentially be unlawful.⁴⁷ The point arose in *Wrexham Maelor BC v Roberts*⁴⁸ where local justices adopted a different approach and held that a trader had been acting as a pedlar at the material time. Although he had generally moved in search of his customers, he had been observed to stop for other purposes than making a sale. He had, for example, paused to untangle the strings of the balloons he sold, or to stamp his feet. In the Divisional Court the prosecutor submitted that having made these findings of fact the local justices had been obliged to convict, but this submission was roundly rejected by the court. The court accepted that a pedlar could act as such even if he stopped for other purposes than trading.

The examples were offered of a trader who stopped to speak to someone he recognised in the street, or the trader who bent down to tie his shoelace. The court emphasised that the proper approach is to consider the purpose of the pause and the length of time for which it takes place and then to reach a judgment taking into account the fundamental requirement that a pedlar must travel as he trades. The conclusion will be a question of fact for the local justices.

This ruling is consistent with older authorities concerning the activities of pedlars and other sellers in markets. Pedlars, in common with any other member of the public, always had a

⁴⁶ It will be a question of fact for the court as to when a pause becomes illegitimate. No further guidance is possible beyond a reminder that the ultimate test is whether the pedlar is going in search of customers.

⁴⁷ “*though he was entitled to stop to trade that was only so in the sense of pausing for the purpose of effecting individual sales.*” at p.410.

⁴⁸ 8.7.96 unreported. Transcript CO/209/96

right to go into a market and could not be required to pay stallage (i.e. pay a sum analogous to rent) provided they did not set up a pitch in the market-place. It was always accepted that pedlars, (and other sellers) who carried their goods, could stop and rest without becoming liable to a payment for trading from a fixed position.⁴⁹

One important issue remains concerning the question of trading from a stationary position. It concerns the provision for market traders in the 1871 Act. Market traders are exempt the need to obtain a pedlars certificate under s.23 of the Pedlars Act 1871. The existence of this provision suggests that Parliament regarded their activities as similar to those of pedlars and was thus forced to make provision for them lest they fell within the statutory definition of a pedlar. In other words, Parliament's view seems to have been that trading from a fixed position did not prevent a market trader from falling within the *prima facie* definition of a "pedlar" and so special provision had to be made to prevent this. If this reasoning is correct, this somewhat weakens the conclusion in *Watson v Malloy* and its progeny that a pedlar is only someone who sells whilst on the move. It might also embrace traders who do stop from time to time in one pre-selected location as market traders do, otherwise the provisions in s.23 of the 1871 Act would have been unnecessary.

The reason for the decision in *Watson v Malloy* probably lies in considerations of judicial policy as much as in a literal construction of the 1871 Act and the street trading code. Hutchison J emphasised this policy issue most clearly: "If the defendant (Mr Malloy) is a pedlar then the restrictions imposed on street trading are virtually ineffective."⁵⁰

Notwithstanding s.23 of the 1871 Act, the decision in *Watson v Malloy* and later cases reveal that the courts are now most unlikely to be sympathetic to arguments that Parliament intended that pedlars should be able to trade from fixed positions in a street. The pedlars

⁴⁹ This rule benefited any member of the public wishing to sell in the market-place. It can be explained by the principle that any one has a legal right to buy and sell in the market, and cannot be required to rent a stall (i.e. pay stallage) unless they intend to trade from a spot or pitch. Goods carried into the market for sale can be placed upon the ground so that the seller can rest; it is not permitted to place goods on the ground so as to occupy one spot from which trading can be conducted unless the seller is prepared to pay stallage. The seller must have the intention of moving on to another part of the market once rested if stallage is to be avoided. It would seem that stallage cannot be demanded simply because a sale is made whilst the goods are on the ground: *Mayor of Yarmouth v Groom* (1862) 1 H & C 102, esp. 111; *Townend v Woodruff* 5 Exch 506. The analogy with pedlars trading on the highway is clear. These rules apply in lawful markets created by charter or under statute. Many modern markets are not lawful in this sense.

⁵⁰ [1988] 1 WLR 1026, 1031.

exemption is thus to be construed narrowly. If it were not, as we have seen, the licensing scheme would be largely undermined.

Calling out to customers

The pedlar must go to the customers, not *vice versa*. Calling out to customers to attract their trade can, depending on the facts, be an indication that the pedlar is not going in search of customers, but expecting them to come to him.⁵¹

However, it would be going too far to suggest that calling out is prohibited. Provided that the trader is otherwise moving along the street (and thereby seeking business) it seems arbitrary to suggest that he can only communicate a willingness to sell by conduct and not by ‘crying the wares’. It is also significant that where the trader has been convicted there has been evidence other than mere calling out on which to sustain the conclusion that the trader was not going in search of customers. The case-law suggests that convicted traders who “cry their wares” have also been observed trading from a stationary position. This means that the justices had other evidence on which to base a conclusion that the trader was not going in search of customers and did not need to rely exclusively on the fact of calling out.

The dominant requirement is that a pedlar must go in search of customers. But this requirement could be satisfied where a pedlar who, in moving along a street and having identified a possible customer, communicates by calling out that the goods carried are exposed for sale. If on the facts the customer then responds to the pedlar to negotiate a sale, the pedlar can be said to be going to the customers. In other words, provided justices have sufficient evidence to conclude that pedlars are seeking their customers, pedlars may signal a willingness to sell by calling out just as they may by conduct. Whether the overriding test is satisfied will be a question for the local justices to be determined on the facts of each case.

Use of a trolley, barrow or cart

It was held in *Shepway District Council v Vincent*⁵² that, depending on the facts, a pedlar may still be acting as such notwithstanding that he or she uses a trolley on wheels *whilst*

⁵¹ E.g., ‘calling out’ was an issue in *Stevenage BC v Wright* (above n.41).

⁵² [1994] C.O.D 451.

going in search of customers. This demonstrates that the trolley or cart should be used simply as a means of transporting goods whilst the pedlar is otherwise travelling and seeking business. As we have seen, it is not within the scope of the pedlar's exemption to trade in a stationary position from a barrow attracting custom to the barrow. Nor would it seem to be permitted to trade from the barrow even if it is pushed to a small number of different locations,⁵³ *a fortiori* if these are but a few yards apart.⁵⁴

Somewhat bizarrely, there is authority that the pedlar does not become liable to prosecution as an unlicensed street trader if the trolley is of limited mobility for in *Vincent*⁵⁵ one of the wheels was actually broken. However, this is not entirely consistent with the later decision in *Croydon LBC v Burdon*⁵⁶ where the pedlar's inability to move the barrow from street to street was significant evidence that he was trading from a pitch and thus a street trader. A broken wheel might, depending on the facts, suggest that the trolley was not sufficiently well-maintained to travel from street to street.

There is also authority that the trolley should be small and easily moved. The use of large, heavy, equipment seems to take the trader beyond scope of the pedlar's exemption, probably because this raises an inference that it is incapable of being moved easily from street to street.⁵⁷ Whether the apparatus is of a sufficiently small size will be a question of fact for the local justices, although arguably it is its capacity for movement from street to street rather than size *per se* that should be the dominant consideration, and there is obviously a relationship between size and mobility.

⁵³ *Chichester District Council v Wood* [1997] C O D 240. This is consistent with the reasoning in *Stevenage BC v Wright* (above n.41) where Leggatt L.J. stated: "The use of a stall or stand may indicate an intention to remain in one place or in a succession of different places longer than is necessary to effect a particular sale or sales." (at p. 410). He added, however, that the use of the stall was not conclusive evidence by itself of unlawful trading. It is clearly a question of fact for the court. In *Wood* the trading locations were about 100 yards apart.

⁵⁴ E.g., *South Tyneside MBC v Jackson* [1998] E.H.L.R. 249; *Croydon LBC v Burdon*, above, n.43.

⁵⁵ [1994] C.O.D 451.

⁵⁶ Above n.43.

⁵⁷ *Croydon LBC v Burdon*, above, n.43. There is some inconsistency between this decision and that in *Shepway District Council v Vincent*, above, n.52.

Acting as a pedlar within the City of Westminster Act 1999 and the City of Newcastle-upon-Tyne Act 2000

It is appropriate to notice the narrower exemption under the City of Westminster Act 1999, and the City of Newcastle Act 2000. It will be recalled that each confines lawful peddling to trading that *only* takes the form of selling house-to-house. The London Local Authorities Bill 2003 will, if enacted, permit the authorities in other London Boroughs to regulate pedlars in a similar manner. This means that each of these exemptions do not benefit pedlars who wish to trade in commercial districts. Nonetheless, there are uncertainties about their scope and meaning.

One uncertainty concerning this kind of exemption is the meaning of the italicised words “if the *trading* is carried out only by means of *visits from house to house*”. Is the pedlar only acting lawfully by calling at each house systematically in residential streets (i.e., “cold calling”)? Can the pedlar call at one house where he or she knows they are likely to make a sale and then call at a more distant house omitting to call at houses in between? There is nothing in the statutory words which precludes such an activity. But what is the consequence if the pedlar is approached by a customer to make a sale at some point between the two houses? According to a strict view the exemption would be lost. But the issue is somewhat obscure because in such a case it can be argued that the pedlar may still be *trading* from house-to-house (i.e., conducting a house-to-house selling business) even if invited by a passer-by to make a *sale* between houses. By analogy if a milkman were approached to sell a pint of milk to a passer-by, he or she would not cease to be a rounds person simply because that one customer has not pre-placed an order.⁵⁸

Reform

As we have seen, the recent pieces of legislation, namely, the City of Westminster Act 1999, City of Newcastle-upon-Tyne Act 2000, the Street Trading Act (Northern Ireland) 2001 and, if enacted, the London Local Authorities Bill 2003, restrict peddling to house-to-house sales. But, these reforms have not affected peddling in the majority of the districts of England and Wales outside of London. There is, however, considerable political pressure to achieve reform. Will this take place and, if so, what form is desirable?

⁵⁸ See *Kempin (t/a British Bulldog Ice Cream) v Brighton and Hove Council* [2001] EWHC Admin 140.

Street trading and peddling: the political debate

There is without doubt a powerful and organised lobby against pedlars. This operates both at national and local level. At national level various individuals and organisations are engaged in informing interested MPs about street trading problems as they see them. In general their representation focus on (i) the repeal of the Pedlars Acts 1871 & 1881,⁵⁹ that is to say, the amendment of street trading legislation so that the exemption for pedlars is abolished; and (ii) that the power of seizure of goods be extended beyond London in accordance with the Westminster model. Amongst the organisations which have urged Parliament to make one or more of these changes are the National Association of British Market Authorities, the Local Government Association, the Association of the British Chambers of Commerce and the Association of Town Centre Management. The Local Government Licensing Forum has also been urged to lobby Parliament to abolish the pedlars' exemption.⁶⁰ There is also an All Parliamentary Group on Town Centre Management Issues which receives representations on street trading. Some MPs are particularly active in the debate. For example, Brian Cotter MP has tabled Early Day Motions calling for the repeal of the Pedlars Acts and seeking to bring *all* street trading within local authority control.⁶¹ One might comment *en passant* that any reform is unlikely be so draconian. Each licensing scheme, no matter how severe, recognises that some exemptions are necessary (e.g. for rounds persons, and lawful markets and fairs).

Local shopkeepers and other retailers, such as those in council- operated markets, also often view peddling as an undesirable and unfair competitive activity. These traders sometimes assert that the Pedlars Acts are an anachronism. Pedlars are not seen as

⁵⁹ Controversially there have been suggestions that the minister responsible should use powers under the Regulatory Powers Act 2001 to effect the reform by statutory instrument: *Licensing News*, 27th March 2003. However, an important limitation on this power is contained in s. 3 (2) (a) of the 2001 Act which requires "that the provisions of the order, taken as a whole, strike a fair balance between the public interest and the interests of the persons affected by the burden being created".

⁶⁰ *Licensing News*, 27th March 2003. The North West Region has invited the National Licensing Forum to consider formulating a policy on this issue.

⁶¹ Early Day Motions Tabled 29th July 2002 and 18th December 2002. He has also unsuccessfully urged the minister responsible to make a statement on pedlars and illegal trading: House of Commons Written Answers, 31st January 2003: Miss Melanie Johnson, MP Parliamentary Under-Secretary of State for Competition, Consumers and Markets.

“genuine pedlars” but as “unauthorised street traders (who) masquerade as pedlars”.⁶² These and other arguments, seem to reduce to three principal objections: (i) that of unfair competition to established retailers, who are also often shopkeepers;⁶³ (ii) a lack of accountability to both the public and the authorities, which allows ‘rogue’ pedlars to trade in counterfeit or substandard goods; and (iii) that the activities of pedlars, where they occur in sufficient numbers, can cause problems of congestion on the streets. We shall consider these in turn.

Unfair competition

Various arguments are often raised that pedlars create unfair competition for licensed street traders, for retailers paying uniform business rate and for market traders operating in legitimate council-run markets.⁶⁴ In the House of Commons it has been suggested that peddling is a particular problem to seasonal trade where pedlars have been accused of “dropping in, creaming off the profits and then disappearing again”.⁶⁵

The issue is firstly, that persons claiming to be pedlars have been known to set up stands outside shops retailing similar products.⁶⁶ The pedlar is then seen to be “undercutting” the shop-keeper. At the heart of this argument is the related concern that pedlars have an unfair advantage because of the relatively minor cost of a pedlar’s certificate.⁶⁷ In contrast, street traders are often required to pay much higher fees for street trading consents. One argument is that the trading advantages of peddling should be removed by forcing the pedlar to apply for a street trading licence in each district in which they pursue their trade (hence the argument that the Pedlars Acts be repealed). In practice, the issue is not so straightforward.

⁶² Quoted from a submission by the National Association of British Market Authorities to the All Parliamentary Group on Town Centre Management Issues, 26th January 2000.

⁶³ It has also been argued that the “unfair” competition inflicts a detriment on charities which otherwise benefit from bazaars and other charity sales: HC Deb 1 July 1998 col 316, Mr. David Heath MP.

⁶⁴ One example of this argument was put by Jane Griffiths MP in explaining her support for an Early Day Motion calling for the repeal of the Pedlars Acts 1871-1881: http://www.janestheone.com/press_june2002.htm#pedlarsreform

⁶⁵ HC Deb 1 July 1998 col 317. See also <http://www.harrow.gov.uk/noticeboard/item.asp?intItemID=2446&irp=&irph=news> for a recent example of local authority enforcement and the reasons for it.

⁶⁶ Many local government officers recount this as one of the major problems.

⁶⁷ See n.7 above.

Some local authorities do not grant street trading consents,⁶⁸ which means that this potential trading opportunity is closed. Moreover, as itinerant traders they will have to obtain a consent in every district they wish to trade. This raises an economic issue to which we shall return.

Lack of accountability - public interest considerations

It must also be acknowledged that there are other arguments which are used to persuade policy makers to reform the law. These arguments are based upon the public interest. Sometimes proponents of these assert that pedlars are “fly-by-night” traders selling poor quality, contraband or fake goods against whom the consumer has little redress.⁶⁹

Although this has been a significant problem in some districts,⁷⁰ this argument does not furnish a strong case for abolishing the pedlars’ exemption. The proper course might be to prosecute the offenders leaving more honest pedlars free to ply their trade. In practice, the issue is more challenging because the rogue pedlar often disappears before the authorities, such as trading standards, can act, and the consumer has no means of identifying the seller in order to pursue other redress.⁷¹

Congestion

In at least two districts the councils have reported⁷² regular street congestion when pedlars who sell popular goods are legitimately trading from one spot for a considerable time, attracting a

⁶⁸ Canterbury was formerly one such district, although its policy has now changed. Much depends on the facts of each case but it is a general provision of Administrative Law that where a public authority has a power to regulate an activity that power does not extend, in effect, to banning that activity. To purport to apply a ban (for example by resolving never to grant a street trading licence) could amount to an unlawful “fettering” of the public body’s discretionary powers: *British Oxygen Co Ltd v. Minister of Technology* [1971] AC 610.

⁶⁹ See also HC Debs col 317. This was also an argument used by Jane Griffiths MP http://www.janestheone.com/press_june2002.htm#pedlarsreform on the grounds that pedlars had been found in her constituency selling shoddy ‘teletubbies’ which only the intervention of trading standards officers curtailed.

⁷⁰ See http://www.croydon.gov.uk/..Press_ and note 65 above.

⁷¹ Although the increasing use of CCTV in town centres should make offenders easier to identify.

⁷² Canterbury: submission of Eryll Woolett to the All Parliamentary Group on Town Centre Management Issues, 26th January 2000 and Harrow: <http://www.harrow.gov.uk/noticeboard/item.asp?intItemID+2446&irp=&irph=news>. In Canterbury the problems have now been addressed by allocating pitches to traders who formerly operated or purported to operate as pedlars. These traders have obtained street trading consents.

crowd of potential customers. The highway may be partly blocked, but it is unlikely that a prosecution for obstruction of the highway could succeed, provided that the pedlar was acting within the scope of the pedlar's certificate. The certificate would provide lawful authority for this activity.⁷³ It is unclear whether this problem is frequently encountered in many other districts.

Central Government Policy

In 1994, as part of its de-regulation initiative introduced under the Deregulation and Contracting Out Act 1994, the Government consulted about the possibility of reforming the street trading legislation, including the future of peddling. Opinion on the merits of reform was "almost equally divided."⁷⁴ Despite concerted lobbying since that consultation exercise the Westminster government is unlikely at present to seek Parliament's approval for the abolition of the Pedlars Acts, although, as we have seen, certain local authorities have circumvented this by promoting local legislation. The Government's stance may well be encapsulated in the following, and if this is so, it suggests that the Department of Trade and Industry is not convinced that peddling is contrary to the public interest such that further regulation (or even abolition) is necessary. The exemption for pedlars is presently kept under review, but the arguments for its abolition have not yet persuaded the Government to act.⁷⁵

'Given the more limited range of goods that he can sell, I am not sure how far (the pedlar) can be said to damage the business of street traders. It could be argued that the competition offered by pedlars is no more unfair than that between street traders and small shops - it is a matter of different considerations - or between small shops and out-of-town stores. Pedlars often quickly move on. Many people will therefore choose to buy goods from more established traders whom they will inevitably regard as more reliable.'⁷⁶

If the Government remains unpersuaded of the desirability of repealing the Pedlars Acts there is an implicit recognition that these enactments, and the exemptions to which they

⁷³ Highways Act 19880, s.137.

⁷⁴ House of Lords Hansard Written Answer, 7th May 1996: Baroness Blatch. Twenty seven representations were received.

⁷⁵ E.g., House of Commons Hansard Written Answers, 5th June 2000, Mr Mike O'Brien, MP; Hansard Written Answer, 11 June 2002, Miss Melanie Johnson, MP.

⁷⁶ HC Deb 1 July 1998 col 320, Mr George Howarth MP.

have given rise, have some continuing value. It is, therefore, not obvious why Parliament has already permitted two local authorities to promote private enactments which, as far as many pedlars are concerned, reduce the commercial value of these exemptions to vanishing point. This inconsistency is a problem that follows *a fortiori* now that Parliament is considering the London Local Authorities Bill 2003, which is likely to have a similar effect throughout the London boroughs.

If the Government has now reached a different conclusion favouring reform, it is arguable that it is its responsibility to take the initiative, rather than that of individual local authorities. Parliamentary time should be found for a public general Act of Parliament to achieve a coherent reform applicable throughout England and Wales. Instead, and in the absence of a proper debate about street trading, some more wealthy local authorities are successfully obtaining parliamentary approval for private Bills, whilst many others are left to continue operating the unsatisfactory regime in the street trading code. This approach deepens the confusion in the regulatory system, and arguably achieves detailed changes, the need for which has not been fully demonstrated.

In Scotland, the possible reform of street trading, which is a devolved matter, is also being considered. In July 2002 a Task Group was established by the Scottish Executive to review the operation in Scotland of the licensing schemes under the Civic Government (Scotland) Act 1982. In its preliminary conclusions the Task Group rejected the argument from Convention of Scottish Local Authorities (CSLA) that the pedlar's exemption should be abolished. The argument of the CSLA had been that possession of a pedlar's certificate *ipso facto* circumvents the requirement to seek a street trading licence. The Task Group's preliminary conclusion was that this contention paid insufficient attention to the functional differences between pedlars and street traders, in so far as the pedlar has to peddle their goods. Since pedlars cannot trade from a fixed position, they were, in the view of the Task Group, distinguishable from street traders. Its provisional conclusions have, however, been subject to extensive consultation and, at the time of writing, a final report on possible reform is due to be presented to Scottish Ministers.

A possible model for reform

It can be argued that in the light of the widespread abuse of the pedlars' exemption there is a need to re-examine it. As we have seen, a modern development in England has been to restrict peddling to house-to-house sales in residential areas. The objection to this is that not all goods in which pedlars trade can be peddled successfully from house-to-house, and the restriction, if adopted more widely, would greatly undermine the economic prospects of many pedlars.

If the exemption under the Local Government (Miscellaneous Provisions) Act 1982 were abolished outright many pedlars would be forced to obtain street trading consents in order to access customers in the commercial districts. There are, however, obvious difficulties with such a radical approach.⁷⁷ The fundamental problem is that a pedlar often operates in many districts and the street trader in fewer, possibly in only one or two. It would not be appropriate for all pedlars to be forced to obtain an annual street trading consent because the cost of that change would effectively prevent them from trading from place to place.⁷⁸

The only practical approach would be to require them to seek temporary consents in each district. From the pedlars' perspective, the disadvantage, (apart from the cost) compared with the present regime, would be that local authorities currently have no duty to grant temporary consents, and some do not do so. Local authorities that do provide temporary consents would in any case refuse to do so if the pedlar proposed to compete by selling similar goods to a shop keeper or other trader in the immediate vicinity of the proposed pitch.⁷⁹

Even under current legislation, a temporary licence or consent, allows the pedlar, in return for a small fee, to adopt potentially more lucrative trading practices. For example, they would have the opportunity to trade from a barrow on a well-located pitch enabling them carry and, perhaps to turn-over, more stock. One immediate advantage of this is that it would no longer be open to rival traders to argue that competition from these traders was unfair, since they would be paying for their consents. The system would create a more 'level playing field'. But this is not all because the licensing authority can under the present legislation impose conditions both as to the type of goods sold, and in relation to the location of the pitch so as to avoid other sources of friction with rival retailers. Public liability insurance could also, under current rules, be a condition of the licence.

Another advantage, from the standpoint of the authorities, would be that the designation of

⁷⁷ These arguments are also relevant in districts such as Westminster and Newcastle where pedlars wish to operate in the commercial districts.

⁷⁸ The annual fee for a street trading consent in Crawley (Industrial Estate Area) is £5,250, whereas for trading in the town centre it is £21 per day. Oxford City Council currently charges £3840 per annum for a street trading consent. In the South Gloucestershire Council district the annual fee is £900. Knowsley Metropolitan Council charges £941 per annum. In contrast, in Stirling, the annual licence fee is £60. Under the City of London (Various Powers) Act 1987 the fee for an annual licence is restricted by the terms of the Act to a £5: s.10.

⁷⁹ It is also important to ensure that a diverse range of goods are available: see, e.g., para 72 of the Best Value Audit by the Audit Commission of Lewisham LBC's Street Trading and Trading Standards, June 2002.

a prohibited street would be more effective than under the present system; in other words, any temporary pitches would not be permitted in streets in respect of which the local authority had determined that street trading was inappropriate.

However, a system of temporary licences would entail some additional administrative burdens for the local authority, as well as certain problems for the pedlars. First, the authority would have to ensure that a reasonable number of pitches were reserved for temporary consent holders. Some, such as Canterbury City Council, currently do this, but this is probably not a universal practice. However, some pedlars not granted a pitch might still operate peripatetically, so the opportunity to trade would not be solely dependent on the availability of a pitch.

Secondly, additional resources would be required to deal with numerous applications for temporary consents. However, this objection should not be exaggerated because even under existing law it is legitimate to set the daily fee at a rate which would allow recovery of this additional cost to the public purse.⁸⁰

Pedlars might object to this reform that their right to acquire a pedlar's certificate would become a mere hope that a local authority would grant a temporary consent. Not all pedlars would succeed in gaining consents. However, recent experience in Canterbury, where the local authority has gone to some lengths to accommodate former pedlars as consent holders, suggests that this difficulty could be over-stated.⁸¹

However, if the Pedlars Acts were repealed, the existing legislation would require amendment in the following respects. Firstly, it would be necessary to enact a provision *requiring* local authorities to operate a regime of temporary consents (and in particular by reserving a reasonable number of temporary pitches for the successful consent holders). However, the decision whether to grant a consent in an individual case would remain discretionary.

Second, there would remain the problem of accountability to the public. As we have seen, there have been complaints that too many pedlars are seen as "fly-by-night" traders, selling poor quality goods and then disappearing leaving their customers without redress. A system

⁸⁰ *R v. Manchester City Council ex p. King* (1991) 89 LGR 696.

⁸¹ I am indebted to Mr Roger Vick of Canterbury City Council for information concerning current practice in that district.

of temporary consents would partly address this because it would bring former pedlars within local authority control. The licensing decision should engage questions concerning the trader's background (criminal record etc). The provision of references might also be required. At the very least, the trader would have to give their name and address to the local authority, which would ensure that they could be traced. But, by themselves, these are not complete solutions because it is the aggrieved member of the public, rather than the local authority, that sometimes needs to pursue any rogue traders. This could be addressed by a requirement that consent holders wear identity badges at all times during trading. This is currently required in some districts as a condition of the licence, but there are no mandatory requirements under the existing law.⁸² Moreover, in districts in which a badge is worn it does not always carry the trader's business address. This latter detail is a necessary one.

Finally, there are arguments that the powers of seizure and forfeiture currently enacted under the City of Westminster Act 1999 and City of Newcastle-upon-Tyne Act 2000 should be extended to all districts. If the reformed legislation were to strike an appropriate balance between the interests of street traders and shop keepers on the one hand and pedlars on the other, there would be a strong case for dealing firmly with those who nonetheless chose to violate it. Pedlars (who became temporary consent holders) might benefit from this since, if the public were assured that the rogues were kept off the streets, the public might deal with the pedlar/consent holder with greater confidence.

Conclusion

It would be preferable if Parliament considered the matter as a public policy issue and resolved the question whether, as a matter of general principle, the pedlars' exemption under the street trading code should continue or, if not, what form future reform should take. At present there seems to be no coherent policy on street trading. The Government has failed to articulate a case for reform, but it appears to allow individual local authorities to pursue their own reforming agenda by promoting private legislation. Any reform should be systematic rather than piecemeal and advance a clearly identified public interest. Such a reform should strike a fair balance between the interests of all those doing business in the town centres. A possible means of achieving that balance has already been suggested.

⁸² Consideration might be given to enacting "standard conditions" to be included in each consent. The London Local Authorities act 1990, s. 27 (7) provides an example of this.

The days have long passed in which authors can depict pedlars, such as Hardy's Physician Vilbert, padding their relentless path along the great white highways of Wessex, a trader whose movements were "as truly timed as those of the planets in their courses".⁸³ But it should not be forgotten that the modern pedlar is also an itinerant, trading from town to town: he or she is not a street trader. It should be for Parliament to decide whether within the interstices of the modern commercial world there is a place for such trading, and it has been argued that there is such a case, perhaps within a reformed, but balanced, street trading regime.

Yet even Parliament's conclusion on this issue may not be the final word. Trawl the internet and you will find "pedlars" by the score, no-longer traversing physical distances to trade in market towns whilst eyed with suspicion by the authorities and hostility by their rivals, but crying their wares across the infinity of cyberspace.⁸⁴ Even the insubstantial licensing regime of the Pedlars Acts 1871-1881 cannot tie the hands of these new traders who, with the acuity for which they are notorious, cannily place themselves one step ahead of street regulation!

Professor Barry Hough
Bournemouth University

⁸³ Thomas Hardy, *Jude the Obscure*, Penguin: London 1985, p. 68. The regularity of a pedlar's movements was well known in those days. For example, the trading habits of 'Johnny-in-the-Morning' who traded from, and lived in, a wagon in which he travelled from place to place in north Wiltshire and Gloucestershire have only recently passed beyond living memory.

⁸⁴ According to the Government, 45% of UK households have Internet access and 46% of Internet users now buy goods and services on-line: Melanie Johnson MP's speech to the All Parliamentary Group for the Markets Industry, 14th May, 2003.