

Regulation of Non-Surgical Cosmetic Procedures



The beauty and aesthetics industry contributes significantly to the UK employment economy, and the range of treatments available to the public is changing all the time.

Our current legal regulatory regime in this field is woefully inadequate to control and regulate practitioners and service providers in the market now, let alone in the future.

In England, outside London, acupuncture, skin colouring, cosmetic piercing and electrolysis are capable of being regulated by adoptive registration under the Local Government (Miscellaneous Provisions) Act 1982. In London, a wider range of treatments can be licensed by London-centric legislation. In Wales, the Public Health (Wales) Act 2017 applies, which does not extend the range of treatments, but provides more flexibility. Local Authorities also have the option to introduce Local Acts, and byelaws, covering hygiene, and model byelaws address infection control.

There are other ways of penalising harmful practices, ranging from Health and Safety at Work (etc) Act 1974 offences, to trading standards offences, to regulations controlling hazardous substances, and even prosecution for assault. The complexity of procedure, and the difficulty in understanding the suitability of the legal options available to regulators means that, too often, good practice is not enforced. A large number of troubling cases go unreported in the first place, because the victims did not know where to turn to make their complaint.

The legislative scheme is manifestly confusing, and the wide variation in approach upon a purely geographical basis is unhelpful. Even where adopted, the level of control that local authorities can exert, over practice and training under the legislation is low. It hardly seems

too dramatic to describe the current legal landscape as the “Wild West”. This is particularly concerning in an industry that is growing exponentially, driven increasingly by social media and cultural expectations, and with the capacity to cause great harm.

Current legislation does not even touch upon the wider range of treatments and services that the public now access on a regular basis. These include treatments such as botox and dermal fillers; electrical skin treatments involving high heat, or lasers. Legal definitions are too narrow to encompass many of these modern treatments, which are capable of causing significant damage if incorrectly applied. At a time when enforcement and protection need to be at their optimum level, the experience of professionals and the public is quite the opposite. The variability of the quality of practitioners in the market place is alarming. It is entirely possible to obtain an online “qualification” and establish a business offering risky treatments to the public with minimal scrutiny and no insurance. The plethora of informal policy and guidance simply makes matters more confusing, not least because much of it is inconsistent, or even contradictory.

The vast majority agree that the current regulatory landscape is not fit for purpose. Recently, the calls for a comprehensive overhaul of this worrying area of the law have become louder.

In May 2019, an All Party Parliamentary Group for Beauty, Aesthetics and Well-being was announced, and was welcomed by Government. It seems likely that the timely formation of this APPG has been a catalyst for a complete review of the regulation of this industry, which will need to be as thorough and fundamental as previous reforms of the alcohol, entertainment, gambling and animal licensing regimes have been.

The latest exciting development has come as an opportunity has been presented to amend the Health and Care Bill, currently passing through Parliament. At the instigation of the Chartered Institute of Environmental Health, the Institute of Licensing, the Joint Council for Cosmetic Practitioners and many other key stakeholders¹, an amendment to the Bill has been tabled:

¹ Including, in no particular order, the Royal Society for Public Health; the Association of Directors of Public Health; Save Face; the Royal Society for the Prevention of Accidents; the British Beauty Council; the Hair and Beauty Industry Authority; the National Hair and Beauty Federation; the Beauty Industry Group; the Faculty of Public Health, the Tattoo and Piercing Industry Union and others

The Health and Care Bill Amendment

“Licensing of aesthetic non-surgical cosmetic procedures

(1) No person may carry on an activity to which this subsection applies—

(a) except under the authority of a licence for the purposes of this section, and

(b) other than in accordance with specified training.

(2) Subsection (1) applies to an activity relating to the provision of aesthetic non-surgical procedures which is specified for the purposes of that subsection by regulations made by the Secretary of State.

(3) A person commits an offence if that person contravenes subsection (1).

(4) The Secretary of State may by regulations make provision about licences and conditions for the purposes of this section.

(5) Before making regulations under this section, the Secretary of State must consult the representatives of any interests concerned which the Secretary of State considers appropriate.

(6) Regulations may, in particular—

(a) require a licensing authority not to grant a licence unless satisfied as to a matter specified in the regulations, and

(b) require a licensing authority to have regard, in deciding whether to grant a licence, to a matter specified in the regulations.”

In the House of Commons, the amendment enjoyed widespread cross-party support, with 20 MPs putting their name to it at Report Stage.

In the House of Lords, the amendment was tabled by Baroness Merron and co-sponsored by Baroness Finlay, ex-Health Secretary Lord Lansley, and Baroness Brinton. This is a strong and high-profile group of cross-party peers.

Lord Kamall, Minister for Technology, Innovation and Life Sciences has been broadly receptive to the amendment, and it is clear that the government has acknowledged that a strong case has been made for further regulation in this area and is considering the recommendation for a licensing scheme.

In the event that a new licensing regime was accepted and implemented by the government, how would it work?

Much in the same way as the animal licensing regime, the primary legislation would contain the “hook” upon which later regulations could be hung. All of the detail of the licensable activities and the modes of control would be set out in the more detailed regulations, which would be more flexible and capable of being updated to take account of future treatments, not currently within purview.

Licensing regimes work upon the basis that the State regulates activities, which are otherwise lawful, to control impacts that can arise when those activities are conducted inappropriately in some respect. This catches unacceptable extremes within a spectrum that is otherwise acceptable.

The proposed amendment provides the power to the Secretary of State to introduce the control required in the future, which affords sufficient time to design the necessary regulations carefully, and with wide ranging consensus. Broad stakeholder support is important, particularly when it comes to introducing qualification, training and entry requirements into this large and competitive industry. The regulations would address everything from premises to expertise, and would be worded in such a way as to be as future-proof as possible.

To design a licensing scheme it is necessary to undertake three steps:

1. Identify the categories of activities which require regulating. In this case, that would comprise non-surgical beauty, aesthetic and similar treatments. These are the “licensable activities”.

2. Identify

(a) the way in which those activities might be conducted which would cause unacceptable impact, and

(b) identify those who might be impacted.

3. Identify the way in which the activities might be limited or regulated to mitigate to an acceptable standard the impacts identified.

In the beauty and non-surgical aesthetic arena, it can be seen that some treatments have a potential for direct harmful impact to the body if done incorrectly; some will have infection/sterilisation issues because of the equipment used, while some have little immediate impact but the potential for long term harm or impact if done repeatedly. Appropriate interventions will depend upon the nature of the potential impact. Some treatments might be quite safe in the hands of someone well trained, but dangerous when conducted by an amateur. Some treatments might be very safe to administer, but clean equipment is essential. Others might be suitable only for informed adults because of the inherent risk, and other examples will, no doubt, emerge.

By analogy with the Licensing Act 2003 licensing objectives, alcohol gives rise to very different harms and impacts than music does. It makes sense to distinguish them into different licensable activities. Similarly, under the Animal Licensing Regulations, dog breeding is a very different activity from horse riding schools and the potential harms and impacts are very different.

Licensing objectives define in wide terms the standards and criteria that premises and practitioners must meet. There is one clear licensing objective for beauty and aesthetics, and that is the promotion of public safety. Public health, by contrast is a complicated objective, which would have to be considered very carefully, in the context of the issues that have arisen around promoting public health through the licensing of alcohol.

It is also arguable that there should be a licensing objective that a treatment should be effective or of a minimum level of quality, but that may be too difficult to measure. What is effective for one person, or something that they appreciate might be disappointing for someone else, through no fault of the practitioner. Training and quality of application of the treatment is, perhaps, not so much a licensing objective as a matter for conditions either for

the premises licence or the practitioner. This probably needs to be expressed as a specific training qualification for a specific treatment, rather than a broad-brush overarching objective that tries to encapsulate a wide range of treatments.

One of the key failings identified in the current deficient regulatory system is the lack of public awareness and education about operators who are safe and suitable to provide aesthetic treatments. To address this in any future scheme, licences should be issued and displayed, for transparency to the general public, and a public licence register should be maintained by the Local Authority for public scrutiny.

In terms of the enforcement regime, once again, although perhaps counter-intuitively, the animal licensing regime probably offers a workable model for the beauty industry. The applicant should apply for a premises licence, which should result in an inspection of the premises which need to meet certain standards to provide the services on offer. Minimum conditions should be met for the provision of specific treatments, and additional conditions can be met for higher quality which would result in a higher star rating for the premises.

Enforcement thereafter typically proceeds upon the basis of public whistle blowing against those who are not licensed, (a simple, binary assessment that the public can clearly understand: licensed -v- unlicensed); and proactive enforcement by the Authority in their area, by way of spot checks. This is effective in other licensing regimes, and local authority officers are experienced in this type of exercise.

Local authorities should have the power, as with all licensing regimes, to revoke or vary the licences at their discretion, in accordance with criteria set out in regulations. For the unlicensed, there would be the power of prosecution and penalty, usually in the form of fines, with imprisonment as an option for the most serious examples of offending.

The recognisable pattern of a licensing regime would work well in the beauty and aesthetics arena, and bring welcome consistency for consumers, regulators and operators alike. This long overdue reform appears finally to be on the table, and this is an area to watch with increasing interest.

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