Agenda item	**6**
Report no	**HLC/003/18**

THE HIGHLAND COUNCIL

Committee:	**THE HIGHLAND LICENSING COMMITTEE**
Date:	**12 January 2018**
Report title:	**Response to Scottish Government consultation on guidance on licensing of sexual entertainment venues and changes to licensing of theatres**
Report by:	**The Principal Solicitor – Regulatory Services**

1. Purpose/Executive summary

1.1 This report invites members

- to consider the draft guidance produced by Scottish Government on the licensing of sexual entertainment venues and changes to licensing of theatres (Appendix 1),
- to approve the attached draft consultation response (Appendix 2), and
- to reconsider arrangements for the licensing of premises used for the performance of plays.

2. Recommendation

2.1 The Committee is invited to approve the attached draft consultation response, subject to any amendments which members wish made, as the Committee's response to the Scottish Government consultation on draft guidance on the licensing of sexual entertainment venues and changes to licensing of theatres.

2.2 The Committee is further invited to agree that the resolution made by the Highland Licensing Committee on 2 February 2016, under section 9 of the Civic Government (Scotland) Act 1982, to vary, with effect from 1 January 2017, the existing public entertainment licensing resolution of 26 February 1998 to include, at part 7. of the 2016 resolution, the use of premises for the performance of plays (where there is a charge to the public) as an activity requiring a public entertainment licence will not be enforced in its current form.

In the interest of accommodating transitional arrangements for existing holders of licences under the 1968 Act, and in order for members to consider whether there should be flexibility in the form of exemption for smaller venues, it is recommended that further consideration be given to rescinding and remaking part 7. of this resolution once section 74 of the Air Weapons and Licensing (Scotland) Act 2015 is brought into effect and an appropriate timeframe for these transitional arrangement can be ascertained.

3. Background

3.1 Section 76 of the Air Weapons and Licensing (Scotland) Act 2015 ("the 2015 Act") introduces new provisions in Part III and Schedule 2 of the Civic Government (Scotland) Act 1982 ("the 1982 Act") allowing local authorities to resolve that sexual entertainment venues ("SEV") in their area will require to be licensed. Where such a resolution is made, similar procedures as those already applicable to the licensing of sex shops will apply also to the licensing of SEV. It is anticipated that these new provisions will be brought into effect in the course of 2018.

3.2 Section 74 of the 2015 Act also contains provisions allowing local authorities to resolve to include the use of premises for the performance of plays in the activities which will require a public entertainment licence under section 41 of the 1982 Act. The existing mandatory regime of licensing of such premises under section 12 of the Theatres Act 1968 will be repealed. Again, it is anticipated that this will commence in 2018.

3.3 Scottish Government have now produced draft guidance on the provisions for the licensing of SEV and on the changes to the licensing of theatres. This is attached at **Appendix 1**. Any comments require to be submitted to Scottish Government by 7 February 2018. Draft comments for the Committee's approval are attached at **Appendix 2**.

4. SEV licensing

4.1 The consultation relates purely to the content and quality of the draft guidance. It is not an opportunity to revisit the terms of the 2015 Act itself or the merits of the decision by the Scottish Parliament to allow SEV to continue to operate in Scotland, albeit that decision may appear anomalous given the Scottish Government's stated commitment to eradicating violence against women, of which commercial sexual exploitation (which includes activities such as stripping and lap dancing) is a recognised form.

4.2 The draft comments attached for approval accordingly largely focus on the need for greater clarity in relation to certain practical and legal aspects of the licensing process.

4.3 Members should note that the requirement for SEV to be licensed will apply in Highland only if the Committee makes a resolution to that effect once these new provisions come into force. It is recommended that consultation with interested bodies and the wider public take place before the Committee makes such a resolution.

4.4 If a resolution to require SEV to be licensed is made, it will come into effect one year after the date of making the resolution. Notice of the resolution must be published by no later than 28 days before the date on which the resolution will come into effect.

4.5 An SEV policy statement must be published at the same time and in the same manner as the publication of the notice of the resolution. Full consultation on an appropriate SEV policy statement, followed by adoption of a final policy statement, will therefore require to take place in the 11-month period between the making of the resolution and the publication of the notice. This should include, amongst other things, consultation on two separate matters which the new legislation will require authorities (who have resolved to license SEV) to determine from time to time and publish. These determinations are:

- a determination under paragraph 7(3D) of Schedule 2 to the 1982 Act of the persons or bodies on whom applicants for an SEV licence must serve a copy of the application under paragraph 7(3C) within 7 days of making the application, and

- a determination of the appropriate number of SEV for the local authority's whole area and for each "relevant locality" within that area (and this number may be nil).

4.6 Members will note that the draft comments in Appendix 2 include various comments seeking clarification of these determination requirements, which, on analysis of the wording of the legislation are not particularly straightforward, or are at least not as straightforward as the draft guidance might suggest.

4.7 Members may also wish to note that, within the Highland area, there is currently only one premises, located in Inverness city centre, which would be likely to fall within the definition of SEV contained in the new legislation and which may therefore require an SEV licence if a resolution to license SEV is made. In the operating plan in the premises licence (under the Licensing (Scotland) Act 2005) for the sale of alcohol at that premises, "adult entertainment" is included as an activity and is known to be provided within the premises on a daily basis.

4.8 There are a small number of other premises also with "adult entertainment" included as an activity in their alcohol premises licence operating plans. However it is understood that this activity has been included in their operating plans only to allow for occasional events (eg. stag or hen parties). Any such premises at which sexual entertainment (within the meaning of the new legislation) takes place on 3 or fewer separate occasions within any 12-month period will not come within the definition of SEV and will therefore not require an SEV licence. Any at which such entertainment takes place on 4 or more separate occasions will require an SEV licence.

4.9 It should also be noted that, for the purposes of the existing alcohol licensing regime under the Licensing (Scotland) Act 2005, Scottish Government are proposing to delete the definition of, and reference to, "adult entertainment" currently contained in The Licensing Conditions (Late Opening Premises) (Scotland) Regulations 2007. They have not, however, also proposed either deletion of "adult entertainment" from the list of activities in Question 5 in the premises licence application form/operating plan (prescribed in Schedule 5 to The Premises Licence (Scotland) Regulations 2007), or amendment to the terminology in those Regulations to refer to "sexual entertainment", as defined in the new SEV legislation, rather than to "adult entertainment" (which will be undefined).

4.10 To the extent that this is likely to cause confusion both for Licensing Boards and alcohol premises licence applicants, a comment on this issue is included in Appendix 1.

5. Theatre licensing

5.1 In anticipation of the repeal of the existing mandatory regime for licensing premises used for the performance of plays under the Theatres Act 1968 and this activity becoming one which authorities may resolve to include in activities licensable under public entertainment licensing ("PEL") under section 41 of the 1982 Act, the Committee included this activity in the list of proposed changes to PEL activities when undertaking public consultation on these proposed changes in 2014-15. Following this consultation,

the Committee resolved on 2 February 2016 to include this activity under PEL, with effect from the date at which the relevant provisions of the 2015 Act come into force. The relevant section of this resolution is worded as follows:

> **"7. Premises used for the performance of plays**
> **Change:** License the use of premises for the performance of plays where there is a charge to the public. This activity will only be licensed under the public entertainment category once the provisions in the Theatres Act 1968 governing the licensing of premises used for the performance of plays are repealed, and corresponding changes to the 1982 Act are brought into effect to allow the use of premises for the performance of plays to be included as an activity which requires a public entertainment licence."

5.2 While the inclusion of this activity in the 2016 resolution (in anticipation of the legislation coming into effect) may have been considered a sensible move at the time, various issues raised by this are now apparent:

1. It is not possible to accommodate or adhere to the legally required transitional arrangements for existing Theatres Act licence holders (these are explained in the draft guidance) if the Council's 2016 resolution comes into effect immediately the relevant provisions of the 2015 Act come into force in 2018.

2. Time will in any event be needed to prepare specific guidance notes for applicants, application forms, etc., and publish these before the PEL licensing requirement comes into effect.

3. The main reason for the repeal of section 12 of the Theatres Act 1968 and allowing the performance of plays to become a public entertainment licensable activity under section 41 of the 1982 Act was to introduce greater flexibility. The aim was to allow licensing authorities to decide, if they so wished, to exclude smaller venues/theatrical performances from any licensing regime. No such flexibility was considered by the Committee when agreeing the terms of part 7. of the 2016 resolution.

4. It is questionable, in any event, whether part 7. of the 2016 resolution was competent given that the power to resolve to include the use of premises for the performance of plays as a licensable form of public entertainment under section 41 of the 1982 Act did not exist at the time the 2016 resolution was made.

It is accordingly recommended that the Committee agree that part 7. of the 2016 resolution will not be enforced in its current form and that consideration will be given to rescinding and remaking this part of the resolution, in accordance with the procedures required under section 9 of the 1982 Act, once the power to resolve to include this activity under public entertainment licensing has come into effect and an appropriate timeframe for transitional arrangements for holders of existing licences can be ascertained.

6. **Implications**

6.1 Not applicable.

Date: 6 December 2017

Author: Susan Blease

Air Weapons and Licensing (Scotland) Act 2015

Consultation on:
Guidance on the Provisions for Licensing of Sexual Entertainment Venues and Changes to Licensing of Theatres

November 2017

Scottish Government
Riaghaltas na h-Alba
gov.scot

CONSULTATION ON GUIDANCE ON THE PROVISIONS FOR LICENSING OF SEXUAL ENTERTAINMENT VENUES AND CHANGES TO LICENSING OF THEATRES

Introduction

1. The key aims of civic licensing are the preservation of public safety and order and the prevention of crime. The Scottish Government considers that it is appropriate that sexual entertainment venues should be licensed in order that both performers and customers benefit from a safe, regulated environment and that the licensing of these venues would help limit the risk of criminality, such as prostitution and human trafficking.

2. The Air Weapons and Licensing (Scotland) Act 2015 (the '2015 Act') therefore provides for the creation of a new licensing regime for sexual entertainment venues (SEV), such as lap dancing clubs. The provisions, when commenced, will allow local authorities to licence such venues under the Civic Government (Scotland) Act 1982 (the "1982 Act"). We understand that there are currently only around a dozen such establishments in Scotland.

3. The draft guidance is a work in progress primarily to support implementation of the new licensing regime for SEV. It also includes material on the repeal of the existing mandatory licensing regime for theatrical performances under section 12 of the Theatre Act 1968 and the ability of local authorities to licence theatres under the more flexible public entertainment licence requirements contained within the 1982 Act. The 2015 Act provides for this but much will depend on commencements or amendments to secondary legislation that are still to be made. In particular, details of the timeline will be dependent on the particulars of any commencement order and the guidance will be updated to reflect the final position before publication.

Background

4. The SEV provisions in the 2015 Act were subject to detailed stakeholder engagement, consultation and parliamentary scrutiny. In developing the licensing regime care was taken to balance individual freedom of choice with the right of local authorities to exercise appropriate control and regulation of sexual entertainment venues that operate within their areas.

5. The provisions at section 76 of the 2015 Act establish a specific licensing regime for the regulation of SEV. This allows for greater local control over the provision of such venues by allowing local authorities to licence SEV and to set the number able to operate in their area taking account of local circumstances.

6. However, this is not a mandatory regime and it will be for individual local authorities to determine whether they wish to licence SEV. If a local authority passes a resolution to licence SEV, the resolution must specify a date when it is to take effect, which is at least one year from the date the resolution is passed and the local authority must also prepare a policy statement. Both the resolution

and the policy statement should be published, at the same time and in the same manner, not less than 28 days prior to the resolution taking effect.

7. Where a resolution is in place, the established procedure for considering applications to operate SEV, which is laid out at Schedule 2 of the 1982 Act, should be followed. Where no resolution is in place, no licence will be required to operate SEV.

Purpose of Consultation

8. In carrying out its functions in relation to SEV, a local authority must have regard to non-statutory guidance issued by Ministers. The purpose of this consultation is to invite views on the draft non-statutory guidance which has been developed prior to it being finalised and published.

9. The non- statutory *Guidance on the Provisions for Licensing of Sexual Entertainment Venues and Changes to Licensing of Theatres* at **Annex A** is a technical document to support the operation of the new licensing regime, as such, the guidance cannot go much beyond explaining the legislation in layman's terms. While the interpretation of the primary legislation is ultimately a matter for the courts, the guidance aims to provide advice to local authorities, SEV operators, local people and other interested parties on the new measures introduced by the legislation.

10. The draft guidance takes account of engagement with local authority stakeholders. The views of Scottish Government policy officials with an interest in violence against women and girls, prostitution and human trafficking have also been taken on board to ensure that it recognises the relationship between licensing SEV and other strategies such as *Equally Safe: Scotland's strategy for preventing and eradicating violence against women* and the *Trafficking and Exploitation Strategy*.

11. A non- prescriptive approach has been taken to drafting the guidance as we consider that local authorities are best placed to reflect the views of the communities they serve and to determine whether sexual entertainment establishments should be licensed within their areas and if so, how many and under what conditions.

12. The prime intention of the draft guidance is to assist local authorities in taking forward work in relation to licensing SEV and to help ensure that such activities take place in safe and regulated environments.

13. It is important that the guidance meets its aims and we would welcome comments on :

a) any areas within the draft non-statutory guidance which you found were unclear or not easily understood, please specify the paragraph

b) other issues which you believe should be taken into account within the guidance.

14. Please note that this consultation is not seeking views on the legislation relating to the licensing of SEV which was fully explored during the parliamentary passage of the 2015 Act.

Deadline for responding

15. You are invited to send your views and comments on the draft Guidance on the Provisions for Licensing of Sexual Entertainment Venues and Changes to Licensing of Theatres by **midnight on 07/02/2018.**

Responding to this Consultation

16. Please respond to this consultation using the Scottish Government's consultation platform, Citizen Space. You view and respond to this consultation online at https://consult.scotland.gov.uk/justice/licensing-of-sexual-entertainment-venues. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before consultation closes at midnight on 07/ 02/ 2018.

17. If you are unable to respond online you can submit a response along with a completed Respondent Information Form (see "Handling your Response" below) to:

    Licensing.Consultation@gov.scot

Handling your response

18. If you respond using Citizen Space (http://consult.scotland.gov.uk) you will be directed to complete the Respondent Information Form. Please indicate how you wish your response to be handled and, in particular, whether you are happy for your response to published.

19. If you are unable to respond via Citizen Space please complete the Respondent Information Form provided at **Annex B** and submit it alongside your response. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

20. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

21. Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at http://consult.scotland.gov.uk. If you use Citizen Space to respond, you will receive a copy of your response via email.

22. Following the closing date, all responses will be analysed and considered along with any other available evidence. Responses will be published where we have been given permission to do so.

Comments and complaints

23. If you have any comments about how this consultation exercise has been conducted, please send them to Licensing.Consultation@gov.scot

Scottish Government consultation process

24. Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work. You can find all our consultations online: http://consult.scotland.gov.uk. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

25. Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (https://www.ideas.gov.scot)

26. Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

    - indicate the need for policy development or review
    - inform the development of a particular policy
    - help decisions to be made between alternative policy proposals
    - be used to finalise legislation before it is implemented.

27. While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

ANNEX A

DRAFT GUIDANCE ON THE PROVISIONS FOR LICENSING OF SEXUAL ENTERTAINMENT VENUES AND CHANGES TO LICENSING OF THEATRES

AIR WEAPONS AND LICENSING (SCOTLAND) ACT 2015

GUIDANCE ON THE PROVISIONS FOR LICENSING OF SEXUAL ENTERTAINMENT VENUES AND CHANGES TO LICENSING OF THEATRES

AIR WEAPONS AND LICENSING (SCOTLAND) ACT 2015

GUIDANCE ON THE PROVISIONS FOR LICENSING OF SEXUAL ENTERTAINMENT VENUES AND CHANGES TO LICENSING OF THEATRES

CONTENTS LIST

Introduction

The key aims of civic licensing are the preservation of public safety and order and the prevention of crime. A specific licensing regime for sexual entertainment venues will allow local authorities to consider local circumstances in setting the number of venues able to operate within their areas (this could be nil) and to exercise appropriate control and regulation of these venues. A published sexual entertainment policy statement will provide local communities with a clear indication of the local authority's policy and examples of licensing conditions, along with enforcement details. The policy should also demonstrate how the local authority intends to help protect the safety and wellbeing of performers, customers and the wider public.

Legislation

1. The Air Weapons and Licensing (Scotland) Act 2015[1] (the 2015 Act) received Royal Assent on 4 August 2015. The provisions of the Act which relate to the licensing of sexual entertainment venues (SEV) come into force on [**Date to be agreed]**. However this is not a mandatory licensing regime and it will be for local authorities to determine whether they wish to licence SEV, whether to limit their numbers and to determine individual licence applications. When doing so local authorities will need to consider the implications, opportunities and risks of their decisions. We would envisage that SEV licences may be required in some areas from [**Date to be agreed].**

2. Section 76 of the 2015 Act inserts sections 45A, 45B and 45C into Part III of the Civic Government (Scotland) Act 1982[2] (the 1982 Act). These provisions establish a specific licensing regime for the regulation of SEV and allow for greater local control over the provision of such venues. Although licensing of SEV follows a similar pattern to that covered by Part I, Part II and Schedule 1 of the 1982 Act, local authorities may wish to note that these provisions have no application to Part III licences which are solely governed by Schedule 2 of the Act.

3. While this guidance is primarily in respect of the SEV licensing regime, it also includes details at paragraphs 87-88 of the repeal of the existing mandatory licensing regime for theatrical performances under section 12 of the Theatre Act 1968 and the ability of local authorities to licence theatres under the more flexible public entertainment licence requirements contained within the 1982 Act. **To allay concerns raised, it is worth emphasising that theatrical performances will not fall under the provisions for SEV**.

4. Information in respect of both SEV and the theatre provisions is provided at: paragraph 90 on commencement; at paragraphs 93-96 on transitional provisions; and at paragraphs 101-102 on the consequential changes required to The Licensing Conditions (Late Opening Premises) (Scotland) Regulations 2007 as a

[1] http://www.legislation.gov.uk/asp/2015/10/contents

[2] http://www.legislation.gov.uk/ukpga/1982/45/contents

result of the creation of a SEV licensing regime and the changes to theatre licensing.

5. This guidance also makes reference to the Licensing (Scotland) Act 2005 (the 2005 Act[3]), which provides a licensing regime for the sale of alcohol. The 1982 Act, and the 2005 Act provide for a variety of different licences, and it is possible that the same activity may require more than one licence. Care should therefore be taken to ensure that the requirement to obtain a licence and any exemptions from the requirement to obtain a licence are carefully considered.

6. The 1982 Act sets out that civic licensing decisions are the responsibility of the licensing authority, a committee made up of locally elected councillors. The 2005 Act provides that liquor licensing decisions are the responsibility of the local Licensing Board. These terms are used throughout this guidance. In practice the relevant committees may be known by different names, or different licensing regimes may be covered by the same local authority committee. Where different committees are involved in the licensing of the same business, then it can be useful to co-ordinate in relation to the setting of licence conditions etc.

7. Where a local authority opts to licence SEV within its area, the provisions at section 45A of the 1982 Act require a licence for premises operated as SEV where the sexual entertainment is performed live, is for the direct or indirect financial benefit of the organiser and is for the sole or principal purpose of sexual stimulation of members of the audience. However, premises where sexual entertainment is provided on no more than 4 occasions in a twelve month period are not to be treated as SEV. The *Licensing of sexual entertainment venues: interpretation* section at paragraphs 80-86 of this guidance provides additional definitions and further information.

8. The following link shows the passage of the Air Weapons and Licensing (Scotland) Bill through the Scottish Parliament, and includes further documentation that may be of interest including the Explanatory Notes and Policy memorandum: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/76383.aspx .

<u>The Guidance</u>

9. Section 45B(7) of the 1982 Act requires that, in carrying out its functions, a local authority must have regard to guidance issued by Ministers. This non-statutory guidance is intended to assist local authorities, but other parties such as the Police, venue operators, relevant organisations and performers may also find it useful.

10. The guidance should be read in conjunction with the relevant legislation, particularly Part III and Schedule 2 of the 1982 Act and the relevant accompanying documents for the Air Weapons and Licensing (Scotland) Act

[3] http://www.legislation.gov.uk/asp/2005/16/contents

2015. This guidance however should not be seen as a replacement for independent legal advice.

Background

11. On 24 March 2005, previous Scottish Ministers set up a Working Group on Adult Entertainment to review the scope and impact of adult entertainment activity and make recommendations on the way forward. This followed concerns expressed about the lack of controls on adult entertainment activity. The Group[4] made a number of recommendations aimed at improving standards in the industry, ensuring the safety of performers and customers, regulating the impact on the locality, improving local accountability and control and ensuring that there was no inadvertent impact on artistic freedoms.

12. At that time, it was felt that, as SEV also sold alcohol and therefore required alcohol licences, it was best left to local licensing boards to regulate adult entertainment via the existing licensing regime for alcohol.

13. In 2010 Sandra White MSP introduced amendments to provide for a specific system of licensing for sexual entertainment which were considered by the Scottish Parliament as part of its scrutiny of the Criminal Justice and Licensing Bill at Stages 2 and 3. The proposed provisions broadly mirrored those that had been introduced in England and Wales in section 27 of the Policing and Crime Act 2009. While the Scottish Government supported the proposals, Parliament rejected them due to concerns about the effect of operating a dual licensing system and concerns about the lack of opportunity to fully consider the proposals.

14. Since then, the court judgment in BrightCrew Limited v City of Glasgow Licensing Board [2011] CSIH 46XA86/10 [5] called into question the ability of Licensing Boards to set conditions that stray beyond the sale of alcohol. As a result, Scottish Ministers considered that a specific licensing regime for SEV was the best solution for future regulation of the industry and to remove uncertainty around attempting to regulate under alcohol licensing matters that go beyond the remit of that regime.

15. A consultation was published in June 2013[6] (the consultation) inviting views on the establishment of a licensing regime based on the draft provisions that Ms White had proposed in 2010. Section 76 of the 2015 Act amends the 1982 Act to provide for this.

[4] http://www.gov.scot/Publications/2006/04/24135036/0

[5] https://www.scotcourts.gov.uk/search-judgments/judgment?id=2a9286a6-8980-69d2-b500-ff0000d74aa7

[6] http://www.gov.scot/Publications/2013/06/3607

Relationship with other Strategies

16. In response to the consultation there was wide support for the principle of a new licensing regime including from local authorities, Police, violence against woman and gender groups.

17. However, some concerns were raised that licensing SEV encouraged unhealthy attitudes to women and therefore damaged society as a whole.

18. The Scottish Government accepts the freedom of adults to engage in legal activities and employment. However, it will continue to promote, through all relevant means, gender equality and actions that tackle out-dated attitudes that denigrate or objectify particular groups or individuals.

19. *Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls* [7] was first published in 2014 and updated in 2016. It sets out a definition of violence against women and girls which includes 'commercial sexual exploitation, including prostitution, lap dancing, stripping, pornography and human trafficking'.

20. Whilst recognising the conflict between this definition and the licensing of sexual entertainment venues this guidance will help to ensure that such activities take place in safe and regulated environments. When deciding whether to licence, and whether to limit, SEV in their area local authorities will need to consider the interaction with their own local policies and strategies, as well as the legal implications to minimise the risk of legal challenge.

21. Equally Safe's aim is to work collaboratively with key partners across all sectors to prevent and eradicate all forms of violence against women and girls and the attitudes which perpetuate them. Its priorities are: achieving gender equality; intervening early and effectively to prevent violence; and maximising the safety and wellbeing of women, children and young people.

22. The *Trafficking and Exploitation Strategy*[8], required under section 35 of the Human Trafficking and Exploitation (Scotland) Act 2015 was published on 30 May 2017. It sets out the Scottish Government's strategy to work with partners to make Scotland a more hostile place for human trafficking. The aims of the strategy are to identify victims and support them to safety and recovery; identify perpetrators and disrupt their activity; and address the conditions that foster trafficking and exploitation.

23. In developing the licensing regime care has therefore been taken to balance individual freedom of choice with the right of local authorities to exercise appropriate control and regulation of SEV that operate within their areas.

[7] https://beta.gov.scot/policies/violence-against-women-and-girls/equally-safe-strategy/

[8] http://www.gov.scot/Publications/2017/05/6059

24. Ministers consider that local authorities are best placed to reflect the views of the communities they serve and to determine whether sexual entertainment establishments should be licensed within their areas and if so, under what conditions.

25. A local authority licensing SEV will have to publish a SEV policy statement, developed in consultation with relevant interest groups (including violence against women partnerships) which will provide local communities with a clear indication of the local authority's policy. Where a SEV is approved, licensing conditions, along with enforcement, will help reduce the risk of criminality such as prostitution and human trafficking; and help protect the safety and wellbeing of performers, customers and the wider public. The community should, in turn, benefit from a safe, regulated environment.

26. This is a complex area and local authorities will have to consider the local circumstances and balance the legal obligations of legislation including, but not limited to, the EU Services Directive, the Regulatory Reform (Scotland) Act 2015 with the needs of their communities to mitigate the risks of legal challenge and any rights SEV operators may have particularly under Article 1, Protocol 1 of the European Convention of Human Rights (entitles every person to the peaceful enjoyment of their possessions) and Article 10 (freedom of expression).

Licensing of sexual entertainment venues

27. Section 76 of the 2015 Act introduces a licensing regime for SEV. It achieves that by amending the existing licensing scheme for sex shops provided for in Part III and Schedule 2 of the 1982 Act so that the provisions, with necessary modification, also apply to SEV. It is however not mandatory for a local authority to licence SEV.

28. When deciding whether to licence SEV, local authorities should consider the legal complexities it introduces and ensure they are able to mitigate the risks of legal challenge to an acceptable level.

<u>Local Authority Resolution</u>

29. Where a local authority decides to licence SEV, section 45B of the 1982 Act, requires the local authority to pass a resolution in order for SEV licensing to have effect in their area.

30. In considering whether to pass a resolution a local authority should consider whether they will wish to control SEVs either now or in the future. If there is no resolution in place, then no licence is required to operate an SEV. It may therefore be appropriate to determine a resolution even where there are no current SEV in operation if the local authority considers that it is likely to be thought that it would be inappropriate for any SEV to operate in its area in the future. Otherwise it will be possible for a SEV to operate there unregulated until a SEV licensing regime is put in place.

31. In considering whether to pass a resolution to licence SEV, local authorities may wish to look carefully at their localities and consider a range of issues such as:

    - whether there are any sexual entertainment venues already operating
    - the location of schools
    - the location of places of worship
    - the location of heavily residential areas
    - whether there have been incidents involving anti-social behaviour, sexual assaults or more minor harassment reported in any particular area
    - whether there have been incidents of human trafficking or exploitation locally.

32. Local authorities have extensive experience of engaging with local people and will know what works best in their individual areas and may wish, as a matter of good practice, to seek the views of local people and businesses prior to deciding whether to pass a resolution. In doing so, local authorities may wish to make any relevant information available to local people in order to inform their understanding. Local authorities may also wish to engage with known SEV as soon as a decision has been made, to ensure that they are aware of what action they will need to take, and to seek input from the local Police Scotland human trafficking champion or the Human Trafficking Unit at Gartcosh.

33. In considering whether to pass a resolution to licence SEV, local authorities must also have cognisance of other relevant legislation such as the EU Services Directive, the Regulatory Reform (Scotland) Act 2015 and any rights SEV operators may have particularly under Article 1, Protocol 1 of the European Convention of Human Rights (entitles every person to the peaceful enjoyment of their possessions) and Article 10 (freedom of expression). Local authorities should consider whether the decision is proportionate and justifiable.

34. If licensing SEV, a local authority must determine, from time to time, the number of SEV that they consider appropriate for their area and each relevant locality. Nil may be considered the appropriate number. The determination should be publicised. Further guidance on what a local authority may wish to consider in determining numbers and localities is provided below in relation to developing the policy statement.

<u>Specified Day</u>

35. Where a local authority passes a resolution, it must specify a date from when it is to take effect in their area. This must be at least one year from the date the resolution is passed. The local authority must also publish notice that they have passed a resolution not less than 28 days prior to the date the resolution is to take effect. The notice must state the general effect of the licensing procedure and provisions at Schedule 2 of the 1982 Act, as modified for SEV, and be published either electronically or in a local newspaper.

Statements of policy in relation to sexual entertainment venues

36. Section 45C of the 1982 Act requires that where a local authority has passed a resolution under section 45B(1) that a licensing regime for SEV will have effect in their area, they will then be required to prepare and publish a sexual entertainment venue policy statement. The statement of policy should set out and justify the position of the local authority with regards to licensing SEV and should support local authorities should they face any legal challenges.

Content

37. The policy statement should include details of the impact a local authority considers the licensing of SEV will have in its area. Section 45C(3) of the 1982 Act states:

> "In preparing a SEV policy statement, a local authority must—
>
> (a) consider the impact of the licensing of SEV in their area, having regard, in particular, to how it will affect the objectives of—
>
> (i) preventing public nuisance, crime and disorder,
> (ii) securing public safety,
> (iii) protecting children and young people from harm,
> (iv) reducing violence against women, and
>
> (b) consult such persons or bodies as they consider appropriate."

38. For the purposes of the section, "children" are defined as persons under the age of 16 and "young people" as persons aged 16 or 17.

39. Policy statements should be published at the same time and in the same manner as the notice of resolution is published i.e. it should be published not less than 28 days prior to the date the resolution is to take effect, either electronically or in a local newspaper.

40. The policy statement should provide local communities with a clear indication of the local authority's policy and must be consistent with the licensing objectives and procedures set out in the 1982 Act as amended.

41. The statement might include information on where the local authority is likely to consider to be appropriate or inappropriate locations for SEV and indicate how many SEV are considered to be appropriate for a particular locality in its area along with explaining the reasons behind this.

42. In developing the statement, local authorities may also wish to take account of whether any sexual entertainment venues are already operating in its area under the existing regime for alcohol licensing and, if so, whether they wish to continue to licence the same number of venues as are currently operating.

43. The local authority may wish to reflect on whether reducing the number of venues, or setting the number at zero, in their area will have a disproportionate effect on business and on whether they may leave themselves open to legal challenges e.g. under Article 1, Protocol 1(entitles every person to the peaceful enjoyment of their possessions) of the European Convention of Human Rights.

44. Where there are currently no sexual entertainment venues operating, a local authority may wish to consider if there may be benefit in making a resolution to give effect to the licensing regime even where it considers that the number should be set at zero. In setting the number at zero, a local authority should be able to demonstrate proportionality by evidencing that the competing interests of individuals alongside those of the community had been fairly considered and appropriately balanced.

45. In developing the policy statement, we consider it best practice for local authorities to consult with persons with an interest and this should include organisations such as violence against women partnerships, child protection committees and community councils.

46. In exercising any functions in relation to the licensing of SEV, the local authority is required to have regard to their SEV licensing policy statement. It is also required, from time to time, to review the policy statement, revise it as appropriate and publish the revised statement. We suggest that it may be best practice to align the review of both the resolution and the policy statement. However it will be for individual local authorities to determine the timeframe for undertaking the reviews required.

Licensing Conditions

47. Under paragraph 9 of Schedule 2 to the 1982 Act local authorities have a power to impose reasonable licence conditions. In doing this local authorities need to be flexible in responding to each application and in some cases additional or more tailored conditions reflecting local circumstances may be appropriate.

48. Conditions are specific requirements that the licence holder must comply with, otherwise the licence could be refused or revoked. Paragraph 19(1)(c) of Schedule 2 states that a licence holder who, without reasonable excuse, knowingly contravenes or permits the contravention of a specified condition will be guilty of an offence.

49. The local authority can attach standard conditions for all licences granted for SEV, they may also impose individual conditions to licences.

50. By way of example, such licence conditions could regulate:

- the display of advertisements on or connected to the venue.
- the days and times when the premises may be used as a SEV.
- the visibility of the interior of the SEV to passers by
- the number of persons to be admitted to the premises.

51. The local authority should give careful consideration as to whether the condition proposed is necessary. The local authority should also consider whether, in all the circumstances, the condition is reasonable and proportionate and therefore not open to challenge.

52. Any condition attached to the licence must be clear, so that the licence holder is aware of his obligation to comply.

53. Part of the local authority's role is to ensure improved working conditions and a safer environment for the women who work in SEV. They may wish to encourage operators to actively identify potential victims of human trafficking in their recruitment procedures and to work with agencies such as the Trafficking Awareness Raising Alliance (TARA) to combat the trafficking of individuals and families.

54. In terms of how a premises licensed as a SEV should be run, local authorities may wish to consider adopting some or all of the following non-exhaustive list of suggestions and develop them as model conditions within their Policy Statement:

- list of full names, dates of birth, nationality and contact details (address or telephone number) for all performers to be available on the premises for immediate production if requested by Police or local authority officers.
- ensure immigration status is in order and performers have not been the victims of human trafficking
- employment of security guards
- use and storage of CCTV
- provision of hygienic changing facilities and a toilet with access to hot water exclusively for the use of the performers
- set break times for performers
- the provision of a break room exclusively for the use of the performers
- performers to be escorted by security to nominated taxi or to their car at end of shift
- performers to remain clothed outwith performance area
- no physical contact between performers and customers
- rules to be displayed at appropriate locations within the venue of customer conduct that is deemed acceptable e.g. customers to remain fully clothed at all times
- performers not to accept offer from customer of payment in return for sexual favours
- performers not to accept any form of contact details from customers
- performers not to engage in any unlawful activity within SEV
- no photographs or video recordings to be taken.

55. It should be borne in mind that it is extremely likely that SEV will also require to have a premises licence under Part 3 of the 2005 Act and care will be required to ensure that any SEV conditions are attached to the SEV licence and that they do not contradict the conditions applied to the alcohol licence. In the event that the SEV does not also require an alcohol licence, local authorities may wish to consider whether any of the conditions attached to such licences would be appropriate to that particular SEV.

Applications

56. The local authority resolution will specify a date from which the SEV licensing regime is to take effect in its area. Under paragraph 25(3) of Schedule 2 of the 1982 Act a local authority cannot consider any application for a SEV licence prior to the date specified in the resolution and cannot grant any licence until it has considered all applications received.

57. Local authorities will therefore wish to consider developing new application forms specifically in respect of SEV licences. Authorities will also have to determine when these forms should be made available to operators / prospective operators. It may also be appropriate to intimate in the resolution when applications will be considered by the local authority.

58. Paragraph 25 of Schedule 2 also provides that where a SEV is trading in the area before the resolution has been published and before the specified day of effect has applied for a SEV licence under Schedule 2, then they may continue trading until the application is considered. If the application is refused they may continue to trade until the timescale for an appeal under paragraph 24 has lapsed or the appeal has been determined or abandoned.

59. We suggest that in considering an application for a SEV licence, with the view to reaching an evidence based decision on whether it should be granted, local authorities will wish to look carefully at the proposed location and take account of

- the existing character and function of the area in which it will be located
- whether there are any schools near the vicinity of the SEV
- whether there any places of worship in that vicinity
- whether there are other relevant businesses or charities operating in the area e.g. homelessness shelters, supported accommodation, recovery units etc.
- whether the SEV is close to heavily residential areas
- whether there have been incidents involving anti-social behaviour, sexual assaults or more minor harassment reported in that area
- the views of residents and other relevant interested persons
- input from the local Police Scotland human trafficking champion or the Human Trafficking Unit at Gartcosh.

60. It is important to note that a SEV licence will be required for premises where sexual entertainment is provided on more than 4 occasions in a twelve month period even where that entertainment is booked by the person hiring the venue.

Consideration

61. Local authorities will follow the established procedure for considering applications laid out at Schedule 2 of the 1982 Act. The procedure is applicable to licensing sex shops and has been modified to apply to SEV. Paragraph 9(3) sets out a list of persons to whom a licence may not be granted and paragraph 9(5) lists grounds on which a local authority may refuse an application for the granting or renewal of a licence. Each licence application should be fully considered on its own merits. However note, under paragraph 9(5)(c), where the number of venues in the local authority's area or relevant locality at the time the application is made is equal to or exceeds the number which the local authority consider is appropriate for their area or that locality the local authority should refuse the application without further consideration.

62. The provisions in relation to making an application for a licence or the renewal of a licence are detailed at paragraph 6 of Schedule 2. In considering an application, the local authority will wish to satisfy itself that the applicant is not an unsuitable person to hold a licence by reason of having been convicted of an offence or for any other reason.

63. The local authority can at any time decide to vary a licence on any grounds it thinks fit or revoke a licence in line with the provisions set out at paragraph 13 of Schedule 2.

64. A decision not to grant a licence or to revoke a licence may be subject to appeal. An appeal would be to a Sheriff in the first instance and could be on the grounds that the authority erred in law, based their decision on an incorrect material fact, acted contrary to natural justice or exercised their discretion unreasonably.

65. Any appeal in relation to a SEV licence must be made within 28 days of the date of the decision appealed against.

66. Under paragraph 12(2)(b) of Schedule 2 a local authority may grant a SEV licence for one year or such other period that it deems appropriate.

Notification

67. Applicants will require to advertise their applications for a licence in a local newspaper specified by the local authority and for a notice to be displayed on or near the relevant premises. The legislation imposes a further duty at paragraph 7(3C) of Schedule 2 requiring each applicant for a licence to operate a SEV to send a copy of their application to such persons or bodies as have been determined by the local authority within 7 days of making the application and to certify to the local authority that they have done so. There is also a new obligation on local authorities at paragraph 7(3D), requiring them to determine which persons and bodies are to receive copies of applications and to publicise that list as they consider appropriate.

List of appropriate persons

68. In relation to notification of a SEV licence application, the Cabinet Secretary for Justice stated during Stage 3 consideration of the legislation:

> "Although the current process already allows for robust notification procedures, with requirements for both newspaper advertising and notices to be publicly displayed, there are advantages in requiring specific notification to particular bodies that will have an interest in the licensing of sexual entertainment venues. There is a practical advantage in ensuring important stakeholders, including violence against women partnerships and community councils are notified of applications early, so that they have sufficient time to consider applications and to make such representations to the authority as they consider appropriate. There is also an advantage in that it will send a very clear message that groups identified as being appropriate to receive copies of the application, including violence against women partnerships and community groups, are at the heart of the licensing process."

69. In line with this, we suggest that it is essential to ensure that those with an interest are notified as early as possible and that particular organisations such as violence against women partnerships and community councils should be considered important stakeholders in the licensing process. They should therefore be included on the published local authority list of those who are to receive copies of applications.

70. Local authorities may also wish to consider including on the list businesses, schools, places of worship, child protection committees, residents who are in the vicinity of the proposed SEV along with anyone else they consider appropriate.

ECHR Issues

71. When taking a decision to refuse an application local authorities should take account of any rights SEV operators may have, particularly under Article 1, Protocol 1 of the European Convention of Human Rights (entitles every person to the peaceful enjoyment of their possessions) and Article 10 (freedom of expression). Local authorities may wish to consider whether there is any interference with the applicant's human rights. And if so is it necessary and proportionate for the prevention of disorder or crime, the protection of health or the protection of the rights and freedom of others and whether the interference can be justified in the general public interest.

72. In implementing the SEV legislative provisions local authorities will wish to ensure that they do so in compliance with the Convention rights and that they put in place flexible policies which take account of individual circumstances.

Fees

73. Paragraph 18 of Schedule 2 provides that a local authority should charge a reasonable fee which is sufficient to meet the expenses incurred by the authority in exercising its functions under the Schedule. In setting fees, local authorities will wish to have regard to the EU Services Directive.

Enforcement

74. Offences and sanctions which relate to SEV licensing fall wholly under Schedule 2 of the 1982 Act and are set out in paragraph 19 of Schedule 2. Local authorities will wish to be aware that these provisions only apply where a resolution to licence SEV has been made.

75. The powers to enter and inspect and to enter and search licensed SEV are set out at paragraphs 20 and 21 of Schedule 2. These are similar to the provisions relating to Part II licences.

Conclusion

76. The 1982 Act makes clear that any decision made by the local authority, when considering applications for SEV licences, should be reasonable. This applies to fees, conditions which may be added to the licence, and to the time taken to consider the application.

77. The local authority should consider the facts of individual licence applications, and make decisions which are based on local priorities and circumstances.

78. The local authority should, where possible, ensure that there is consistency in these decisions, and in the conditions which may be attached to any licence granted.

Licensing of sexual entertainment venues: interpretation

79. Part III of the 1982 Act currently allows local authorities to control the number and location of sex shops in their area and Schedule 2 contains the detailed licensing procedures and provisions for sex shops. Section 76 of the 2015 Act creates a new licensing regime for SEV. It inserts sections 45A - 45C into Part III of the 1982 Act; modifies Schedule 2 so that it applies when a local authority resolves to licence SEV; and amends the title of Part III to “Control of sex shops and sexual entertainment venues”.

Definitions

80. Section 76(3) inserts an interpretation section, which underpins the SEV licensing regime, into the 1982 Act at Part III, section 45A. The relevant definitions are:

> “(2) “Sexual entertainment venue” means any premises at which sexual entertainment is provided before a live audience for (or with a view to) the financial gain of the organiser.

(3) For the purposes of that definition—

"audience" includes an audience of one,

"financial gain" includes financial gain arising directly or indirectly from the provision of the sexual entertainment,

"organiser", in relation to the provision of sexual entertainment in premises, means—

(a) the person ("A") who is responsible for—

(i) the management of the premises, or

(ii) the organisation or management of the sexual entertainment, or

(b) where A exercises that responsibility on behalf of another person (whether by virtue of a contract of employment or otherwise), that other person,

"premises" includes any vehicle, vessel or stall but does not include any private dwelling to which the public is not admitted,

"sexual entertainment" means—

(a) any live performance, or

(b) any live display of nudity,

which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).

(4) For the purposes of the definition of "sexual entertainment", "display of nudity" means—

(a) in the case of a woman, the showing of (to any extent and by any means) her nipples, pubic area, genitals or anus,

(b) in the case of a man, the showing of (to any extent and by any means) his pubic area, genitals or anus."

81. In summary, the provisions at section 45A of the 1982 Act require a licence for premises operated as SEV where the sexual entertainment is performed live, is for the direct or indirect financial benefit of the organiser and is for the sole or principal purpose of sexual stimulation of members of the audience.

<u>Exemptions</u>

82. However, premises where sexual entertainment is provided on no more than 4 occasions in a twelve month period are not to be treated as SEV. This exemption is to avoid drawing into the SEV licensing regime venues where the main purpose is clearly not to provide regular sexual entertainment e.g. venues which have the very odd stag or hen party providing such entertainment. Section 45A(10) specifies how occasional use is to be calculated:

"(a) each continuous period during which sexual entertainment is provided on the premises is to be treated as a separate occasion, and

(b) where the period during which sexual entertainment is provided on the premises exceeds 24 hours, each period of 24 hours (and any part of a period of 24 hours) is to be treated as a separate occasion."

83. It is important to note that a SEV licence will be required where such entertainment occurs on more than 4 occasions in a twelve month period even where that entertainment is booked by the person hiring the venue. It is also important that any premises where sexual entertainment may be performed are properly supervised, as breach of the above limit without a licence is an offence.

Sex shops

84. Section 45A specifically identifies sex shops as not being sexual entertainment venues and provides a power to allow Ministers to specify other premises which do not fall into the category of sexual entertainment venues. A further power is provided so that Ministers can specify descriptions of performances or displays of nudity that are not to be treated as sexual entertainment for the purposes of the legislation.

Under 18s

85. Paragraph 19(1) of Schedule 2 of the 1982 Act prevents anyone under the age of 18 being employed in a SEV. Section 45B(6)(g) of the 1982 Act modifies paragraph 19(1)(e) of Schedule 2 in respect of SEV to make it an offence for a licence holder or their agents to knowingly permit a person under the age of 18 entry to the sexual entertainment venue at a time when sexual entertainment is being provided, or at any other time without reasonable excuse. An example of a reasonable excuse might be where a plumber's mate is called upon to fix an emergency leak.

Public entertainment

86. Section 41 of the 1982 Act enables a licensing authority to direct that a public entertainment licence is necessary for certain types of activity. Section 41(2) of the 1982 Act provides that a "place of public entertainment" is any place where members of the public are admitted or may use any facilities for the purposes of entertainment or recreation. Section 76(2) of the 2015 Act amends section 41(2) of the 1982 Act to exclude a sexual entertainment venue from being licensed under a public entertainment licence.

Licensing of Theatres

Repeal of existing mandatory licensing provisions

87. The provisions at section 74 of the 2015 Act repeal the existing mandatory requirement for theatrical performances to be licensed under the Theatre Act 1968[9] (the 1968 Act) and supporting provisions in the 1968 Act that allow for

[9] http://www.legislation.gov.uk/ukpga/1968/54

powers of entry and inspection. The section also removes the exemption for premises licensed under the 1968 Act from the 1982 Act. This means that local authorities will be able to licence theatres under the public entertainment licence requirements contained in section 41 of the 1982 Act. Section 74 also inserts an equivalent of the anti-censorship provisions from the 1968 Act into the 1982 Act, so that licensing authorities will not be able to censor theatrical performances under the public entertainment licensing regime within the 1982 Act.

Local Authority resolution

88. Following the repeal of the theatre licensing provisions within the 1968 Act, local authorities may wish to consider making a public entertainment licensing resolution under section 9 of the 1982 Act to licence theatres. This requires local consultation, publicity and a 9 month period of notice before having effect. Local authorities are familiar with setting a resolution to bring activities within the scope of public entertainment licensing as the public entertainment licensing regime is currently used for licensing activities such as concerts, funfairs, variety shows etc. Having the local authority set out the scope of the public entertainment regime allows for greater flexibility and local authorities will, for example, be able to exclude premises offering plays to very small audiences from the licensing requirement where they consider that appropriate and proportionate.

Commencement of licensing of theatres and sexual entertainment venues

89. The Air Weapons and Licensing (Scotland) Act 2015 (Commencement No. 1) Order brought section 76(1) and 76(3) into force on 1 December 2015 for the purpose of inserting section 45A into the 1982 Act, but only for the purposes of making orders under section 45A(7)(b) and (11) of that Act. These provisions enable subordinate legislation to be made under the 1982 Act.

90. The provisions at section 74 and the outstanding provisions at section 76 of the 2015 Act are to be fully commenced on [**Date to be agreed**] by the Air Weapons and Licensing (Scotland) Act 2015 (Commencement No.XX and Saving Provisions) Order 2018.

91. In commencing the primary legislation, careful consideration was given as to how and when any existing primary legislation either removed or amended should be 'switched off' and the new provisions take effect and also as to whether the legislation being commenced had any impact on existing secondary legislation which required it to be amended.

92. The transitional and consequential amendments to existing legislation as a result of the provisions at section 74 and 76 of the 2015 Act are detailed below.

Transitional provisions

Section 74 - Theatres

93. To ensure a smooth transition from the mandatory theatre licensing regime under the 1968 Act to the optional public entertainment licensing regime within the 1982

Act the latest expiry date for a licence granted under the 1968 provisions is [**Date to be agreed**] This is intended to allow local authorities sufficient time to consider whether to licence theatres under the 1982 Act and for any resolution to take effect before the licensing regime under the 1968 Act ends.

94. This means that licences granted prior to the commencement of section 74 of the 2015 Act will be able to continue for their natural duration and that new applications and renewal requests can be considered and granted under the 1968 Act until either a local authority resolution comes into effect or until [**Date to be agreed**] whichever comes first.

Section 76 – SEV

95. Section 45B(1) - (3) of the 1982 Act provides:

"(1) A local authority may resolve that Schedule 2 (as modified for the purposes of this section) is to have effect in their area in relation to SEV.

(2) If a local authority passes a resolution under subsection (1), Schedule 2 (as so modified) has effect in their area from the day specified in the resolution.

(3) The day mentioned in subsection (2) must not be before the expiry of the period of one year beginning with the day on which the resolution is passed."

96. This means that existing SEV will not be allowed to continue trading indefinitely. Following a local authority resolution being passed to licence SEV, they will be able to trade for not less than a year under existing arrangements and then will have to submit an application for a licence for a sexual entertainment venue. There should be no assumption that an existing establishment should be allowed to continue under the new regime even when a premises licence under the Part 3 of the 2005 Act is in place. Each licence application should be fully considered on its own merits.

97. Local authorities may wish to be aware of court judgements in:

- Thompson R v Oxford City Council [2013] EWHC 1819 (admin) (28 June 2013)[10] and
- Thompson R v Oxford City Council & Anor [2014] EWCA Civ 94 (11 February 2014)[11]

98. The 'Oxford' cases stressed that the grant of a licence should not be viewed as a grant for eternity and that a new licensing committee can take a different view of the same facts.

[10] http://www.bailii.org/ew/cases/EWHC/Admin/2013/1819.html

[11] http://cases436.rssing.com/browser.php?indx=12680078&item=11604

Consequential Amendments in relation to liquor – The Licensing Conditions (Late Opening Premises) (Scotland) Regulations 2007

99. Following a review of secondary legislation we noted that amendments were required to secondary legislation related to liquor licensing, namely **The Licensing Conditions (Late Opening Premises) (Scotland) Regulations 2007**[12] (the Regulations). These liquor regulations include a definition of adult entertainment and a reference to theatre licensing.

100. These Regulations specify conditions which must be imposed by a Licensing Board on the granting of a liquor premises licence where the operating plan specifies that the premises will, on any occasion, be open for a continuous period beginning on one day and ending after 1am on the following day.

101. **Local authorities may wish to be aware that, as sexual entertainment venues now fall to be regulated under a separate specific licensing scheme it is no longer necessary to provide a definition of "adult entertainment" in these liquor Regulations. Similarly, as licensing of theatres now falls under the optional public entertainment licensing scheme, reference to section 12 of the Theatres Act 1968 (which has been repealed by section 74(3) of the 2015 Act) is not required**.

102. The Regulations therefore will be amended to remove the definition of "adult entertainment" in regulation 1(2) and the reference to "adult entertainment "in section 3(2)(a)(iii); the reference at section 3(3)(c) to section 12 of the Theatres Act 1968 will also be removed.

[12] http://www.legislation.gov.uk/ssi/2007/336/regulation/1/made

ANNEX B - Consultation on Guidance on the Provisions for Licensing of Sexual Entertainment Venues and Changes to Licensing of Theatres

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

Are you responding as an individual or an organisation?

☐ Individual

☐ Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

☐ Publish response with name

☐ Publish response only (without name)

☐ Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

☐ Yes

☐ No

Consultation questions

We would welcome comments on any areas within the draft non-statutory guidance which you found were unclear or not easily understood. Please specify the paragraph.

We would welcome comments on other issues which you believe should be taken into account within the guidance.

This publication is available at **www.gov.scot**

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78851-363-0 (web only)

Published by The Scottish Government, November 2017

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS315746 (11/17)

Appendix 2

THE HIGHLAND COUNCIL

THE HIGHLAND LICENSING COMMITTEE

COMMENTS ON SCOTTISH GOVERNMENT GUIDANCE ON THE PROVISIONS FOR LICENSING OF SEXUAL ENTERTAINMENT VENUES AND CHANGES TO LICENSING OF THEATRES

Consultation question 1 : "We would welcome comments on any areas within the draft non-statutory guidance which you found were unclear or not easily understood. Please specify the paragraph."

Comments in response to question 1

Paragraphs 16 - 21

1. It is not easy to understand from these paragraphs whether, in this instance, the Scottish Government accepts its own definition of violence against women from its "Equally Safe" strategy as including forms of commercial sexual exploitation such as stripping and lap dancing, or is seeking to distance itself from it.

   In this regard, reference is made in particular to paragraph 19, which refers to this definition as "*a definition*" as opposed to Scottish Government's definition. Paragraph 20 then states "*Whilst recognising the conflict between this definition and the licensing of sexual entertainment venues this guidance will help to ensure that such activities take place in safe and regulated environments*."

   If Scottish Government accepts that violence against women includes commercial sexual exploitation and that the latter in turn includes sexual entertainment such as stripping and lap dancing, paragraph 20 could be clearer and more candid. A candid statement might read along the lines that, while recognising the inconsistency between the Government's strategy of eradicating violence against women, of which sexual entertainment is a recognised form, and the licensing of sexual entertainment venues, the Government considers that this guidance will help local authorities to ensure that this form of violence against women will at least take place in a regulated environment.

Paragraph 25

2. This paragraph contains a statement that "*Where a SEV is approved, licensing conditions, along with enforcement, will help reduce the risk of criminality such as prostitution and human trafficking;*". However, licensing conditions require to meet the test of necessity. This is recognised elsewhere in the draft guidance (see paragraph 51). The test of necessity would rule out the imposition of licensing conditions which prohibit acts which the law already provides are criminal offences. It is unclear, therefore what is intended by the statement that licensing conditions will help to reduce the risk of criminality.

Paragraph 26

3. Reference is made in this paragraph to the need for local authorities to mitigate the risks of legal challenge and "*any rights SEV operators may have particularly under Article 1, Protocol 1 of the European Convention of Human Rights (entitles every person to the peaceful enjoyment of their possessions) and Article 10 (freedom of expression)"*. A similar warning is repeated at several other points in the draft guidance (see also paragraphs 33, 43 and 71). These warnings appear to have been lifted from the equivalent guidance provided by the Home Office for the licensing of SEV in England and Wales, which makes similar references to Articles 1 and 10 and adds, as a footnote, the citation for the House of Lords decision in the sex shop case, Belfast City Council –v- Miss Behavin' Ltd (Northern Ireland) (2007) UKHL 19.

   However, neither the draft guidance for Scotland, nor the published guidance for England and Wales appear to have considered whether, or to what extent, these Convention rights would be engaged in the case of the licensing of SEV, as opposed to the licensing of sex shops.

   Article 10

   In the Belfast City Council case, the House of Lords was dealing with solely with sex shop licensing, under legislation very similar to our own sex shop licensing legislation. Insofar as articles such as books, magazines, DVDs and the like would be sold on the sex shop premises, it was accepted by the court that the respondent's right to disseminate such articles came within the ambit of freedom of expression, with the effect that Article 10 was engaged.

   The right of freedom of expression is, of course, recognised as encompassing more than freedom of speech and extending also to freedom of "artistic expression". If, however, a form of entertainment is "artistic expression", with the effect that Article 10 is engaged, it cannot also then meet the definition of "sexual entertainment" introduced into s45A of the 1982 Act by section 76 of the 2015 Act ("*any live performance or live display of nudity which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means*)").

   It is inconceivable, therefore that a legal challenge to a local authority's refusal of a SEV licence could be made in reliance on an argument that the refusal was a breach of the applicant's Article 10 right to freedom of artistic expression. The appellant would effectively be inviting the sheriff to quash or reverse the decision to refuse a SEV licence on the ground that such a licence was not required at all.

   Where Article 10 might come into play would be in any prosecution under paragraph 19(1)(a) of Schedule 2 to the 1982 Act in respect of an unlicensed entertainment venue. The defence might argue that the entertainment in question was not sexual entertainment (within the meaning of section 45A of the 1982 Act) but was a form of artistic expression. This would be a matter for the prosecution service to argue, however, and not the local authority.

As the draft guidance is intended to be read by licence applicants as well as local authorities, it is considered that the repeated warnings to local authorities which it contains about the potential for legal challenge under Article 10 are likely to mislead licence applicants, give them a false expectation that this Convention right is engaged and thereby encourage hopeless, though still costly, legal challenges.

Article 1

Separately, while Article 1 (enjoyment of possessions) is potentially engaged in licensing cases, case law strongly indicates that it is unlikely ever to be a ground on which to quash or reverse a local authority's decision to refuse a licence. Reference is made in this regard to House of Lords judgment in the Belfast City Council case and in particular to the judgment of Lord Neuberger at paragraphs 100 to 103 and the further case law he discusses.

100. While Article 1 of the First Protocol is, as I see it, engaged in the present case, I find it impossible to conceive of circumstances in which a disappointed applicant for a sex establishment licence who could not show that a refusal contravened his Article 10 rights could nonetheless succeed on the ground that it infringed his rights under Article 1 of the First Protocol. It would be wrong to express a concluded view to that effect, because experience shows that circumstances can arise which are not foreseen by judges.
101. Nonetheless, it is appropriate briefly to refer to two decisions in this connection. The first is *ISKCON v United Kingdom* 18 EHRR CD 133, where the Commission, in a decision that the application in question was inadmissible, observed "that, as a general principle, the protection of property rights ensured by Article 1 of Protocol Number 1…cannot be used as a ground for claiming planning permission to extend permitted use of property". Secondly, there is the reasoning of the Court of Appeal in *re UK Waste Management Limited's Application* [2002] NI 130, where the Court of Appeal similarly held that a refusal of planning permission could not give rise to an infringement of Article 1 of the First Protocol. Carswell LCJ, giving the judgment of the court, said at 143F that the applicant's "peaceful enjoyment of its property has not been disturbed" and that "[s]till less is it a deprivation of [its] possessions". He also stated that, if there had been any relevant interference "it was in the public interest and proportionate".
102. It is perhaps also worth mentioning the decision of the Strasbourg court in *Fredin v Sweden* [1991] ECHR 12033/86 which concerned the revocation of an existing licence to extract gravel from land owned by the applicant. It was held that this did not infringe the applicant's rights under Article 1 of the First Protocol on the grounds that, even though the applicant suffered a substantial financial loss as a result of the revocation, and receive d no compensation therefore, the revocation, which was for environmental reasons, was within the wide margin of appreciation afforded to the state

under the third limb of the Article. Of course each case turns on its own facts, but if the revocation of an existing licence, with its substantial financial detrimental effect on the landowner, can be justified, it is indeed hard to conceive circumstances in which the refusal of the grant of a licence for the use of a property for the selling of pornographic articles on any of the grounds set out in paragraph 12 could fall foul of the property owner's rights under Article 1 of the First Protocol.

103. In this case, I consider that the respondent's case on Article 1 of the First Protocol is hopeless. That was the view of Weatherup J, but the Court of Appeal, again approaching the issue in the wrong way (for the reasons given in *Denbigh*), held that the decision of the Council was flawed because it had not specifically addressed the respondent's rights under Article 1 of the First Protocol. I am bound to add that, even if that had been a good point, it would seem to me fanciful to think that the Council would (or even could) have come to a different conclusion from that which it did, if it had taken into account those rights.

Again in the interest of avoiding misleading applicants, creating false expectations and encouraging hopeless legal challenges, the draft guidance should accordingly not emphasise to the degree it does the risk of legal challenge under Article 1.

Paragraph 33

4. See comments in relation to paragraph 26 above.

Paragraph 34

5. This paragraph repeats the requirement in paragraph 9(5A) of Schedule 2 to the 1982 Act to determine, from time to time "*the appropriate number of sexual entertainment venues for their area* ***and*** *for each relevant locality*" (emphasis added). However, "*relevant locality*" is defined in existing paragraph 9(7) (as amended to refer to SEV) of the Schedule to mean *"(a) in relation to premises, the locality where they are situated; and (b) in relation to a vehicle, vessel or stall, any locality where it is desired to use it as a sexual entertainment venue*."

   It is unclear how local authorities can fulfil the duty created by paragraph 9(5A) (in respect of determining numbers for "*each relevant locality*") in advance of any applications for SEV licences being made as, given the definition of "*relevant locality"* in paragraph 9(7), a locality does not become a "*relevant locality*" until a specific premises or place has been put forward for use as an SEV.

   Highland, for example, currently has only one locality (Academy Street, Inverness) which would currently meet the definition of "*relevant locality*", containing as it does a premises used as a lap dancing bar. If that remains the case (and should Highland Council resolve to license SEV), the duty under paragraph 9(5A) would require us to determine from time to time the appropriate number for the whole Highland area and for that one relevant locality, but not for any other individual locality, as none is a "*relevant*" locality.

It is not clear that this was the intention behind new paragraph 9(5A), and further guidance on how authorities are to meet the duty in paragraph 9(5A), in circumstances where they do not have, or have few, "*relevant localities"* as defined in paragraph 9(7) would be helpful.

Paragraph 46

6. It is unclear why this paragraph should suggest that it would be "*best practice to align the review of both the resolution and the policy statement*". There is no requirement to review the resolution (i.e. the resolution to license SEVs) once made. Was the intention perhaps to suggest that the periodical determination of the appropriate number under paragraph 9(5A) of Schedule 2 be aligned with review of the policy statement?

Paragraph 54

7. In the list of suggested topics which local authorities might work up into model conditions, the suggestions commencing with the words "Performers not to ….", would be better grouped together under a suggested obligation enforceable against the licence holders themselves, eg:

    - that the licence holder have in place a code of conduct for performers which includes the following requirements ……
      and a requirement to adhere to this code of conduct must be included in the terms on which the licence holder engages any performer to perform at the premises.

Paragraph 56

8. The words "prior to that date" should be added at the end of this paragraph for the sake of clarity (see terms of paragraph 25(3) of Schedule 2 to the 1982 Act).

Paragraph 59

9. Included in suggested matters to be taken into account in determining a licence application are "*the views of residents*". While the views of residents who become aware of an application and submit objections or representations on the application to the authority must clearly be taken into account, it is feared that the wording of paragraph 59 may be read by other residents (i.e. those who were not aware of the application in time to make timeous representations) as suggesting that the local authority should have engaged in or required a full neighbour notification process.

    Answering ensuing complaints of failure to give or require adequate neighbour notification will be an unnecessary drain on local authority time. There are, of course, no notice requirements other than the requirements (a) for the applicant to publish an advertisement in a newspaper (or for the authority to publish a notice of the application electronically), (b) for the applicant to display a notice for 21 days on or near the premises, and (c) for the applicant to send a copy of the application to each person or body listed in the authority's determination under

paragraph 7(3D) of Schedule 2. However, the persons and bodies listed in the paragraph 7(3D) determination would have to specific persons and bodies so that the applicant has clarity as to whom he must send a copy of the application to under paragraph 7(3C). It would not be possible therefore to include in a paragraph 7(3D) determination unspecified categories of persons such as "residents" or "neighbouring residents".

It is considered therefore that this suggestion in paragraph 59 should be accompanied by a footnote clarifying that local authorities have no duty to engage in full neighbour notification or power to require applicants to do so. See also comments below in relation to paragraphs 67 to 70 of the draft guidance.

Paragraph 61

10. With regard to the reference to paragraph 9(3) of Schedule 2 to the 1982 Act, which sets out a list of persons to whom a licence may not be granted, the list currently includes persons who are not resident in a member state of the EU, and bodies corporate which are not incorporated in a member state of the EU. Premature though this comment may be, assurance is sought that appropriate amendments will be introduced promptly when the UK leaves the EU, so that this form of licensing remains workable. (There is a knock on effect also on paragraph 19(1) of the Schedule which includes as an offence employment in an SEV of any person to whom under paragraph 9(3) a licence could not be granted.)

11. With regard to the last two sentences of this paragraph, which read "*Each licence application should be fully considered on its own merits. However note, under paragraph 9(5)(c), where the number of venues in the local authority's area or relevant locality at the time the application is made is equal to or exceeds the number which the local authority consider is appropriate for their area or that locality the local authority should refuse the application without further consideration.*", the final sentence over-simplifies the position in relation to consideration to be given in "nil determination" cases.

Where an application is made for a licence in a locality in which the authority have previously determined the appropriate number of SEV to be nil, that determination clearly has to be reconsidered "*at the time the application is made*" before paragraph 9(5)(c) can be relied on as a ground on which to refuse the application. Even in the absence of any objection to the application on other grounds, fairness (and potentially also the right to a fair hearing in the determination of the applicant's civil rights under Article 6 of the First Protocol of the Convention) would dictate that the authority gives notice to the applicant of its intention to rely on paragraph 9(5)(c) and an opportunity, at the very least, to make submissions as to why, in the applicant's opinion, a nil determination is not, or is no longer, appropriate in that locality and/or submissions in support of any case the applicant wishes to make that there are special features in his case which nonetheless justify a grant. It would be wrong for authorities to refuse under paragraph 9(5)(c) without considering any such submissions.

In addition, if objections has been received from third parties on any relevant grounds (whether simply raising the nil determination issue, or raising other grounds of refusal), Paragraph 8 of Schedule 2 would require that these be notified to the applicant and either that a hearing take place before the authority reaches a final determination or that the applicant be given the opportunity to notify the authority in writing of his views on the objection.

In practice, at any hearing before a licensing committee under Paragraph 8, the committee would have to hear all of the applicant's submissions, be they restricted to the issue of nil determination or also include his case in response to other grounds of objection put forward.

Admittedly, at the end of such a hearing, the committee would require first to decide whether to refuse under Paragraph 9(5)(c) and, if refusing on this ground, would not then have to go on to consider whether any other ground of refusal raised also applies. However, before getting to that stage, the consideration process involved would be far more complex than the wording of the end of paragraph 61 of the draft guidance would suggest.

Paragraph 64

12. There is no mention of the fact that, in terms of Paragraph 24(2) of Schedule 2, there is no right of appeal to the sheriff against refusal of an application if: (a) an applicant has not followed all such procedures under the Schedule for stating his case to the local authority as have been made available to him, or (b) the ground of refusal was either of the grounds specified in paragraph 9(5)(c) or (d).

    In relation to refusals under paragraph 9(5)(c) or (d), these can only be challenged by way of judicial review.

    As it is the intention that this guidance be for the benefit of all interested parties, it would be helpful if this information were included. It would also assist in pre-empting attempted appeals to the sheriff where no right to appeal to the sheriff exists.

Paragraphs 67 to 70

13. In the first sentence of paragraph 67, the words "and for a notice to be displayed" should be changed to "and to display a notice" (so that the sentence makes sense).

14. Paragraph 67 also fails to mention that the authority may dispense with the requirement that the applicant publish a notice in a newspaper and may instead publish a notice electronically (paragraph 7(3A) of Schedule 2).

15. With regard in particular to the reference in paragraph 67 to the new duty under paragraph 7(3D) to determine from time to time the persons or bodies who must receive a copy of the application, and to the terms of paragraph 70, which states "*Local authorities may also wish to consider including on the list businesses, schools, places of worship, child protection committees, residents who are in the*

vicinity of the proposed SEV along with anyone else they consider appropriate." further clarity on this is sought.

As commented on in relation to paragraph 59 above, the persons and bodies listed in the published paragraph 7(3D) determination would have to be sufficiently specified to enable the applicant to know to whom exactly he must send a copy of the application under paragraph 7(3C). The determination which the authority makes and publicises from time to time under paragraph 7(3D) cannot therefore simply list vague categories of persons such as *"residents who are in the vicinity of the proposed SEV".*

Paragraph 71

16. See comments in relation to paragraph 26 above.

Paragraphs 101-102

17. The forthcoming amendments to the Licensing Conditions (Late Opening Conditions) (Scotland) Regulations 2007 to remove the definition of, and references to, "adult entertainment" are noted.

However, there is no mention of amendment also to the form of operating plan prescribed by Regulation 6 and Schedule 5 of the Premises Licence (Scotland) Regulations 2007. This includes, at question 5(e), the activity "Adult entertainment" in the list of activities to be confirmed in the premises licence application, if they are to be provided at the premises.

In the interest of avoiding confusion as to the meaning of "adult entertainment", the terminology in the latter Regulations should be amended to refer to "sexual entertainment", as defined in section 45A of the 1982 Act, rather than to "adult entertainment" (which will be undefined).

CONSULTATION QUESTION 2 : "We would welcome comments on other issues which you believe should be taken into account within the guidance."

Comments in relation to consultation question 2

1. While it is appreciated that it is for local authorities to identify localities, it is noted that the published guidance for England and Wales gives some further guidance on this by reference to how the issue has been looked at by the courts (see paragraph 3.36 of the Home Office Guidance and R v Peterborough City Council ex parte Quietlynn 85 L.G.R. 249).

   It would be helpful if the guidance for Scotland did likewise.