

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

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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.

Local authorities that do not currently have any sexual entertainment venues may wish to carefully consider whether there would be merit in making a resolution and setting a number (including nil) of such venues for their area to allow them to control the number of sexual entertainment venues operating in their area in the future.

It is important to note that The Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019¹ amend Schedule 2, paragraphs 9(3)(e) and 9(3)(f) of the Civic Government (Scotland) Act 1982² (the 1982 Act). This change prevents the granting of a licence for a sex shop or sexual entertainment venue to a person who is not resident in the United Kingdom (the UK) or was not resident throughout the 6 month period prior to the application being made. It also prevents the granting of a licence to a body corporate not incorporated in the UK. These provisions come into force on exit day. The previous residency restrictions for granting a licence were to a member state of the EU.

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 2015³ (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 26 April 2019. However this is not a mandatory licensing regime and it is 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.
2. Section 76 of the 2015 Act inserts sections 45A, 45B and 45C into Part III of 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

¹ <http://www.legislation.gov.uk/ssi/2019/6/contents/made>

² <http://www.legislation.gov.uk/ukpga/1982/45/contents>

³ <http://www.legislation.gov.uk/asp/2015/10/contents>

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 91-92 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 address concerns raised, it is worth emphasising that theatrical performances which are not provided solely or principally for the purpose of sexually stimulating the audience will not be classed as sexual entertainment. As a result, the use of the premises for those performances will not require an SEV licence.**
4. Information in respect of both SEV and the theatre provisions is provided at: paragraphs 93-96 on commencement; at paragraphs 97-102 on transitional provisions; and at paragraphs 103-107 on the consequential changes required to The Licensing Conditions (Late Opening Premises) (Scotland) Regulations 2007 and The Premises Licence (Scotland) Regulations 2007 as a 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 Act⁴), 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 premises 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 alcohol licensing decisions are the responsibility of the local Licensing Board. These terms are used throughout this guidance and refer to the licensing functions of a local authority. 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 paragraph 4 of Schedule 2 of the 1982 Act will apply in their area and a licence will be required for premises operated as SEV. Premises are classed as an SEV where sexual entertainment is provided before a live audience for the direct or indirect financial benefit of the organiser. Sexual entertainment is any live performance or live display of nudity provided 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*

⁴ <http://www.legislation.gov.uk/asp/2005/16/contents>

venues: interpretation section at paragraphs 84-90 of this guidance provides additional definitions and further information.

8. The passage of the Air Weapons and Licensing (Scotland) Bill through the Scottish Parliament includes further documentation that may be of interest including the Explanatory Notes and Policy memorandum⁵.

The Guidance

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. A *Consultation on Guidance on the Provisions for Licensing of Sexual Entertainment Venues and Changes to Licensing of Theatres*⁶ was published on 1 November 2017 with a closing date of 7 February 2018. The responses received were carefully considered and were of assistance in finalising this guidance.
11. 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 2015. This guidance does not represent legal advice and any individual or organisation reading this guidance should not treat this guidance as a replacement for independent legal advice. The interpretation of the 1982 Act, as amended by the 2015 Act, is ultimately a matter for the courts.

Background

12. 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 Group⁷ 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.
13. 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.

⁵ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/76383.aspx>

⁶ <https://consult.gov.scot/justice/licensing-of-sexual-entertainment-venues/>

⁷ <http://www.gov.scot/Publications/2006/04/24135036/0>

14. 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.
15. Since then, the Inner House of the Court Of Session in *BrightCrew Limited v City of Glasgow Licensing Board* ([2011] CSIH 46⁸) held that the licensing regime in the 2005 Act was limited to the regulation of the sale of alcohol and couldn't extend to matters not linked to 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. This approach would remove concerns around Licensing Boards attempting to use the alcohol licensing regime to regulate matters that go beyond the remit of that regime.
16. A consultation was published in June 2013⁹ (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.

Relationship with other Strategies

17. 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.
18. However, some concerns were raised that licensing SEV encouraged unhealthy attitudes to women and therefore damaged society as a whole.
19. 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.
20. *Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls*¹⁰ was first published in 2014 and updated in 2016 and again in 2018. 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'.

⁸<https://www.scotcourts.gov.uk/search-judgments/judgment?id=2a9286a6-8980-69d2-b500-ff0000d74aa7>

⁹ <http://www.gov.scot/Publications/2013/06/3607>

¹⁰ <https://beta.gov.scot/policies/violence-against-women-and-girls/equally-safe-strategy/>

21. Whilst recognising the conflict between this definition and the licensing of SEV, 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 around limiting a legitimate business activity to minimise the risk of legal challenge.
22. 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. *Equally Safe: A Delivery Plan for Scotland's strategy to prevent and eradicate violence against women and girls*¹¹ was published in November 2017. It will help to ensure that the ambitions of the Equally Safe Strategy make a tangible difference.
23. The *Trafficking and Exploitation Strategy*¹², 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.
24. In developing the licensing regime, care has therefore been taken to balance the freedom of individuals to engage in legal employment and activities with the right of local authorities to exercise appropriate control and regulation of SEV that operate within their areas.
25. Ministers consider that local authorities are best placed to reflect the views of the communities they serve and to determine whether SEV should be licensed within their areas and, if so, under what conditions.
26. A local authority which chooses to licence SEV will have to publish an 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 an SEV licence is granted, licence 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.
27. Local authorities will have to consider the circumstances pertaining in their local area and their statutory obligations (including, but not limited to, their obligations under the EU Services Directive¹³ and the Regulatory Reform (Scotland) Act

¹¹ <http://www.gov.scot/Publications/2017/11/5647>

¹² <http://www.gov.scot/Publications/2017/05/6059>

¹³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF>

2014¹⁴). Local authorities will also have to consider the rights SEV operators may have under the European Convention on Human Rights (ECHR) particularly under Article 1, Protocol 1 (peaceful enjoyment of possessions) and Article 10 (freedom of expression) of the Convention. ECHR issues are discussed further at paragraphs 73-77.

Licensing of sexual entertainment venues

28. Section 76 of the 2015 Act introduces a discretionary licensing regime for SEV. It achieves that by amending the existing licensing regime 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 important to emphasise that it is not mandatory for a local authority to licence SEV. A flowchart setting out the steps local authorities are required to take is at Annex A.

29. When deciding whether to licence SEV, local authorities should obtain independent legal advice in order to ensure that they are able to mitigate the risks of legal challenge to an acceptable level. They should also take into account the Public Sector Equality Duty¹⁵ to which local authorities are required to pay 'due regard' when carrying out their functions and the specific duty¹⁶ to assess and review policies and practices.

Local Authority Resolution

30. 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. It also requires at section 45C that where a local authority decides to licence SEV it must prepare an SEV policy statement and further information on this is provided at paragraphs 38-57.

31. In considering whether to pass a resolution a local authority should consider, whether they will wish to control SEV even if no such premises are currently in operation in their area. If there is no resolution in place, then no licence is required to operate an SEV. Existing SEV could continue to operate, new SEV could come into operation, without an SEV licence. Sexual entertainment in those venues would remain largely unregulated. If a resolution is passed, existing SEV and any new SEV, will require an SEV licence.

32. 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;

¹⁴ <https://www.legislation.gov.uk/asp/2014/3/contents>

¹⁵ <http://www.legislation.gov.uk/ukpga/2010/15/section/149>

¹⁶ <https://www.legislation.gov.uk/ssi/2012/162/regulation/5/made>

- the location of places of worship;
- the location of heavily residential areas;
- the location of women's refuges and shelters and other services focussed on supporting women, children and young people;
- whether there have been incidents involving anti-social behaviour, sexual assaults, prostitution or more minor harassment reported in any particular area; and
- whether there have been incidents of human trafficking or exploitation locally.

33. Local authorities who have resolved to licence SEV must determine the appropriate number of SEV for both their area and for each relevant locality within their area (see paragraph 9(5A) of Schedule 2 of the 1982 Act). Paragraph 9(5)(c) of Schedule 2 allows local authorities to refuse applications on grounds that, at the time the application is determined, the number of SEV in the local authority's area or relevant locality is equal to or exceeds the number that the authority considers appropriate for their area or that locality.
34. Local authorities have extensive experience of engaging with local people and will know what works best in their individual areas. Local authorities 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 the operators of 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.
35. 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 2014 and the Convention rights of SEV operators. Local authorities should consider whether the decision to licence SEV is proportionate and justifiable.
36. 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.

Specified Day

37. 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

38. 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 an SEV 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

39. 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.”

40. 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.

41. 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.

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

43. The statement might include information on the locations where the local authority is likely to consider the operation of SEV to be appropriate or inappropriate. The statement could also be used to indicate how many SEV are considered to be appropriate for the local authority’s area or particular localities within its area. The reasons for these policy positions should also be provided.

44. In developing the statement, the local authority may also wish to take account of whether any SEV 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.

45. 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. The local authority should also consider whether reducing the number of SEV in their area or setting the number at zero would create a risk of legal challenge (for example under ECHR or on grounds of reasonableness).
46. 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 will require to demonstrate proportionality by evidencing that the competing interests of SEV operators alongside those of the community had been fairly considered and appropriately balanced.
47. 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 as well as Police Scotland and local businesses (including the operators of any existing SEV).
48. 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 local authority's stated appropriate number of SEV and the policy statement. However it will be for individual local authorities to determine the timeframe for undertaking the reviews required.

Licensing Conditions

49. 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.
50. Conditions are specific requirements that the licence holder must comply with, otherwise the licence could be 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.
51. The local authority can attach standard conditions for all licences granted for SEV, they may also impose individual conditions to licences. 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; and

- the number of persons to be admitted to the premises.
52. The local authority should give careful consideration as to whether the condition proposed is necessary and, with the Brightcrew case in mind, whether it is linked to the regulation of sexual entertainment. The local authority should also consider whether, in all the circumstances, the condition is reasonable and proportionate and therefore not susceptible to challenge.
53. Any condition attached to the licence must be clear, so that the licence holder is aware of their obligation to comply.
54. Part of the local authority's role is to ensure improved working conditions and a safe environment for the women who work in SEV. The local authority may wish to encourage operators to actively identify potential victims of human trafficking in their recruitment procedures. Where a local authority is made aware of a person who is or appears to be a victim of human trafficking, they have a duty to notify Police Scotland.
55. The Association of Licensed Adult Entertainment Venues in Scotland has a toolkit, *A Guide for Employers and Contractors*¹⁷ which is intended to ensure that venues are operated in a fair manner, protecting human rights and that potential victims of human trafficking are identified in the recruitment process.
56. In terms of how a premises licensed as an SEV should be run, in addition to the minimum standards expected of workplaces through health and safety regulations, 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 actively seek to identify performers who may have been the victim of human trafficking;
 - employment of security guards;
 - use and storage of CCTV;
 - provision of hygienic changing and showering 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;
 - access to medical checks and sexual health advice to be provided on site;
 - the licence holder to ensure performers remain clothed outwith performance area;
 - the licence holder to ensure no physical contact between performers and customers;

¹⁷ <http://www.alaevs.co.uk/members/>

- the customers to be informed of rules of customer conduct that is deemed acceptable e.g. customers to remain fully clothed at all times and these rules displayed at appropriate locations within the venue licence holder to ensure customers do not seek sexual favours or offer performers payment in return for sexual favours;
- the licence holder to ensure customers do not to offer or ask for any form of contact details from performers;
- the licence holder to ensure customers do not to engage in any unlawful activity within the SEV;
- the licence holder to ensure no photographs or video recordings are taken of the performers.

57. 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 the SEV licence conditions 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

58. 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 an SEV licence prior to the date specified in the resolution and cannot grant any licence until it has considered all applications received prior to that date.

59. Local authorities will therefore wish to consider developing new application forms specifically in respect of SEV licences. Authorities will also have to determine a date 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.

60. 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.

61. We suggest that in considering an application for an 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, women's refuges, 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 as far as is possible¹⁸; and
- input from the local Police Scotland human trafficking champion or the Human Trafficking Unit at Gartcosh.

62. It is important to note that an 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. Paragraphs 85-86 of this guidance provide additional definitions and further information regarding exemptions.

Consideration

63. 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.
64. 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.
65. Under paragraph 15 of Schedule 2, the local authority can at any time decide to vary a licence on any grounds it thinks fit. The local authority can revoke a licence in line with the provisions set out at paragraph 13 of Schedule 2.
66. A decision not to grant a licence or to revoke a licence may be subject to appeal under paragraph 24 of Schedule 2. 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.
67. Any appeal to a Sheriff in relation to a SEV licence must be made within 28 days of the date of the decision appealed against. However, where the application is

¹⁸ It should be noted that local authorities do not have a duty to engage in full neighbourhood notification or power to require applicants to do so.

refused under paragraph 9(5)(c) or (d) of Schedule 2, the applicant can only challenge the refusal by way of judicial review.

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

Notification

69. Applicants will require to advertise their applications for a licence in a local newspaper specified by the local authority and to display a notice on or near the relevant premises. However, a local authority may dispense with the requirement for an applicant to publish a notice in a newspaper and instead publish notice of the application electronically. The legislation imposes a further duty at paragraph 7(3C) of Schedule 2 requiring each applicant for a licence to operate an 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 an 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

70. In relation to notification of an 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.”

71. 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.
72. Local authorities may also wish to consider including on the list local businesses, schools, places of worship and child protection committees, along with anyone else they consider appropriate.

ECHR Issues

73. 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

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law..) and

Article 10 –

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

74. 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.

75. In deciding whether or not to grant a licence for an SEV, local authorities should also bear in mind the rights provided for at the following ECHR Articles

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

1. *No one shall be held in slavery or servitude.*

2 *No one shall be required to perform forced or compulsory labour.*

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

76. Further information can be found in the Equality and Human Rights Commission Freedom of Expression Legal Framework guidance¹⁹ which explains the legal framework which protects freedom of expression and the circumstances in which that freedom may be restricted in order to prevent violence, abuse or discrimination.

77. 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 the competing interests of individuals alongside those of the community.

Fees

78. Paragraph 18 of Schedule 2 provides that a local authority must 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. The R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) (Respondents) v Westminster City Council (Appellant) [2015 and 2017]²⁰ rulings may also be of interest.

Enforcement

79. 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.

80. 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

81. 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.

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

83. 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.

¹⁹ <https://www.equalityhumanrights.com/en/publication-download/freedom-expression-legal-framework>

²⁰ <https://www.supremecourt.uk/cases/uksc-2013-0146.html>

Licensing of sexual entertainment venues: interpretation

84. 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

85. 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.”

Exemptions

86. 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.”

87. It is important to note that an 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

88. Section 45A expressly states that sex shops are not SEV and provides a power to allow Ministers to specify other premises which do not fall into the category of SEV. 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

89. Paragraph 19(1) of Schedule 2 of the 1982 Act provides that the employment of anyone under the age of 18 in an SEV is an offence. 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 SEV 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. It is worth noting that the reasonable excuse defence only applies where entry to the SEV is knowingly permitted to a person under the age of 18 at a time when sexual entertainment is not being provided – there is no reasonable excuse defence where entry is permitted at a time when sexual entertainment is being provided.

Public entertainment

90. 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

91. The provisions at section 74 of the 2015 Act repeal the existing mandatory requirement for theatrical performances to be licensed under the Theatre Act 1968²¹ (the 1968 Act) and supporting provisions in the 1968 Act that allow for powers of entry and inspection. Section 74 of the 2015 Act also removes the exemption for premises licensed under the 1968 Act from the public entertainment licensing regime in 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

92. Following the repeal of the theatre licensing provisions within the 1968 Act, local authorities may wish to consider making a public entertainment licensing resolution, or vary an existing resolution, under section 9 of the 1982 Act in order to require theatres to obtain a public entertainment licence. 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

93. 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

²¹ <http://www.legislation.gov.uk/ukpga/1968/54>

making orders under section 45A(7)(b) and (11) of that Act. These provisions enable subordinate legislation to be made under the 1982 Act.

94. The provisions at section 74 and the outstanding provisions at section 76 of the 2015 Act are fully commenced by the Air Weapons and Licensing (Scotland) Act 2015 (Commencement No.9 and Transitional Provisions) Order 2019.
95. In commencing the primary legislation, careful consideration was given as to the transitional arrangements for the repeal of existing legislation and the commencement of the new licensing regimes in the 2015 Act. Any necessary consequential changes to existing secondary legislation brought about by the commencement of the 2015 Act provisions was also considered.
96. The transitional arrangements, and the consequential amendments to existing legislation, required as a result of the commencement of sections 74 and 76 of the 2015 Act are detailed below.

Transitional provisions

Section 74 - Theatres

97. 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 amendment to the public entertainment licensing regime will be commenced first and the repeal of the theatre licensing regime will follow at a later date. This will give local authorities sufficient time to consider whether to licence theatres under the 1982 Act and for any resolution under section 9 of the 1982 Act to take effect before the licensing regime under the 1968 Act ends.
98. This means that theatre licences will continue until the repeal of the 1968 Act provisions but, during that timeframe, local authorities will be able to introduce a public entertainment licensing regime for theatres to take effect from the date of repeal. This will enable local authorities which wish to continue licensing theatres to ensure that public entertainment licences will come into force immediately on the repeal of theatre licences, leaving no period in between where theatres are unlicensed.

Section 76 – SEV

99. 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.”

100. If a local authority chooses to introduce a licensing regime for SEV they will first require to pass a resolution under section 45B of the 1982 Act. Following a local authority resolution being passed to licence SEV, existing SEV will require to apply for an SEV licence but will be able to continue to trade without a licence until the final determination of that application. The existence of a premises licence under the 2005 Act will be no guarantee that an SEV licence will be granted for those premises – the SEV licensing regime and the alcohol licensing regime regulate two different activities.

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

- Thompson R v Oxford City Council [2013] EWHC 1819 (admin) (28 June 2013)²² and
- Thompson R v Oxford City Council & Anor [2014] EWCA Civ 94 (11 February 2014)²³

102. 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.

Consequential Amendments in relation to alcohol –

The Licensing Conditions (Late Opening Premises) (Scotland) Regulations 2007

103. Following a review of secondary legislation we noted that amendments are required to secondary legislation related to alcohol licensing, namely **The Licensing Conditions (Late Opening Premises) (Scotland) Regulations 2007**²⁴ (the Regulations). These alcohol regulations include a definition of adult entertainment and a reference to theatre licensing.

104. The Regulations specify conditions which must be imposed by a Licensing Board on the granting of an alcohol 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.

105. 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 alcohol 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.

²²<http://www.bailii.org/ew/cases/EWHC/Admin/2013/1819.html>

²³<http://cases436.rssing.com/browser.php?indx=12680078&item=11604>

²⁴<http://www.legislation.gov.uk/ssi/2007/336/regulation/1/made>