



Law Society
of Scotland

Response

Consultation on guidance on the provisions for
licensing of sexual entertainment venues and
changes to licensing of theatres

6 February 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Licensing sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation on guidance on the provisions for licensing of sexual entertainment venues and changes to licensing theatres (Guidance). The sub-committee has the following comments to put forward for consideration.

General Comments

The statutory background to this consultation is important. Section 76 of the Air Weapons and Licensing (Scotland) Act 2015 (2015 Act) amends the Civil Government (Scotland) Act 1982 (1982 Act) in respect of the licensing of sexual entertainment venues (SEV). Throughout this response, when we refer to a SEV, we mean the definition of SEV in section 45A (2) of the 1982 Act.¹ We wonder if that section is fully operational given the limited effect of the Commencement Order.¹ Paragraph 89 of the guidance requires clarification as its effect is unclear. It may be or is intended for the further Commencement Order referred to in paragraph 90 of the guidance to section 45 in full. What exactly the wording of 'outstanding provisions' in relation to section 76 in paragraph 90 needs to be specified. That is to ensure that there are no gaps in the legislation when the various sections of the relevant legislation are fully commenced.

Section 76(3) of the 2015 Act (section 45B (7) of the 1982 Act once it is commenced) states that a local authority must have regard to any guidance issued by the Scottish Ministers. We understand that the draft guidance at Annex A of the consultation is described as '*a work in progress*' and is intended to be issued to support the implementation of the new licensing regime for the SEV.²

¹ (<http://www.legislation.gov.uk/ssi/2015/382/contents/>).

² Paragraph 3 of the consultation

The guidance is also required to refer to the licensing regime for theatrical performances and the ability of local authorities to license theatres under the public entertainment license requirements as set out in the 1982 Act. Exactly what the status of the guidance is in relation to the local authorities is unclear since section 76(3) of the 2015 Act above is not relevant to theatres.

We do question whether this should correctly be included within the terms of the consultation since it is clear that much *'will depend on commencements or amendments to secondary legislation that are still to be made'*.³

We do fully recognise that the guidance *'will be updated to reflect the final position before publication'*. Though we understand that intention, given the complexity of the legislation, it is important to ensure that where secondary legislation is required to be drafted and passed, such secondary legislation is comprehensive and makes all the relevant changes. The status too and the authority of such guidance requires to be clearly stated. We make reference below to where the guidance may well benefit from further clarification (see the guidance below).

The consultation seeks to 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.

We have a number of issues to make as well as some observations on the paragraphs of the guidance.

Purpose of the guidance:

The consultation refers to the guidance as a *'technical document to support the operation of the new licensing regime'*.⁴ To whom exactly is the guidance being directed?

It refers to explaining the legislation *'in layman's terms'* which would imply that it should be available and understood by the public. If so, there is a need for the guidance to be in terms that can readily be understood by the public. Since the guidance goes on to refer to *'local people and interested parties'*, we would assume that means exactly that - understood and available for the public. That is in contrast to paragraphs 11 and 12 of the consultation which tends to indicate that the guidance is being aimed at:

- *'local authorities being best placed to reflect...'* and
- *'the prime intention of the draft guidance is to assist local authorities in taking forward work in relation to...'*

³ Paragraph 3 of the consultation.

⁴ Paragraph 9 of the consultation

We understand that the guidance may have many purposes. The purpose needs to be set out clearly and the language for the relevant audiences considered. That needs to be clarified. If it is intended for the public, it will need to be in all formats and available presumably online.

Form and style of the guidance:

The guidance appears to be rather complex, lengthy and repetitive. It refers to ancillary (unreferenced) documentation and organisations. It contains detailed legal references and terminology. We would question whether in its current form that is appropriate as such for its intended audience. (We refer to specific examples under the relevant paragraphs below).

We appreciate before the guidance comes into force, secondary legislation would be needed. However the guidance does refer to the '*commencement of licensing of theatres and [SEVs]*.' This would be unnecessary because what the guidance will do is set out guidance on the actual legislation then in force.

It has been difficult to follow the guidance in its current form. The interpretation of any⁵ legislation is a matter for the courts so we query at the frequent references to the European Convention on Human Rights (ECHR) and various statutes which have been quoted in full. Legislation provides the background to the guidance. The guidance should identify the relevant legislation but the guidance is to amplify and illustrate how practices are to work. The legislation would not need to be referred to in full. If required, it can then be referred to for its terms. As envisaged, the guidance should not be a replacement for legal advice for any party.

Timelines/Flowchart:

Where we do consider that there is a role for the guidance is in production of a clear timeline and/or flowchart as to the process to be followed. The chronology is very hard to follow as to the timings of the resolution, consultation and policy. If a flowchart or timeline was included, it would avoid the need for much of the text. It would make it much easier to follow exactly how section 76 will operate (section 45B of the 2002 Act once enacted).

Morality:

What role if any does '*morality*' play in relation to the licensing of SEVs? If this plays a role, at all, how should '*morality*' be defined? Does this justify a reduction in the number of SEVs?

Paragraphs:

As requested in relation to the paragraphs, we set out our observations which may be categorised under the headings above.

⁵ Paragraph 9 of the consultation refers to primary legislation. This should if required refer to legislation meaning both primary and secondary as the court would require to give effect to both.

Introduction:

The purpose of the guidance needs to be set out clearly.

SEVs: It refers to the fact that the number of SEVs in any local authority area may be nil. That is not part of an introduction. The issue of the numbers of SEVs would benefit from clarification. What does it mean in leaving it for the various local authorities to decide? Some local authorities would not be affected as they have no SEVs. What action do they require to take to demonstrate proper consideration of the issue of SEVs? What policy considerations need to be undertaken and demonstrated? Though we appreciate that there may be ECHR implications in relation to SEVs, should this actually be articulated in the guidance. Is this a question of law? There could also be questions about any changes to the number of SEVs. Our members did consider that these were all issues that did fall to be covered in the guidance to be issued and would benefit from more detail and clarification.

There is a reference to a published sexual entertainment policy statement. Is this a requirement for the local authority to issue? If so, a reference would need to be inserted to the relevant document. This refers back to the questions around the purpose of the guidance.

Legislation:

We question if this section is required in full. A brief statement of the law should suffice, if required.

Should a general definitions section be included? There needs to be consistency in the use of terms when referring to Acts, SEVs etc.

Paragraph 1 recognises that there is no mandatory licensing regime. It should refer to 'is' and not 'will be' as the legislation will then be in place. We would make the same point about use of 'envisage'.

Paragraph 2: The use of 'similar pattern' in the guidance is unclear and would benefit from clarification.

Paragraph 3: This repeats what would be included in the introduction to the guidance. We wonder if the expressions should be in plain English. An example is '*not ally concern*' could be expressed as 'not cause concern'. This again refers back to the question of the intended audience.

Paragraph 4: The cross-referencing would benefit from revision. It does not seem to refer correctly to the corresponding paragraphs e.g. paragraphs 93-96 should refer to 93- 98. The purpose of the paragraph would be best covered by the index.

Paragraph 5 and 6 are unclear. These would benefit from revision. The term 'liquor' and 'alcohol' are both used. It is unclear what the final sentence of paragraph 6 means.

Paragraph 7 repeats much of paragraph 2. Should this not refer to the section 76 of the 2015 Act? There would be benefit in one comprehensive definition section.

Paragraph 8 seems unnecessary.

The Guidance:

Paragraph 9 seems to raise the issue of the actual legal status of the guidance.

Paragraph 10 seems to be covered under the section headed 'legislation.'

Background:

Paragraphs 11 – 15: Are these necessary as this seems to be duplication. Once the legislation has been enacted, there does not need to be reference to the Bill's progress in court. Should case law be included within the guidance? If so, the correct reference is [2011] CSIH 46.

Relationship with other Strategies:

Paragraphs 19 and 21 should set out the priorities correctly if reference is required to the strategy documentation.

Paragraph 25 refers to the Introduction and requires clarification.

Paragraph 26: Should the law be included? If this is required, there needs to be references to footnotes. It is the Regulatory Reform (Scotland) Act 2014 not 2015. The reference to the ECHR Article 1 would be to the right to property.

Licensing of sexual entertainment venues

Paragraphs 27 and 28 repeat the section under Legislation.

Local Authority Resolution

Paragraphs 29- 35: We would refer to our earlier comments on the use of a timeline. We would also query the status of the guidance.

Paragraph 31 refers to 'may' in contrast to paragraph 33 which refers to 'must'.

Paragraph 33: Where there is a reference to '*Police Scotland trafficking champion*' or to the Human Trafficking Unit at Gartcosh, this should include references or hyperlinks. This also repeats paragraph 26.

Paragraph 34 would benefit from clarification.

Paragraph 35: This would benefit from a diagram or timeline.

Statement of policy in relation to sexual entertainment venues

Paragraph 37- 55: We would suggest that this section would be assisted by definitions (paragraph 38).

Paragraph 43 is a repeat.

Paragraphs 45 and 46 refer to 'we'. Who does this refer to?

Paragraphs 50 and 54 refer to 'could' and 'may'. What does 'non-exhaustive' mean? Should it include instead a general catch all provision?

Paragraph 53 requires a reference to what is the '*Trafficking Awareness Raising Alliance*'.

Paragraph 55 would benefit from clarification as to what the last sentence means.

Applications

Paragraph 58 needs a reference to an Act. Should 'specified day' be a defined term?

Paragraph 59 refers to 'we'. Who does this refer to?

Paragraph 60 does not replicate the legislation. Section 45 A(9) states '*.....are not to be treated as a sexual entertainment venue if sexual entertainment has not been provided on more than 3 previous occasions which fall wholly or partly within the period of 12 months ending with the start of the current occasion*'.

Paragraph 64 is a legal matter. Is it necessary?

Paragraph 67: The reference to 'new' is unnecessary in the final sentence since this will be the procedure then applying.

Paragraph 68: Is this necessary?

Paragraph 69 refers to 'we'. Who does this refer to?

Paragraph 71- 72: We queried if reference to ECHR was needed. These paragraphs would benefit from clarification.

Paragraph 73 requires a reference.

Licensing of sexual entertainment venues: interpretation

Paragraph 80: Should this not be included under a definition section?

Commencement of licensing of theatres and sexual entertainment venues

Paragraphs 89- 92: This should not be needed in guidance. The same applies to transitional provisions.

Paragraph 97: This refers to English case law which should not be included. The precedent value of such cases is a matter for legal advice as to their potential effect in Scotland.

Paragraphs 99- 102: We note that there is a requirement for legislative amendments on account of the removal of the definition of adult entertainment. These are matters for draft secondary regulations and not as part of the guidance.

We hope that these observations are helpful for your purposes and are of course happy to discuss any points arising if that would be helpful. We do appreciate that the guidance *is 'a work in progress'* and look forward to receiving further advice in relation to the guidance in due course.



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