

NUMBER 33 JULY 2022

Journal of Licensing

The Journal of the Institute of Licensing

In this issue

The ethical social economy

by *Philip Kolvin QC*

SEVs and the PSED

by *Jeremy Phillips QC & Michael Feeney*

Taxi Licensing: new guidance on passenger contracts

by *Neil Morley*

No smoke without fire: is tougher regulation of shisha premises on the cards?

by *Richard Brown & Charles Holland*

Opinion: SEVs deserve a fairer hearing

by *Silvana Kill*

Case note: Cross-border hiring: achieving a measure of local control

by *Gerald Gouriet QC & Leo Charalambides*

Case note: The Licensing Act 2003, data management and the ICO

by *Tony Ireland & Leo Charalambides*

SEVs and the PSED

Given the controversial nature of lap-dancing clubs and the local opposition they regularly attract, many thought that the public sector equality duty would offer a conclusive argument against granting SEV licenses. **Jeremy Phillips QC** and **Michael Feeney** beg to differ

In an unreported judicial review against the grant of a sexual entertainment venue (SEV) licence, which was settled by consent in May 2017, Mrs Justice Jefford said: "There is no direct evidence that the defendant [Sheffield City Council] has had due regard to the public sector equality duty (as it is required to do under s 149 of the Equality Act 2010). The decision gives no indication that it has been considered... Further, there is a tenable basis for the claimant's inference that the defendant has wrongly ignored objections based on the potential impact on gender equality, treating them as moral objections and irrelevant."¹

Despite the relevance of the public sector equality duty (PSED) and considerations of gender equality to SEV licences, there is no other caselaw, guidance or information on how the PSED interacts with SEV licensing. The Home Office Guidance on SEVs briefly discusses the applicant's rights under Article 10 and Article 1, Protocol 1 of the European Convention on Human Rights without mentioning the PSED, and the Home Office's Guidance issued under s 182 of the Licensing Act 2003 references the PSED in two short paragraphs, again without explaining how the PSED might apply in practice.²

Given the arguably obvious relevance of the PSED to SEV licensing and the lack of current guidance or information, this article seeks to explore how the PSED might properly interact with SEV licensing. Part I provides an outline of the relevant legislative background for SEV licensing and the PSED. Part II argues that while the PSED might at first blush appear to militate against the grant of *any* SEV licence, in practice the application of the PSED is more complicated. Finally, Part III concludes with suggestions as to how local authorities should approach their duty under the PSED when performing their statutory functions related to SEVs.

Part I: Legislative background

The Local Government (Miscellaneous Provisions) Act 1982

The control of SEVs via licensing was introduced for the first time by s 27 of the Policing and Crime Act 2009, which amended Schedule 3 of the Local Government

(Miscellaneous Provisions) Act 1982 (LG(MP)A) to bring SEVs within the regulatory regime governing "sex establishments".³ The provisions of Schedule 3 only come into force if local authorities resolve to adopt them and take the steps prescribed.⁴ It is believed that most (if not all) local authorities in England and Wales have resolved to adopt the 1982 Act.

In para 2A(1) of Schedule 3, an SEV is defined as "any premises at which relevant entertainment is provided before a live audience for the financial gain of the organiser or the entertainer". Para 2A(2) defines "relevant entertainment" as any live performance or 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)". The definition of SEVs is therefore broad and can include gay clubs, burlesque venues, and "swingers" bars as well as lap-dancing and other similar venues.

A licence for an SEV can be granted for up to one year, and the licence can be subject to conditions.⁵ A local authority can also make regulations prescribing standard conditions which apply to all licences granted for sex establishments, unless specified otherwise.⁶ Under para 12(3), an application for renewal or grant of an SEV licence can be refused on the following grounds:

- (a) *that the applicant is unsuitable to hold the licence because of a criminal conviction or any other reason;*
- (b) *that if the licence were granted the business would be carried on for the benefit of someone who would not have been granted the licence;*
- (c) *that the number of sex establishments in the relevant locality is equal to or exceeds the number which the authority considers appropriate; and*

³ See the Home Office's Guidance on SEVs (2010) for more background information on SEVs.

⁴ Section 2(1)-(4), LG(MP)A.

⁵ Schedule 3, para 8, LG(MP)A.

⁶ Schedule 3, para 13, LG(MP)A.

¹ *Paterson's Licensing Acts* (130th Edn, 2022), para 1B.20.

² Home Office's *Revised Guidance issued Under s 182 of the Licensing Act 2003* (2018), paras 14.66-14.67.

SEVs and the PSED

- (d) *that the grant or renewal of the licence would be inappropriate having regard to the character of the relevant locality, the use to which any premises in the vicinity are put, or the layout character or condition of the premises in respect of which the application is made.*

Finally, an SEV licence can be revoked on any of the grounds set out above. It should be noted that, importantly, para 12(4) specifies that "nil" may be an appropriate number for the purposes of deciding how many sex establishments are appropriate to the relevant locality.

The Equality Act 2010

The PSED is imposed on public authorities by s 149 of the Equality Act 2010 which, in its material parts, provides as follows:

(1) *A public authority must, in the exercise of its functions, have due regard to the need to-*

(a) *eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

(b) *advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*

(c) *foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

(3) *Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-*

(a) *remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*

(5) *Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular to the need to-*

(a) *tackle prejudice, and*

(b) *promote understanding.*

The main protected characteristics that are of potential relevance for SEVs are sex, gender reassignment and sexual orientation. The Court of Appeal has provided a summary of the legal principles governing the PSED in *R (Bracking)*

v Secretary of State for Work and Pensions [2013] EWCA Civ 1345 at [26]:

- (1) Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
- (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements.
- (3) The relevant duty is upon the decision maker personally and the decision maker cannot be taken to know what their officials know.
- (4) A decision maker must assess the risk, the extent of any adverse impact, and the ways in which such a risk may be eliminated before the adoption of a proposed course of action and not afterwards.
- (5) Quoting from *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), the PSED must "be exercised in substance, with rigour, and with an open mind", and the PSED is a non-delegable, continuing duty.
- (6) Quoting Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84]: "General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria."
- (7) Officials reporting to the decision maker must not merely tell the decision maker what they want to hear.
- (8) Quoting from Elias LJ in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) at [78]: "The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker".
- (9) If there is not sufficient information available to fulfil the statutory requirements, then there is a duty to acquire relevant material, which will frequently involve consultation with appropriate groups.

Part II: The PSED in practice

At first, it might seem as if the PSED would militate against

a local authority ever granting an SEV licence. Of particular concern, arguably, will be the safety of women both inside and outside of a venue, as well as the potential for SEVs to contribute to the sexual objectification of women, which leads in turn to inequality and violence. If a local authority must have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between men and women, then how, it is often said, can an SEV licence ever be justified?

These are strong arguments, and in many cases they may carry significant weight, especially since as previously noted, the legislation allows local authorities to conclude that it is not appropriate to have any SEVs in a relevant locality. As Karon Monaghan QC put it to the House of Commons Women and Equalities Committee in 2018, SEVs “have an impact on the wider community because they promote the idea that sexual objectification of women and sexual harassment commonly in those environments is lawful and acceptable... How are we [licensing SEVs] in the 21st century? We are not going to get rid of sexual violence if we mandate the sexual objectification of women in licensed venues.”⁷

Despite the force of these arguments, the relationship between the PSED and SEV licensing is, we suggest, more complicated than it might at first appear. To start with, many organisations (such as the International Union of Sex Workers) argue that sex workers have a right to work in gainful employment in a safe and properly regulated environment. Licensing, in particular the ability to impose conditions, gives local authorities considerable power to control and regulate SEVs. If SEV licences are not granted then this power will not be exercised, the practical effect of which might be that sex workers are unable to find lawful employment, or are obliged to work in more far more dangerous and unregulated conditions. For example, a study into the nature and prevalence of sex work in the UK commissioned by the Home Office noted that “some erotic dancers identified the revocation of many SEV licences following the Policing and Crime Act 2009, without attendant scrutiny of working conditions, as problematic: ‘suddenly [there were] fewer venues to work in, and a surplus of labour. Not enough work to go around creates a race to the bottom in terms of value... The clubs that survived the cull now have a monopoly, and can control working conditions to their own benefit.’ (Female Erotic Dancer)”.⁸ A complete ban on SEVs and subsequent deregulation would create a tension between the supporters of such a measure and those who see sex work as a legitimate

and consensual form of entertainment, provided it is made safe for those concerned and properly regulated.

Second, it is necessary to consider those with “protected characteristics” other than women, such as those who have undergone gender reassignment or who are not heterosexual. In recent years, there has been a proliferation of pansexual and polysexual sex clubs. In certain circumstances, refusing a licence for such clubs could possibly amount to discrimination, as doing so might deprive those with such protected characteristics from having access to safe, regulated SEVs that cater to their own sexual preferences. The same regulatory considerations highlighted above for “traditional” SEVs such as lap-dancing clubs also apply, of course, to pansexual or polysexual sex clubs. If there is no safe, regulated environment for such venues, then underground versions of these clubs might become dangerous places to work or frequent.

Therefore, while the PSED is highly relevant to SEV licences, it is not obvious that the application of the PSED in practice will always lead to the same conclusion. Everything depends on the facts and circumstances of each individual case, with the number of sex establishments in the relevant locality and the nature of the SEV proposed being particularly important factors. The arguments of those who oppose SEVs on the grounds of gender equality will often carry great weight, but should not necessarily be determinative. The PSED might even, in certain circumstances, be a factor supporting the granting of an SEV licence.

Part III: Suggestions for local authorities

The fact that the PSED can cut both ways leaves local authorities in a difficult position when considering SEV licence applications and the adoption of SEV policies. This article concludes by offering a few points of advice for how local authorities might discharge the PSED.

First, it is crucial to remember that the PSED does not require a specific outcome, and the duty is to have “due regard” to the three equality objectives set out in s 149(1). *The Equalities and Human Rights Commission (EHRC) Technical Guidance on the PSED* states that “how much regard is ‘due’ will depend on the circumstances and in particular on the relevance of the aims in the general equality duty to the decision or function in question. The greater the relevance and potential impact, the higher the regard required by the duty.”⁹

The emphasis is, therefore, on taking the general equality considerations in s 149(1) seriously and placing them at the heart of decision-making; there is no requirement that

⁷ House of Commons Women and Equalities Committee, *Sexual Harassment of Women and Girls in Public Places: Sixth Report of Session 2017-2019* (2018), para 135.

⁸ Professor Marianne Hester, Dr Natasha Mulvihill, Dr Andrea Matolcsi, Dr Alba Lanau Sanchez and Sarah-Jane Walker, *The Nature and Prevalence of Prostitution and Sex Work in England and Wales Today* (2019), p 20-21.

⁹ *The EHRC Technical Guidance on the Public Sector Equality Duty* (February 2021), para 2.20.

SEVs and the PSED

equality concerns must be determinative. So long as a local authority has applied its thinking conscientiously and specifically to the equality objectives, then a judicial review challenge against the grant of an SEV licence would have to surmount the high hurdle of showing that the local authority had acted irrationally.

Second, local authorities must consider what evidence they would have to show that they have properly discharged the PSED requirement. If a local authority does not have sufficient information to consider the equality objectives, then they are under a duty to acquire that information.¹⁰ There is no requirement to have, in every instance, hard statistical data, and a public body can also use external sources, such as information available from the EHRC and local or national representative groups.¹¹ *The EHRC Essential Guidance on the PSED* also states that "engagement should be proportionate to the size and resources of your organization, as well as to the significance of the policy to the aims of the general duty. It may be particularly important where you need to build or improve your evidence base."¹²

For SEVs, local authorities should consider consulting as early as possible with local stakeholders including sexual violence specialists, women's groups and (where relevant) LGBTQ+ groups.¹³ Local authorities should also seek to obtain data on sexual crime statistics in the relevant locality. Where a local authority has adopted an SEV policy, it might be possible to rely in part on the data that informed the SEV policy. When considering an individual application, local authorities should, however, be wary of relying exclusively on an SEV policy to say that the PSED has been discharged; in the planning context, an argument that the PSED had been discharged when granting planning permission because the relevant planning policy had itself been designed to address issues of equality was unsuccessful.¹⁴ Although the existence of guidelines and criteria for determining individual applications can help demonstrate that the PSED has

been discharged,¹⁵ the potential impact of each individual application needs to be assessed on its own merits and within its own context.

Finally, conditions on SEV licences can be a vital way of discharging the PSED, as the ability of local authorities to impose conditions is one of the main benefits of regulation. In October 2018, the House of Commons Women and Equalities Committee published a report on the sexual harassment of women and girls in public places which recommended that local authorities should "consider adopting stringent zero tolerance conditions for any existing sexual entertainment venues. These conditions should make it clear that they will withdraw licenses following evidence of harm to women in and around sexual entertainment venues and following evidence of any failure to follow conditions designed to keep women safe within venues."¹⁶ The PSED is a continuing duty, and local authorities must monitor the impact of any SEV licence to ensure that it is not leading to an increase in discrimination or harassment. The EHRC Technical Guidance on the PSED also advises that "a body subject to the duty should remain alert to new evidence suggesting that discrimination or other prohibited conduct is, or could be, occurring and take appropriate action to prevent this happening."¹⁷ Conditions aimed at promoting the safety of women through careful monitoring and enforcement are therefore an effective way of discharging the PSED.

Conclusion

This article has provided some initial observations on the interaction between the PSED and SEV licensing. Our views must, however, remain somewhat speculative until published guidance or caselaw explains how the PSED should be applied in the SEV licensing context. All that can be said with confidence at present is that local authorities are under a duty to consider the PSED when performing their statutory duties in relation to SEV licensing - and that the application of the PSED is perhaps far more nuanced than some commentators have suggested.

Jeremy Phillips QC

Barrister, Francis Taylor Building

Michael Feeney

Pupil Barrister, Francis Taylor Building

¹⁰ *R (Rahman) v Birmingham City Council* [2011] EWHC 944 at [35]. See also *R (on the application of KE and Ors) v Bristol* [2018] EWHC 2103 (Admin) at [105]: "In my view this is a case where the defendant was under a duty to acquire further information, including through consultation, in order to comply with the PSED, yet did not do so."

¹¹ *The EHRC Technical Guidance on the Public Sector Equality Duty* (February 2021), para 5.19.

¹² *The EHRC Essential Guide to the Public Sector Equality Duty* (March 2022), page 20.

¹³ See the House of Commons Women and Equalities Committee, *Sexual Harassment of Women and Girls in Public Places: Sixth Report of Session 2017-2019* (2018), para 142.

¹⁴ *R (on the application of Buckley (on behalf of Foxhill Resident's Association) v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin) at [33]: "It is not, therefore, possible to regard the fact that the application for outline planning permission complied with Policy H8 in the defendant's development plan as automatically involving compliance with the defendant's duties under s 149 of the 2010 Act."

¹⁵ *The EHRC Technical Guidance on the Public Sector Equality Duty* (February 2021), paras 5.46-5.48.

¹⁶ House of Commons Women and Equalities Committee, *Sexual Harassment of Women and Girls in Public Places: Sixth Report of Session 2017-2019* (2018), para 142.

¹⁷ *The EHRC Technical Guidance on the Public Sector Equality Duty* (February 2021), para 3.6.