

Committee :	Date	Classification	Report No.	Agenda Item No.
Licensing Committee	8th January 2014	Unclassified	LC 08/134	

Report of Consumer and Business Regulations Originating Officer: David Tolley – Head of Consumer and Business Regulations	Title Consideration of the Adoption of the Sexual Entertainment Licensing Regime, Policing and Crime Act 2009 -Update
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1 SUMMARY

- 1.1 The Licensing Committee, on the 8th October 2013, requested for an extraordinary meeting to be held to discuss the proposed fees structure for sexual entertainment venues. This report covers this request and gives the Licensing Committee the option of reconsidering its decision not to adopt the legal framework to licence sexual entertainment venues by proposing recommendations to Full Council.
- 1.2 The issues that were subject of concern to the Licensing Committee, where a vote was taken are:
- 1) Exclusion of the White Swan Public House from the Sexual Entertainment Venue Policy
 - 2) Reconsideration of the fees at an extraordinary Licensing Committee
 - 3) Not to adopt the framework legislation to permit a licensing regime for sexual entertainment venues.
- 1.3 It is proposed subject to the Committee's further consideration of the issues that Full Council is recommended to adopt a legislative scheme for the control of lap dancing and striptease premises in Tower Hamlets, as set out in Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982. If the Council determines that the scheme should apply in Tower Hamlets, then no person may operate a sex establishment (including a sexual entertainment venue) in the borough without first obtaining a licence from the Council.
- 1.4 Full council may adopt the licensing scheme for sex establishments even though the Licensing Committee was not previously persuaded to do so. The Committee is asked to make a recommendation to Full Council to this effect. The matters which concerned the Licensing Committee at its meeting on 8 October 2013 are addressed in the report.
- 1.5 The Council currently has no specific licence regime in place for sexual entertainment venues and therefore there is currently no control on the numbers of venues permitted in the Borough.

2 RECOMMENDATIONS

Licensing Committee is requested to –

- 2.1 Recommend to Full Council that Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982, as amended, shall apply in the London Borough of Tower Hamlets with regards to sexual entertainment venues.
- 2.2 Recommend to Full Council that the said Schedule 3 shall apply in the London Borough of Tower Hamlets from 31st March 2014, with regard to sexual entertainment venues.
- 2.3 Recommend to Full Council the proposed standard conditions in Appendix 2.
- 2.4 Recommend to Full Council the fee structure in Appendix 3.
- 2.5 Note the policy in Appendix 1, which will apply on the application of Schedule 3 in Tower Hamlets, and which supports continued operation of existing premises.

3 BACKGROUND

- 3.1 The legislation brought in by Government in 2009 allows Local Authorities the discretion to adopt the legislation to regulate sexual entertainment venues. Once the powers have been adopted the Council can, through its licencing processes:
 - (a) Control the number of premises
 - (b) Control the location of premises
 - (c) Give local people a greater say over sexual entertainment venues in their area.
- 3.2 This report requests consideration of the adoption of the provisions for regulating sexual establishments which cover licences for sex shops, sex cinemas and sexual entertainment venues (SEVs) as set out in the Local Government (Miscellaneous Provisions) Act 1982 ('the 1982 Act') as amended by the Policing and Crime Act 2009.
- 3.3 If the framework legislation is adopted, Members sitting on the Licensing Committee will determine the relevant applications. A policy has been adopted by Cabinet (Appendix 1) that provides a decision making framework for the Licensing Committee to draw upon when making its decisions. It should be noted that the Licencing Committee remains free to and is obliged by law to consider each application on its merits. This flexibility provides Licencing Committee Members with sufficient leeway to consider direct representations made by different communities within the Borough and to make decisions that are sensitive to residents' concerns, equalities issues and take into account the views of the sexual entertainment venues and those in the community that make use of its services on an application by application basis.

- 3.4 The proposed standard conditions are detailed in Appendix 2 and the schedule of fees at Appendix 3. Adopting these is not an Executive function and the Licensing Committee is asked to recommend that Full Council agrees the conditions and the fees at the same time as considering whether or not to adopt the scheme.
- 3.5 A report relating to the adoption of the framework agreement as set out in the Local Government (Miscellaneous Provisions) Act 1982 was submitted to the Licensing Committee on 8 October 2013. A properly made decision not to adopt the framework legislation to enable licensing of sexual entertainment venues was made.
- 3.6 Representations were made by representatives of sexual entertainment venues in relation to the report to the Licensing Committee of 8 October 2013 and report prepared for full Council of 27 November 2013. Officers have attempted to address the matters raised when preparing this report.

Treatment of existing premises

- 3.7 At its meeting on 8 October 2013, the Licensing Committee discussed the circumstances of the White Swan, an iconic gay venue in Commercial Road. The White Swan currently holds a strip tease waiver on its licence and advertises professional strip tease nights on its website. The premises would be affected by adoption of the proposed licensing regime, because sexual entertainment is conducted at the premises.
- 3.8 Members wished to exempt the White Swan from being required to apply for a sexual entertainment venue licence should the legislation be adopted. Members were advised that, if adopted, the legislation would apply to all premises within the London Borough of Tower Hamlets, which would include the White Swan, but that the White Swan, as an existing operator would benefit from the exemption from the “nil limit” provided for existing premises in the Sexual Entertainment Venues Policy agreed by the Mayor in Cabinet on 11 September 2013, in anticipation of the licensing scheme being adopted.
- 3.9 The legal and policy position remains the same as it was when the Licensing Committee considered adoption of the scheme on 8 October 2013 and may be summarised as following in relation to existing premises –
- If adopted the scheme will apply to all sexual entertainment venues, including the White Swan and all premises will need a licence from the Council.
 - The Council’s policy provides an exemption from the nil limit for existing premises. This does not provide any guarantee that existing premises would be successful in obtaining licences under the scheme, as all applications must be considered on their merits.
 - The exemption from the nil limit would, however, remove the requirement for existing premises to demonstrate why the Council should depart from its nil policy, which is a distinct advantage.

- 3.10 It is considered that the nil policy with a limited exception for existing premises strikes the appropriate balance between human rights, the legal requirement to consider every application on its merits and the assorted views of those who do not support a nil policy.
- 3.11 At its meeting on 8 October 2013, the Licensing Committee resolved that the White Swan should be excluded from the Council's Sexual Entertainment Venues Policy. However the determination of that policy is an executive function and a resolution from the Licensing Committee will not serve to amend the adopted policy.

Fees

- 3.12 The Licensing Committee was also concerned by the amount of the proposed application fee to be charged by the Council. The Committee wanted further information about the calculation of the fee.
- 3.13 In calculating the fee for sexual entertainment venues in the Borough, the following costs have been estimated. As this is a new licensing regime a review of the fees will be undertaken at the end of the first licensing period to ensure that the fees are fair and equitable. The table below demonstrates predicted costs.

Activities/ Officer	Estimated time (hours)	Estimated cost (£)
Admin Officer	2	40
Licensing Officer	105	2625
Trading Standards and Licensing Manager	14	420
Compliance and Enforcement visits to licenced operators	105	2625
Head of Service Reviews	7	245
Service Head – Safer Communities	1	45
Democratic Services/ Committee Hearings		2000
Legal Services		1000

- 3.14 Following the decision of the Court of Appeal in *R (Hemming) v Westminster City Council* on 24 May 2013, it has been made clear that the Council may only charge for authorisation procedures when setting its fees.
- 3.15 It is estimated that Licensing Officers will spend 15 working days on administering each application. Officers will have to –

- Examine the application forms
- Examination of plans
- Meeting with applicant
- Visiting premises to determine accuracy of plans
- Consideration of conditions and survey of premises
- Liaison with responsible authorities
- Liaise with the applicant and objectors.
- Administer the consultation process
- Prepare a committee report
- Attend any licensing committee hearing.
- Administration of determination
- Costs associated with appeals

3.16 The cost of compliance monitoring and enforcement against an applicant who is given a licence can fall within the costs of 'authorisation procedures' and therefore can be included in the licence fee.

3.17 These are visits that take place during the course of the year to ensure that conditions are being maintained and that the premises are being managed in line with the licence. Due to the late night operation of these premises, compliance audits are undertaken in the evening and early morning, with more than one Officer in attendance. These audits will require reports to be written and discussion to be held with the licence holder to ensure that compliance with the licensing conditions continue.

Costs in relation to compliance visits results from;

- Overtime for overt visits – undertaken in pairs
- Report writing and feedback to operator
- Overtime for covert visits
- Test purchase monies
- Review costs
- Committee Hearing costs
- Investigation costs – e.g. examining CCTV footage

3.18 Due to the public interest in the Sexual Entertainment Venue consultation, there will be an expectation that compliance visits are undertaken throughout the regime. In subsequent years the fee structure will be reviewed to ensure that fees are recovered on a cost basis.

3.19 The Council must determine its fees on a cost-recovery basis, so comparison with fees in other boroughs is not a relevant consideration. Officers have, however, conducted a benchmarking exercise in respect of 13 other London boroughs and there is nothing to suggest that the Council's costs are excessive. The fees cannot be compared with those under the Licensing Act 2003 as that is a different regime and the fees are set by statute.

- 3.20 The fees estimate the amount of time that Council officers will spend on their part of the Licensing process.
- 3.21 The costs of convening the committee and legal oversight of the SEV process have been estimated.
- 3.22 At the end of the first year of the SEV process, the actual cost of the new regime will be calculated and the fees will be adjusted accordingly. Should the amount collected be in excess of the actual cost of the SEV regime then the fees will be reduced for the coming year and where applicable refunds made.
- 3.23 Once again during the second year, the amount it costs to administer and ensure compliance with the SEV regime will be calculated and fees adjusted accordingly.

Consultation

- 3.24 Consultation on the adoption of the sexual entertainment venues legal framework ran for six weeks from March 18th 2013 to April 29th 2013. The consultation was promoted through East End Life, press releases to all local and Bengali media and on the council's website. Emails notifying about the consultation were sent out, this included emails sent to the responsible authorities, the Licensing Committee, Faith groups, Community Safety Partnership, Women's Organisations, Networks and Forums, Advocacy Services and RSL and Housing Associations. All sexual entertainment venues and their registered owners received letters notifying them of the consultation.
- 2.25 The consultation was hosted online on the Council's website and paper copies were provided if requested. The consultation posed the question 'Do you think the council should adopt new powers to regulate sexual entertainment venues via an enhanced licensing regime?' A concern has been raised that the Council's system permitted only one response per computer, which may have restricted the representations that could be made. This is a possibility which may have affected representations for and against the scheme.
- 3.26 A total of 4,973 responses (526 online and 4,447 paper returns) were received, with 1,400 forms being returned from a single sexual entertainment premises within the Borough. The responses were as follows:
- 108 (2.2%) 'Yes' responses, in favour of adopting
4,865 (97.8) 'No' responses, not in favour of adopting
- 3.27 It is accepted by the industry that they ran a campaign to encourage persons to register their opposition to adoption of the scheme. There is nothing illegitimate about such a campaign. Industry representatives have asserted that there is no basis for concluding that the industry campaign skewed the outcome of consultation. Whether or not there were campaigns 'for' and 'against' which took place during consultation about adoption

of the scheme, it must be recognised that there was a strong expression of public opinion against adoption.

- 3.28 However it should also be considered, the results are in contrast to the community response received to the Council's consultation on the policy approach that might be taken to control sex entertainment venues where there was up to 75% in favour of aspects of sex establishment policy (specifically delineation of localities) control and a 52% to 48% split in favour of a blanket nil policy. The position on the nil limit was effectively split, when sampling error is taken into account.
- 3.29 In contrasting the two sets of consultation results, Members should bear in mind that the survey in respect of the Policy came first and as people were consulting on a policy they may have assumed that the Act was already in force and therefore did not respond to a consultation on adopting. It is fair to say that there was not an overwhelming support for a nil limit, which is why the Policy did not extend the "Nil" limit to existing operators.
- 3.30 The Committee should, take the consultation response into consideration when reaching a decision. Whilst the Council is required to undertake consultation on the adoption of the legislation, a strong 'No' response does not prevent adoption if there remain good reasons for regulation of sexual entertainment venues under the scheme established by Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982. In this regard, the following should be taken into account –
- The overall consultation response represents only a small percentage of those who live and work in the borough. It is not possible to know whether those who did not make representations would have supported or been against adoption of the scheme.
 - Adoption of the scheme will enable the Council to regulate the number, location and conduct of premises in the borough. Whilst this will apply to all premises, it will be particularly important when dealing with applications from new premises.
 - A licensing scheme will give local people a greater say over venues in their areas.
 - The adoption of the scheme will facilitate policy interventions that enhance the ability of the Council to limit impact of SEV's on the community and on particular groups at risk of exploitation.
 - Each case will be considered by the Licensing Committee on its own merits, having regard to the Council's policy. The policy provides support for the continuation of existing premises which meet their licence considerations.
 - The licensing regime will allow the Council to take broader policy implications into consideration when judging applications including limiting the negative impacts on local communities brought about by these venues.
- 3.31 Concerns were raised by Members in discussion, that operators may not be granted their annual licences. This concern is recognised, but in determining applications, members of the Licensing Committee should take account of the Council's policy and also existing operations and whether they have been well controlled.

3.32 These considerations are good reasons for the regulation of sexual entertainment venues under the scheme. On balance, and taking into consideration the outcome of the consultation exercise, it is considered preferable to adopt the scheme in Tower Hamlets and take into account the views of those in favour of sexual entertainment venues when considering each application and in any policy deliberations.

4. COMMENTS OF THE CHIEF FINANCIAL OFFICER

4.1 The adoption of the provision will introduce a new fee structure for sexual entertainment venues. They will need to hold two licences one for alcohol and another for the venue. The new fees for the SEV's are set out in Appendix 3. The number of SEV's that would be affected by the adoption of the new licensing regime is currently 11. If all apply and were granted SEV licenses this would achieve £99,000 in fees. This is the maximum that could be achieved and would be dependent on the relative number of refusals for which there is a partial return of the fee paid. The fee will need to be utilised to fund the administration of the new regime process and any potential legal challenge upon refusal.

4.2 With the threat of any legal challenge arising from adoption of the policy, as no specific provision exist within the Council budgets, any legal costs will have to be met from within the Communities Localities and Culture budget and resources Identified. The extent to which sufficient resources can be identified will need to be considered in the light of the impact on the Council's Medium Term Financial Plan savings.

5 LEGAL COMMENTS

5.1 On 6 April 2010, amendments to the Local Government (Miscellaneous Provisions) Act 1982 ("the 1982 Act") came into effect which permitted local authorities to regulate sexual entertainment venues ("the SEV amendments") in addition to other sex establishments.

5.2 For the purposes of the 1982 Act a sexual entertainment venue ("SEV") means any premises at which entertainment of the following kind is provided before a live audience for the financial gain of the organiser or the entertainer-

- A live performance or a 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).

5.3 The following are not SEVs for the purposes of the 1982 Act –

- Sex cinemas and sex shops (which come within the more general definition of sex establishments).
- Premises at which the relevant entertainment has been provided no more than 11 times in a 12 month period, provided that on each occasion the entertainment has not been provided for more than 24 hours and the occasions are at least a month apart.

5.4 Under section 2 of the 1982 Act the Council may decide that Schedule 3 to the Act, which contains a regime for controlling sex establishments, is to apply in Tower Hamlets. If the Schedule 3 regime is applied in Tower Hamlets, then no person may operate a sex establishment (including an SEV) in the borough without first obtaining a licence from the Council. The requirement for a licence is backed up by provision for offences, each of which carry a maximum penalty of £20,000.

5.5 If premises obtain a sex establishment licence under the Schedule 3 licensing regime, those premises will not also require a licence under the Licensing Act 2003 in respect of entertainment permitted by the sex establishment licence. The premises would still, however, require permission under the Licensing Act 2003 in respect of other licensable activities conducted at the premises (e.g. the sale of alcohol or the provision of regulated entertainment that is not permitted by the sex establishment licence).

5.6 Prior to the SEV amendments in 2010, the Council had determined that the scheme for licensing sex establishments in Schedule 3 of the 1982 Act should apply in Tower Hamlets. However, at the time of introducing the SEV amendments in 2010, the Policing and Crime Act 2009 put in place transitional arrangements (“the Transitional Arrangements”), which specified that a new resolution is required if a local authority wants the Schedule 3 licensing scheme to extend to SEVs in addition to other types of sex establishments such as sex cinemas and sex shops.

5.7 The procedure for deciding that Schedule 3 of the 1982 Act should apply in Tower Hamlets is as follows-

- The Council must consult local people about whether or not to apply the SEV licensing regime in Tower Hamlets. The Transitional Arrangements set up an initial 12-month period in which local authorities might resolve that the SEV amendments would apply in their areas. If an authority did not resolve to adopt the SEV amendments within the timeframe (i.e. by 5 April 2011), then the authority was then required to consult local people about whether to adopt the SEV amendments. The Council was caught by this requirement to consult and the report sets out the results of that consultation.
- The Council must pass a resolution specifying that the Schedule shall apply in Tower Hamlets. The resolution must specify the day on which the Schedule shall come into force (“the Specified Day”), which must be more than one month after the day on which the resolution is passed.
- The Council must then publish a notice that it is adopting the Schedule 3 regime. This must be published for two consecutive weeks in a local newspaper which is

circulated in Tower Hamlets. The first publication of the notice must be at least 28 days before the Specified Day. The notice must state the general effect of Schedule 3.

- 5.8 The Council should have a rational basis for any resolution to adopt the sex establishment (including SEV) licensing regime in Tower Hamlets. The results of the consultation exercise must be taken into account. In this respect, the consultation conducted in relation to whether or not to adopt the sex establishment licensing regime (the 2013 consultation), is the more relevant of the two consultation exercises referred to in the report. If the Council intends to take a different approach than that indicated by the preponderance of views expressed in the 2013 consultation, then it will need to be satisfied there are good reasons for taking that approach. There is material in the report both in favour of and against the adoption of the SEV licensing regime. Before adopting the regime, the Licensing Committee will have to be satisfied that the reasons in favour of adoption are sufficiently cogent.
- 5.9 Standard conditions have been proposed that will be applied to all licensed SEVs (see Appendix 2). Paragraph 13(1) of Schedule 3 to the 1982 Act gives the Council power to make regulations prescribing standard conditions (i.e. the terms, conditions and restrictions on or subject to which licences under Schedule 3 to the 1982 Act are in general to be granted, renewed or transferred by the Council). Such conditions must be proportionate and must be precise so that everyone (Premises Licence holder, those charged with enforcing the conditions, and local residents) would know where they stand. These proposed conditions meet those criteria.
- 5.10 It is proposed to introduce application fees as set out in Appendix 3. Paragraph 1 of Schedule 3 to the 1982 Act allows the Council to set a fee. This paragraph has to be read in conjunction with the Provision of Services Regulations 2009. Pursuant to regulation 18 of those Regulations –
- The Council's procedures and formalities must not be dissuasive, nor should they unduly complicate or delay the provision of the service. Fees should not be used as an economic deterrent and therefore be set at an unreasonably high level to dissuade applications.
 - Any charges must be proportionate and reasonable to the effective (i.e. actual) cost of the authorisation scheme and must not exceed the costs to the Council. Charges may properly reflect the anticipated costs for the Council in administering the application and holding a hearing to consider the application (including legal costs associated with that hearing). The cost of compliance monitoring and enforcement against an applicant who is given a licence can fall within the costs of authorisation procedures, but the costs of enforcement against unlicensed operators may not be so included. The costs incurred in investigating the suitability of an applicant for a licence may be included.
- 5.11 Before taking the proposed decisions in relation to the licensing of SEVs, the Council must have due regard to the need to eliminate unlawful conduct under the Equality Act

2010, the need to advance equality of opportunity and the need to foster good relations between persons who share a protected characteristic and those who do not. An equality analysis has been conducted and is set out in Appendix 4.

5.12 The Council's Constitution provides that the power to licence sex shops and sex cinemas, as provided in section 2 and Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 is delegated to the Licensing Committee. On one view, this delegation includes a power to decide that the licensing scheme should apply in Tower Hamlets, but another view is that this at best permits the Licensing Committee to express an advisory view about adoption of the scheme. Irrespective of the position concerning the Licensing Committee's role, two matters are clear:

- Full Council may determine whether or not the scheme should apply in Tower Hamlets.
- Full Council is not prevented from determining whether or not the scheme should apply in Tower Hamlets by reason of any prior consideration by the Licensing Committee.

5.13 Whilst the Licensing Committee has previously considered adoption of the licensing scheme, it is now being asked to give the matter further consideration and make recommendations to Full Council. Provided that members of the Committee approach the matter with open minds, there is nothing to prevent the Committee from the proposed further consideration.

5.14 Determining the Council's policy in relation to licensing under the scheme (should it be adopted) is an executive function which is the responsibility of the Mayor. On 11 September 2013, the Mayor in Cabinet agreed that the policy in Appendix 1 should apply in the event that the scheme is adopted in Tower Hamlets.

6. ONE TOWER HAMLETS CONSIDERATIONS

6.1 Legislation gives local authorities the opportunity to control sexual entertainment venues. The legislation was drafted to allow communities to have a say about whether sexual entertainment venues should be allowed to operate in their community and it gives the local authority the power to determine limits on numbers and localities. An equalities impact assessment is provided at Appendix four. In addition as the decision to adopt the framework legislation will bring the policy into effect. Members may wish to consider the equalities impact assessment at Appendix 5 in relation to the policy.

6.2 The adoption of Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 as amended by section 27 of the Policing and Crime Act 2009 will enable this to happen.

6.3 It is important to note that, after adopting the above legislation, the Licencing Sub Committee remains free to and is obliged by law to consider each application on its

merits. Accepting the material consideration of Council Sexual Entertainment Venue policy this flexibility provides Committee Members with sufficient leeway to consider representations made by different communities within the Borough and to make decisions that are sensitive to equalities issues and where relevant to the needs of the sexual entertainment venues and those within the community who make use of its services.

7. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT

7.1 There are no adverse impacts identified.

8. RISK MANAGEMENT IMPLICATIONS

8.1 The Mayor in Cabinet has adopted the policy on sexual entertainment venues for the Borough. Full Council is being requested to re-consider the adoption of the legislation to enable the policy to take effect. There is potential for legal challenge to the Council's adoption of the licensing regime for sex establishments, which will have associated costs.

9. CRIME AND DISORDER REDUCTION IMPLICATIONS

9.1 Adoption of this legislative framework will complement the Crime and Drug Reduction Partnership Plan.

10. EFFICIENCY STATEMENT

10.1 There are no efficiency considerations arising from the report.

11. APPENDICES

Appendix 1 – The Sexual Entertainment Venue Policy
Appendix 2 – Standard Conditions for Sexual Entertainment Venues
Appendix 3 – Fee Structure
Appendix 4- Equalities Impact Assessment – framework
Appendix 5 – Equalities Impact Assessment – policies

Background Papers: Section 100D of the Local Government Act 1972

NONE

