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## NORTH AYRSHIRE COUNCIL

21 August 2019

### Licensing Committee

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**Title:** Licensing of Sexual Entertainment Venues – Civic Government (Scotland) Act 1982

**Purpose:** To advise the Committee of the results of a public consultation, and to make proposals for further action.

**Recommendation:**

1. That the Committee should note the results of the public consultation;
2. That the Committee should make a Resolution requiring that Sexual Entertainment Venues hold a Licence in the terms set out in Paragraph 3.1 below.

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### 1. Executive Summary

- 1.1 The Licensing Committee's remit is to exercise the Council's licensing functions. These functions arise under many statutes, mainly the Civic Government (Scotland) Act 1982, which gives Councils the option of Licensing "Sexual Entertainment Venues" ("SEVs").
- 1.2 The present Report relates to the possibility that the Council might make a Resolution to introduce a system of SEV Licensing, and follows the preliminary consideration of this matter at the Meeting on 8 May 2019.
- 1.3 The public consultation period for consideration of whether or not the Council should introduce a system of SEV licensing has elapsed without comment and it is therefore recommended that the Council introduces such a system for the reasons detailed in this report.
- 1.4 While there have been no written representations to the consultation, it is open to members of the public to make oral representations to the Committee

### 2. Background

- 2.1 At present lap-dancing clubs do not require to be licensed anywhere in Scotland. There are no lap-dancing clubs in North Ayrshire, or in most of Scotland. There are about 19 clubs in Scotland (mostly in Glasgow, Edinburgh, Dundee and Aberdeen).
- 2.2 These clubs hold a Premises Licence under the Licensing (Scotland) Act 2005. This Act regulates the sale of alcohol and the Licence is granted by a Licensing Board (as opposed to a Licence granted by the Council under the Civic Government (Scotland)

Act 1982). The Court of Session has decided that Licensing Boards are not entitled to place conditions regulating lap-dancing clubs (for example, regulating the working environment in the Premises, requiring CCTV coverage of staff-only areas, and prohibiting physical contact between workers and customers). In the case of *Brightcrew Ltd. v. The City of Glasgow Licensing Board*, [2011] CSIH 46, 2012 SC 67, 2012 SLT 140 the Court of Session decided that the alcohol licensing system was limited to the regulation of the sale of alcohol, and could not be used to regulate SEVs.

2.3 Accordingly the Scottish Parliament amended the 1982 Act so as to permit (but not require) Licensing Authorities to Resolve to adopt a new Licensing system for SEVs. The amendments to the Act affecting SEVs commenced on 26 April 2019.

2.4 The new licensing system does not apply automatically. Individual Councils throughout Scotland have to decide whether or not to apply the new licensing system in their area, even if there is no likelihood of a lap-dancing club being operated in their area. The Committee first considered this matter at its Meeting on 8 May 2019 which was the first Meeting after the legislation commenced (see description of the stages of the process below).

2.5 The SEV legislation is related to the Scottish Government Policies:

'Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls'

'Trafficking and Exploitation Strategy'

2.6 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 defined by the legislation as any live performance or live "Display of Nudity" provided for the sole or principal purpose of sexual stimulation of members of the audience. "Display of Nudity" is defined in the Act. However, premises where "Sexual Entertainment" is provided on no more than 4 occasions in a 12-month period are not to be treated as SEVs (so would not need a Licence).

2.7 If the Resolution is made, the Council must draft a statement on its Policy on the Licensing of Sexual Entertainment Venues (a "SEV Policy Statement"). To do this, the Council will consult the public and relevant interest groups (including violence against women partnerships). This is separate from the recent Consultation.

2.8 The Council is entitled to set a limit to the number of SEVs throughout North Ayrshire, or in particular localities. In either case the limit could be zero. For example, the Council might:

- prohibit SEVs entirely, throughout North Ayrshire, or

- prohibit SEVs within a set distance of schools, residential areas and places of worship.

This would be done by the SEV Policy Statement. The draft would be considered at a future Meeting of the Committee;

2.9 The process of establishing this type of Licensing involves two meetings of the Licensing Committee. The process is in stages:

- (a) first Committee meeting: preliminary consideration of the question of whether, in principle, the operation of a SEV is something that should be licensed by the Council (held on 8<sup>th</sup> May 2019);
- (b) public consultation;
- (c) second Committee meeting: to consider the results of the public consultation and decide whether or not to make a Resolution requiring that SEVs should hold a Licence (current stage of the process);

If the Committee decides not to make a Resolution, the process stops there.

If the Committee decides to make a Resolution, the process continues with further stages.

2.10 The further stages are described below. For the purpose of illustration, the timetable has been calculated on the assumption that the Committee approves the Resolution set out in Paragraph 3.1 of this Report. The timetable dates are printed in square brackets (for example "[Friday 21 August 2020]").

The further stages are:

- (d) the Committee states a date when the new Licensing requirement will apply. This must be at least one year after the date the Resolution is made [Friday 21 August 2020];
- (e) The period for drafting the SEV Policy Statement ends about one month before the Resolution's Effective Date, due to the publication requirements of Stages (f) and (g). Assuming that the Committee adopts the earliest possible Effective Date (Friday 21 August 2020), the Committee will have about 11 months to draft the SEV Policy Statement [Friday 24 July 2020];
- (f) at least 28 days before the Resolution takes effect, the Council must publish notice (electronically or in a newspaper) of the Resolution, stating the general effect of the legislation (Section 45B(4) and (5));
- (g) at the same time and in the same manner as the Notice of Resolution is published, the Council must publish the SEV Policy Statement (Section 45C(4));
- (h) Applications for the grant of SEV Licences would be referred to the Licensing Committee, whether or not they appeared to be excluded by the SEV Policy Statement, and delegated powers would not be used to grant a SEV Licence (once granted, delegated powers would be used for renewal of a SEV Licence in the same way that those powers would be used for any other type of Licence).

2.11 The meeting on 21 August 2019 is the second Committee meeting (Stage (c)).

Stage (a) (the preliminary consideration) occurred at the Committee meeting on 8 May 2019, which was the first Meeting after the legislation commenced on 26 April 2019. The Minute of that meeting includes:

*"The Committee agreed (a) that North Ayrshire should adopt a scheme of licensing Sexual Entertainment Venues; (b) that public consultation should be put in place; and (c) that an update report on the outcome of the public consultation be provided to a future meeting."*

Stage (b) (public consultation) was carried out as follows. A Notice was placed on the Community Planning Partnership page of the Council website. This Notice explained what was happening and provided a response form.

- 2.12 Committee Members' background papers will include copies of any responses received. At the date of drafting this Report there have been no public responses to the public consultation request.

### **3. Proposals**

- 3.1 The Committee should make a Resolution to require that SEVs hold a licence in the following terms:

*"The Council resolves that, from and after Friday 21 August 2020, Schedule 2 of the Civic Government (Scotland) Act 1982 (as modified by Section 76 of the Air Weapons and Licensing (Scotland) Act 2015) is to have effect in the Council area in relation to Sexual Entertainment Venues."*

### **4. Implications/Socio-economic Duty**

#### **Financial**

- 4.1 At the preliminary stage where the Committee is considering a Policy decision, but is not making a decision on a proposal affecting particular premises, there are unlikely to be financial implications for the Council, apart from the costs of establishing a new licensing system. In the future, there are possible financial implications in relation to any decision, if that decision means that the ability of the Applicant or Licence Holder to derive income is limited. If there are any Court Proceedings, the Council may have to meet legal expenses.

#### **Human Resources**

- 4.2 None. The Licensing office is not aware of any proposals to establish a SEV in the Council area, and any applications which are made will be accommodated within the existing staffing establishment.

#### **Legal**

- 4.3 (a) There are unlikely to be any immediate legal implications of a Policy decision, but if a future Committee decision on a particular proposal is challenged in Court, part of that challenge may relate to the process which the Committee followed in making the Policy decision. A decision to grant or refuse a Licence may lead to an appeal to the Sheriff.

- (b) Before deciding whether or not to make a Resolution, the Council must consider other legislation such as:

- (a) the EU Services Directive,
- (b) the Regulatory Reform (Scotland) Act 2014,
- (c) the European Convention on Human Rights,

and the Scottish Government Guidance quoted below.

In the Clerk's opinion none of that legislation prevents the Council from establishing a Licensing system for SEVs, and it would be consistent with the Scottish Government Guidance to do so.

- (c) Due to the EU Services Directive, Local Authorities should consider whether the decision to licence SEVs is proportionate and justifiable. In the United Kingdom, the "Provision of Services Regulations", S.I. 2009-2999 implement the EU Services Directive ("Directive 2006/123/EC of the European Parliament on Services in the internal market"). For the purposes of the Regulations, the Council is a "Competent Authority" and is therefore prohibited by Regulation 14 from establishing an "Authorisation Scheme" (such as a new Licensing system) unless certain conditions are satisfied:

- "(a) the Authorisation Scheme does not discriminate against a Provider of the Service,*
- (b) the need for an Authorisation Scheme is justified by an overriding reason relating to the public interest, and*
- (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because inspection after commencement of the Service activity would take place too late to be genuinely effective."*

- (d) Condition (a) is satisfied, in that the Licensing system would be open to anyone who met the statutory criteria (the Applicant must be 18 years or older, and must be a United Kingdom national).

- (e) Condition (b) is satisfied:

- If there was a system of SEV Licensing: any Application for a Licence would be referred to the Police, who would have the opportunity to identify the people operating the business, where the funds for it came from, and where the workers in the business came from. If a Licence was granted, the Police and the Council's Civic Licensing Standards Officer would be entitled to enter the premises as of right, but
- If there was no system of SEV Licensing: they could not do these things. This might limit the effectiveness of the Laws about people-trafficking, money-laundering, and Proceeds of Crime. As the premises would be private property, the Police would

only be able to enter if either the owner invited them in, or they had a Warrant or a reasonable belief that offences were or recently had been committed.

- (f) If there was a system of SEV Licensing: the Council could attach conditions to the Licence, for example
- requiring premises to have CCTV coverage of all areas (not just performance areas);
  - requiring records to be kept of the full name, address, date of birth and place of birth of any performer or anyone else working on the Premises (including copies of passports and other identity documents);
  - requiring Premises to provide private spaces for performers to use when not working;
  - requiring Premises to be screened from outside so that no-one outside could see inside.
- (g) If there was no SEV Licensing system:
- there could be no such conditions;
  - there would be no opportunity for the public to make objections or representations about any proposal to establish a SEV nearby;
  - SEVs could be established within the Council area and there would be no opportunity for the Council to consider whether or not the proposal was appropriate for the particular locality. Unlike other Licensing legislation, the SEV legislation permits a Council to decide, in advance of dealing with any Application, that no SEVs will be allowed anywhere in the Council area, or to limit SEVs to certain locations. If North Ayrshire Council did not make a Resolution, it would have no opportunity to express a 'nil limit' in a SEV Policy Statement or to prevent an SEV from operating in a locality which might be thought unsuitable (for example, within a set distance of schools, residential areas and places of worship).
- (h) Condition (c) is satisfied because there is no "less restrictive measure" available to the Council. Either the Council licenses SEVs, or it does not. The new legislation followed an unsuccessful attempt by the City of Glasgow Licensing Board to regulate SEVs using the alcohol licensing system (the Brightcrew case, above). The new legislation was a recognition by the Scottish Parliament that there was no existing system of regulation.
- (i) The EU Services Directive does not prevent the Council from establishing a system of SEV Licensing.
- (j) The Council is a "Regulator" under the Regulatory Reform (Scotland) Act 2014 and therefore has a duty, in exercising its regulatory functions, to contribute to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of those functions to do so (Section 4(1)).

- (k) This does not oblige the Council to grant a Licence:
- where it would otherwise refuse it (for example, because the Applicant is not 'fit and proper' or the Premises are unsuitable for the proposed use);
  - where the proposal contravenes any Policy limiting numbers of SEVs (or prohibiting them altogether).
- (l) The Regulatory Reform (Scotland) Act 2014 does not prevent the Council from establishing a system of SEV Licensing.
- (m) The European Convention on Human Rights protects the rights of SEV operators who have existing businesses. There are in fact no SEVs in North Ayrshire. There are in other parts of Scotland. If the Council there refuses a Licence Application from an existing Organiser, one of the arguments which might be made by the SEV Organiser is that the Council's action has breached the Organiser's right to freedom of possessions (European Convention of Human Rights, Protocol 1, Article 1). It might also be argued that the Council's action had deprived employees of their jobs, by closing their employer's business.
- (n) The Convention right protects existing property rights, but not property rights which do not yet exist. No action by a Council which did not already have SEVs in its area could be said to breach the Convention.
- (o) The Convention does not prevent the Council from establishing a system of SEV Licensing.
- (p) The Scottish Government recognises that there are competing considerations. In exercising functions under the new legislation, the Council is obliged to have regard to the Guidance issued by the Scottish Government in March 2019, which includes:

*"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' 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'.*

*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' 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' 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."*

### **Equality/Socio-economic**

#### **4.4 The Equality Act 2010 imposes duties on the Council:**

- (a) Section 1(1) ("Public sector duty regarding socio-economic inequalities"): the Council

*"must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage."*

- (b) The Council is a "Relevant Authority" for the purposes of Section 149(1) of the Equality Act 2010 ("Public sector equality duty") so:

*"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 [that 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."*

The "Relevant Protected Characteristics" are: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

The Clerk has considered these Duties in preparing this Report and does not consider that the present proposals will have any significant impacts.



There are no SEVs in North Ayrshire and the Council is not aware of any proposal for a SEV, so the adoption of a Resolution will not prejudice any existing businesses or workers.

Adoption of the proposed Resolution would indicate the Council's recognition of the concerns stated in the two Scottish Government Policies referred to in the Report, and would advance the Council's efforts to

*"eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [that Act];".*

A resolution to license sexual entertainment venues will ensure control over the number of such venues and ensure that any venues are properly regulated and subject to licensing control and conditions. In turn this supports the Scottish Government's Equally Safe Strategy considered under Legal Implications, and will have benefits in terms of the protected characteristic of sex.

### **Environmental and Sustainability**

4.5 None.

### **Key Priorities**

4.6 An effective licensing system, for example monitoring the 'fit and proper' status of licence-holders and the suitability of premises, helps progress towards one of the Priority Outcomes of the North Ayrshire Council Plan 2019-2024: "People and communities are safe".

### **Community Wealth Building**

4.7 There are no Community Wealth Building issues.

## **5. Consultation**

5.1 Consultation has been carried out as described above. If there are Licence Applications later these will be referred to the Committee after appropriate consultation with Police Scotland, Scottish Fire and Rescue, and Council Directorates.

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For further information please contact **William O'Brien, Solicitor (Licensing)**, on **01294 324305**.

### **Background Papers**

None