

Air Weapons and Licensing (Scotland) Bill: Introductory Questions



The Scottish Parliament
Pàrlamaid na h-Alba

Thank you for responding to the Local Government and Regeneration Committee's Call for Evidence on the Air Weapons and Licensing (Scotland) Bill. All submissions will be examined and considered as part of the Committee's scrutiny of the Bill.

Please be aware that questions marked with an asterisk (*) require an answer before you can submit the form.

Follow the Local Government and Regeneration Committee's Twitter feed - all Committee tweets on this Bill will have the hashtag #aw&bill.

*1. Please supply your name and contact details:

Name:

Prof Phil Hubbard

Organisation:

University of Kent

Address 1:

Address 2:

City/Town:

Postcode:

Country:

Email address (if no email leave blank):

Phone Number:

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SUBMISSION ID
NUMBER

139

*** 2. Please confirm that you have read and understood the Scottish Parliaments [“Policy on the treatment of written evidence by subject and mandatory committees”](#):**

Yes

*** 3 Please confirm whether you are content for your name to be published with your submission:**

Yes

No

*** 4. Which of the three categories below best describes your interest in the Bill (please tick only one)?**

Personal

Professional

Commercial

*** 5. Do you wish your email to be added to the Committee’s distribution list for updates on progress of the Bill:**

Yes

No

*** 6. Invitations to give oral evidence to the Committee on the Bill will be based on the submissions received. If you wish your submission to be included amongst those considered for possible invitation to give oral evidence, please indicate here.**

Yes

No

*** 7. You may answer questions on the entire Bill, or on any part of the Bill. Please indicate which parts of the Bill you are responding to? (You may select as many options that apply).**

All of the Bill

Equalities, climate change and other Scottish Government objectives

Air Weapons

General licensing issues

Alcohol licensing

Civic licensing – taxi/private hire car licensing

Civic licensing – scrap metal dealers

Civic licensing – theatre licensing

Civic licensing – sexual entertainment venues

Name/Organisation:

1. Equalities, Climate Change and other Scottish Government objectives

You may respond to all the questions or only those you have a specific interest in. (Text boxes have no word limit, they will increase in size accordingly).

8. Do you consider that the Bill has any implications for meeting Scotland's climate change commitments? Please explain.

9. Do you consider that the Bill has any implications for meeting Scotland's equality and/or human rights commitments? Please explain.

The clauses on the regulation of Sexual Entertainment Venues has implication for minority sexual rights. EU Court of Human Rights cases have been interpreted to suggest that there is a right to buy and sell sexual entertainment and/or products (see Belfast City Council v. Miss Behavin' Ltd (Northern Ireland) [2007] UKHL 19 (25 April 2007) and that licensing must not impinge on freedom of sexual expression unless there is a clear justification for doing so in terms of the municipal or civil interest. This implies there is a duty for local authorities implementing the licensing system to be mindful of the rights of individuals to view or provide sexual entertainment, both of which are lawful activities. This may be particularly important in the context of venues targeting LGBT audiences, though the general principle should be the same when considering the rights of all adults to consume or perform Sexual Entertainment: unless there is a clear justification for preventing this happening, particularly in terms of preventing crime and disorder; securing public safety; preventing public nuisance; protecting children from harm; and protecting and improving public health, refusal of licenses for sexual entertainment venues might be deemed as unreasonable in the terms of human rights. Regulation must always be proportionate and reasonable, and mindful of impacts on different social groups, even if large sections of the community find the behaviour of such groups objectionable or immoral.

10. Do you consider that the Bill has any implications for preventative spending and/ or public services reform? Please explain.

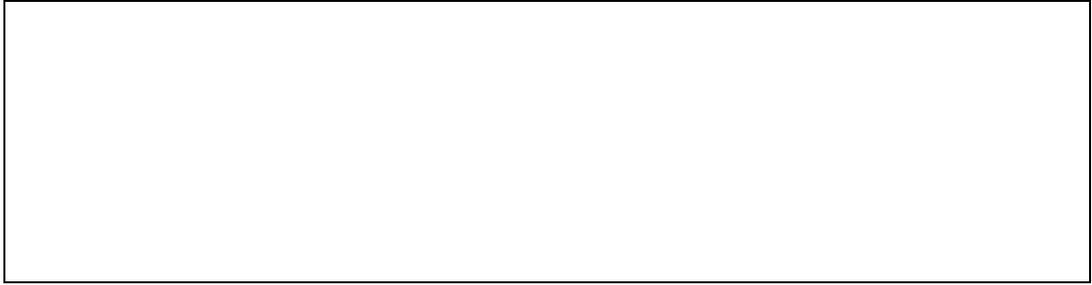
11. Do you consider that the Bill has any implications in relation to European Union issues? Please explain.

As (9) above. EU Human Rights cases suggest the burden must be on the governmental (municipal) power to justify its regulation of businesses in clear terms in cases where that regulation appears to impinge on freedom of expression.

The danger of introducing a separate licensing system is that it may appear contrary to the 2009 EU services directive if it appears that particular commercial premises are being subject to regulation that is disproportionate. If the introduction of a licensing system for sexual entertainment were read as in any way introducing ‘unnecessary or excessively complex and burdensome procedures, the duplication of procedures...the arbitrary use of powers by the competent authorities’ or ‘disproportionate fees and penalties’ it would be seen as contrary to section 45 of the 2009 EU Services Directive and could be prone to legal challenge on this basis. Any system of licensing of sexual entertainment must be proportionate and non-discriminatory against sex businesses given the regulation of sexual behavior and personal liberties is only justified when this regulation serves another governmental objective which is rational and reasonable (e.g. the protection of children or the improvement of public health). These principles are underlined in *Belfast City Council (Appellants) v. Miss Behavin’ Limited (Respondents) (Northern Ireland) (2007)*, where it was established that certain human rights to expression and rights to use of land can be overridden when it serves other stated governmental goals. Here, the onus is nonetheless on the government concerned to clearly state the goals which the regulatory act is designed to meet. It is also relevant here to note *Hemming v Westminster City Council (2013)*, which ruled that fees must be proportionate and reasonable, and cannot be justified with reference to the operation of a licensing regime, only the cost of an individual application.

In sum, if a new licensing regime is introduced, its intentions and objectives must be clearly stated; its procedures must be clear and any licence fee must be proportionate with the work undertaken to process an application and not in any way designed to discourage applications of this type. If such safeguards are not taken there is a risk that regulation will be challenged via European courts or with reference to EU Human Rights legislation.

12. Do you have any other comments on the impact of the proposals contained in the Bill relation to Scottish Government objectives?



Name/Organisation:

Prof Phil Hubbard, University

6. Civic Licensing – Sexual Entertainment Venues

You may respond to all questions or only those you have a specific interest in.
(Text boxes have no word limit, they will increase in size accordingly).

50. What are the consequences of operating the new licensing regime using the definitions set out at section 68 of the Bill?

- 'sexual entertainment venue'
- 'audience'
- 'financial gain'
- 'organiser'
- 'premises'
- 'sexual entertainment', and
- 'display of nudity'

These definitions are relatively clear. However, the definitions as currently offered might extend to However, contrary to the above, it may be worth noting that a number of premises may also fall into the definition of an SEV which have not been considered to be the object of regulation by those drawing up these guidelines. Three instances may be highlighted:

Gay saunas or encounter venues: if a man pays a fee to enter a (gay) male sauna, and then another man strips off in front of him with the intention of sexually stimulating him, there is both nudity, an audience, and financial gain on behalf of the premise owner. Likewise, in some gay clubs there are dark rooms and dance floors where customers may strip with the intention of exciting and stimulating others around them. In Lambeth there are a number of venues of this type licensed as SEVs.

Massage parlour: when a customer pays for a massage, and the masseur performs in a naked or semi-naked state, this may fall within the remit of the definition as currently given. This is problematic given the ambiguous nature of brothels and massage parlours in Scottish law – while brothels are of course illegal, licensed massage parlours are known to be spaces where sex is negotiated between consenting adults for a fee. In such spaces, sexual entertainment could be said to be performed for an audience (albeit, an ‘audience of one’). No premises of this type have been licensed as SEVs in England & Wales though very many could be interpreted as falling into the category as defined.

Swinger’s clubs: there may be swinging venues or sex party venues where organisers charge visitors a fee to attend, and where consenting adults strip to sexually stimulate others. These may fall under the definition of an SEV as currently defined: at present just one club in England & Wales of this type has been licensed (La Chambre, Sheffield).

It should be noted that some of these spaces will not be licensed for the sale of alcohol, but this does not mean that they should escape the remit of the need for licensing as outlined in the Bill. The consequences of introducing licensing must require local authorities to consider if such premises exist in the locale, as regarding such premises as outwith the law is potentially legally unreasonable.

Section 45b could be modified to clarify that the licensing of Sexual Entertainment Venues is in no way related to alcohol licensing: at the moment it implies that the granting of a licence for Sexual Entertainment should not be influenced by the refusal or granting of an alcohol licence. This is presumably relevant in the context of *Brightcrew Ltd v City of Glasgow Licensing Board* [2011] CSIH 46 in which it was determined that liquor licensing boards should have no say over matters incidental to alcohol sales.

The point is more fundamental: sexual entertainment licensing relates to premises that might not previously have been within the ambit of licensing per se. The meaning of 45(A) clause 11 is pivotal here given Scottish ministers will be able to exempt some displays of nudity from the licensing regime, but this power needs to be carefully deployed.

51. The Bill specifies that a venue hosting sexual entertainment on three occasions or less within a 12 month period would not be treated as a sexual entertainment venue: does this have any unintended consequences?

The justification for this is not clear, and differs from England & Wales. However, this would require any premise providing more than 3 days of sexual entertainment to seek a licence, which will mean that venues providing monthly striptease will need a licence, which is not the case in England & Wales.

On the basis of my research, I would suggest that any venue that offers sexual entertainment less than once a month is unlikely to be perceived by the public as a sexual entertainment venue.

52. Local licensing authorities will be able to set the number of sexual entertainment venues in their area to below the existing level, or zero: are there any advantages or disadvantages to this approach?

The thrust of the proposed legislation, which mirrors that in England & Wales, suggests that this is the case, with case law suggesting that local authorities are able to make judgments about where is, and where is not, a suitable locality based on their interpretation of the contingencies of individual situations. *R (KVP ENT LTD) v South Bucks DC (2013)* and *R (Alistair Lockwood-Thomson) v Oxford CC (2013)* both imply that the discretion available to licensing committees/boards is considerable indeed: this means they can rule a locality inappropriate on the basis of their interpretation of the current and future uses of land. While the decision must be rational and reasonable in light of the facts of the case, it does not appear that licensing committees or boards have to be strictly guided by the weight of local objections, and may overrule or discount objections made by other relevant authorities, including the police. In England and Wales, licences of this type have been granted contrary to the advice of police, and in some cases contrary to the advice of licensing officers. Equally, licenses have been refused by local authorities where there have been no objections or evidence of criminality or poor management.

My analysis of the licensing of SEVs in England and Wales hence leads me to the conclusion that the relevant authority may be accused of exercising an arbitrary power – with no right of appeal – unless any decision is justified clearly in relation to governmental and licensing objectives: to avoid any accusations of unfair and discriminatory decision making the onus is on the local authority to advertise clearly that an application has been made; to solicit the opinions of local people and provide opportunities for representations to be received and to provide as much guidance to applicants as is possible prior to application as to what relevant considerations might be in a given case. Clearly, stipulating a nil limit is defensible within the law, but the presumption of a nil limit without careful consideration of possible locations where an SEV might be permissible would appear to be prejudicial towards this type of business. Considering each case on its merits would appear to be more appropriate than setting a de facto nil limit at the outset for the area under the jurisdiction of the local authority.

53. The Bill relies mainly on the existing licensing regime for sex shops as set out in

section 44 and Schedule 2 of the Civic Government (Scotland) Act 1982 (application, notification, objections and representations,

revocation of licences etc., enforcement and appeals): is this mechanism adequate for the licensing of sexual entertainment venues - if not, please explain why?

The procedures are clear and defensible. There have been few cases in Scotland which suggest that the procedures for licensing sex shops have not been fit for purpose.

54. Are there any barriers to licensing authorities operating the new licensing regime?

The requirement that local authorities must 'from time to time' determine the appropriate number of SEVs appropriate to their area and each relevant locality is a vague requirement which does not specify how often this must occur, and the extent to which this must reflect local opinion (e.g. must there be consultation?) In the absence of such determinations, local authorities should endeavour to consider each case on its merits. In a legal sense, it seems legally unreasonable to specify a nil limit for a local authority area without considering all possible localities in which SEVs might be sited. This requires local authorities to specify relevant localities at the outset if they decide to go down this route, and demonstrate that all are unsuitable. Without such justification, nil limits will prove difficult to uphold.

55. Civic Licensing

Do you have any other comments to make on the civic licensing aspects of the Bill?

