The Scottish Parliament
Pàrlamaid na h-Alba

LOCAL GOVERNMENT AND REGENERATION COMMITTEE

AGENDA

2nd Meeting, 2015 (Session 4)

Wednesday 14 January 2015

The Committee will meet at 9.30 am in the Mary Fairfax Somerville Room (CR2).

1. **Declaration of interests:** Cara Hilton will be invited to declare any relevant interests.

2. **Appointment of European Union Reporter** The Committee will appoint a member to serve as its European Union Reporter.

3. **Public petitions: PE1538** The Committee will consider the following petition- PE1538 by Dr Richard Burton on behalf of Accountability Scotland, on Transparency in SPSO investigations.

4. **Air Weapons and Licensing (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

   Janet Hood, Associations Licensing Specialist, Associaiton of Licensed Adult Entertainment Venues Scotland;

   Andrew Cox;

   Professor Phil Hubbard, University of Kent;

   Mairi Millar, Legal Manager Licensing, Glasgow City Council;

   Willie Taylor, Service Manager, Dumfries and Galloway Council;

   Jon Morgan, Director, Federation of Scottish Theatre;

   Eric Anderson, Depute Clerk to the Licensing Board, Aberdeen City Council;

   Laura Tomson, Co-Director, Zero Tollerance;

and then from—

Michael McDougall, Solicitor, Glasgow City Council;

Gary Walker, Principal Policy Officer, Waste Unit, National Operations, Scottish Environmental Protection Agency;

Guy Jefferson, Director, SP Distribution, Scottish Power.

5. **Air Weapons and Licensing (Scotland) Bill (in private):** The Committee will consider the evidnece received.

6. **Community Empowerment (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.

David Cullum
Clerk to the Local Government and Regeneration Committee
Room T3.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5223
Email: david.cullum@scottish.parliament.uk

The papers for this meeting are as follows—

Agenda Item 2

Paper by the clerk	LGR/S4/15/2/1

Agenda Item 3

SPSO Paper	LGR/S4/15/2/2

Agenda Item 4

PRIVATE PAPER	LGR/S4/15/2/3 (P)
Written Submissions	LGR/S4/15/2/4

Agenda Item 6

See Paper: LGR/S4/15/1/8(P)

Local Government and Regeneration Committee

2nd Meeting, 2015 (Session 4), Wednesday, 14 January 2015

Appointment of EU Reporter and Forthcoming EU Matters

Appointment of EU Reporter

1. Following the recent change to Committee's membership the Committee no longer has a EU Reporter as this role was formerly undertaken by Stuart McMillian.

2. An integral part of the Scottish Parliament's EU Strategy is to make committees responsible for the appointment of an EU Reporter to:

(a) manage the committee's EU engagement; and

(b) take the lead on scrutiny of EU proposals.

The Scottish Parliament's EU Strategy

3. The Scottish Parliament's European Union Strategy was developed to respond to the changes introduced by the Treaty of Lisbon.

The strategy is intended to:

- develop an early engagement approach and set an 'upstream' agenda based upon intelligence gathering and analysis of EU policy making at the earliest (pre-legislative) stages;
- mainstream the scrutiny of draft EU legislation to subject committees; and
- mainstream the 'downstream' monitoring of the transposition and implementation of legislation to subject committees.

The Role of the EU Reporter

4. The role of the EU Reporter is to act as 'champion' for EU matters within the Committee. This will involve promoting the European dimension in the work of the Committee, taking the lead on EU early engagement and in developing relationships with the European Commission and European Parliament, leading the Committee's EU scrutiny work, promoting and speaking to European issues, highlighting the European dimension within policy debates and acting as a conduit between the Committee and the European Committee of the Scottish Parliament.

Forthcoming EU matters

5. Annual consideration of the Commission's Work Programme (CWP) is integral to the Scottish Parliament's early engagement with EU issues, as detailed in the Parliament's European Strategy. SPICe has prepared a short briefing on the CWP, Europe 2020 and the Scottish Government's work in this area. This briefing is annexed to this paper. The briefing also includes some suggested possible priorities for committees arising from the CWP.

6. The European and External Relations (EER) Committee is holding an evidence session with the European Commission on the new CWP on 22 January to which EU reporters will be invited.

7. The Scottish Government is currently reviewing its European Action Plan and plans to publish a revised approach in early April. It is also likely that the Scottish Government's Action Plan will be more regularly updated in the future.

8. Each year the EER Committee brings together a series of subject-specific reports from all of the Scottish Parliament's subject committees and Equal Opportunities Committee in a single report which is the subject of a debate in the Chamber early in each calendar year.

9. For 2015, the Committee has been asked to report by 13 February 2015 to the EER Committee on the European work it has undertaken during 2014 and, what the Committee intends to do in 2015 in terms of its EU priorities. The EER Committee will consider an overarching report of all the Scottish Parliament's Committee on 5 March, with an EER Committee led debate on the EU priorities of committees being held at the end of March.

10. The Clerks and the EU Reporter will prepare a further paper for the Committee on possible EU priorities for 2015 early in the New Year, with a view to agreeing a Report to the EER Committee by 5 February.

Recommendation

11. The Committee is invited to nominate a member to act as EU Reporter for the Committee.

12. The Committee is asked to note its EU Matters work timetable.

Claire Menzies-Smith

Senior Assistant Clerk

SCOTTISH PARLIAMENT EUROPEAN STRATEGY BACKGROUND PAPER

Context

Both the European Parliament and the European Commission began new five year mandates in 2014. In the case of the European Parliament, this follows the elections in June, and in the case of the European Commission it follows the election of new European Commission President Jean-Claude Juncker. More information on the composition of the new European Parliament and European Commission is available in SPICe Briefing SB 14-62 European Commission and European Parliament 2014-2019.

The start of a new European Commission mandate presents a good time for Scottish Parliament Committees to engage with measures arising from the new Commission's priority policy areas.

The European Commission President's Priorities and the Work Programme

Ahead of his election by the European Parliament, Jean-Claude Juncker presented his political priorities. He identified ten policy areas on which his Commission would focus, centering on encouraging economic growth. The policy priorities have been adopted by the new European Commission.

The ten priority policy areas are[1]:

1. A new boost for jobs, growth and investment
2. A connected digital single market
3. A resilient energy union with a forward-looking climate change policy
4. A deeper and fairer internal market with a strengthened industrial base
5. A deeper and fairer economic and monetary union
6. A reasonable and balanced free trade agreement with the US
7. An area of justice and fundamental rights based on mutual trust
8. Towards a new policy on migration

[1] http://ec.europa.eu/priorities/docs/pg_en.pdf

9. A stronger global actor

10. A union of democratic change

The European Commission's Work Programme outlining the policy programme for 2015 and throughout the Commission's term was published on 16 December 2014[2]. The programme sets out 23 new initiatives to be introduced in 2015, whilst 80 pending pieces of legislation are proposed for withdrawal.

The Work Programme consists of a political Communication and four annexes. The new initiatives in Annex I focus on concrete actions to implement the ten priorities in the Political Guidelines of the Juncker Commission. Annex II is the list of initiatives which it is proposed are withdrawn, applying the principle of 'political discontinuity'. In Annex III, the Commission is actively pursuing its better regulation agenda by proposing fitness checks and evaluations of existing legislation. Annex IV lists legislation that has already been adopted and will become applicable in 2015.In addition to those initiatives referred to in the Work Programme, in 2015 the Commission will run the European Semester process, prepare secondary legislation in the area of financial services following important recent reforms, and put the new programmes for the European Structural and Investment Funds into operation. Implementation of the reform of the Common Agricultural Policy will also be a priority.

The initiatives listed in the Work Programme relate to the 10 political priorities outlined by the Commission President. A number of the specific proposed initiatives are likely to have an impact on Scotland. These are indicated below along with the political priority that they relate to:

- Promoting integration and employability in the labour market (A New Boost for Jobs, Growth and Investment)
- Mid-term review of the Europe 2020 strategy (A New Boost for Jobs, Growth and Investment)
- Digital Single Market Package (A Connected Digital Single Market)
- Strategic Framework for the Energy Union (A Resilient Energy Union with a Forward Looking Climate Change Policy)
- Communication on the Road to Paris – multilateral response to climate change (A Resilient Energy Union with a Forward Looking Climate Change Policy)
- Communication on the post 2015 Sustainable Development Goals (A Stronger Global Actor)
- Review of the GMO decision-making process (A Union of Democratic Change)

Ahead of the publication of the Work Programme, concern was expressed by stakeholders across the European Union about the European Commission's apparent plans to withdraw the two major environment legislative dossiers currently undergoing negotiations in the Parliament and Council. MEPs and eleven member states wrote to Juncker and Timmermans in November 2014 asking them not to scrap the proposals.

[2] http://europa.eu/rapid/press-release_MEMO-14-2704_en.htm

With the publication of the Work Programme, it was confirmed that both the proposal to amend the National Emissions Ceilings Directive, part of the air quality package, and the proposal to amend a number of waste Directives, part of the circular economy package, have been withdrawn. The European Commission have proposed that the National Emissions Ceilings Directive be modified as part of the legislative follow-up to the 2030 Energy and Climate Package, and the circular economy package be withdrawn and replaced by a "new, more ambitious proposal" by the end 2015[3].

The circular economy package had included proposals already introduced on packaging and packaging waste; landfill of waste; end of life vehicles; on batteries and accumulators and waste batteries and accumulators, and on waste electrical and electronic equipment.

Europe 2020 and the European Semester

Europe 2020

Europe 2020 is the European Union's economic strategy for boosting economic growth and creating new jobs. The aim of Europe 2020 is to create economic growth which is smarter, more sustainable and socially inclusive.

The EU has set five objectives - on employment, innovation, education, social inclusion and climate/energy - to be reached by 2020. The specific targets which have been agreed by all Member State Governments are:

- 75% of the population aged 20-64 should be employed
- 3% of the EU's GDP should be invested in R&D
- Reduction of the greenhouse gas emissions by 20% compared to 1990
  Increase in the share of renewable energy sources in final energy consumption to 20% and; 20% increase in energy efficiency
- The share of early school leavers should be under 10% and at least 40% of 30-34 years old should have completed a tertiary or equivalent education
- Reduction of poverty by aiming to lift at least 20 million people (from an EU population of just over 500 million) out of the risk of poverty or exclusion.

The Flagship Initiatives

The European Commission has identified seven flagship initiatives which they believe will help boost growth and jobs and achieve the Europe 2020 targets (European Commission 2013d). Each of the initiatives requires coordinated work at both Member State and EU level. The seven initiatives are grouped under three top level headings of "smart growth", "sustainable growth" and "inclusive growth". The seven initiatives are:

Smart growth

- Digital agenda for Europe
- Innovation Union

[3] http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf

- Youth on the move

Sustainable growth

- Resource efficient Europe
- An industrial policy for the globalisation era

Inclusive growth

- An agenda for new skills and jobs
- European platform against poverty

The Europe 2020 targets sit within the three top level headings. For instance, the targets for 75% employment, 3% of GDP for research and development and educational attainment sit under the smart growth heading. The 20/20/20 target related to energy is incorporated within resource efficient Europe and the target to reduce poverty is addressed in inclusive growth.

Member State driven

Europe 2020 is largely Member State led through decisions and discussions at the European Council whilst in the Council of Ministers, national ministers responsible for the relevant policy areas (for example competitiveness, employment and education) discuss implementation of the National Reform Programmes in their area of competence. The European Commission's role includes coordinating Member State actions, providing EU level assistance for specific measures.

Each Member State has translated the Europe 2020 targets into national targets and policies. Monitoring the performance of Member States against their targets is undertaken by the European Commission which has set up a yearly cycle of economic policy coordination called the European Semester.

Whilst Europe 2020 is Member State driven, most measures proposed by the European Commission in the Work Programme relate to the achievement of the Europe 2020 targets and the flagship initiatives.

The European Semester

The European Semester involves the European Commission undertaking a detailed analysis of EU Member States' programmes of economic, fiscal and structural reforms and providing them with recommendations for the next 12-18 months. Part of this coordination relates to the implementation of the Europe 2020 strategy.

The key elements of the European Semester which relate to the delivery of the Europe 2020 strategy are the publication of the Annual Growth Survey each November; Member States then produce their own National Reform Programmes outlining their efforts to help Europe achieve the aims of Europe 2020. Finally the Country Specific Recommendations are produced by the European Commission and adopted by the European Council include an analysis of the Member State's National Reform Programme and an overall assessment of their efforts to help Europe achieve its aim of smart, sustainable and inclusive growth.

The UK National Reform Programme

On 30 April 2014, the United Kingdom submitted its 2014 National Reform Programme (NRP) to the European Commission. In the Foreword to the UK NRP for 2014, the UK Government states:

> "The National Reform Programme reports on the actions that the government is taking to address the Country-Specific Recommendations (CSR) addressed to the UK by Heads of State or Government at the European Council in June 2013, in the areas of deficit reduction, improving housing market function, skills shortages, workless households, access to finance and network infrastructure. It also reports against policies in support of the Europe 2020 Strategy priorities of employment, research and development, secondary and tertiary education, poverty reduction and energy and climate change."

The UK's NRP also reported on progress in broad policy areas covered by the five headline EU-level targets under the Europe 2020 Strategy, relating to employment, education, poverty reduction, research and innovation, and energy and climate change.

The Scottish Government's National Reform Programme

The Scottish Government has been producing its own distinct National Reform Programme since 2011. The Scottish NRP is sent to the European Commission and is referenced in the UK NRP.

The Scottish National Reform Programme for 2014 (SNRP) was published in April 2014 and set out Scotland's progress against each of the Europe 2020 targets along with information on the actions taking place to assist in Scotland meeting the targets. Progress against the targets is also set out in the Scottish Government's National Performance Framework (NPF) with progress captured through the NPF's seven purpose targets and 50 national indicators.

Scottish Government's European Priorities

The Scottish Government's priorities for EU engagement are identified in the Action Plan and are focussed on four key areas:

- Energy and Climate Change
- Marine Environment including Fisheries
- Research and Creativity
- Freedom, Security and Justice (formerly Justice and Home Affairs)

The Scottish Government is currently reviewing its European Action Plan and plans to publish a revised approach in early April. Thus, the Government's European priorities may change in the next six months. Committees may wish to consider whether further scrutiny is required in the event changes to the Scottish Government's European priorities have an impact on policies covered by each Committee's remit.

Agenda Item 3 **LGR/S4/15/2/2**
14 January 2015

Local Government and Regeneration Committee

Meeting 14 January 2015

Supplementary information from the SPSO

Purpose

The following paper is from the Scottish Public Service Ombudsman (SPSO) and is an extract from their guidance document relating to information sharing. This information was requested by the Committee during the oral evidence session with the SPSO on 7 January 2015.

Members should be aware that the document provided is a snapshot from the SPSO's internal guidance. The document is made up of extracts from a number of sections of the internal guidance document. The main casework guidance is currently 158 pages, and is a living document. It is only for internal use as it refers to a number of abbreviations. A number of the links within the document link to staff guidance and policy documents which will not work outside the SPSO.

The document is not regarded as confidential and the full document and extracts are released upon request, however they are not stored on their website. The obligations and processes are explained in non-technical and plain language on the website for customers.

The Paper has been provided to assist Members in their consideration of Petition: PE1538 by Dr Richard Burton on behalf of Accountability Scotland, on transparency in SPSO investigations.

Paul Nicholson
Committee Assistant
9 January 2015

SPSO Internal Document
Guidance on Information Sharing

NB This "guidance" is taken from a series of extracts from a number of internal documents used by staff of the SPSO.

Common Law and Natural Justice

Beyond any statutory duties and limits placed on the Ombudsman, he must also fulfil any duties imposed on him by Common Law. Common Law is made up of previous decisions by judges in courts or other tribunals. The main common law duty imposed on the Ombudsman (and all public bodies) is to act with Natural Justice. This means he must act fairly and it must be clear to others that he is acting fairly. In practice this means SPSO must have a fair procedure for dealing with complaints, must be impartial and must give reasons for our decisions. Further information on this area of law can be found in these slides from Anderson Strathern's session on natural justice and the Scottish Government's paper.

Freedom of Information (Scotland) Act 2002 (FOISA) and Data Protection Act 1998 (DPA)

The Act contains a number of sections which prevent or enable the giving and receiving of information by SPSO in situations where this would not otherwise happen. SPSO has the same power as the Court of Session to ask for documentation but must also act in confidence, not making the personal details of complainants available to the public. As a public body we are also subject to both FOISA and DPA. Both these Acts may reinforce an existing provision in the SPSO Act not to disclose information and to act in confidence, or may give rise to an overriding obligation to disclose information. This will depend on the exact circumstances of the information concerned.

FOISA requires that we make information available to a member of the public on request unless there is an absolute or qualified exemption that means we cannot release the information. One of the absolute exemptions prohibits the release of information covered by the DPA. The DPA covers personal information relating to a living individual while FOISA generally covers any non-personal information.

Both Acts require SPSO to record and store information in a particular way and to respond to any request for information.

Step 9a - Sharing Information

	ASSOCIATED ACTIVITY	RESPONSIBLE OWNER	TIMESCALE (in working days)	NOTES
	The first consideration in relation to sharing information, be it with the complainant, BUJ, or a third party, is: • does it need to be shared in order for the concerned party/parties to comment on prior to us issuing a decision, in order to complay with the principles of natural justice , ensuring there is fairness in our process The second is: • Should the CR have any concerns or queries about sharing the information, they should liaise with the DP/FOI officer in the first instance; these should be escalated to the ER Manager and/or the Director where appropriate. Where a complainant requests, either verbally or in writing, that information obtained by us from the BUJ during our consideration of the complaint at this stage is shared with them, and it is likely the case will be closed within ER under Step 10, consideration must be given to the following criteria: • does the information contain a significant new argument not previously put forward; • does the information contain sensitive, secure data or personal data relating to others; • does the information contain new or significant information not previously available or known to the complainant; • is providing the information as it is provided likely to significantly impede progress of the consideration of the complaint Each request must be considered on its own merits. It is important that, if the above criteria apply, the request is differentiated from a 'general' request to see information, which should be directed to the	ERCR	Steps 6 – 10 within ten weeks of receipt	Also see Section E3 If the criteria outlined apply, any concerns about sharing information in this manner should first be checked with the FOI/DP officer and then the BUJ (if, for example, the CR is concerned about the sensitivity or confidentiality of the information provided and/or that information may be exempt from disclosure under certain provisions of FOISA/ DPA). The BUJ should be asked to confirm within five working days that they are content for the information to be released. If they are not, the request must be formally logged as an FOI or DP request and responded to in this way. Please note medical records should

	ASSOCIATED ACTIVITY	RESPONSIBLE OWNER	TIMESCALE (in working days)	NOTES
	FOI/DP processes. A request does not need to specifically refer to legislation to fall within it - ask the FOI/DP Officer if you would like assistance in making the distinction. Upon following the process outlined in the Notes, the CR should then share the information with the complainant and allow them 20 working days to comment upon it. If the CR considers the above do not apply, the complainant should be informed by the CR that separate provision to them of a copy of the BUJ's response will not be necessary as part of our decision making process, and that the information from the BUJ will be incorporated into and referred to within the decision letter. The decision letter will also advise the complainant of the decision review process; the CR can explain to the complainant their right to comment on the information provided by the BUJ via this process. If the complainant suggests that they should have had an opportunity to comment on the information prior to the issue of our decision, and the fact that we did not do this was not fair to them, they should be directed towards the service delivery complaint process. Whenever a request for information is withheld the individual must be informed of their rights under FOISA/DPA and under FOISA offered the right to request a review of the decision. It is good practice to make file notes of any consideration, action or otherwise, and decisions in relation to the sharing of information. Should the complainant make a request to be provided with a copy of any advice received at this stage of the process, please see guidance at Section E7			not be released without appropriate checks, and we do not have the authority to release medical records relating to a deceased person. If the BUJ is content with the release, and any outstanding concerns have been dealt with, the CR can release the information. Please note that any 'recorded request' must be responded to under the relevant legislation, with an ack. issued within 3 days and a response within 20 days.

Step 6a – Sharing information

	ASSOCIATED ACTIVITY	RESPONSIBLE OWNER	TIMESCALE	NOTES
	The first consideration in relation to sharing information, be it with the complainant, BUJ, or a third party, is: • does it need to be shared in order for the concerned party/parties to comment on prior to us issuing a decision, in order to comply with the principles of natural justice , ensuring there is fairness in our process The second is: • Should the CR have any concerns or queries about sharing the information, they should liaise with the FOI/DP officer in the first instance; these should be escalated to the ERM and/or the Director where appropriate. Where a complainant requests, either verbally or in writing, that information obtained by us from the BUJ during our consideration of the complaint at this stage is shared with them, they have not already received this as per Step 9a of the ER process, and it is likely the case will be closed at Step 10 of the INV process, consideration must be given to the following criteria: • does the information contain a significant new argument not previously put forward; • does the information contained from the BUJ contain sensitive, secure data or personal data relating to others; • does the information from the BUJ contain new or significant information not previously available or known to the complainant; • is providing the information as it is provided likely to significantly impede progress of the consideration of the complaint Each request must be considered on its own merits. It is important that, if the above criteria apply, the request is differentiated from a			If the criteria outlined apply, any concerns about sharing information in this manner should first be checked with the FOI/DP officer and then the BUJ (if, for example, the CR is concerned about the sensitivity or confidentiality of the information provided and/or that information may be exempt from disclosure under certain provisions of FOISA/ DPA). The BUJ should be asked to confirm within five working days that they are content for the information to be released. If they are not, the request must be formally logged as an FOI or DP request and responded to in this way. Medical records should not be released without appropriate

	ASSOCIATED ACTIVITY	RESPONSIBLE OWNER	TIMESCALE	NOTES
	'general' request to see information, which should be directed to the FOI/DP processes. A request does not need to specifically refer to legislation to fall within it - ask the FOI/DP Officer if you would like assistance in making the distinction. Upon following the process outlined in the Notes, the CR should then share the information with the complainant and allow them 20 working days to comment upon it. If the CR considers the above criteria do not apply, the complainant should be informed by the CR that separate provision to them of a copy of the BUJ's response will not be necessary as part of our decision making process, and that the information from the BUJ will be incorporated into and referred to within the decision letter. The decision letter will also advise the complainant of the decision review process; the CR can explain to the complainant their right to comment on the information provided by the BUJ via this process. If the complainant suggests that they should have had an opportunity to comment on the information prior to the issue of our decision, and the fact that we did not do this was not fair to them, they should be directed towards the service delivery complaint process. In an instance where the CR knows the complaint is being or will be dealt with at Steps 8a, 8b and 10 of the INV process the two criteria should still be considered, but the fact that the complainant will have an opportunity to comment on a draft version of the public report should also be taken into account. If, following consideration of all the circumstances and the attached Notes, the CR is satisfied the information should be released in advance of and separate to the issue of a draft report, this should be shared, and the complainant should be allowed 20 days to comment upon it. Whenever a request for information is withheld the individual must be			checks, and we do not have the authority to release medical records relating to a deceased person. If the BUJ is content with the release, and any outstanding concerns have been dealt with, the CR can release the information. Any 'recorded request' must be responded to under the relevant legislation, with an ack. issued within 3 days and a response within 20 days.

	ASSOCIATED ACTIVITY	RESPONSIBLE OWNER	TIMESCALE	NOTES
	informed of their rights under FOISA/DPA and under FOISA offered the right to request a review of the decision. It is good practice to make file notes of any consideration, action or otherwise, and decisions in relation to the sharing of information. Should the complainant make a request to be provided with a copy of any advice received at this stage of the process, please see guidance at Section E7			

Releasing advice

It must first be noted that it is a matter for the case owner, with the delegated authority of the Ombudsman, to decide the relevance and significance of the advice provided by the expert adviser and how it is applied in order to reach a judgement on each individual complaint. Advice provided to us by advisers is solely for our use during the investigative process. It should not be assumed whether and to what extent the advice will be relied upon by us during the course of our decision making until the decision has been issued. It is also for the CR to satisfy themselves about the credibility of the advice received.

Each DP request for a copy of an adviser's report or advice note is assessed on its own merits. The FOI/DP Officer will handle all such formal requests in the normal manner. In high risk/ high profile cases, release of the advice should be discussed with the Director and, if appropriate, the Ombudsman.

If we receive a DP request for the advice received whilst a complaint is still being investigated, the advice may or may not be withheld until after the decision is issued, as this could ensure that the investigation can continue without interference. Of particular relevance in this regard is Section 12(1) of the Act.

It may be the case that a complainant requests to receive a copy of an adviser's report informally (ie not via a DP request). In this instance, the CR has the option to release the advice. However, the process as outlined above should still be adhered to and any concerns should be discussed with the FOI/DP Officer, team manager and/or Director as appropriate.

It may also be the case that we decide we may want to share advice without it ever having been asked for, for example if the advice contains significant new information or argument. In this instance, we need to be sure there are no concerns about releasing the information contained within (for example, if there is third party information, confidential or sensitive information – for example, health or social services related – or information that could be detrimental to an individual's health and wellbeing). Always liaise with the FOI/DP Officer in this instance.

Scottish Information Commissioner

The Scottish Information Commissioner (SIC) is responsible for enforcing and promoting the right to access information held by Scottish public authorities. Information and guidance on the Freedom of Information (Scotland) Act 2002 (FOISA), the Environmental Information (Scotland) Regulations 2004 (EIRs), exemptions, the public interest test, vexatious/repeated requests, fees/excessive cost of compliance, validity of requests, previous SIC decisions, records management, and much more can be found on the SIC website at www.itspublicknowledge.info, which should be the main point of reference. The website also provides many other resources including links to the FOISA, the EIRs, Codes of Practice, Fees Regulations and FAQs for public authorities on fees and timescales (including calculation of working days). This SPSO guidance document is not intended to be used in place of the SIC guidance, and will not repeat that guidance in detail.

Access to personal information is governed by the Data Protection Act 1998 (DPA), which is enforced and promoted by the UK Information Commissioner.

Freedom of Information (Scotland) Act 2002

Any person has a right to see any kind of recorded information held by a Scottish public authority, subject to certain exemptions.

Environmental Information (Scotland) Regulations 2004

The Environmental Information (Scotland) Regulations 2004 (EIRs) give everyone the right to ask for environmental information held by a Scottish public authority. Requests do not need to be in writing, and the 20 working day response deadline can be extended by a further period of up to 20 working days if the volume and complexity makes it impracticable for the authority to deal with the request within the original 20 days. If the request is made in writing, the authority has an obligation to deal with the request under the EIRs and an option to also deal with the request under the Freedom of Information (Scotland) Act 2002 (FOISA). However, the authority may choose to apply the exemption in section 39(2) of the FOISA for environmental information, if it is in the public interest to maintain that exemption, and so only deal with the request under the EIRs. Review, enforcement and appeals procedures in the EIRs mirror those in the FOISA.

Section 60 Code of Practice

The Scottish Minister's Section 60 Code of Practice on the Discharge of Functions by Scottish public authorities under the FOISA and the EIRs can be found on the Scottish Government website at www.scotland.gov.uk. This guidance stresses in particular the best practice to be followed in providing advice and assistance to requesters, and promotes the importance of proactively publishing information.

Records Management

The intention is that the SPSO complies fully with the Scottish Minister's Section 61 Code of Practice on Records Management created under Section 61(6) of the FOISA. The Code of Practice is available on the Scottish Government website at www.scotland.gov.uk.

Procurement

The Freedom of Information section of the Office of Government Commerce website at www.ogc.gov.uk provides advice about what to release and when in relation to procurement activities. Annex A of the Civil Procurement guidance material gives general guidance on what to release at which point.

Publication Scheme

All Scottish public authorities must produce and maintain a publication scheme which is approved by the SIC. Publication schemes describe the information that the authority publishes, how to access that information and whether it is free of charge or available for a payment. Information in the publication scheme can always be released. There is a chance, however, that information which has not yet been uploaded may contain elements that ought not to be released and should be redacted. The SPSO publication scheme is available on our website at www.spso.org.uk and we publish information that we hold within the following classes.

Class 1: About us
Class 2: How we deliver our functions and services
Class 3: How we take decisions and what we have decided
Class 4: What we spend and how we spend it
Class 5: How we manage our human, physical and information resources
Class 6: How we procure goods and services from external providers
Class 7: How we are performing
Class 8: Our commercial publications

Requests for Information

Requests to the SPSO for information held (or believed to be held) by the SPSO must be in writing or some other permanent format. The SPSO is a Scottish public authority for the purposes of the FOISA and the EIRs, and requests for information must be dealt with in line with the statutory requirements. Requesters must give an adequate description of the information they require, but do not need to state reasons for the request or refer to relevant legislation. The requester may also express preference for the format for information to be provided in.

Verbal Requests

If the request for information is made verbally, the person dealing with the request should consider whether it would be in the requester's interest to make the request in a recordable format so that the rights under the FOISA will apply. This should certainly be discussed with the requester where there is any doubt whether all the information can be provided.

Identity of the Requester

Section 8(1)(b) of the FOISA requires that the requester provides their full name (shown in email address in not sufficient) and an address for correspondence. An email address, or a PO Box would be sufficient contact information to enable the SPSO to respond. Requests made on behalf of another person must name the third party (the 'true applicant') in order to be valid.

Section 8 of the Freedom of Information (Scotland) Act 2002 requires that when making a request for information an applicant must provide his or her name, together with an address for correspondence. While the Scottish Information Commissioner deems that an email address is sufficient for the purposes of the FOISA, th Commissioner has issued guidance which states that an applicant must provide his or her own name when making a request. The reason for this is that any appeal to the Court of Session in Scotland in connection with a request must be made using the true name of the applicant and this must be the name used in the original request to the public authority.

Broad, General or Unclear Requests

If the request is too broad or general (for example, seeks all information on a topic over many years) we have a duty to provide advice and assistance to the requester in order to focus the request before either accepting a revised request which meets the criteria or closing the request. The breadth of a request is not in itself an automatic reason to refuse it, although cost considerations might well be relevant here. The advice is to contact the requester, and ask for clarity about what they are specifically looking for. Section 1(3) of the FOISA (regulation 9(2) of the EIRs) deal with the issue of unclear requests and those which have been formulated in too general a manner for an authority to comply.

Mixed EIRs/FOISA Requests

If a request covers both environmental information and non-environmental information or some of the information is not held, the person dealing with the request must separate out all the elements of the request and deal with each element individually. However, all parts of the request can be dealt with in one letter of response.

Advice and Assistance

At all times, SPSO must provide advice and assistance to a person who has made, or proposes to make, a request for information. This is a statutory duty (section 15 of the FOISA and regulation 9 of the EIRs). This could include seeking clarification in relation to an information request or assisting the requester in identifying and describing relevant information. If the request is unclear and clarification is sought, the clock does not start until clarification is received. The section 60 and section 62 Codes of Practice expand on this and recommend a number of practical steps.

Assistance to make a request in a recordable format
If the requester is having difficulty making a request in a recordable format, whether because of a disability or any other reason, the person dealing with the request can offer to write it down for them. In such cases the requester should be asked to sign and return the written request to the SPSO. It is appropriate to provide the requester with two copies of the request (one for their records) and a freepost envelope for the reply.

Assistance in framing or clarifying a request
If the requester has had difficulty in stating what information they want, the person dealing with the request can work with them to try to narrow the information down to something we can help with or which might be more useful. For example, a requester asks for all the information we hold on a particular public authority. This wide request would embrace (but not be limited to) information relating to investigations, enquiries, research/events - and it is unlikely that the requester actually wants everything. In this instance, it would be good practice to describe the sorts of information we do hold, helping to identify the elements the requester would like to see. The process of seeking clarification must be recorded in Workpro. The 20 working days for responding to the request will commence on the day after receipt of the clarification. If no clarification response has been received, the person dealing with the request should write to the requester again, stating that we are unable to proceed with the request. Where the information requested is not held by the SPSO, the duty to advise and assist includes advising which public authority holds the information requested, if this is known. Where the person dealing with the request does not know which public authority would hold the information, there is no obligation to carry out research on behalf of the enquirer.

Responding to a Request

The SPSO must establish whether it holds the information requested, consider whether all or part of the information falls within an exempted class, and respond to the request within 20 working days following the date of receipt of the request. For email requests, the received date is the actual date of the email, even if the email is received outside office hours.

Where information cannot be provided, the SPSO must issue a refusal notice, stating the reasons for refusal and informing the requester of their rights of appeal. Reasons for refusal include:

- do not hold the information requested (section 17 of the FOISA)
- information is covered by an exemption
- excessive cost of compliance exceeds £600 (section 12 of the FOISA)
- vexatious or repeated request (section 14 of the FOISA)

Information Not Held
The requester must be informed that the information is not held, or no longer held, by the SPSO. The SPSO Archiving Policy may be useful in explaining our procedures for retention, archiving and disposal. In limited circumstances, it may be necessary to issue a refusal letter (section 18 of the FOISA) which neither confirms nor denies that the information is held by the SPSO. The requester must be advised that they have a legal right to request a review of the response and to address any request for review to the SPSO Director.

Absolute Exemptions
Absolute exemptions are listed in section 2(2) of the FOISA. Some absolute exemptions mean there is no requirement for a harm test or a public interest test under the FOISA (although other rules of law imported into the FOISA by exemptions may contain such tests). Information just cannot be accessed. Other absolute exemptions cover information which can be accessed through other legislation, for example subject access requests under the DPA.

Qualified Exemptions
Where a qualified exemption is applied, the SPSO must go on to consider the public interest test in order to determine whether the information should be released or could legitimately be withheld.

Public Interest Test
Although not defined in the FOISA, the public interest has been described as something which is of serious concern and benefit to the public, not just something of individual interest, and as something that is in the interest of the public, not just of interest to the public. When applying the test, public authorities are deciding whether it serves the interests of the public better to withhold or disclose information. The 'public' does not necessarily mean the entire population, but might relate to a relatively localised public, for example, a small community or interest group.

Key Exemptions
Section 26(a)of the FOISA 'Prohibitions on disclosure' (absolute)
Information is exempt information if its disclosure by a Scottish public authority is prohibited by or under an enactment. For example, section 19 of the Scottish Public Services Ombudsman Act 2002 (SPSOA) states that it is the duty of Ombudsman not to disclose information obtained in respect of a complaint or request, except for the purposes specified within that Act.

Section 30(b) of the FOISA 'Prejudice to effective conduct of public affairs' (qualified)
Information is exempt information if its disclosure would, or would be likely to, inhibit substantially (i) the free and frank provision of advice; or (ii) the free and frank exchange of views for the purposes of deliberation. For example, the comments of individuals who attended and spoke at internal meetings and who may be discouraged from speaking freely and frankly at future meetings should their comments be made public.

Section 30(c) of the FOISA 'Prejudice to effective conduct of public affairs' (qualified)
Information is exempt information if its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. For example, information relating to particularly sensitive matters which, if made public, would substantially inhibit the Ombudsman from conducting SPSO affairs.

Section 33(1)(b) of the FOISA 'Substantial Prejudice to Commercial Interests' (qualified)
Information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including a public authority. For example, commercially sensitive details of a contract entered into between the SPSO and another organisation.

Section 36(1) of the FOISA 'Confidentiality' (qualified)
Information which could be subject to a confidentiality of communications claim in legal proceedings.

Section 36(2) of the FOISA 'Confidentiality' (absolute)
Information obtained from a third party and whose disclosure would be an actionable breach of confidence.

Section 38(1) of the FOISA 'Personal information' (absolute)
Information is exempt information if (a) it is personal data of which the requester is the data subject and has a right of access under the DPA (subject access request – deal with under the DPA); or (b) it constitutes personal data and disclosure of the information to a member of the public would either contravene any of the data protection principles, or be likely to cause damage or distress; or the requester is the data subject but the information is exempt from release to them under Part IV of the DPA.

Charging
The SPSO can charge a 'reasonable amount' under the EIRs for environmental information.

Where the request is for environmental information which will cost more than £600 to supply, the requester can be asked to pay the full cost of providing the information.

The SPSO can calculate the estimated cost of complying with FOI requests and may charge within the framework provided by the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004.

We cannot take account of costs incurred in determining whether information is held, or whether the requester is entitled to receive it.

- The estimate of staff costs cannot exceed £15 per hour.
- Where the cost of providing information is over £100, the SPSO may charge a fee in line with the Fees Regulations. The fee cannot exceed ten percent (£50).
- Where the cost of providing the information would be over £600, the SPSO is not obliged to provide the information under the FOISA. If we do so, we may charge the full cost.
- In all cases where fees are applied, a fees notice must be issued and must detail how projected costs were calculated.
- Where the fees will exceed the upper cost limit of £600, requesters must be advised on how to bring their request within the cost threshold.

Vexatious, Manifestly Unreasonable or Repeated Requests

The SPSO can refuse to comply with a vexatious or repeated request. A vexatious request is determined by the information requested, not the person making the request, and is only relevant to requests made under the FOISA, not the DPA. An individual can make as many requests for information as he/she wishes, and cannot be labeled as vexatious - each of their requests must be determined on a case-by-case basis. There is no provision for aggregating the cost of responding to multiple requests received from the same person.

Vexatiousness needs to be assessed in all the circumstances of an individual case. If a request is not a genuine endeavour to access information for its own sake, but is aimed at disrupting the work of the SPSO, or harassing individuals in it, then it may well be vexatious. There are a number of ways in which it may be possible to identify individual requests as being vexatious, notably:
If a requester explicitly states that it is their intention to cause the SPSO the maximum inconvenience through a request, it will almost certainly make that request vexatious.

If we have an independent knowledge of the intention of the requester. Similarly, if a requester (or an organisation to which the requester belongs, such as a campaign group) has previously indicated an intention to cause us the maximum inconvenience through making requests, it will usually be possible to regard that request as being vexatious.

If the request clearly does not have any serious purpose or value. Although the FOISA does not require the person making a request to disclose any reason or motivation, there may be cases which are so lacking in serious purpose or value that they can only be fairly treated as vexatious. For instance a request for the number of unmarried employees in an organisation, could be classified justifiably as a vexatious request. Such cases are especially likely to arise where there has been a series of requests. Before reaching such a conclusion, however, we should be careful to consider any explanation which the requester gives as to the value in disclosing the information which may be made in the course of an appeal against refusal.

If the request can fairly be characterised as obsessive or manifestly unreasonable. These requests will be exceptional and we must have valid reasons for making such a judgement. An apparently tedious request, which in fact relates to a genuine concern, must not be dismissed. However we are not obliged to comply with a request which a reasonable person would describe as obsessive or manifestly unreasonable. It will obviously be easier to identify such requests when there has been frequent prior contact with the requester or the request otherwise forms part of a

pattern, for instance when the same individual submits successive requests for information. Although such requests may not be 'repeated' in the sense that they are requests for the same information, taken together they may form evidence of a pattern of obsessive requests so that we may reasonably regard the most recent as vexatious.

We therefore need to keep records of all FOI receipts as evidence when assessing potentially vexatious requests. We should contact the SIC for advice before declaring any request to be vexatious.

Information Held

If the information cannot be supplied straight away, an acknowledgement should be sent to the requester within three working days.

The person dealing with the request must first establish whether we hold the information. This will depend on the information requested and how specific the request is. Electronic and paper records are held in several locations (Workpro, complaint files, H and G drives, individual outlook boxes, etc). The person dealing with the request must also consider whether information may be held in some of the less obvious locations or formats (diaries, deleted email folders, etc). The person dealing with the request should do some initial searching for relevant information (searches on Workpro, asking colleagues who may be able to help). If unsure of what is held and by whom, the person dealing with the request should issue an email to all relevant staff, setting out the detail of the information request and asking for any relevant information.

For wide-ranging requests involving multiple records, the person dealing with the request should collate the record titles so that a schedule of the documents can be supplied when responding to the request.

The person dealing with the request should also ensure that a record of the searches carried out is available in Workpro. This may simply consist of the email sent to colleagues and their responses, but where record sets have been searched in more detail, this should be noted.

The person dealing with the request must evaluate all the information identified and reach a view on whether it should be released or withheld under any exemptions, including consideration of the public interest test where appropriate. In some cases some information may need to be redacted. All information withheld, including redactions, must be explained in the response by citing the relevant exemption and why it has been applied, how the public interest test has been applied, and why the conclusion has been reached that release is not in the public interest.

If a request is being dealt with by somebody other than the FOI/DP Officer, draft refusal responses should be forwarded, along with the information which is to be withheld or redacted, to the FOI/DP Officer for approval before the response is sent out. Where the information can be released in full, it should be collated and, if necessary, transferred into the agreed format.

The requester must be advised that they have a legal right to request a review of the response and to address any request for review to the Director at the SPSO.

Formatting Information

Responses should be sent by the same means that the request was made. We will comply with the requesters preference for the format of the information where it is reasonably practical to do so. The Disability Discrimination Act 1995 applies to information requests just as it does to all other service provision. If the requester has specified a format because of a disability, we must comply. The only exception to this is where it would be unreasonable to do so. The burden of proof of what is reasonable lies with the SPSO. The Race Relations (Amendment) Act 2000 places similar duties on public authorities in terms of provision of translated information.

Complaint Files
Section 12 of the SPSOA requires that an investigation by the Ombudsman must be conducted in private, and section 19 of the SPSOA specifically prohibits the Ombudsman from releasing information obtained in respect of a complaint, except for the purposes specified in that Act. Even the documents that are generated by the SPSO will in many cases be constituted by, discuss and pertain to information that has been obtained. Information prohibited by or under an enactment is exempt from release under section 26 of the FOISA.

Complaint files are likely to contain a mixture of personal and non-personal information. Personal information is also exempt from release under section 38 of the FOISA.

Third Party Consultation
If a request includes information about third parties, public authorities or suppliers to the SPSO, it may be appropriate to seek their comments on disclosure. This is particularly important where the release of such information without a third party's prior consent may result in an actionable breach of confidence. However, consultation should always be proportionate. The consultation letter should set out the parameters of the consultation and make it clear that it is ultimately a matter for the SPSO to decide whether the information should be released. The letter should give a date by which responses must be made, allowing time to formulate the response to the requester.

Common Requests for Information

Requests for Qualifications and Experience
The SPSO Job Descriptions and Person Specifications contain this information.

Requests for Names and Qualifications of Advisers
Normally we will release the names of advisers. In terms of qualifications, we will normally give details of their background that 'qualify' them to give advice on that subject. Normally complainants are really only looking for reassurance that the adviser 'knows what they are talking about'. Biographical details about our Scottish in-house advisers (where available) can be released as written. All SPSO advisers should be made aware of our position on release of this information. PHSO adviser biographical information should be edited down to clinical qualifications etc. PHSO advisers are aware that they will be named in reports and are used to their details being requested. It is good practice to contact the adviser before releasing the information.

Requests for Information about SPSO Processes or Policies
If someone requests information which we already have in printed form, or available on our website, this can be sent directly. This does not need to be dealt with under the FOISA, although we should try to respond within 20 working days in case of appeal to the SIC.

Requests for Statistics
These should always be handled under the FOISA, however, some information is already available in the annual reports or on our website. In case of more specific requests where the information has not already been published, the Information Analyst will collect the relevant information and the FOI/DP Officer will respond to the request.

Requests for Legal Advice
Section 36(1) of the FOISA states that 'Information in respect of which a claim to confidentiality could be maintained in legal proceedings is exempt information'. In a briefing note explaining this exemption, the SIC confirms that this applies to information shared between a public body and professionally qualified and instructed lawyers. The SPSO feels that there is a public interest in maintaining client/lawyer confidentiality where appropriate. However, in the spirit of the FOISA, the SPSO might be happy to share the substance of the advice that was received.

Rights of Appeal

If the requester is dissatisfied with the response to an information request, they have the right under section 20(1) of the FOISA to request a review (and a right of further appeal to the SIC). Requesters must be advised to write to the SPSO to request a review within 40 working days of receipt of the decision, to specify their name and address for correspondence, to identify the decision that they wish to have reviewed, or the aspect of the handling of the request that they are unhappy with, and to address their review request to the SPSO Director.

Requests for review should be acknowledged within three working days. The review must be an objective assessment of the complaint and involve a thorough assessment of the handling of the request. Reviews will be undertaken and completed as quickly as possible, and in all cases will be completed within the statutory 20 working days.

If the requester is dissatisfied with the outcome of the review, they should be advised of their right under the FOISA to appeal to the SIC within six months following the date of receipt of the review notice.

It is important that all relevant information, to include information withheld, and any audit trail of decisions taken, is retained until the period for review and appeal to the SIC is complete.

Offences under the FOISA

Where a request has been made and the information would be communicable under the FOISA, it is an offence for any person to take any action with the intention of preventing disclosure of information. This applies to both the SPSO and to any person who is employed by, is an officer of, or is subject to the direction of, the SPSO.

Initial Handling and Recording Information Requests

See guidance at the end of this section.

Information Request Flowchart

See flowchart at the end of this section.

Data Protection Act 1998

The SPSO is legally obliged to protect any personal information that we hold, and we are required to notify with the Information Commissioner's Office (ICO).

Personal Data

Section 1 of the Data Protection Act 1998 (DPA) defines personal data. Information relating to a living individual who can be identified either from the data of from the data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

The Information Commissioner's Office

The ICO is there to help organisations understand their obligations and keep them updated as and when they change. Information and guidance on all areas of the DPA and our responsibilities can be found on the ICO website at www.ico.gov.uk, which should be the main point of reference. This SPSO document is not intended to be used in place of the ICO guidance, and will not repeat that guidance in detail.

Data Controller

Section 1(1) of the DPA defines a data controller as 'a person who (either alone or jointly or in common with other persons) determines the purpose for which and the manner in which any personal data are, or are to be, processed'.

Processing

Section 1(1) of the DPA defines processing, which means obtaining, recording, or holding the information or carrying out any operation or set of operations on it, including:

- Organisation, adaptation or alteration
- Retrieval, consultation or use
- Disclosure by transmission, dissemination or otherwise making available
- Alignment, combination, blocking, erasure or destruction

Notification

The ICO maintains a public register of data controllers. Notification is the process by which a data controller's details are added to the register.

Data Protection Principles

The DPA works in two ways. Firstly, it helps to protect individuals' interests by obliging organisations to manage the information they hold in a proper way. It states that anyone who processes personal data must comply with eight principles, which make sure that it is:

- fairly and lawfully processed
- processed for limited purposes
- adequate, relevant and not excessive
- accurate and up to date
- not kept for longer than is necessary
- processed in line with individuals' rights
- secure
- not transferred to other countries without adequate protection

The second area covered by the DPA gives individuals important rights, including the right to know what information is held about them and the right to correct information that is wrong.

Correcting Information

If individuals believe the personal data that we hold is inaccurate, they can write to us to tell us what they believe is wrong with their information and what should be done to correct it. Correcting Information

Preventing Processing of Information

Individuals can also ask the SPSO not to process information about them that causes substantial unwarranted damage or distress. A response must be provided within 21 days. The SPSO is not always bound to act on the request. Preventing Processing of Information

Retention of Data

The fifth data protection principle states that personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes. Please refer to the SPSO Archiving Policy.

Protecting Personal Data

Tips for SPSO staff on how to protect the personal data they hold:

- do not share passwords
- encrypt any personal information held electronically if it will cause damage or distress if it is lost or stolen
- shred all confidential paper waste
- be wary of people who may try and trick you into giving out personal details
- carry out any appropriate identity checks before giving out personal details
- be aware that you can be prosecuted if you deliberately give out personal details without permission
- consider whether it is appropriate to leave a message on an answering maching
- only include necessary information in telephone messages
- use a strong password (at least seven characters) and have a combination of upper and lower case letters, numbers and the special keyboard characters like the asterisk or currency symbols
- do not send offensive emails about other people, their private lives or anything else that could bring the SPSO into disrepute
- do not believe emails that appear to come from your bank that ask for your account, credit card details or your password (a bank would never ask for this information in this way)
- do not open spam, not even to ask for no more mailings. Delete the email
- consider whether the content of emails should be encrypted or password protected
- only include necessary information in emails
- make sure you choose the right email address before you press send
- consider asking email recipients to acknowledge receipt of emails
- make sure you use bcc if you do not want to reveal recipients in emails
- be careful; when using group email addresses
- if you send a sensitive email from a secure server (gsi) to an insecure recipient, security will be threatened. You may need to check that the recipient's arrangements are secure enough before sending.

Further guidance on out of office records management and security is at Section F2. Please also refer to the SPSO Clear Desk and Screen Policy.

Emergency Protocol for Security and Data Breaches

In the event of a breach a security or SPSO information and/or files being misplaced or stolen, it is important to deal with the breach effectively. The breach may arise from a theft, a deliberate attack on our systems, the unauthorised use of personal data by a member of staff, accidental loss, or equipment failure. We must respond to and manage the incident appropriately. The following actions should be taken:

- the staff member should report the loss to their line manager and the FOI/DP Officer within 24 hours or as soon as is practicably possible thereafter;
- the FOI/DP Officer, or, in their absence, the relevant manager, should record the breach in a central database and is responsible for recording all the actions taken by the SPSO to investigate and conclude the matter; and
- it is good practice to report the breach to the ICO within 24 hours, and thereafter provide a response within 72 hours detailing the steps we have taken.

We will need a strategy for dealing with the breach, including:

- a recovery plan, including damage limitation
- assessing the risks associated with the breach
- informing the appropriate people and organisations that the breach has occurred
- reviewing our response and updating our information security

Important guidance on data security breach management and reporting breaches is available on the ICO website, follow the links.

ICO Assessment

If an individual believes there has been a breach of the Act they can ask the ICO to assess whether our processing of personal data complies with the Act. The ICO can ask us to take steps to comply with the Act, issue enforcement notices and even impose financial penalties in respect of deliberate or reckless handling of personal data which seriously breaches the Act. The ICO cannot award compensation, only the courts can do this.

Data Protection Audit

The ICO may make an assessment as to whether an organisation's processing of personal data follows good practice. Following completion of the audit, the ICO will provide a comprehensive report to the organisation along with an executive summary, which is published on the ICO website with the data controller's agreement. Organisations can register their interest with the ICO on their website to be considered for a data protection audit.

Offences under the DPA

- unlawfully obtaining, disclosing, or procuring the disclosure of personal data;
- selling, or offering to sell, personal data which has been unlawfully obtained;
- processing personal data without notifying the Information Commissioner (and other offences related to notification);
- failing to comply with an enforcement notice or an information notice, or knowingly or recklessly making a false statement in compliance with an information notice;
- obstructing, or failing to give reasonable assistance in, the execution of a search warrant;

- requiring someone, for example during the recruitment process, to exercise their subject access rights to supply certain information (such as records of their criminal convictions), which the person wanting it would not otherwise be entitled to. This offence, known as 'enforced subject access', is not yet in force; and
- the unlawful disclosure of certain information by the Information Commissioner, his staff or agents.

Failure to comply with the data protection principles is not, on its own, a criminal offence.

Subject Access

One of the main rights which the DPA gives to individuals is the right of access to their personal information (section 7 of the DPA). As a data controller, the SPSO is required to respond to Subject Access Request (SAR)'s under the DPA.

Processing a Subject Access Request

Receipt

The request must be in writing. The request does not have to mention the DPA. The requester might just ask for access to personal data/information/files/records. On receipt of the SAR, the FOI/DP Officer must be advised that it has been received. The FOI/DP Officer will give advice on processing the SAR.

Charges

The data controller may charge a fee of £10, unless the information is held in an unstructured filing system, in which case we can charge in line with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. These say, amongst other things, that if the cost of providing the information exceeds £450, we are under no obligation to comply with the request.

Process the Request

The person dealing with the request should check the request to ensure that all of the necessary information has been provided. If all the necessary information is there, an acknowledgement is issued. Where further information is required (such as proof of identity or more details about the information requested), this should be requested straight away.

Verify the Identity of the Requester

The data controller should satisfy themselves as to identity of person. Where we reasonably require further information in order to confirm the identity of the requester and to locate the information, and we have informed the requester of that requirement, we are not obliged to reply to the request unless we have received that further information. Where requests are made by a third party, we must be satisfied that they are authorised to act on behalf of the individual. It is the third party's responsibility to provide evidence of this entitlement.

Repeat Requests

We are not obliged to comply with an identical or similar request to one we have already dealt with, unless a reasonable interval has elapsed between the first request and any subsequent ones. SPSO practice is that a minimum of 12 months should have elapsed between the first request and receipt of the second. If the requester disputes our definition of a 'reasonable interval' in respect of their request, they may complain to the ICO.

Start the 40 day count

The data controller has up to 40 calendar days to respond, from the date of receipt of the request, or from receipt of the further information to identify the requester and to locate the requested data (and following receipt of fee if appropriate).

Gather the Information
The person dealing with the request will contact any SPSO staff who are likely to hold the personal data and request a full copy.

Ask for Comments
Relevant SPSO staff should be asked for any comments they may have about the information before it is released. Where information has been provided to the SPSO by third parties, it may be appropriate to ask for any comments from those third parties before it is released, especially where sensitive personal information is concerned, but it is for the SPSO to decide what information to release. In the case of medical records, comments must be obtained from the relevant health professionals as soon as possible.

Conjoined Data
The SPSO may withhold information if it contains personal data of another individual who can be identified from that information, unless the other individual consents, or it is reasonable not to get consent. Information does not have to be released unless it is reasonable to release it, taking into account the tests in section 7(6) of the DPA. Redaction should be considered in these circumstances. Disclosing third party personal data without a valid reason constitutes a breach of Article 8 of the European Convention of Human Rights.

SPSO Complaint Files
Information relating to ongoing complaints is likely to be more sensitive than information from a closed case, but in either situation it is important to consider whether disclosure would have any adverse consequences, either for the SPSO or for other parties. Responses to such requests should always be discussed with the FOI/DP Officer.

Exemptions
Part IV of the DPA sets out the exemptions which may be used to withhold information from data subjects. Some exemptions to the subject access provisions include:

- confidential references given by the data controller
- information relating to negotiations with the data subject
- legal professional privilege – where confidentiality of information between client and professional legal adviser could be maintained in legal proceedings
- self-incrimination

Respond to the Request
Unless it is clear from the letter of request, the person dealing with the request should establish the preferred method of providing the information. Depending on the sensitivity of the information, it may have to be sent out by courier.

Subject Access Complaints

Individuals can appeal to the ICO if they consider the SPSO has not complied with section 7 of the DPA. If an individual is unhappy with the SPSO response, or the way in which their request has been handled, the matter should firstly be referred to the SPSO Director for further investigation, although the requester does not have to accept this route and may go straight to the ICO. In case of appeal to the ICO, it is SPSO practice to retain all relevant information for six months.

SPSO Complaint Handling

Section 12 of the SPSOA states that the procedure for conducting the investigation and obtaining information is to be such as the Ombudsman thinks fit.

During consideration of a complaint, it is essential that those parties providing information to the SPSO are reminded of our obligations under our own Act and under the DPA; are advised that information could be shared; and are invited to provide reasons why any information they provide should not be shared. Listed authorities should be advised when a copy of the enquiry letter has been sent to the complainant for information, and that their response together with any relevant documents may be copied to the complainant. Where the listed authority has requested that information not be shared with the complainant, the CR should ask the listed authority to provide a written statement of the reasons for this request. If the CR decides that the reasons are not sufficient, then they will consult their manager and/or the FOI/DP Officer. The decision, however, ultimately rests with the SPSO.

The CR should obtain consent from the complainant before any information that the complainant has provided is shared with the listed authority.

Where we have been provided with information that is not relevant to the complaint, we should return it or advise we will destroy it.

When recording information, the CR should use objective language. The CR should keep in mind that individuals may have a right to see what has been recorded if they request to do so.

SPSO Complaint File Management

For file management see Section F1

The British and Irish Ombudsman Association Guidance

The British and Irish Ombudsman Association (BIOA) has developed guidance in conjunction with the ICO to assist BIOA members in complying with their obligations under the DPA. This very useful guidance can be found at www.bioa.org.uk/literature.php.

In line with the BIOA guidance, although not all information held on SPSO complaint files will necessarily constitute complainants' personal data, the SPSO deals with requests from complainants for information on their complaints in as helpful a way as possible and releases information under the DPA unless there is a valid reason for withholding.

Requests for Information from SPSO Complaints Files

Requests for copies of documents originally sent to us

If complainants send us original documents, we will normally take copies for our records and return the originals as a matter of course. Any request for their own information should be handled the same way, we do not need to handle this as an FOI/DP request although we should try to respond within 20 working days, to avoid any appeal to either Information Commissioner.

Requests for copies of medical records

We need to write to the body concerned and ask if they see any reason for not releasing the documents, and if the person making the request is not the subject of the records, we need to seek separate consent from the data subject (if possible).

Requests for copies of deceased persons medical records

We may receive requests for access to a deceased persons records, quoting the Access to Health Records Act 1990. Legal advice is at Appendix 1. The SPSO is not a 'holder' in terms of the Act, and requesters do not have the right to access medical records held by the SPSO, even if the requester is the next of kin of a deceased patient. We should not release any medical records for deceased persons but should instead refer the enquirer to the relevant health board.

Requests for copies of advice
Normally we will release copies of the advice we receive from the advisers when requested, along with the name of the adviser. This should always be referred to the FOI/DP Officer in the first instance.

Requests for information after a report is laid
Normally, the publication of a report signifies the end of any debate we can enter into about the complaint. However, complainants are still entitled to request information following the report. If we receive correspondence which may be a request for information, staff should refer to the FOI/DP Officer for advice. Generally there will be a difference between a request for information (for example, question starting who, when, what, where) and a question about our handling of the complaint (for example, a question starting how or why) however it will not always be as clear cut as this.

Requests for Service Delivery Complaint information
Service Delivery Complaints are a separate process to handling complaints about authorities within our jurisdiction. Where staff have commented on the representations made against them, we maintain that the free and uninhibited provision of information by the CR is an essential part of investigating this kind of complaint, and that the member of staff concerned should be entitled to a degree of confidentiality. We therefore maintain that paragraph (f) of section 5.2.5 of the BIOA guidance on data protection is relevant here, and consequently, Section 31 of the DPA, and thus we reserve the right to withhold this kind of information from the complainant. This exemption has been applied in a previous case, ICO reference RFA0141301. At that time the Commissioner agreed that the exemption was applied correctly.

Initial Handling and Recording Information Requests

Information requests may come in by post, ask@ or by our online request form, via the front office or direct to SPSO staff.

All staff should deal with straight forward information requests as far as they can. Where they are unable to deal with the request, they will pass it on to the FOI/DP Officer.

Where the SPSO has simply been copied into correspondence, we should acknowledge receipt but advise that we will not take any further action, and ask the sender not to copy us into correspondence in future.

The person dealing with the request for information is responsible for recording the request on Workpro as soon as the request is received.

A new section should be created in Workpro choosing case type FOI/DP/EIR. All known contact details should be entered into the record and saved.

The person dealing with the request is the Case Owner.

In the 'FOI/DP/EIR' section of the record, the type of request should be selected, the level, and the request receipt date, target date, and request details entered. The 'casework involved' box should be checked if the request relates to a complaint. This is to allow checks to be carried out when archiving to prevent information being destroyed in case of appeal.

The case should be linked to any other related Workpro records.

Information request cases on Workpro are electronic records only. Where letters and paper documents are received, these should be scanned and logged on the electronic record. All emails should be attached to the Workpro record. File/telephone notes should also be used where appropriate.

In the Workpro template list there is a group of basic templates which should be used when dealing with information requests.

When closing the case, the response date, response details, and exemptions should be entered, along with an estimate of the time taken in minutes.

Information Request Flowchart

Request for information received

Straight forward requests where information can easily be provided can be dealt with by all staff (with advice from FOI/DP Officer if required). Regard should be taken of timescales (DPA 40 calendar days, FOISA 20 working days), and appeal options. All other requests to FOI/DP Officer ASAP (to allow acknowledgment letter to be issued within 3 working days of request received).

Requests must be in writing and provide full name & contact address details. The date received for emails is the actual date received, even if it is outwith office hours. If the request is unclear, must get clarification ASAP (clock starts once clarification received). Must also bear in mind our duty to advise and assist under FOISA.

If clearly making SAR for personal information log on Workpro as DP, mark as 'casework involved' and link cases with complaint ref number.	If request for information from complaint file quotes FOI, log initially on Workpro as FOI, mark as 'casework involved' and link cases.	Log FOI requests on Workpro as FOI (mark as 'casework involved' and link cases if appropriate).
Acknowledge within 3 working days as SAR under DPA (40 calendar days deadline).	Acknowledge explaining s26(a) FOISA (s12 & s19 SPSOA) & s38(1)(a) FOISA (personal data), therefore more beneficial to consider under DPA (40 calendar days deadline), provide details of right to request review and appeal to SIC, and change Workpro case to DP. Regard should be taken of who the complainant actually is.	Acknowledge within 3 working days as FOISA (20 working days deadline).
Deceased records – include paragraph about deceased records in acknowledgement (advise of right to request review and appeal to SIC).		Gather information internally and consider FOISA exemptions.
Health (or sensitive i.e. social work) – write to authority ASAP for comments on release of information to ensure no harm. Seek advice from appropriate IPA if no comments received from authority and if you wish to consider releasing IPA Report.		
Copy and check file to remove any conjoined or confidential information etc. and consider DPA exemptions.		
Respond within 40 calendar days (arrange TNT if necessary) and provide details of review and appeal to ICO.		Respond within 20 working days and provide details of right to request a review and appeal to SIC.

Request for review received (must be made within the 40th working day after)

Log on Workpro as DP review for Director of Corporate Services, mark as 'casework involved' and link cases.	Log on Workpro as FOI review for Director of Corporate Services (mark as 'casework involved' if appropriate and link cases).
Acknowledge (within 3 working days).	Acknowledge (within 3 working days).
Respond within 20 working days and provide details of appeal to ICO (retain information for 6 months from date of final decision in case of appeal).	Respond within 20 working days and provide details of right to appeal to SIC (retain information for 6 months from final decision in case of appeal).
Log any appeals to ICO on Workpro as DP appeal, mark as 'casework involved' and link cases.	Log any appeals to SIC on Workpro as FOI appeal (mark as 'casework involved' if appropriate and link cases).

Agenda Item 4 **LGR/S4/15/2/4**
14 January 2015

Local Government and Regeneration Committee

Meeting 14 January 2015

Written Submissions on the Air Weapons and Licensing (Scotland) Bill

Purpose

1. This paper provides members with the written submissions received as part of the Committees call for evidence on the Air Weapons and Licensing (Scotland) Bill. The submissions sent by the witnesses who are attending the meeting on Wednesday 14 January 2015 are included in this paper.

Submissions

2. The paper includes the following submissions:

Paul Nicholson
Committee Assistant
9 January 2015

Submission: Glasgow City Council

3. General Licensing Issues

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).

23. Is the current Scottish licensing regime, as set out in the Civic Government (Scotland) Act 1982 and the Licensing (Scotland) Act 2005, fit for pupose?

Glasgow City Council's Licensing Authority ("the Licensing Authority") respectfully suggests that the 1982 Act is not fit for purpose. The Authority notes that the Act is over 30 years old and while it has been updated by various provisions, the Authority is of the view that the underlying structure of the Act requires to be updated and refreshed. The most straightforward way of achieving this is through a new consolidated act.

The Authority would also suggest that consideration should be given to converting the 1982 Act into an objective based regime and allowing the Authority to have regard to these objectives when determining applications. Such objectives would allow the Authority to tackle issues that are fundamental to the licensing regime where those issues fall out with the scope of the fit and proper person test. Such objectives would also help guide the formation of the Authority's policies.

The Authority also has specific concerns relating to the 1982 Act's compatibility with the European Union Service Directive, enforcement and fees.

24. Should a licensing system seek to regulate individual behaviour or communities of space (eg. 'city space' etc.)?

While the Licensing Authority believes that the priority of the licensing regime should be the regulation of the activity, it does see the merit in regulating communities of space however, the focus should be upon determining whether the activity is safe. Regard should also be had to the suitability of the individual / origination behind that activity, i.e. it is a fit and proper person.

The Authority would welcome the Scottish Government consulting on innovative proposals relating to the licensing of open spaces. However, any proposal should allow the licensing authority to retain the ability to regulate the type of activity that is taking place at the open space.

25. In what way should the licensing system in Scotland interact with the support the land use planning system, community planning and regeneration?

Both the Licensing Authority and the Licensing Board have a concern that a specific focus upon the above objectives may potentially detract from the primary purpose of the licensing regime, i.e. to uphold the licensing objectives whether they be the ones set down in the Licensing (Scotland) Act 2005 or implied, i.e. the 1982 Act. Ultimately, licensing regimes are concerned with determining whether the application is compatible with the aims of the licensing regime.

The Authority and Board would respectfully submit that in order to ensure public confidence in the licensing regime, that they should remain free from statutory obligations to consider the above matters.

Furthermore, both the Licensing Authority and the Board are aware of a body of case law that dictates that they cannot consider planning matters when considering licensing applications.

26. How does the licensing system in Scotland assist with the delivery of sustainable development and economic balanced areas?

As above.

27. In what way does the licensing system in Scotland support health and planning, addressing health inequalities and public health wellbeing outcomes?

As above.

Name/Organisation: Glasgow City Council

6. Scrap Metal Dealer Licensing

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).

40. Taking the proposals in sections 63 to 66 of the Bill together, how will they have the desired effect of strengthening the metal dealers' licensing regime to the extent that metal theft and related criminal activity is reduced?

The Licensing Authority has for some time been concerned with the extent of metal theft at both a local and national level. The Authority's concern was reflected in its previous consultation response in relation to this matter and it therefore welcomes the Scottish Government proposal to remove the exemption warrant system, the requirements relating to recordkeeping and the imposition of cashless payments. It believes that the introduction of such measures can help build a more robust licensing regime that will assist in preventing the easy disposal of stolen metal through metal dealer premises, many of which are currently under no duty to maintain records or carry out reasonable enquiries as to the source of the metal.

Furthermore, the Licensing Authority recognises that this is not a uniquely Scottish problem and believes it is one that should be tackled on a UK wide basis. It notes that many of proposals within the Bill reflect those contained within the English and Wales' Scrap Metal Dealers Act 2013, e.g. cashless transactions. As such, the Licensing Authority urges the Scottish Government to adopt these measures. Such a consistent approach will, hopefully, prevent Scotland being targeted by metal thieves who are deterred by the measures in place in England and Wales.

41. In your view, could the Bill be further strengthened in any way, for example, by including an accreditation scheme for metal dealers?

While the Licensing Authority recognises that the vast majority of metal dealers operate within the law and appreciate the difficulty they face in distinguishing legitimate scrap metal from that which is stolen, it does however have concerns as to metal dealers who facilitate metal theft. The Authority believes that an accreditation system can help tackle this culture by improving the standards of the metal dealing industry.

42. Removal of exemption warrant - do you wish to comment on the proposal to remove the exemption warrant system?

The Licensing Authority is strongly supportive of the proposal to remove that the exemption warrant system.

The Authority can see no justification for continuing to provide for an exemption to the licensing requirements based upon turnover. No other licensed activity has such an exemption and it is unclear what the rationale would be for maintaining an exemption in the future to allow any metal dealer the opportunity to remain outwith regulatory control

43. Removal of requirement to retain metal on-site - what impact will the proposal to remove the retention of metal requirement have on the enforcement of the licensing regime and prevention of criminal activities?

The Licensing Authority is of the view that the retention of metal requirements should be removed as it recognises that such requirements may not be reasonably practical due to the Metal Dealer's need to turn scrap metal round quickly and also the requirements of the SEPA Licence in respect of its storage. The Authority notes that its Trading Standards officers are of the view that once metal has been received and processed by a metal dealer, it is difficult to determine and trace its origin. As such, the retention of metal requirements serves little practical purpose and its aims are best served by robust record keeping requirements.

44. Forms of payment - what is your view on the proposal to go 'cashless' and is there merit in considering whether metal dealers could be allowed to operate using cash for only very small transactions, which could be limited to a certain number per month?

The Licensing Authority is supportive of a cashless payment system being applied in respect of all metal and itinerant dealers as the prohibition on cash transactions for the disposal of metal will, hopefully, assist in reducing the likelihood of stolen metal being disposed off through licensed businesses.

The Authority suggests that any exception to the cashless system will only serve to expose the system to abuse. The most straight forward solution is to ban cash payments entirely. Any deviation from the cashless payment system will expose the system to circumvention and thus undermine its purpose.

This, once again, ties in with the Authority's belief that it is important to view the Licensing Regime in respect of metal dealers on a UK wide basis. It is noted that England and Wales have adopted a cashless payment system and the Licensing Authority would suggest that it is important that Scotland follow suit to ensure that metal thieves are not attracted north of the border to take advantage of cash payments.

45. Forms of identification and record keeping:

In line with the Scrap Metal Dealers Act 2013, the Bill adds additional record keeping requirements to a metal dealer's licence including recording the means by which a seller's name and address was verified and retaining a copy of the document, and the method of payment and a copy of the payment document. The Bill will also require a metal dealer to record information in books with serially numbered pages or by means of an electronic device, and to keep separate records at each place of business. Such information and documents are to be kept for three rather than the current two years.

How important is it that the record keeping requirements reflect those in the Scrap Metal Dealers Act 2013, and do you agree with the Scottish Government that the proposed record keeping requirements are not unduly burdensome?

As the Licensing Authority has stated throughout this document, it is of the view that only by presenting a united front with England and Wales, can metal theft be deterred and combated. And while it does not wish to impose burdensome requirements upon scrap metal dealers however, if Scotland where to adopt more liberal record keeping requirements than England and Wales then the Licensing Authority would be concerned that “regime shopping” would take place whereby organised crime would be attracted to Scotland. This would be due to a perception that it is easier to dispose of stolen scrap metal.

46. Mandatory and discretionary licensing requirements:

The Scottish Ministers can impose mandatory licensing requirements, such as those included in the Bill relating to record keeping and the identification of customers. In addition, local authorities can also attach discretionary requirements to licences in their areas.

Does the Bill get the balance right between mandatory and discretionary licensing requirements? Should the Bill include other mandatory conditions for obtaining a metal dealer's licence, such as installing CCTV at metal dealers' premises or in relation to labelling of metal and 'forensic coding'?

While this Licensing Authority does advocate a universally robust approach to the licensing of Metal Dealers, it does recognise the need to allow licensing authorities to attach additional local conditions to reflect the uniqueness and challenges of their own local area. However, at a national level there should be a suitably robust, mandatory scheme which provides for consistency across all licensing authority areas.

With specific reference to the conditions highlighted in the Scottish Government's above question, the Authority is of the view that these should form mandatory conditions as they are represent the basic standard of crime prevention that should be expected from metal dealers. A failure to impose these basic standards exposes the dealer and therefore the entire supply chain to organised crime. It is the Licensing Authority's view that mandatory conditions should seek to protect the supply chain from organised crime and therefore a minimum standard should be imposed.

Name/Organisation:

7. Civic Licensing – Theatre Licensing

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).

47. Will there be any impacts during the transitional period between ending the current theatre licence and starting the public entertainment licence?

While the Licensing Authority welcomes the repeal of the Theatres Act 1968 and the introduction of theatres into the public entertainment licence, the Authority would draw the Scottish Government's attention to the need for the Authority's present resolution to be amended. As the Government will be aware, the process to amend could take up to nine months.

The Authority would also suggest that consideration is given to the repeal of the Cinemas Act 1985 and the incorporation of cinemas into the public entertainment licence regime. The Authority notes that England and Wales have both seen the repeal of the 1985 Act.

48. Are there additional costs or resource implications on theatres or licensing authorities?

As outlined above the Licensing Authority is of the view that its current public entertainment resolution will need to be amended. The lapse in time between the repeal of the 1968 Act and the amendment of the resolution will create real practical difficulties for existing theatres. Therefore, the Licensing Authority suggests that the Scottish Government amend the Bill so to provide for the automatic conversion of existing licences to Public Entertainment Licences. A failure to do so will doubtless impact upon existing theatres' finances.

49. How should licensing authorities integrate their current fee charging structure into their public entertainment regime?

The Licensing Authority assumes that as the licensing of theatres is being incorporated into the public entertainment licence and therefore is then part of the 1982 Act then it will be subject to the charging structure of the said Act.

Name/Organisation: Glasgow City Council

8. 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'

Financial gain

The Licensing Authority is concerned that by linking the performance to financial gain this will provide an avenue for venues to argue that performances do not generate any such gain where such an activity is auxiliary to a primary activity, i.e. the sale of alcohol or that the event is free to enter. It is suggested that financial gain is expanded to include where such entertainment is provided auxiliary to another activity where there is a financial gain.

Further, the Authority is concerned that by connecting “financial gain” to the organiser then there may be an argument by the licence holder that the entertainment is done for the financial gain of a self employed performer.

Premises

It is suggested that for the avoidance of doubt, the definition should include reference to private member clubs.

Display of nudity and live performance

In the view of this Authority, the terms “display of nudity” and “live performance” require to be further defined. It is submitted that the aforementioned terms are interlinked and that without clear definition, the term “live performance” is subjective to the reader. It would appear to the Authority that as drafted the definition turns upon the performer’s state of dress. Clear definition is therefore required in order to avoid potential issues regarding interpretation from arising once introduced`.

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?

In the view of the Licensing Authority, no such cap should be placed on premises that are used for sexual entertainment. The Authority is of the view that to do so would be contrary to the premise behind the introduction of the proposed licensing provisions and the overarching principles of the 1982 Act, i.e. the preservation of public order and safety and the prevention of crime. It is also the view of this Authority that the potential for criminality can exist during one performance or one hundred performances in a SEV and the number of performances does not reduce that risk. Likewise, the potential for public order and public safety to be compromised can exist during one performance in a SEV or many. SEVs should therefore always be subject to the requisite licensing regime. Further, in the view of this Licensing Authority, if a cap were to be introduced, it would be extremely difficult to monitor in practice which SEVs had fulfilled their quota of three performances and which had not.

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?

Whilst the Licensing Authority acknowledges Glasgow City Council's policy on violence against women and is acutely aware of the risk of criminality and criminal activities such as exploitation, prostitution and trafficking that can be associated with SEVs, it recognises that these venues currently form part of Glasgow's economy. This Authority is of the view that the ability to introduce a policy setting a cap at zero should be made available to Local Authorities. Transitional provisions for existing premises would need to be considered and the Authority requests that the Scottish Government explicitly states whether such premises benefit from "grandfather rights". It is important that there is clarity as to whether these premises' right to trade can be removed. The Authority would suggest that there is the possibility of extensive litigation taking place in the event that a licensing authority, if it decides to set the level of SEVs at zero, refuses to grant an existing SEV a licence. However, the Authority stands by its view that it is important that Local Authorities have this discretion.

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 Licensing Authority is of the view that the 1982 Act is in need of a refresh and that the inclusion of the licensing of SEVs further stretches the Act. However, the Authority is satisfied that the proposed amendments to establish the licensing regime, is a positive move.

The Authority notes that section 45B(5A)(a) of the Bill states that *"from time to time"* a local authority must determine the appropriate number of SEVs. The Authority suggests that clarification is required as to what factors the Authority can consider in arriving at the appropriate number of SEV and how often it should carry out a review or what should trigger a review of the number of SEVs.

The Authority suggests that detailed consideration requires to be given to the possible introduction of a national mandatory set of conditions for licence holders of a SEV. It is the view of this Authority that such a set of conditions would go some way to establishing a coherent position on the protection of performers in SEVs. This would be particularly useful when dealing with SEV operators running a chain of establishments in different Local Authority areas. Further conditions should include detailed provision regarding the use and operation of CCTV equipment within SEVs as well as the provision of CCTV tapes and equipment to authorised officers of Local Authorities and the police upon request. Conditions regarding advertising and the distribution of promotional materials should also be contained in such a set of conditions as should the impact of such venues upon children and young persons. A condition requiring each SEV to maintain a list of their performers should also be considered.

In the further view of this Licensing Authority, crucial to the operation of a successful SEV licensing regime are transitional provisions for existing premises as well as detailed enforcement provisions. In order to assist with the regulation of SEVs and to help ensure the protection of performers, members of the public in attendance at the SEV and to reduce the risk of criminality, detailed enforcement provisions akin to those provided in Part 3A of the Bill should be introduced, i.e. Civic Licensing Standards Officers. Transfer provisions for which there is no current provision contained within the 1982 Act should also be considered.

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

The Licensing Authority welcomes the clarity offered by section 45B(6A) of the Bill namely, that a local authority may refuse an application for the grant or renewal of a licence even if the premises has a licence by virtue of a premises licence under the Licensing (Scotland) Act 2005.

However, the Licensing Authority would suggest that, for the avoidance of doubt, the above section should be amended to reflect the fact that the presence of any other licence does not prevent the Licensing Authority from refusing an application, i.e. a public entertainment licence.

The Licensing Authority would also welcome clarity from the Scottish Government as to whether sexual entertainment venues that are currently licensed under the Licensing (Scotland) Act 2005 should be subject to any quasi-grandfather rights in the determination of their applications for SEV Licences. Clear guidance from the Scottish Government would be helpful in ensuring that the Licensing Authority is not embroiled in expensive litigation.

55. Civic Licensing

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

of the Bill?

The Licensing Authority welcomes the creation of the Civic Licensing Standards Officer. However, the Licensing Authority does suggest that the enforcement triggers in the 1982 Act should be revisited with a process analogous to the review system in the Licensing (Scotland) Act 2005. Such a process would allow for the CLSOs to intervene and work with licence holders in an educational role.

In keeping with the above matter, the Authority would further suggest that it should have the power to revoke licences under the 1982 Act as opposed to merely suspending the licence for the unexpired portion of it. If a matter is serious enough for the Authority to suspend a licence for the unexpired portion, then it follows that the licence should simply be revoked. This would tie in with the above suggest that a review procedure is put in place.

As referred to in previous answers, the Licensing Authority is of the view that licensing objectives should be introduced in relation to civic licensing, e.g. public disorder and public safety. The introduction of such objectives, would allow the Licensing Authority to make decisions to uphold the licensing objectives that may fall out with the fit and proper person test. Furthermore, such licensing objectives would help inform the drafting of policies.

The Licensing Authority welcomes the introduction of provisions that will enable Local Authorities and Licensing Board to comply with certain aspects of the EU Services Directive that was transposed into UK law in early 2010. Whilst the Authority is supportive of these provisions it notes that further work is required before licensing legislation can be considered fully compliant with EU law – particularly in relation to application fees and licence durations.

By way of example Schedule 2 of the Civic Government (Scotland) Act 1982 requires applicants for Sex Shops (and future Sexual Entertainment Venues) to have been resident in the UK for at least 6 months. This is patently at odds with the Directive's objective of furthering cross-board service provision.

Submission: Scottish Power

9. Scrap Metal Dealer Licensing

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).

40. Taking the proposals in sections 63 to 66 of the Bill together, how will they have the desired effect of strengthening the metal dealers' licensing regime to the extent that metal theft and related criminal activity is reduced?

We believe that the new measures which include steps to tighten record keeping and customer identification requirements are positive. Of upmost importance, is the new prohibition which will prevent a dealer from paying for metal in cash. We opine that this will remove the incentive of ready cash for a potential metal thief as well as making it easier to identify any persons involved in the selling of metal.

41. In your view, could the Bill be further strengthened in any way, for example, by including an accreditation scheme for metal dealers?

Penalty

We consider that the maximum penalty of £5000 for an offence is disproportionate given the implications that the theft of metal can cause. Whilst we do appreciate this is the maximum level afforded by the Criminal Procedures (Scotland) Act 1995 for statutory offences, we understand that the limit for common law offences tried summarily are in fact higher. It is our position that an increase in maximum penalty is required to have any meaningful impact. We believe that the legislation must allow for the application of the full sentencing powers available to the courts, including the additional sentencing powers available under the Criminal Procedure (Scotland) Act 1995 and the Proceeds of Crime (Scotland) Act 1995 than are currently provided for in the bill in order to present a more effective deterrent to offenders. Another area which could be improved is with regards to repeat offenders as the current bill does not deal with harsher penalties for such offenders.

Identity

The Civic Government (Scotland) Act 1982 proposed section 33B (5)(c) says that a dealer must “keep a copy of any document produced by a person to verify that person’s name and address”. We believe that there should be a requirement placed on a dealer to verify the identity of a person supplying or receiving metal for recycling.

If such a requirement is introduced, it is essential that the person whose identity is to be verified, and the form of acceptable documents, is set out clearly and unambiguously. This would be most easily achieved by a photographic identification which we believe should be a mandatory requirement of the bill.

We propose that there may be an opportunity to use credit card style credentials with photographs & authorisations. This could be similar to Energy & Utility Skills register cards or Street Works qualifications register. This would allow for the tracking of holders and location of where the scrap is being disposed of. Ultimately, this would be aligned to a register of fixed base & Itinerate Scrap Metal Dealers (SMD's) countrywide which would include information on volumes & types of scrap collated. This would permit the authorities / public to ask who is taking their scrap away with a fee or not involved to satisfy themselves of the legitimacy of the itinerate scrap dealer.

Metal dealer definition

The Bill's definitions of a metal dealer and an itinerant metal dealer in the Civic Government (Scotland) Act 1982 section 37 are not changed by the new Bill and require a person both to buy and to sell metal before they qualify. One significant implication is that a typical itinerant who collects from households without making payment for the items or materials he collects would not require a licence, and would thus remain outside the scope of the Bill. Furthermore, there is scope for a person collecting general waste and other materials, but actually earning a substantial proportion of his income from separating out and selling scrap metal, to escape the licensing regime. Similarly, skip hire operators and demolition contractors generating a substantial amount of their revenue from sale of scrap metal could escape the definition and need for licensing.

We note that the Civic Government (Scotland) Act 1982 section 37(2) allows the manufacturers' buying of scrap for manufacture of other articles to be excluded from the definition of metal dealer, providing scope for creative interpretation of both "manufacture" and "other articles" to evade licensing. For example, a metal dealer who has a small furnace for the manufacture of aluminium ingot would fall outside the scope of the Bill.

We believe that the Bill should be amended to capture "all persons carrying out a business consisting of buying or selling scrap metal", with some specific exemptions for manufacturers disposing of their own surplus materials or offcuts. A clear and comprehensive definition of metal dealer, to include businesses generating a significant proportion of their income from sale of scrap metal is essential.

One proposal may be to establish and publish a list of fully compliant recommended Scrap Metal Dealers who carry out the functions as described above with any included – Exclusivity as to an ability to smelt etc. This should result in an enhanced set of records to be kept and verified as to who and where materials came from and payments to what registered licence holder(s). This would also improve traceability of the raw materials. The list of Scrap Metal Dealers as already known under the metal theft group we are part of already has an established RAG (Red, Amber & Green) flag system which could be utilised. Should a person engaged in this scrap process not be VAT registered, it would seem logical to require them to pay tax of some description through either a business or home address which can be verified.

Licences

The Civic Government (Scotland) Act 1982 section 5(4) allows a person who may be carrying on an activity which requires licensing five days to produce the licence.

By placing an obligation on metal dealers to display copies of their licence on their premises, and for itinerant metal collectors to display their license/s on their collection vehicles, this may assist enforcement agencies in identifying illegal dealers.

42. Removal of exemption warrant - do you wish to comment on the proposal to remove the exemption warrant system?

N/A

43. Removal of requirement to retain metal on-site - what impact will the proposal to remove the retention of metal requirement have on the enforcement of the licensing regime and prevention of criminal activities?

N/A

44. Forms of payment - what is your view on the proposal to go 'cashless' and is there merit in considering whether metal dealers could be allowed to operate using cash for only very small transactions, which could be limited to a certain number per month?

Cash trading

We welcome measures that will deter metal theft by removing opportunities for the anonymous disposal of stolen material for cash.

Methods of payment

Electronic transfer definitions and associated record-keeping requirements are poorly defined. As a specific example, 'payment in kind' is not addressed.

Payment mechanisms that would be permitted under the Civic Government (Scotland) Act 1982 proposed section 33A are unclear. For example, in proposed section 33A (2)(a) there is no restriction on the person to whom a non-transferrable cheque may be made out; it does not have to be the seller or any person whose identity has been verified.

Furthermore, proposed section 33A(2)(b) fails to link the seller and payee for electronic transfers. It also does not define "account", nor does it set any parameters for traceability of transfer between an account and the seller.

One of the schemes currently employed in England & Wales is the setting up of cheque cashing facilities by scrap metal dealers "next door" to their existing traditional operations. This allows the thieves to potentially accept a cheque and then cash it almost immediately without question. We do not believe that this issue is addressed in this bill.

Scrap Metal Dealers or Itinerate Scrap Metal Dealers who cannot supply a card or licence to register the scrap against should automatically default and therefore no payment should be made to them. This would also encourage the Itinerate Scrap Dealer to register, and the receiving Scrap Metal Dealer to log what they have received against a registered person. This will result in the payment being made to a known registered licence holder. Taxation should be a matter for the proper authorities.

45. Forms of identification and record keeping:

In line with the Scrap Metal Dealers Act 2013, the Bill adds additional record keeping requirements to a metal dealer's licence including recording the means by which a seller's name and address was verified and retaining a copy of the document, and the method of payment and a copy of the payment document. The Bill will also require a metal dealer to record information in books with serially numbered pages or by means of an electronic device, and to keep separate records at each place of business. Such information and documents are to be kept for three rather than the current two years.

How important is it that the record keeping requirements reflect those in the Scrap Metal Dealers Act 2013, and do you agree with the Scottish Government that the proposed record keeping requirements are not unduly burdensome?

Record keeping requirements are pragmatic and may potentially be utilised as evidence by the authorities should a case be raised against an appellant.

46. Mandatory and discretionary licensing requirements:

The Scottish Ministers can impose mandatory licensing requirements, such as those included in the Bill relating to record keeping and the identification of customers. In addition, local authorities can also attach discretionary requirements to licences in their areas.

Does the Bill get the balance right between mandatory and discretionary licensing requirements? Should the Bill include other mandatory conditions for obtaining a metal dealer's licence, such as installing CCTV at metal dealers' premises or in relation to labelling of metal and 'forensic coding'?

With the exception of our belief that there should be a requirement placed on a dealer to verify the identity of a person supplying or receiving metal for recycling; any further obligations should be discretionary. Should the requirement to provide photographic evidence not be stipulated in the final bill; we would be keen to see CCTV as an alternative and a mandatory requirement.

Submission: Professor Phil Hubbard

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.

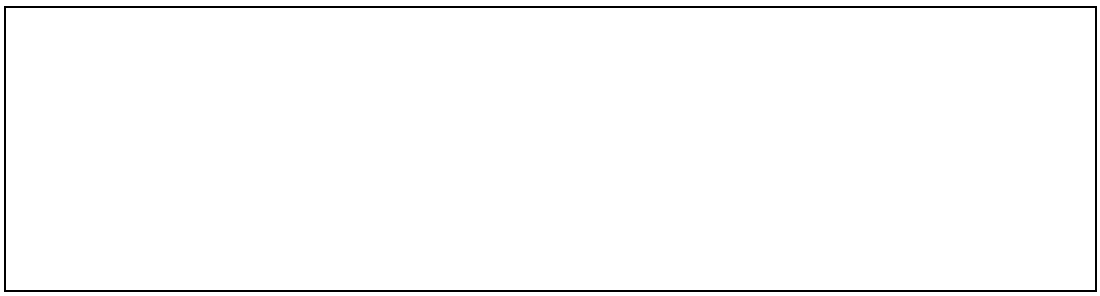
11. **Do you consider that the Bill has any implications in relation to European Union issues? Please explain.**

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

11. 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 alchohol 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

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 permissable 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?

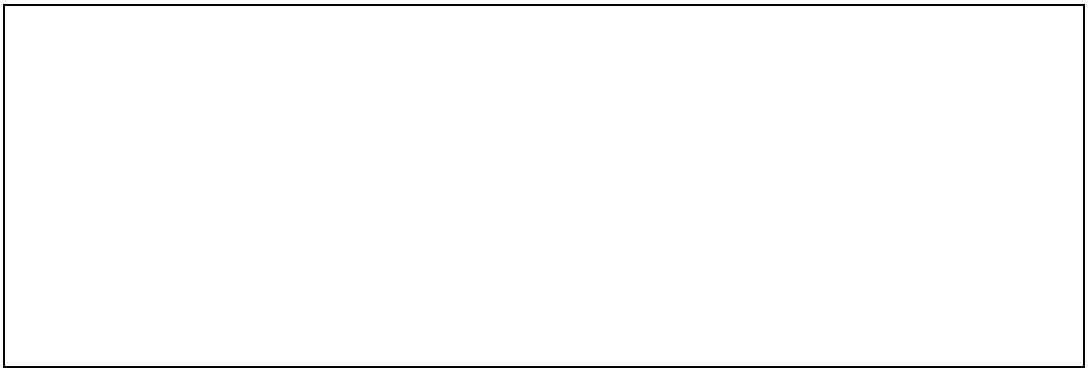
The procedures are clear and defensible. There have been few cases in Scotland which suggest that the procedures for licensing sex shops have not been fit for purpose.

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?



Submission: Dumfries and Galloway Council

12. Civic Licensing – Theatre Licensing

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).

47. Will there be any impacts during the transitional period between ending the current theatre licence and starting the public entertainment licence?

The proposal to abolish mandatory licensing for theatres should be recognised as such. Only if licensing authorities are satisfied that local licensing, under PEL, is necessary should their PEL Resolution be extended to cover theatres or certain specification of theatres. This should not be perceived as merely a shift of theatre licensing to PEL.

48. Are there additional costs or resource implications on theatres or licensing authorities?

It is to be noted that the inference that theatres would likely be covered by a Public Entertainment Licence, fails to appreciate fully that theatre licensing is presently mandatory whereas it is up to each licensing authority to determine whether to license places of public entertainment and, if so, what type of entertainment to cover.

The licensing authority will require information upon which to decide whether there is a need to license theatres as places of public entertainment. The fact that mandatory licensing of theatres has been abolished will be a very strong indicator, perhaps even a starting point, that licensing of theatres under PEL is not necessary.

For authorities not licensing places of public entertainment any consultation and decision making process under the 1982 Act is likely to be substantial and detailed.

For those presently with PEL, the process may be less detailed but will still include significant press publication fees for statutory notices if the authority's resolution is to be widened to include theatres.

Many local theatres are amateur, community based initiative who will not welcome any increase in fees-which must be extremely likely.

49. How should licensing authorities integrate their current fee charging structure into their public entertainment regime?

Local decision taking into account local circumstances.

Name/Organisation: Dumfries & Galloway Council

13. 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'

This has been the subject of detailed consultation with responses on these issues having been collated and analysed.

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?

Policing springs to mind.

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?

If Scottish Ministers believe that this activity should be prohibited as exploitation then they should legislate to ban it and not merely allow a licensing authority a tortuous process to introduce the licensing of this activity and then effectively to ban it by agreeing a zero level.

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?

There should be a separate schedule.

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

As it will be a decision of the licensing authority whether to license Sexual Entertainment Venues, this will involves detailed consultation, Committee and officer time and press publication fees for statutory notices and Committee and officer time in preparing and issuing a policy on the appropriate number of SEVs for its area, which limit may be zero.

It is extremely unlikely that an authority would receive an application: most of the wasted effort would be avoided by making it a mandatory licensed activity.

55. Civic Licensing

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

No further views.

Submission: Federation of Scottish Theatres

14. Civic Licensing – Theatre Licensing

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).

47. Will there be any impacts during the transitional period between ending the current theatre licence and starting the public entertainment licence?

Whilst welcoming the simplification that this rationalisation of the licensing regime would create, we would ask that all licensing authorities and licensed premises are given sufficient time and guidance in advance of the transition to make any necessary adjustments in order to comply with the change in licensing arrangements. We would also propose that licensing authorities allow licensees to transfer to the new licensing regime at the end of their current license period in order to avoid both a backlog of license renewals all at the same time and any additional expense for the licensee by effectively having to renew their licence before the old one has expired.

48. Are there additional costs or resource implications on theatres or licensing authorities?

It is hard to predict if there will be additional costs for theatres as licensing authorities do not necessarily set the same charges for their PELs as for their Theatre Licenses. This would require further research. Some venues because of the nature of their operation hold both a PEL and a Theatre Licence and for these venues we anticipate a saving in both time and money.

49. How should licensing authorities integrate their current fee charging structure into their public entertainment regime?

We would certainly expect that licensing authorities do not increase their current fees for PELs as we understand that the cost is determined on a self-funding basis and we would see the simplification of the licensing regime for theatre as, at worst, cost neutral for licensing authorities and, at best, cost beneficial.

Name/Organisation: Federation Scottish Theatre

15. 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'

We believe the definition as currently composed runs the risk of both vexatious complaint and potential self-censorship of artists for fear of falling within the scope of the legislation. We would propose the removal of the word 'any' from the definition as this leaves open the potential for vexatious complaint and the removal of the word 'verbal' which might then include any dialogue of a sexual nature. We would also like to see included in the Bill an explicit statement that this is not intended to include 'artistic performances whose primary purpose is artistic, creative or educational' and an exemption for 'arts venues and venues taking part in an arts festival.' We would also expect any accompanying guidance to local authorities to emphasise the intention of the act not to limit or censor artistic performance so that local authorities, venue programmers and artists are clear about the purpose and scope of the legislation.

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?

No comment

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?

No comment

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?

No comment

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

No comment

55. Civic Licensing

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

No comment

Submission: Aberdeen City Council

16. Civic Licensing – Theatre Licensing

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).

47. Will there be any impacts during the transitional period between ending the current theatre licence and starting the public entertainment licence?

As the Bill does not provide any details regarding the transitional arrangements between ending theatre licences and introducing public entertainment licences for these premises it is difficult to comment at this time.

We would state however that if an adequate and reasonable transition period is given for existing licence holders to apply for their new public entertainment licence then this should not have a detrimental impact.

48. Are there additional costs or resource implications on theatres or licensing authorities?

One significant implication which we can forsee is in relation to licensing authorities' section 9 resolutions for places of public entertainment which require to specify the places and classes of entertainment which shall be licensed by that authority. Public Entertainment licensing is an optional form of licensing and it is at the discretion of the authority whether to licence it or not and if so what types and places of entertainment. Theatre licences on the other hand are a mandatory form of licensing. If authorities are now to licence theatres by means of public entertainment licences not all authorities may licence places of public entertainment or if they do they will not have this activity, the public performance of a play in their section 9 resolution. Therefore authorities will require, if they wish, to vary their resolutions before the new licensing regime can begin. As you should be aware the variation of a section 9 resolution is a lengthy process, a minimum of nine months which will therefore have resource implications for authorities. Would a fast track procedure be considered necessary to reduce the implications for parties in particular local authorities. As stated above public entertainment licences are optional and theatre licences are mandatory do the new provisions now mean that the licensing of theatres are also now optional? It is essential that these technical matters are resolved as soon as possible to avoid any unnecessary preparation work by authorities.

Conditions ?

49. How should licensing authorities integrate their current fee charging structure into their public entertainment regime?

Our current public entertainment fees are – new grant £695(3yrs)

Renewal (530) 3 yrs

Our current Theatre licence fees are – new grant £750 (1yr)

Renewal £573 (1)

Theatre licence holders will therefore benefit from a reduction in fees.

There should not be any real difficulties integrating our current fee structure into the new licensing regime.

Name/Organisation: Aberdeen City Council

17. 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'

Sexual entertainment venue – we are still concerned regarding the financial gain element of the definition. We previously stated that the fact that it depends on the financial gain of the organiser to be licensed could mean that it could be argued that where performers are self employed a licence is not required, arguing that the performers provide the entertainment and that the occupier/ owner provides only ancillary entertainment.. We would therefore seek clarification of the definition of the term Organiser and would seek confirmation as to whether this would now include performers who were self employed

Audience – pleased to see that you have taken on Board comments previously made and that definition includes an audience of one so that lap dancing and peep shows would be covered.

Financial Gain – definition would appear sufficient but we would question why the financial gain element has been included since the similar provision for the payment of money or moneys worth has recently been removed from the licensing of places of Public entertainment. Again we would submit that there is a need for consistency of approach in the act.

Organiser – the definition would appear sufficiently wide but as questioned above we would seek clarification as to whether it includes self employed performers .

Premises – we are in agreement with this definition

Sexual entertainment - our previous comments we would submit are still valid. We submitted that the definition of sexual entertainment was sufficiently clear ans wide enough to encompass all types of sexual entertainment including any future developments. However we feel it may still be too wide so as to include, with regards to (a) burlesque and exotic dancing. In order to ensure that such forms of entertainment are not caught by the new legislation. We noted that in the Chambers dictionary for example the definition of exotic includes “pertaining to striptease” If there is not further definition it would be possible for different authorities to take different views on whether something required a licence, again giving rise to a lack of consistency

Display of nudity – agree that this is very clearly defined.

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?

Yes this would have consequences as it could potentially create a loop hole which could be exploited by organisers who rather than having a permanent premises with a licence and proper facilities for the performers could simply transfer the activity around different venues where there are no such facilities and protection. Such an exemption could therefore mean defeating the aims and purposes of these amendments to the 1982 Act.

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?

We agree that licensing authorities should be allowed to decide whether there should be no such premises/venues in their area. In doing so they should be allowed to take account of their own local circumstances .

There would of course be a disadvantage to exiting businesses which are licensed. Although there is quite a lengthy period before the authority's decision could take effect there could be a significant impact on their income and livelihood

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?

Yes we would agree that the mechanism for the licensing of sex shops is adequate for the licensing of sexual entertainment venues as putting these together and taking them out of the realm of the 2005 Act is more appropriate.

Additionally we welcome the introduction of mandatory conditions and for the introduction of government guidance which will provide consistency across the country together with the scope for local conditions to deal with local and circumstances. This we believe will help better regulate the industry.

However given that the licences are to be regulated by Schedule 2 and have the same one year duration as sex shop licences we are concerned as to whether this short period is appropriate. Many of these premises have Premises Licences under the 2005 Act which last indefinitely would a longer duration of say three years maybe be more appropriate for their sex entertainment licence.

There is also the question of fees. We appreciate that Schedule 2 states that authorities must charge such reasonable fees as they may determine. The level of fees for sex shops are often very high. If the fees for sex entertainment venues are to be regulated in the same way consideration will require to be given as to the appropriate level and whether these are consistent with the fees for sex shops and if not the reasons for this and any issues that could arise from this lack of consistency.

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

The majority of premises that would be affected by the new licensing regime are already licensed under the terms of the 2005 Act currently therefore the premises have already been assessed. The new type of licence will simply bring in additional safeguards aimed particularly at the entertainment provided and for the protection of those delivering that entertainment. Therefore although this is an additional form of licence and the introduction of this will have some resource implications of local authorities there are not a huge number of these premises.

We would however request a suitable transition period in order that premises can smoothly move over to the new licensing regime with minimal impact to their businesses and allowing authorities the appropriate guidance and time to process the necessary applications.

If however an authority were to decide that the appropriate level of sexual entertainment premises for their locality was to be zero this could lead to appeals against such policies and impede the operation of the regime.