

Cheltenham Borough Council
Social and Community Overview and Scrutiny Committee

5 March 2003

Sex Establishment Licensing Policy

Report of the Assistant Director, Public Protection

1. Summary and recommendation

- 1.1 This report contains background information on the council's past and current positions regarding sex establishment licensing policy together with a recommendation for the future. To assist the committee in its deliberations the report also contains a summary of basic licensing principles and an opinion from an independent expert.
- 1.2 It is not within the remit of this committee to set policy as this is a matter for full Council. The committee can, however, make recommendations to Council. Before doing so two options appear to be open to the Committee:
- a) if it is considered to be both relevant and appropriate for the council to have a set sex establishment licensing policy, to undertake a full scale review of the council's district, on an area by area basis, setting the appropriate number of sex establishments for each area and recommending to Council accordingly; or
- b) to recommend that no set policy should exist and for each application to be dealt with on its merits.
- 1.3 **Having regard to the expert opinion contained in Section 5 of this report, it is my view that the council would be best served by not having a set sex establishment licensing policy. I therefore recommend that the Committee recommends to Council its position should be to not have a set sex establishment licensing policy but to deal with each application on its own merits.**

2. Introduction

- 2.1 On 28 June 2002, 1 November 2002 and 10 January 2003 the Licensing Committee considered applications for sex establishment licences for various locations in the borough. The Licensing Committee determined each of these applications on the relevant merits of each individual case.
- 2.2 At its meeting on 1 November 2002 the Licensing Committee requested a general review of the council's policy in respect of sex establishment licensing.
- 2.3 In accordance with the council's constitution, any policy review of this nature falls within the remit of this Overview and Scrutiny Committee before any recommendations are made to Council for its consideration.

2.4 To assist this Committee in its deliberations an independent legal opinion has been sought from a nationally recognised expert in such matters.

3. Background

3.1 The power for councils to control sex establishments is contained in Part II and Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982.

3.2 Section 2(1) of the Act provides for an authority to resolve that Schedule 3 of the Act is to apply to its area. On 25 April 1983 the council gave full delegated powers to the Licensing Committee to decide whether or not to adopt the provisions of Schedule 3 and to deal with all matters connected therewith.

3.3 On 21 June 1983 the Licensing Committee resolved that Schedule 3 shall apply to the area of Cheltenham.

3.4 Under the legislation there are a number of mandatory grounds providing that no licence should be granted in certain circumstances, e.g. to a person under 18 years of age. In addition, there are some discretionary grounds for refusal:-

- if the applicant is unsuitable to hold the licence having been convicted of an offence or for any other reason;
- if the licence was to be granted or renewed, the business to which it relates will be managed by or carried on for the benefit of a person other than the applicant who would be refused the grant or renewal if he made the application himself;
- if the number of sex establishments in the relevant locality is equal to or exceeds the number which the Licensing Authority considers appropriate for the locality - that number can in fact equal nil;
- if the grant of the licence will be inappropriate having regard to:-
 - (a) the character of the relevant locality; or
 - (b) the use to which any premises in the vicinity are put; or
 - (c) the layout, character or condition of the premises, vehicles, vessel or store.

3.5 Having regard to the above, in 1983 the Committee determined the 'relevant locality' to be the whole of the borough and set an appropriate number of nil. This policy decision was successfully challenged at appeal when it was held that the whole of the council's area was too wide a relevant locality to set a number of nil. There has been no formal change to this policy since 1983. Hence the request of Licensing Committee for a review of the policy.

3.6 Since 1983 the borough's area has changed significantly. There has also been a considerable amount of case law, some of which is referred to later in this report.

3.7 Members should take note that grounds for determination of such licences do not concern matters of morality. Regardless, therefore, of any moral stance Members may have, such matters should be put to one side in considering the content of this report and in making any decisions based upon it. The activities controlled by sex establishment licences are very clearly lawful activities.

4. Basic principles of licensing law

- 4.1 The following guidance is contained in Circular 62/1982: 'The purpose of licensing is to introduce a uniform system of control to ensure public health and safety over places of public resort and to minimise the nuisance caused to the immediate neighbourhood.' While this circular is specific to public entertainment licensing the concept can be applied equally to all licensing functions.
- 4.2 It must also be understood that in determining licence applications the Licensing Committee sits in a quasi-judicial capacity. While there are a considerable number of laws relating to licensing there are a number of principles which underpin them all. The Licensing Committee and any of the council's policies to which it is working must have regard to these principles.

4.3 The legal framework

When considering licensing law it is important to remember there are currently four main elements:

- natural justice
- statute law - what the statute actually says
- case law - how courts have interpreted and, in some cases, expanded the law
- Human Rights.

4.4 Natural justice

- 4.4.1 Natural justice is a difficult concept to define precisely. One basic definition is that natural justice consists of the rights that a reasonable person would expect to have in the circumstances.
- 4.4.2 There are two basic principles to natural justice, namely that those affected by a decision should be allowed the opportunity of being heard before the decision is made, and that no person should participate in the making of a decision if they might be biased.
- 4.4.3 The Human Rights Act 1998 gives the principles of natural justice statutory force under article 6 of the European Convention on Human Rights.
- 4.4.4 It should be noted that not only bias but the appearance of bias should be avoided. In the case of ***Hannam v Bradford City Council (1970) 2 All ER 960*** the High Court ruled that 'it does not matter what actually happens in the committee room but what the impartial bystander looking in thinks may have happened'.

4.5 Statute law

- 4.5.1 Legislation can prescribe certain requirements which the local authority must follow when determining licence applications. There are also instances when the local authority is allowed quite a wide discretion in granting or refusing certain applications. It is important to remember however, when looking at licensing statutes, what the purpose of the legislation is. No matter how wide the powers in an Act appear to be they must be applied to achieve the purposes of the legislation.

4.5.2 Licensing legislation is often either a response to some tragedy or an attempt to deal with a perceived mischief. For example, the Safety of Sports Grounds Act 1975 was passed as a response to the Ibrox Park disaster and was amended after the Bradford tragedy. Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 was an attempt to control the proliferation of sex shops.

4.6 Case law

4.6.1 As few Acts of Parliament will get a 'crystal mark' for clarity it is ultimately for the courts to interpret and clarify the law. There are a very large number of judgements relating to licensing. Some have already been referred to and others will be referred to later in this report. It must be stressed, however, that where the High Court or a higher court has ruled on an issue, this is in effect the law unless it is subsequently overturned or modified by a later judgement.

4.7 Human Rights

4.7.1 The Human Rights Act 1998 imposes a duty on courts to interpret legislation in a way which is compatible with the European Convention. Courts may not necessarily interpret legislation in the most obvious way but in a way which satisfies Convention requirements.

4.7.2 So far as licensing is concerned the most relevant parts of the Convention are: article 6 (fair hearing); article 8 (privacy and family life); and Protocol 1 (enjoyment of possessions). It should be noted that:

1. Section 6 of the Human Rights Act 1998 provides that it will be unlawful for a public authority to act in a way which is incompatible with a Convention right.

2. Article 6(1) of the Convention provides:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly.'

3. Article 8 provides:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.

- (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society for public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others.'

4.7.3 It seems inevitable, therefore, that there will be a conflict between an applicant's right to enjoy his or her licence and a resident's right for respect for his or her home and family life.

4.8 From the above it can be seen that whatever action the Licensing Committee takes it must not only act but also be seen to be acting in a transparent, fair and open manner without any bias towards any interested party to include applicant or objector alike.

5. An independent view

- 5.1 Where an Authority has a discretion, it is entitled to adopt a policy or guideline which indicates how it proposes to exercise that discretion. However, such a policy, or any decision made under it, is liable to challenge if the effect of the policy is that the decision maker 'shuts his ears' to an application or class of applicants (**Eastleigh Borough Council -v- Betts (1983) 2AC613**). What the law requires is that each case must be considered in the light of the policy but not so that the policy automatically determines the outcome (**R -v- Hampshire County Council Ex parte W (1994) ELR460**).
- 5.2 The courts have, therefore, indicated that local authorities can have policies but that the policy must not determine the application. Each case has to be very carefully considered on its merits but, where there is a policy, in the light of the policy. This then leads to the next point - whether or not a policy will assist applicants and also councillors in decision making in particular circumstances. Whether or not a policy does assist depends upon the legislation. As the courts have indicated local authorities can have policies in respect of licensing sex establishments but any policy will have to be clear. In the case of **R -v- Birmingham City Council and others Ex parte Quitelyn Ltd (1985) 83 LGR 461** the local authority had a policy in respect of not granting licences for sex establishments in certain localities. Such a policy will be acceptable at the time it is introduced. However, the nature of localities can always change. Consequently, if a local authority does have a policy of this sort it is essential that the policy is kept under review. For example, it would not be acceptable for a local authority to introduce a policy in 1990 and then determine an application under that policy in 2002 unless, prior to determining the application, the council has:
- looked at the policy;
 - looked at the reasons for the introduction of the policy if it concerned a locality;
 - looked at the locality as it was when the policy was introduced; and
 - looked at the locality as it is at the present time.
- 5.3 There is no reason for a local authority to have a policy in force before it can refuse an application for a licence for a sex establishment on any of the discretionary grounds. A council can carefully consider an application and then turn it down on any of the discretionary grounds. By doing this and not working under the umbrella of a policy a local authority cannot be accused of fettering its own discretion or slavishly following its policy. It can be seen to keep an open mind in respect of all applications and determine each application on its merits having looked at all the current relevant information including the area where a person wishes to open a sex establishment.

5.4 Any decision made under a policy can only be as good as the policy itself. A policy concerning the licensing of sex establishments and the process of dealing with such applications can only deal with grounds for refusal as set out in the legislation. If the council does introduce a policy it can give applicants the impression that any application is being pre-judged. By not having a policy local authorities are keeping open their discretion to determine each application on its own individual merits which will clearly include looking at the location of the premises which are the subject of the application. By not having a policy a council is indicating that it is keeping its mind open to determine each individual application at the time the application is made, taking into account all relevant facts. This ensures there can be no challenge to a decision taken under a policy which could be challenged because it is out of date in that circumstances in the area where the proposed premises are located have changed since the policy was made.

6. Conclusion

6.1 Any decision made under a policy can only be as good as the policy itself. If a policy is flawed then any decision made under it can be successfully challenged. Policies can be useful where a local authority has a complete discretion. However, in respect of the licensing of sex establishments there are a limited number of grounds upon which an application can be refused. If councils introduce policies that state they will not licence such establishments in certain specified localities this may give the impression that the authority is prejudging any application. In addition, unless the policy has been reviewed within a short period of time, for example within 12 months of an application, the policy could be challenged as being out of date especially if the nature of any locality had changed since the policy was approved. Even without a policy there is no reason why an application should not be refused on any of the discretionary grounds.

6.2 There does not seem to be any real benefit to a local authority in having a policy in respect of sex establishments when the following points are considered:

- the way the legislation is drafted
- the comments by various judges over the years about the negative correlation between local authorities having policies and such policies not prejudging any application
- the fact that councils have a discretion to refuse an application on any of the specified grounds regardless of whether or not there is a policy.

6.3 It seems preferable by far and easier for Members not to have a policy and to decide each individual application on its own merits. This has the additional benefit of ensuring each case is looked at with regard to its own circumstances, and there is then no possibility of a local authority facing a challenge on an unreasonable, irrational or out of date policy.

7. Implications

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| 7.1 Financial | No budgetary provision exists to enable a review to be undertaken. |
| 7.2 Legal | As detailed in the report. |
| 7.3 Personnel | As financial. |

7.4 Equal opportunities, social justice and anti-poverty None.

7.5 Environmental None.

Background Papers

- ‘Entertainments Licensing Law and Practice.’
Duncan Robinson, Roger Butterfield and
David Chambers

- Independent legal opinion - Roger Butterfield

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