

A settlement last summer of a judicial review brought by a campaigner against a local authority decision to renew a sexual entertainment venue (“SEV”) licence for a lap-dancing club, and its sequel, to be heard in June 2018, serve as useful reminders of the general importance of the wide duties placed upon local authority decision-making. These duties are sometimes left by the wayside as committees, officers, legal advisers and practitioners all direct their focus on the licensing statute in question.

That first judicial review caused the local authority in question (Sheffield City Council) to consult on and adopt a new sex establishment policy which directly grappled with the duty in question (the Public Sector Equality Duty or “PSED”).

The issue of whether the new policy adequately dealt with the PSED is on the way back to the Administrative Court this summer. A crowdfunded campaigner secured permission to judicially review the adoption of the that policy on the basis that, in considering the PSED, the Council failed to give consideration to what is described “the negative impact on all women and the wider impact on gender equality in resolving not to set a limit on sex establishments in the city”.

By way of background, the SEV in question was (and remains) a lap-dancing club operated by the national chain, Spearmint Rhino. It is located on Brown Street in the Cultural Industries Quarter of Sheffield City Centre. It is close to Sheffield Hallam Student’s Union, galleries and other community buildings.

SEV licences have to be renewed annually. When the licence came up for renewal before the licensing sub-committee in May 2016 there was concerted objection from campaigners, with 132 pages of representations adverse to renewal in the agenda pack.

Many of those objections took the form of a template letter, found on a campaign website, which made the point that the local authority had a duty under the Equality Act 2010 to work to eliminate unlawful discrimination, harassment and victimisation, and asked whether the Council had undertaken an Equality Impact Assessment in formulating its policy.

These were astute points to make. S.149(1) of the 2010 Act provides that a public authority has a duty (the Public Sector Equality Duty or “PSED”), in the exercise of its functions, to have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic (i.e. age; disability; gender reassignment; marriage and civil

partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation) and persons who do not share it; and

- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The Council had a policy which had been published in April 2011. It made no reference to the 2010 Act or PSED. The report to the sub-committee was similarly silent as to the topic.

The potential role of PSED in sex licensing had been canvassed by Philip Kolvin QC in his book Sex Licensing, published by the Institute of Licensing in 2010. The view he expressed was:

*[7.29] Section 149 of the Equality Act 2010 obliges public authorities in the exercise of their functions to have due regard to the need to eliminate discrimination, harassment and victimization, to advance equality of opportunity between the sexes and to foster good relations between the sexes. The role of gender equality is not well understood, and is far less well carried through, in licensing processes. However, gender equality may well influence decision-making under the LCMPA.*

*[7.30] First, authorities may use the licensing process – and in particular the attachment of conditions – to protect performers from harassment and any threat to their dignity, by requiring proper supervision and facilities.*

*[7.31] Second, any suggestion that women would be less protected would be less welcome in premises than men can be met by a protective condition.*

*[7.32] Third, and most significantly, the fears of women using the vicinity of premises may be reflected in decisions as to the location of such facilities. The importance of gender in relation to town centre planning was underlined in a research report for the Office of the Deputy Prime Minister:*

*‘Women, children and men use towns and cities in different ways, and thus face different problems. A good quality environment for women should be attractive, easy to use, convenient and safe and meet their specific needs. Women are particularly concerned about issues of personal safety and security, the provision of facilities and the detailed design of buildings and spaces particularly in residential areas, public buildings, shopping areas and city and town centres. Many women feel vulnerable in getting around, as users of public transport and as pedestrians, and their movement is often constrained by fear of attack. This is particularly true for older women and women with children travelling alone. Environments that work well during the day can feel hostile at night.’*

[7.33] *These concerns are directly reflected in the Royal Town Planning Institute's Gender and Spatial Planning Good Practice Note, which states:*

*'In relation to the 24-hour economy policy, ensure that the views of women are considered. Evidence shows that in certain locations, lap-dancing and exotic dancing clubs make women feel threatened or uncomfortable.'*

[7.34] *If a woman, whether objectively justified or not, fears to use a part of the town centre characterized by sex establishments, this may be argued to amount to discrimination, in that her access to the public infrastructure of the town is impaired in comparison to that of men. Where relevant these considerations ought properly to be taken into account by authorities at the decision-making stage, and possible also at the policy-making stage.*

[7.35] *Of course, the equality duty is not confined to sex. It extends to religion or belief and disability. There may well be views expressed by faith groups as to the location, prominence or number of sex establishments in their locality, which ought to be duly weighed. And the needs of disabled customers may be reflected in decisions as to access and layout.'*

At the hearing in April 2016, the licensing sub-committee were persuaded by Spearmint Rhino (coincidentally represented Mr Kolvin) to renew the licence.

The objectors complained many of their objections were said to be irrelevant and inadmissible by those advising the sub-committee on the basis they were "moral" objections, and therefore not relevant for the reasons given in *R. v Newcastle City Council, ex parte The Christian Institute* [2001] LGR 165. There, Collins J. had said:

*... it might be perfectly reasonable to refuse a licence for a sex shop which is in the vicinity of a school or a some religious building. That is a recognition that sex shops may attract a particular clientele whose presence may not be considered desirable in some areas and that is something again which can be taken into account, but it has nothing to do with the morality of sex shops as such. It is the effect on the locality and on those living nearby which has to be taken into account and it is that is the distinction which is drawn. Thus, straightforward objections on the ground that sex shops should not be allowed to exist have no part to play in my or a local authority's consideration of the case.*

One objector, who sought to remain anonymous, obtained public funding to bring a judicial review, using the services of DPG Law and Karon Monaghan QC. On 1 November 2016, permission was granted by Jefford J., who made the following observations in her order:

*There is no direct evidence that the Defendant [Sheffield City Council] has had due regard to the Public Sector Equality Duty (as it is required to do under s.149 of the Equality Act 2010). The decision gives no indication that it has been considered.*

*Further, there is a tenable basis for the Claimant's inference that the Defendant has wrongly ignored objections based on the potential impact on gender equality, treating them as moral objections and irrelevant.*

A further challenge to the 2011 policy was refused permission on the basis it was out of time. A hearing was listed for 9 and 10 May 2017.

Prior to this hearing, such is the annual nature of SEV licences, Spearmint Rhino's annual renewal application came before the licensing committee on 11 April. A substantial number of objections were made, many of them now referring them to the passages above from Sex Licensing. As might be expected, the officer's report to the sub-committee did now deal with the PSED, and an Equality Impact Assessment ("EIA") had been completed. This stated that whilst previous representations that contend that SEVs contribute to the objectification, victimisation and harassment of women had been not taken into account as "moral" objections, the authority had considered this, and formed the view that it should be taken into account on an equalities basis. It was said that the licensing authority must endeavour to reduce the normalisation of sexualisation and objectification of women, avoid exploitation of woman and to promote healthy sexual practices. However it was also stated that the authority felt it would be a negative move to impose a total ban on SEVs. The report to committee made the point that the SEV policy was under review.

The sub-committee renewed the licence. Shortly after that, Sheffield reached a compromise on the judicial review, recognising that it had failed to have due regard to the PSED in the 2016 decision.

Sheffield has since consulted on and adopted a new policy, which came into effect on 1 January 2018. This provides:

*A detailed Equality Impact Assessment (EIA) has been undertaken and kept under review throughout the drafting of this policy and then finalised on publication of the policy. Further EIA's will be conducted where necessary.*

*It is not considered likely that the equalities obligations are at risk as there is no perceivable risk of unequal access to the services between different equality groups, save for those under 18.*

*Licensing Committee members have undertaken equality and diversity training and will be reviewing their learning on a regular basis to ensure their knowledge and understanding of all matters concerning equality and diversity are at the highest standard to allow them to make decisions.*

*This policy includes a clear and unequivocal commitment to meeting the PSED in the exercise of all of the functions under the Act. The policy and the documentation flowing from it are intended to be a key means of facilitating compliance with all of the Council's obligations. Great care has been taken in developing a policy that is fit for purpose in this regard but it is only when it is tested in action that it will be possible to evaluate its effectiveness. This assessment will be kept under regular*

*review, particularly in the early period of implementation, so that any shortcomings identified in the document itself and/or the way it has been implemented can be addressed.*

This did not satisfy the campaigners, who have now secured permission to judicially review the policy, with a hearing of the substantive claim listed for June.

Although important in the sex licensing field, particularly in relation to policy formulation and decision-making, the Sheffield judicial reviews have wider ramifications for all licensing fields.

The effect of the Equalities Act 2010 and the PSED in the sex licensing regime will be the subject of detailed consideration by the Administrative Court in the near future. The name given to a premises, signage and external visibility and advertising may be important considerations to promote gender equality in the vicinity of venues. There may indeed be PSED arguments on the other side (the clubs providing a place of work for performers who are predominantly female), and equality issues that concern other protected characteristics (such as age, disability and sexual orientation). There is much to be said for a detailed, area wide strategy (along the lines of local area profiles suggested by the Gambling Commission under the Gambling Act 2005).

PSED has a role to play in Licensing Act 2003 regime, as the s.182 guidance recognises in paragraphs 14.66-14.67, recommending publication by locations of information *at least annually* to demonstrate compliance. In practice, it may be that PSED is often forgotten about. It is not hard to find major licensing authorities whose very recent policies and officers' reports make *no mention* of the duty.

Taxi/PHV licensing is another regime where the PSED might be at the fore - so, for example, it might be asked what impact do vehicle licensing policies have on disabled passengers (and drivers), and has that impact altered because of the changes caused by the explosion in numbers of PHVs and their drivers; has the impact of English language polices or overseas criminal record checks been properly considered?

As Sheffield's new policy points out, there are a number of wide statutory provisions that apply to all local authority decisions. This is set out in plain terms in paragraph 1.19 of the s.182 guidance ("licensing authorities and licensees should be mindful of requirements and responsibilities placed on them by other legislation" - examples being given). However, Sheffield's experience in 2016 is, I suggest, the rule rather than the exception.

By way of conclusion and reminder, licensing authorities and licensing practitioners might wish to run through the following (not by any means definitive) checklist:

- **Environmental Protection Act 1990, s.89** - imposes a duty on local authorities to keep the highways they are responsible for, so far as practicable, free of litter and clean.

- **The Human Rights Act 1998** - makes it unlawful for a local authority to act in a way which is incompatible with a convention right under the European Convention on Human Rights. Convention rights include:
  - Article 6 - in relation to the determination of civil rights and obligations: Everyone is entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law.
  - Article 8 - Everyone has the right to respect for one's home and private life, including, for example, the right to a "good night's sleep".
  - Article 10 - freedom of expression.
  - Article 1 of the First Protocol ("A1P1) - right to peaceful enjoyment of possessions, which can include the goodwill associated with a licence (*Crompton (t/a David Crompton Holdings) v. Department of Transport for North Western Area* [2003] RT 34 and *R (Malik) v. Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, per Auld L.J. at ¶146), which therefore the holder cannot be deprived of except "in the public interest and subject to the conditions provided for by law". If a measure (such as the refusal of a licence) is to be A1P1 compliant, it needs to comply with the concept of proportionality (see Lord Reed in *Bank Mellat v. Her Majesty's Treasury (No. 2)* [2014] 1 A.C. 700 at ¶174).
- **Legislative & Regulatory Reform Act 2006, s.21** - it is the duty of a local authority when exercising a regulatory function (defined to include functions under the Licensing Act 2003 and taxi/PHV licensing) to have regard to the principles that regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent and regulatory activities should be targeted only at cases in which action is needed. Under **s.22** of the same Act, in formulating policies, the regulator must have regard to the **Regulator's Code**. It is in the author's experience not usual to find a policy or a local authority website that complies with the Regulator's Code.
- **Provision of Services Regulations 2009** - apply to many regulatory functions (not taxis/PHVs), affecting the level fees (see the *Hemming* litigation), the speed of processing applications, tacit consent and other matters including, potentially, the role of trade objectors in the licensing process.
- **Crime & Disorder Act 2009, s.17** - it is the duty of a local authority to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent (a) crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment); (b) the misuse of drugs, alcohol and other substances in its area and (c) re-offending in its area.