REPORT TO: **LICENSING COMMITTEE – 21 SEPTEMBER 2011**

REPORT BY: **LICENSING MANAGER**

REPORT AUTHOR: **NICKII HUMPHREYS**

Sex Establishment Licensing – Consideration of options for formulating a draft policy for consultation.
Schedule 3 Local Government (Miscellaneous Provisions) Act 1982 as amended by section 27 of the Policing and Crime Act 2009.

1.0 PURPOSE OF REPORT

On 22 March 2011 Council resolved that the authority would adopt the new licensing provisions relating to "sexual entertainment venues" (SEVs) and that the Licensing Committee would be responsible for discharging those statutory functions. As part of those functions, the Committee is responsible for formulating the Council's policy in relation to sex establishments.

The purpose of this report is for the Licensing Committee to consider its preferred approach in the formulation of its draft sex establishment policy having regard to the options set out in this report and to authorise the preparation of a draft policy for its consideration and approval prior to public consultation.

2.0 RECOMMENDATION

RECOMMENDED:-

a) that the Committee consider the following options and determine which should be followed in respect of the drafting of the sex establishment policy;

- ***Option 1 – Identifying pre-determined localities and the imposition of numerical controls;***
- ***Option 2 - Consideration of the character of the relevant locality and the use to which any premises in the vicinity are put;***
- ***Option 3 – Consideration of applications on individual merit***

and;

b) that the Head of Legal, Licensing & Registrars be authorised to draft a policy for consideration and approval by the Licensing Committee prior to public consultation.

3.0 BACKGROUND INFORMATION

3.1 Section 27 of the Policing and Crime Act 2009 (the "2009 Act") introduces a new category of sex establishment called "sexual entertainment venues" (SEVs) which will now enable local authorities to regulate lap dancing clubs and similar venues under Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 (the "1982 Act"). Previous definitions were limited to either sex shops or sex cinemas. Portsmouth City Council ("PCC") adopted the provisions relating to sex shops and sex cinemas in 1982.

3.2 The new powers enable these types of establishment to be licensed in the same way as sex shops, rather than as pubs and clubs and give councils greater scope and discretion as to how those venues are controlled within their areas. The new measures came into effect on 6th April 2010.

3.3 Council resolved on 22 March 2011 to adopt the new provisions together with further recommendations which are set out below:

(i) That the new statutory provisions will apply to the Portsmouth UA area with effect from 1 November 2011;

(ii) That Council arranges for its Licensing Committee to discharge its statutory functions (including the setting of fees) under Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 as amended;

(iii) That the Licensing Manager be given authority to arrange formal publication of the statutory notices in a local newspaper;

(iv) In such cases where no objections are made to the grant, renewal, transfer or variation of such licences, the City Solicitor be given delegated authority to approve such applications;

(v) That the Licensing Manager prepares a draft policy together with standard conditions applicable to sexual entertainment venues for consideration and adoption by the Licensing Committee and that the licensing manager should include in that draft policy her consideration of whether applications should be refused if they are within three miles of any place of worship, swimming pool, leisure centre, park, youth centre, historic building, tourist attraction, educational premises, school, play area, nursery, children's centre or similar premises.

3.4 Whilst the 1982 Act makes no provision for the adoption of a policy when considering applications for sex establishments, there is nothing to prevent the local authority from doing so, however, each application must be considered on its individual merit at the time the application is made.

With effect from 22 March 2002, the current policy of the Council relating to the licensing of sex establishments (shops and cinemas only) is to consider each case on individual merit (minute no. 13/2002 refers).

Due to the legislative changes now in effect it is appropriate to review the current policy having regard to the introduction of a new category of sex establishment.

3.5 A policy may relate to matters such as information to be provided as part of the application, statements about where the local authority considers a location for such venues to be appropriate or inappropriate. This could be set out in general terms by reference to a particular type of premises, such as a school or place of worship, or more specifically, by reference to a defined locality. It may also provide a general indication of those conditions that may be imposed on a licence.

Equally, the policy could give an indication of how many sex establishments, or sex establishments of a particular kind, they consider to be appropriate for a particular locality.

Different policies or separate sets of criteria may be applied in respect of different types of sex establishments. This may relate to distinctions between the operating requirements of different establishments for the fact that the location that the local authority considers appropriate for a sex shop may be different to that for a SEV.

3.6 When preparing this report and proposed options, the Licensing Manager has taken into consideration the Home Office Guidance dated March 2010 for SEVs, a copy of which is attached as Appendix A.

4.0 LEGAL CONSIDERATIONS

4.1 The 1982 Act sets out 4 discretionary grounds for refusing a sex establishment licence. These are set out below:

(a) The applicant is unsuitable to hold a licence by reason of having been convicted of an offence or for any other reason;

(b) If the licence were to be granted, the business to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant of such a licence if he made the application himself;

(c) The number of sex establishments, or sex establishments of a particular kind, in the relevant locality at the time the application is made is equal to or exceeds the number which the authority considers is appropriate for that locality;

(d) The grant would be inappropriate, having regard –

(i) To the character of the relevant locality;

(ii) To the use to which any premises in the vicinity are put;
(iii) To the layout, character or condition of the premises, vehicle or stall in respect of which the application is made.

4.2 Note: If the local authority decides that it would be inappropriate to grant or renew a licence on the grounds mentioned in (c) and (d) above, there is no right of appeal against this decision but a challenge may be made by way of judicial review if the applicant considers that the local authority:

- Acted outside the scope of the statutory powers;
- Made a decision using an unfair procedure;
- Made an unreasonable decision;
- Failed to act in accordance with the Human Rights Act 1988.

5.0 OPTIONS FOR CONSIDERATION IN RESPECT OF POLICY CRITERIA

5.1 The three options for consideration by the Committee focus upon two specific discretionary grounds available to the local authority when considering applications for sex establishment licences which are referred to in (c) and (d) of paragraph 4.1 above.

5.2 The options are:

Option 1 – Identifying pre-determined localities and the imposition of numerical controls;

Option 2 - Consideration of the character of the relevant locality and the use to which any premises in the vicinity are put;

Option 3 – Consideration of applications on individual merit.

In order to assist the Committee when deciding which option it wishes to pursue, further information has been provided in relation to each of the available options together with any potential areas of concern including reference to established case law.

6.0 OPTION 1 – PRE-DETERMINED LOCALITIES AND IMPOSING NUMERICAL CONTROLS

Consideration of locality and number of sex establishments

6.1 Nil as a viable option?

This provision allows discretion by a local authority to impose a numerical control on the number of sex establishments in a particular locality. This control can apply both to the overall number of sex establishments and also the number of each kind. The provisions of the1982 Act allow for an authority to decide that nil may be an appropriate number when it considers that the circumstances justify such a decision.

Examples of when such circumstances arise could include:

- Family residential or leisure areas;
- Retail areas where it considers that sex establishments would lower the retail attraction;
- Strong faith community;
- Educational area;
- Areas where tourism may be affected based upon advice by tourism authorities;
- Areas with a history of social difficulties such as prostitution or crime and on the advice of the police;

Case law has established that some localities are less suitable than others e.g. the presence of schools and churches[1] or even family pubs[2].

There is a wide discretion which was referred to in the case of *Miss Behavin' Ltd v Belfast City Council*[3] which states:

"The effect of these rather convoluted provisions is that a council may refuse a licence for a sex shop in any locality on the ground it does not consider it appropriate to have sex shops in that locality. It was said that because the Order says that the council "may" refuse, this ground is "discretionary". But I am not sure whether that is a very helpful adjective. It would hardly be rational for the council to decide that the appropriate number of sex shops in the locality was nil, but that it would all the same exercise its discretion to grant a licence. I think it is more accurate to say that the question of how many sex shops, if any, should be allowed is a matter for the council's judgement.

6.2 What is a locality?

The Act does not give a definition of what is to be regarded as a "locality" other than the following:

- The relevant locality for a premises is the locality where the premises are located; or
- The relevant locality for a vehicle, vessel or stall is any locality where it is desired to use it as a sex establishment.

When Parliament first debated the 1982 Act , the Government spokesman in the House of Lords said that the locality is *"the area which, when considered sensibly as a whole, could be said to affected by the presence of a sex establishment in it"*. The term "locality" allowed local authorities sufficient flexibility to make a judgement based upon the facts of the individual case.

[1] *R v Birmingham City Council, ex p Quietlynn Ltd (1985) 83 LGR 461*
[2] *R v Bournemouth District Council, ex p Liam McCann (unreported, 16 November 1988).*
[3] [2007] UKHL 19; [2007] 1 WLR 1420 at [6].

The Court of Appeal[4] has confirmed that a relevant locality is a question of fact and has to be decided on the facts of the individual application. The local authority has to look at the premises for which the licence is sought and then decide the appropriate number of sex establishments, or whether the character of the area was such that it was inappropriate to grant a licence at all. "Locality" does not necessarily mean a pre-defined area and it is not necessary to be able to show the boundaries on a map. However, an entire town, or the whole of the authority's administrative area, is too large to be the relevant locality within the meaning of the 1982 Act.

Philip Kolvin QC, Head of Licensing at 2-3 Gray's Inn Square and previous Chair of the Institute of Licensing has suggested that a local authority could ask itself what local people would regard as their locality. This could possibly be a suburb of a town or an estate within it. It may be an area defined by its shopping centre, school, place of worship or park. It might also be a geographic part of a town which could be defined by roads, rivers or railway. It could even be, for practical or historic reasons, a ward within an administrative area.

When compared to the use of the word "vicinity" in the same section of the 1982 Act, it would suggest that a "locality" envisages consideration of a wider area than that of "vicinity".

6.3 Need for fixed or pre-set boundaries?

The main questions that arise from the locality issue is whether it is necessary to fix or pre-set boundaries and whether a locality can consist of a whole town or administrative area.

In the judgement referred to above, the Appeal Court accepted a previous judgement[5] that the Committee is not obliged to indicate to the parties what it is minded to determine as the relevant locality. Rather, it is for the applicant to make submissions to the authority and it can either agree or disagree.

Additionally, the judgement also stated that in the majority of cases it would not be necessary to come to any conclusion about the precise extent of the locality since the characteristics of the area which undoubtedly would fall within a locality will be sufficient to determine the matter one way or the other. (Note: the character of a locality is another discretionary ground for refusal).

6.4 Locality fixed by way of licensing policy?

The Appeal Court has accepted that localities could be pre-determined and whilst not considered as part of the judgement, this could be achieved by way of a licensing policy.

Whilst this creates some certainties, the Court of Appeal has pointed out that conversely there are drawbacks with establishing pre-determined localities.

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[4] *R v Peterborough City Council, ex p Quietlynn (1987) 85 LGR 249*
[5] *R v City of Chester, ex p Quietlynn Ltd, unreported, 14 October 1983*

Problems could arise if an application was made on or immediately outside the boundary of such a locality and therefore the authority would either have to ignore the pre-determined area or have regard to the character of more than one locality. This problem could be avoided if the authority adopts a starting point of considering the characteristics of the locality in which the premises actually lie.

Whilst pre-determined localities are likely to be similar in character, this might not be so if the starting point for determination of the locality is not a pre-defined area but an area centred on the premises itself.

6.5 How big can a locality be?

Another case decided by the Court of Appeal related to a decision by Cheltenham Borough Council to take the entire town as a single locality.[6] The town covered 13 square miles and the grounds for establishing it as a single locality were given on the basis that it was *"small in area and has its own unique and homogeneous character".* Additionally the authority did not believe that any part of the town could properly be described as a separate locality. The Court of Appeal considered that Cheltenham was much too large an area to be regarded as the relevant locality.

Portsmouth, as a whole, is considered too large to be considered as a single locality.

Whilst the Courts have clearly established that a substantial administrative area should not be taken as a locality, this would not prevent an authority from breaking down its area into discrete localities, examining each area and if appropriate, reaching the conclusion that the appropriate number for each and every such locality is nil.

As was stated in the *Peterborough* case:

"If the Cheltenham Borough Council had said that it had reached the preliminary conclusion that there was no place within their boundaries of which it could be said that it was situated in a locality in which it would be appropriate to licence a sex establishment, no objection would have been taken. It would then have been open to an applicant to apply, saying, "You must have overlooked this site", and the council would then have had to consider whether or not this was right. But what they should not have done was to apply the criteria of appropriateness to the whole town, when Parliament had instructed them to apply in to the locality in which the premises the subject matter of the application was situation, which is a different concept".

6.6 What are the considerations for determining what is an appropriate number for a locality?

If a locality has been determined then the authority must next consider what is the appropriate number of sex establishments in that area and whether that is an

[6] *Cheltenham Borough Council, ex p Quietlynn Ltd (1985) 83 LGR 461*

overall number or split by type of establishments. A suggested number of factors may be considered including:

- General character of the area (i.e. family residential, family leisure or educational area);
- Presence of what can be regarded as sensitive uses (i.e. places of worship, schools, youth clubs, community centres, women's refuges, libraries, parks or swimming pools);
- Current use for night-time leisure activities and with existing sufficient representation of sex-orientated uses? Would one further premises cause the character of the neighbourhood to change?;
- General opinion for the suitability of the area (i.e. arising from a survey);
- Gender equality issues – would further uses deter women from using the area comfortably or at all;
- Would further sex-orientated uses raise the fear of crime in the locality?[7];
- Effects upon regeneration and tourism;
- Level of genuine demand. Risk that excess supply will drive down standards and lead to problems associated with compliance with conditions.

In deciding what may be an appropriate number for a locality, an authority must make such a decision based on rational considerations and use of credible material in order to justify its decision.

6.7 Potential areas of concern

The legislation permits a local authority to set pre-determined localities and control numbers if appropriate, however, it could present the following difficulties:

- if an application was made on or immediately outside the boundary of such a locality and therefore the authority would either have to ignore the pre-determined area or have regard to the character of more than one locality or the applicant can show that the policy should not apply;
- requirement for a full and thorough examination of the city to establish and justify those separate and discrete localities and keep those areas under constant review;
- risk of judicial challenge;
- has the potential to fetter discretion of authority when considering applications;
- Requirement for significant resources and officer time to properly investigate and prepare credible evidence so as to establish whether or not it is appropriate to establish pre-determined localities and the imposition, if any, of numerical controls.

[7] *This issue has been held to be a material planning consideration in West Midlands Probation Committee v Secretary of State for the Environment (1997) JPL 323. However, this is providing that the fear and concern has a reasonable basis. Whilst not a licensing case the facts of the case may be potentially relevant for licensing purposes.*

7.0 OPTION 2 – CONSIDERATION OF THE CHARACTER OF THE RELEVANT LOCALITY AND THE USE TO WHICH ANY PREMISES IN THE VICINITY ARE PUT

7.1 Consideration of the character of a locality

An application may be refused where the grant of a licence would be inappropriate having regard to the character of the relevant locality.[8] This ground for refusal is somewhat different to the grounds relating to number of premises in a particular locality. In those circumstances the local authority must consider "what is an appropriate number" but consideration of the character of a locality requires the local authority to decide whether the grant of a ***particular*** application is inappropriate.

For example, not withstanding that the local authority may not be adverse to granting licences in the locality, the nature of the proposed premises may be such that it deems it inappropriate such as the prominence of the premises, particular branding or reputation or size and nature of the clientele.

7.2 Consideration of the use of premises in the vicinity

An application may also be refused where it is considered that the grant of a licence would be inappropriate having regard to the use of other premises in the vicinity.[9]

This ground permits refusal of a licence regardless of the character of a locality or indeed what may or may not be an appropriate number of sex establishments licences within it.

The type of uses which may be considered inappropriate are set out below and are expressed in the same terms as those for determining locality and appropriate number of sex establishments:

- General character of the area (i.e. family residential, family leisure or educational area);
- Presence of what can be regarded as sensitive uses (i.e. places of worship, schools, youth clubs, community centres, women's refuges, libraries, parks or swimming pools);
- Current use for night-time leisure activities and with existing sufficient representation of sex-orientated uses? Would one further premises cause the character of the neighbourhood to change?;
- General opinion for the suitability of the area (i.e. arising from a survey);
- Gender equality issues – would further uses deter women from using the area comfortably or at all;
- Would further sex-orientated uses raise the fear of crime in the locality?[10];

[8] *Para 12(3)(d)(i)*
[9] *Para 12(3)(d)(ii)*
[10] *This issue has been held to be a material planning consideration in West Midlands Probation Committee v Secretary of State for the Environment (1997) JPL 323. However, this*

- Effects upon regeneration and tourism;
- Level of genuine demand. Risk that excess supply will drive down standards and lead to problems associated with compliance with conditions.

7.3 This ground offers greater flexibility for the Council and follows the Court of Appeal advice that an authority could adopt a starting point of considering and examining the character of the locality in which the premises are actually intended to operate rather than pre-determining areas in advance of receiving any applications.

Equally, by adopting this position the criteria suggested by Council in paragraph 3.3 could be included within the policy in terms of examination of the use to which any premises in the vicinity are put.

It is appreciated that "vicinity" is a smaller area than "locality" when identifying the nature of other premises in the area, but it does offer protection in that the policy could set out that an application may be refused if there are places of worship, swimming pools, leisure centres, parks, youth centres, historic buildings, tourist attractions, educational premises, school, play areas, nurseries, children's centres or similar premises in the vicinity of the proposed application site.

Should members decide to accept option 2 as set out above, the draft policy could be made available for approval and to commence consultation within a relatively short period of time.

7.4 Potential areas of concern

Whilst the criteria put forward by Council could form part of the policy when examining the use of any premises in the vicinity, the reference to a three mile radius is unlikely to be considered to be "a vicinity" within the city of Portsmouth.

8.0 OPTION 3 – CONSIDERATION OF APPLICATIONS ON INDIVIDUAL MERIT

8.1 Currently, it is the policy of the Council to consider applications for the grant/renewal of sex establishment licences (i.e. sex shops) on individual merit and having regard to the grounds for refusal as set out in the 1982 Act.

This also accords with Court of Appeal decisions that a Committee is not required to indicate to the parties what it is minded to regard as a relevant locality. Instead, it is for the parties to make submissions on the matter and the committee may either agree or disagree.

8.2 This approach offers greatest flexibility for the local authority in terms of exercising its discretion when considering such applications and would not prevent the authority from considering refusal of an application if there are

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places of worship, swimming pools, leisure centres, parks, youth centres, historic buildings, tourist attractions, educational premises, school, play areas, nurseries, children's centres or similar premises in the vicinity of the proposed application site.

A policy of this kind (and considered on merit, fairly and in a proportionate way) is unlikely to face judicial challenge from applicants.

Should members decide to accept option 3 as set out above, the draft policy could be made available for approval and to commence consultation within a relatively short period of time.

9.0 TIMESCALES FOR TRANSITION PERIOD

In terms of timescales for implementation of the new powers, a summary of the transitional provisions as laid down in the 2009 Act are summarised below for information:

- Council formally adopted the new statutory provisions to have effect from 1 November 2011;

- A 12 month transitional period begins on "the 1st appointed day" (1 November 2011).

- Six months following the 1st appointed day will be known as "the 2nd appointed day" (1 May 2012);

- The day on which the transitional period ends will be known as "the 3rd appointed day" (1 November 2012);

- Applications may be made from the 1st appointed day onwards, however as the Licensing Authority is able to consider refusal of a licence having regard to the number of sex establishments they consider appropriate for a particular locality, all applications made between 1 November 2011 and 1 May 2012 shall be considered together. (This is to ensure that applicants are given sufficient time to submit their application and that all applications received before 1 May 2012 are considered on their individual merit and not on a first come, first served basis).

- No applications will be decided before 1 May 2012;

- Applications made after 1 May 2012 will be considered when they are made but only after those applications received before 1 May 2012 have been decided.

- 1 November 2012 – Transitional period ends and 2009 Act fully implemented.

10.0 APPENDICES

a) Appendix A – Home Office Guidance for Sexual Entertainment Venues – March 2010.

Licensing Manager