Sex Licensing

(ACSeS Journal, 2009), describing the Policing and Crime Act provisions

In the Policing and Crime Bill, the Government began to address long-standing anomalies in the regulation of lap dancing establishments. However, it has now got its G-string in a twist over loopholes in the scheme, and requires urgently to untangle it before the Report Stage in the House of Lords this autumn. In this article I describe the problem and propose the simplest of solutions.

Why was legislation needed? Lap dancing establishments have grown in number over the last half a decade, from approximately 150 to 300 establishments causing, for many communities, a high degree of concern. The Licensing Act 2003 has proved itself ineffective as a means of control. Only those who live or work in the vicinity may object to a lap dancing establishment. Worse, the only grounds of objection relate to the licensing objectives – crime, disorder, nuisance, public safety and the protection of children. These do not properly reflect the kind of concerns which communities hold regarding the proliferation of such venues in their high streets.

Fortunately, a solution presented itself. The 1982 Local Government (Miscellaneous Provisions) Act 1982 already regulates sex shops and sex cinemas. It provides far wider grounds of objection, including that there are already sufficient in the locality (for which purpose nil may be an appropriate number in certain areas), and that the establishment is inappropriate having regard to the character of the locality or the use of other premises there. In other words, an authority may say “we do not believe that our high street is an appropriate venue to site this activity.”

The Government considered that there is no pressing distinction between lap dancing establishments on the one hand and sex shops and sex cinemas on the other, so that they should all be regulated according to the same test. And so in the Policing and Crime Bill it proposed a new form of premises – the sex encounter venue, for licensing under the 1982 Act. Such a venue is one in which there is live performance or live display of nudity which must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience, for financial gain. This is sufficiently wide to comprise the sex show, the peep show, the striptease, the lap dance and the pole dance, but exclude incidental nudity in dramatic works.

So far so good. Then it began to go wrong.

First, the Government decided to exempt premises which run only occasional sex encounter events. The current proposal is that premises will be allowed 11 events in a 12 month period of 24 hours duration each, provided that each is separated from the other by a month. Hard-bitten licensing officers know that this exemption is entirely unenforceable. Since when do officers have time to camp outside establishments counting how many events they have

run in the last year? Worse still, it will mean that Parliament will be regulating the permanent establishments, which might be expected to run to better standards, while leaving unregulated establishments which are more likely to run to lower standards in terms of hygiene, door control, performer safety, community protection and so forth. The Government reasoning appears to be that the poor old stripagram should not be forced to obtain a licence. But that is a stiletto-heel in the door: the exemption will apply to a live sex show held in someone's garage. The only control would be a temporary event notice under the Licensing Act 2003, but of course only the police may object to that, and then only on crime prevention grounds. The community's wishes are completely irrelevant in the equation. The proposal is such as to stimulate a black economy in sexual services – and it is no comfort that however naïve the thinking, the scheme is at least better than what we have now. It represents half-baked legislation which misses a huge opportunity to bring the industry under more effective control.

Second, the Government has decided that this legislation should be adoptive – that is to say a local authority would have to resolve to give itself the powers to regulate sex encounter venues. This goes against the grain of licensing legislation over the last quarter of a century, which has been to move away from local and adoptive legislation to national licensing frameworks with a wide margin of discretion in local decision-making. The Government has tried to reason that the legislation will impose a burden on those authorities who don't have establishments and want nothing to do with the legislation. In fact, the burden is not only marginal but entirely the other way. Those authorities will acquire no burden whatsoever as a result of the existence of the legislation. However, those authorities who do want the legislative powers will have to go through an adoption process which would not be necessary were the legislation mandatory.

The consequences of this optional legislation will be to create a series of distortions, of which two are particularly serious. First, it is likely that operators will go "forum shopping" towards those areas which have not adopted the legislation, so as to save themselves the fees and possible hassle of obtaining a licence. Second, and linked to this, is that for those authorities who have not adopted the legislation, the first they will learn of the establishment is when (often substantial) capital has been expended fitting it out. Any attempt by them then to adopt the legislation so as to regulate the premises retrospectively will result not only in cries of foul play, but complaints that retrospectivity breaches their rights of property (which includes their commercial business) under Article 1 of the First Protocol of the Human Rights Convention. While, arguably, this is true of all commercial activities brought under regulation for the first time, for the Government to embed this difficulty into its legislation is as bizarre as it is naïve.

A further crucial dimension is the importance of gender equality in this exercise. Clearly, a central plank in the new regime is the thrust towards community empowerment and choice. But a further element is the duty upon local authorities under section 76A of the Sex Discrimination Act 1975 to have due regard have due regard to the need to eliminate unlawful discrimination

and harassment, and to promote equality of opportunity between men and women. Key to this, and seen as such by the Equality and Human Rights Commission in its Code of Practice on the Gender Equality Duty, is a duty to challenge gender stereotyping. This would obviously include lap dancing, whose ethos is to treat women's bodies as purchasable commodities. Ministers have tended to downplay the gender equality aspect of this legislation in favour of the community empowerment argument, perhaps finding the latter a more palatable medicine for a male-dominated cabinet and Parliament. However, the issue of the objectification of women is a crucial one for many women and community groups, and will not go away. The beauty of the proposed scheme is that it would enable the local authority to take its gender equality duty into account in a way in which it is debarred from doing under the Licensing Act 2003. This would not necessarily result in a refusal of the licence, but it would at least place the consideration on the agenda. The difficulty of the dual loopholes of temporary events and non-mandatory legislation is that for all authorities some sexual performance and for many authorities all sexual performance will not even be on their radar, far less have been scrutinised with a gender equality hat on. This is to drive an express train not just through sex legislation but through equality legislation too.

Finally, the solution. The 1982 Act contains power for authorities to waive the requirement for a licence. Authorities who do not consider particular forms of performance to be a problem may invite operators to apply to them for a waiver. This will at least give the authority knowledge of where and what type of sexual performance is taking place on its patch so that it can decide whether it wishes to tighten its approach. It will give them advance warning of any proposal for a large new lap dancing establishment so that they can decide whether the operator should apply for a licence with the transparency and public scrutiny that entails. And, of course, it will involve the authority considering, from the perspective not only of community empowerment but also gender equality, whether it remains appropriate to waive the requirement for a licence. A simple solution, meeting the concerns of most. Hopefully not too simple for Ministers.

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