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Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services



Llywodraeth Cymru
Welsh Government

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Cardiff Bay
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7 December 2015

Dear Jocelyn,

Public Health (Wales) Bill

I would like to thank you and the Finance Committee for your report on the Public Health (Wales) Bill. I am considering the various recommendations of the Committee and will refer to these during tomorrow's Plenary debate on the general principles of the Bill, with a fuller response to the Committee's recommendations to follow in due course. However, in advance of the debate I wanted to provide you with some further information and a technical update on the R (on the application of Hemming) (t/a Simply Pleasures Ltd) (Respondents) v Westminster City Council (Appellant) case, and its potential impact on the Bill.

Background on the case

The case concerned a group of sex shop owners in Westminster who challenged Westminster City Council about both the level of licence fees and the process adopted to set them. The Council had previously required applicants for sex shop licences to pay with their applications a substantial sum (£29,435 in 2011/12), broken down into a smaller amount (£2,667 in 2011/12) relating to the processing of the application and a larger amount (£26,435 in 2011/12) relating to the cost of administering and enforcing the licensing regime as a whole. The larger amount was refundable whenever an application failed.

The respondent had claimed that the system applied by Westminster was illegitimate under domestic and EU law. The primary case was that there was no basis for requiring successful or unsuccessful applicants to meet the costs of administering and enforcing the regime. The secondary case was that there was no basis for requiring such costs to be paid with the applications, even on a refundable basis. The Court of Appeal agreed with the respondent's primary case, holding that such costs had to be funded by an authority such as Westminster out of its general rates or other funds.

Westminster City Council then appealed to the Supreme Court. The Supreme Court concluded:

- Paragraph 19 of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 enables a licensing authority to impose on an applicant a fee for the grant or renewal of a licence which covers the running and enforcement costs of the licensing scheme, to be payable either (a) at the time when the licence is granted; or (b) on a refundable basis, at the time when the application is lodged.
- Article 13(2) of Directive 2006/123/EC deals only with authorisation procedures and fees relating to applications for permission to access or exercise a service activity, such as operating a sex shop. It does not prevent the imposition on those who receive licences of proportionate charges to fund the cost of administering and enforcing the licensing regime.

A reference to the Court of Justice of the European Union has been made on the timing of payments made for licences.

Relevance to the Public Health (Wales) Bill

The Bill establishes a licensing system in relation to special procedures and the case is therefore of direct relevance to these provisions. It is not considered that other parts of the Bill would be affected by the case.

The Committee noted in its report that the Supreme Court considered two possible scenarios relating to the case:

- A “Type A scheme” under which a local authority charges an applicant, on making an application for registration, the costs of making the application and then charges a successful applicant a further fee to cover the costs of running and enforcing the scheme; and
- A “Type B scheme” under which the costs of running and enforcing the scheme were charged at the time of making the application but refunded to unsuccessful applicants.

The Supreme Court has held that a Type A scheme is permissible under both domestic and European law. However, with regard to a Type B scheme, the Court was of the view that the matter should be referred to the Court of Justice of the European Union, with a view to establishing whether such a scheme was consistent with European law. This is essentially a question of timing, i.e. whether or not the costs under Type B schemes can be charged on a refundable basis at the time that the application is made.

The Court of Justice of the European Union has yet to provide its judgment on this issue, but it is my intention for local authorities to have the flexibility to charge reasonable fees, however they wish to. It will be a matter for local authorities to determine whether they wish to use a 'Type A' or 'Type B' scheme.

I am currently considering whether an amendment is required to provide further clarity on this point. I will ensure the revised Explanatory Memorandum addresses this point when it is updated following Stage 2 consideration.

I hope the information provided in this letter provides the clarity sought by Committee members. I am copying this letter to the Chair of the Health and Social Care Committee as this issue was also raised in its report on the general principles of the Bill.

Best wishes

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