

LICENSING OF PAVEMENT CAFÉS BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by the Department for Social Development (the Department) in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum needs to be read in conjunction with the Bill. It does not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause or schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. Pavement cafés are becoming increasingly commonplace in Northern Ireland but currently no legislation exists to regulate this activity. The Roads (NI) Order 1993 makes it unlawful to cause obstruction to a road. At present Roads Service generally ‘tolerates’ pavement cafés provided they do not restrict the free flow of pedestrians or vehicles or compromise public safety. Legislation is already in place in other jurisdictions under which cafés owners etc may apply to their local councils for permission to place tables and chairs on the pavement outside their premises. The relevant legislation in England and Wales is the Highways Act 1980, Part VIIA. The policy objective of this Bill is to introduce a statutory licensing scheme for the regulation of pavement cafés by district councils. The scheme would facilitate the controlled expansion of suitable premises such as cafés, restaurants and pubs in support of the creation of a vibrant daytime and evening economy and for the general well-being of communities.

CONSULTATION

4. In December 2010, following calls from key stakeholders for the introduction of a statutory licensing scheme, a consultation was launched. The Department also met with a number of organisations to discuss the issue. The consultation paper sought views on a proposal to provide district councils with the power to licence occupiers of suitable premises to place tables and chairs on the pavement. It was envisaged that the power should be mainly enabling, allowing each council to design an appropriate licensing scheme for its district. A council would be able to grant a licence, impose reasonable conditions, vary, suspend or revoke the licence and charge a reasonable

fee. There would be a general presumption that no consent would be unreasonably withheld.

5. The overall response to the consultation was very positive. However, following concerns expressed it was decided that one of the assumptions made in the consultation – that Roads Service should undertake the enforcement of the scheme – will no longer be pursued. District councils would therefore be given the power to grant licences and also enforce the statutory scheme.

OPTIONS CONSIDERED

6. Three basic options were considered:

Option 1 - Do nothing. This would not bring clarity in terms of how pavement cafés should be regulated and a café culture successfully promoted. Doing nothing may unjustifiably penalise business interests and compromise public health and safety.

Option 2 – Continue with the Roads Service ‘toleration’ approach provided there are no risks to health and safety. Roads Service regards this as a temporary arrangement pending introduction of formal licensing scheme. This is not considered to be a realistic option in the medium to longer term.

Option 3 – Introduce a statutory licensing scheme to be administered by district councils. This is the preferred option. The evidence shows that a common, clear and transparent legislative framework is required to enable pavement cafés to be properly regulated in the interests of all.

OVERVIEW

7. The Bill contains 32 clauses and one Schedule. Clauses 1 and 2 deal with the general requirement to obtain a pavement café licence. Clauses 3 to 12 set out the application procedures for the grant, renewal, and variation of a licence. Clause 13 sets out the procedure when there are multiple licence holders and there is a change of a business partner. Clauses 14 to 19 deal with revocation, suspension and compulsory variation of a licence. Clause 20 makes provision for certain matters to be recorded in the register under liquor licensing law. Clause 21 specifies the circumstances in which appeals can be made against a decision of a district council. Clauses 22 to 24 give district councils powers of entry, removal etc for the purpose of enforcing the provisions of the Bill. Supplementary matters are set out in Clauses 25 to 32.

COMMENTARY ON CLAUSES

Commentary on the provisions follows, although none is given where the wording is self-explanatory.

Clause 1: Meaning of “pavement café licence” and other key terms

Clause 1(1) provides a definition of the term ‘pavement café licence’. A pavement café licence authorises a person who carries on a business involving the supply of food or drink (in or from premises) to place furniture (tables, chairs etc) in a public area for use by customers.

Subsections (2) to (7) are interpretative sections which clarify terms used to describe the nature of the licence. Clause 1(2) makes clear that a ‘public area’ is a place in the open air which is freely accessible to the public. However, a ‘public area’ which has been acquired or established as a ‘market’ is excluded. Clause 1(4) places a duty on the licence holder to ensure that furniture placed in a licensed area is of a temporary nature and can be removed swiftly.

Clause 2: Offence of placing furniture on public area without a licence

Clause 2 creates an offence of placing furniture, for use for the consumption of food or drink, on a public area without a pavement café licence. The Clause applies to businesses involved in the supply of food or drink (in or from premises) to members of the public. An offence may be committed by either the person (or persons) carrying on the business or any person concerned in the management of the premises. A person guilty of the offence is liable on summary conviction to a fine of up to £1 000. Clause 2(7) makes it a defence for the person charged to prove that he took all reasonable precautions and exercised due diligence to avoid commission of the offence.

Clause 3: Application for licence

Clause 3 provides details of how a qualifying business may apply to the local council for a pavement café licence. An application must include a plan showing the location and dimensions of the proposed pavement café area and meet any other requirements specified by the district council. This Clause should be read in conjunction with Clause 10 (General provision) and Clause 11 (Notice to be displayed).

Clause 4: Grant or refusal of licence

Clause 4 places an onus on a district council to grant a pavement café licence unless one of the grounds for refusing an application applies. The grounds are that:

- the proposed pavement café area is unsuitable for that purpose;
- the use of that area as a pavement café would be likely to result in undue interference or inconvenience to persons or vehicles in the vicinity, or in disorder;
- the applicant has made, in connection with an application, a statement he knew to be false, or failed to fix a notice to the premises specified in the application, or has had a pavement café licence revoked for reasons within the applicant’s control.

Clause 4(4) places a duty on the district council, when considering a new application, to consult with the Roads Service, and where the associated premises has a pub licence, the PSNI, before arriving at a decision. A council may also consult other persons as it considers appropriate. Such consultation will ensure that any possible implications for vehicular traffic or pedestrians, public safety issues, and environmental impacts are properly taken into account.

Clause 5: Form, duration etc of licence

Clause 5(1) gives a power to the Department to make regulations setting out the form of a pavement café licence. The licence **must** specify the holder of the licence and the premises to which it relates and be accompanied by a plan showing the location and dimensions of the pavement café area.

Clause 5(3) provides a council with a degree of discretion to vary the area of the proposed pavement café. Clause 5(4) allows a council to licence one or more public areas, if proposed in the application.

Clause 5(5) gives a council the discretion to decide how long it wants a licence to remain valid. A council can also decide whether licences should all terminate (and hence fall for renewal) on a common date.

Clause 6: Conditions of licence

Clause 6(1) requires a pavement café licence to specify that temporary furniture must not be placed on any public area other than the area covered in the licence. Clause 6(2)(a) requires the inclusion of a prohibition on the consumption of alcohol at a pavement café, where the associated premises are licensed for off-sales only. This is to prevent alcohol purchased in the off-sales from being consumed in the pavement café area. Clause 6(2)(b) allows a council to include an alcohol prohibition in any other pavement café licence, if it is satisfied that consumption of alcohol in the area covered by the licence would be likely to result in disorder.

Clause 6(3) gives a council a discretion to specify further conditions as it considers reasonable, including conditions relating to the design and layout of the pavement café area, operating times, arrangements for the storage of furniture and the payment of fees and public liability insurance.

Clause 7: Renewal of licence

Clause 7 sets out the arrangements for renewal of a pavement café licence. The renewals procedure is broadly similar to that for new applications. However, a council will not be obliged to consult the statutory authorities mentioned in Clause 4(4).

Clause 7(7) permits a council to make certain variations to the licence on renewal.

Clause 8: Variation of section 6 (3) conditions or of area covered by licence

Clause 8 allows the holder of a pavement café licence to apply to the council for a variation of either the **conditions** of a licence or the **area** covered by the licence. The variation procedure is broadly similar to that for new applications. However, a council will not be obliged to consult the statutory authorities mentioned in Clause 4(4).

Clauses 8(4) sets out the options available to a council when considering an application for a variation of licence conditions. Clause 8(5) deals with variation of an area. Clause 8(9) limits the extent to which an area may be varied.

Clause 9: Variation by removal of alcohol prohibition

Clause 9 provides that where a pavement café licence contains an alcohol prohibition, the holder of the licence may, in certain circumstances, apply to a council for the licence to be varied by the removal of the alcohol prohibition. Clause 9 (5) (a) requires the council to consult with the police before deciding on such an application.

Clause 10: Applications: general provision

Clause 10 sets out details of how applications for the grant, renewal or variation of a pavement café licence are to be made and a council's responsibility when such applications are received.

Clause 10(8) makes it an offence for a person, in connection with an application, to make a statement which is false in a material respect and to do so knowing it to be false. A person guilty of the offence is liable on summary conviction to a fine of up to £1 000.

Clause 11: Notice of application to be displayed

Clause 11 requires an applicant for the grant, renewal or variation of a pavement café licence to fix a notice (in a form specified by the council) to the premises specified in the application. The notice must be positioned so as to be visible and legible to the public until the end of the 28 day period allowed for representations.

Clause 12: Fees

Clause 12 gives a district council the power to charge fees which will enable it to offset the cost of administering the pavement cafés licensing scheme. Fees may be charged for the grant, renewal or variation of a licence. Clause 12 places a requirement on a council to publicise the fees it intends to charge and make available the details of how these were calculated. It states the circumstances where refunds of fees **must** be made and provides discretion for a council to refund in any other circumstances.

Clause 13: Change in persons carrying on business

Clause 13 makes clear that a pavement café licence may not be transferred from one person to another. However, where a licence refers to a business partnership and a partner dies or withdraws from the business, the licence may remain in force, with any remaining person(s)

named in the licence treated as the licence holder. If there is an addition to the partnership the new partner will be given the authority to place furniture on the area (similar to employees), but will not be deemed a licence holder of the current licence.

Clause 14: Revocation of licence

Clause 14 sets out the circumstances in which a district council may revoke a pavement café licence. These are that:

- the licensed area (or part thereof) has become, or is going to become, unsuitable for that purpose;
- continuing to use all, or any part of the public area, for that purpose would cause undue interference or inconvenience to persons or vehicles in the vicinity, or be likely to result in disorder;
- the licence holder has –
 - in connection with any application, made a statement he knew to be false, or failed to fix a notice to the premises specified in the application;
 - persistently failed to comply with any condition of a licence;
 - failed to pay any fee (without good reason) to the council.

Clause 15: Suspension of licence

Clause 15 sets out the circumstances in which a district council may suspend a pavement café licence. These are that:

- the licensed area (or part thereof) is, or is going to become, **temporarily** unsuitable for that purpose;
- continuing to use all, or any part of the public area, for that purpose would, **temporarily**, cause undue interference or inconvenience to persons or vehicles in the vicinity, or be likely to result in disorder.

This power allows a council to suspend a licence for example, when utilities maintenance is required, roadworks are scheduled etc. A council may also suspend a licence (as an alternative to revoking it under Clause 14) if the licence holder has made a false statement in connection with any application, or failed to fix a notice to the premises specified in the application, or has persistently failed to comply with any condition of a licence or failed to pay any fee (without good reason) to the council.

Clause 16: Compulsory variation of section 6 (3) conditions

Clause 16 allows a council (at any time) to vary any licence condition imposed under Clause 6(3), where there has been a material change in circumstances. For example, if the

associated premises obtain a liquor licence, a council may decide to modify the opening hours of the pavement café.

Clause 17: Compulsory variation: prohibition of alcohol

Clause 17 allows a council at any time to vary a pavement café licence which does not have an alcohol prohibition by including such a prohibition in the licence conditions. Variation of the licence in this way would be necessary if, for example, a supermarket with a pavement café licence subsequently obtained an off-sales licence (see Clause 6(2)(a)). A council may also insert an alcohol prohibition if it is satisfied that consumption of alcohol in the pavement café area is likely to result in disorder.

Clause 18: Compulsory variation of area covered by licence

Clause 18 allows a council to vary the area covered by a pavement licence. This is regarded as an alternative to revocation where part of the area has become (or is going to become) unsuitable for use as a pavement café or continued use for this purpose is likely to result in undue interference or inconvenience to persons or vehicles in the vicinity, or in disorder. Variation of the area will be subject to the limits imposed by Clause 8(9). If it makes a variation, the council may also vary existing licence conditions under Clause 6(3) or specify new conditions.

Clause 19: Notice of revocation, suspension or compulsory variation

Clause 19 sets out the administrative steps a council **must** take when it intends to revoke, suspend or compulsorily vary a pavement café licence. It must notify the licence holder of its intentions in this regard and state the grounds for the revocation, suspension or variation. The licence holder will have an opportunity to make representations to the council, within a specified period, before a final decision is taken. In most instances this period will be at least 21 days. If considered necessary in the public interest a council may decide to revoke, suspend or vary a licence even though no notification has been given.

Clause 20: Matters to be recorded in register under Licensing Order

Clause 20 gives the Department the power to make regulations requiring particulars of pavement café licences, associated with premises licensed under the Licensing (NI) Order 1996, to be recorded in the licensing register.

Clause 21: Appeals

Clause 21 sets out the circumstances in which an applicant and/or a licence holder can appeal to a court of summary jurisdiction against a decision of a district council.

An applicant may appeal against a decision of a council to refuse any application applied for (i.e. application for grant, renewal or variation), or where the licence is granted, the conditions imposed (which can include an alcohol prohibition, a variation of conditions, or additional conditions) or the area covered by the licence.

Licence holders may also appeal a decision of a district council to:

- revoke a licence;
- suspend a licence or extend a period of suspension;
- vary the area and conditions of a licence, when used as an alternative to revoking the licence;
- limit the duration of a licence.

Clause 22: Powers of entry and inspection

Clause 22 enables a person authorised by a district council to enter and inspect premises, to which a pavement café licence or application relates, for various purposes, including determining whether a licence should be granted, revoked etc.

Clause 23: Power to remove unlicensed furniture

Clause 23 gives a district council the power to remove furniture from unlicensed pavement cafés. It places a duty on the council to notify the person responsible (if known) as to how the furniture may be recovered. A council may recover the cost of removing and storing the furniture and, if not claimed within three months, may dispose of it.

Clause 24: Offence of obstruction

Clause 24 creates an offence of intentionally obstructing a person (authorised by a council) exercising the powers to enter and inspect premises and to remove unlicensed furniture. A person guilty of the offence is liable on summary conviction to a fine of up to £1 000.

Clause 25: Service of notices and documents

Clause 25 allows for the service of notices and documents to be completed via electronic communication.

Clause 26: Power to make further provision

Clause 26 allows the Department to make consequential and transitional provisions where necessary for the purpose of implementing the Bill.

Clause 27: Regulations

Clause 27 provides that regulations made under the Bill are subject to negative resolution procedures, other than regulations that amend any statutory provision, which may not be made unless a draft has been laid before and approved by a resolution of the Assembly.

Clause 29: Byelaws

Clause 29 provides an exemption for certain pavement cafés from the restrictions on drinking in areas designated by district councils. The exemption applies if the pavement café area is associated with a pub, hotel, restaurant, guesthouse (in which the business of a restaurant is

carried on), or a refreshment room in public transport premises, licensed under the Licensing (NI) Order 1996, and does not have a licence condition prohibiting consumption of alcohol.

Clause 30: Definitions

Clause 30 provides definitions for key words and phrases used throughout the Bill.

Schedule

The schedule contains amendments to other legislation as a consequence of the introduction of the Bill.

Paragraph 1 amends Article 71(2) of the Roads (NI) Order 1993 in order that a pavement café licensed by a council, to operate on a road, can do so lawfully.

Paragraph 2 inserts a new Part 5A into the Licensing (Northern Ireland) Order 1996 (the Licensing Order) which introduces new Articles 76A to 76E. A licence is granted under Article 5 of the Licensing Order to certain categories of premises to sell intoxicating liquor for consumption on or off the premises. The Licensing Order does not expressly state where a sale of intoxicating liquor takes place. Therefore the common law is relied on and such a sale is considered to take place at the location where the intoxicating liquor is appropriated to the contract, that is, the bar in the relevant premises. Consequently, Part 5A extends the area where alcohol may be consumed to include a pavement café area associated with certain categories of licensed premises but does **not** extend the area where intoxicating liquor can be sold.

Article 76A provides definitions for certain expressions used in new Part 5A in relation to pavement café areas.

Article 76B provides that for certain purposes a pavement café area, associated with certain categories of premises which may be granted a liquor licence under Article 5 of the Licensing Order, is to be treated as part of such premises. This ensures that a hotel, a guest house in which the business of a restaurant is carried on, a restaurant, or a refreshment room in public transport premises, which would otherwise be prohibited from selling intoxicating liquor for consumption off the premises, is permitted to sell intoxicating liquor for consumption in the pavement café area associated with the premises. This relaxation applies where the pavement café licence does not contain a condition prohibiting the consumption of alcohol in the pavement café area.

Article 76C provides that the pavement café area associated with certain categories of premises which may be granted a licence under Article 5 of the Licensing Order is to be treated as part of such premises for the following purposes:- the hours for licence holders permitting consumption of intoxicating liquor and for customers consuming intoxicating liquor; drinking up time following the end of the permitted opening hours; drink promotions; sale or permitting the sale of alcohol to young people under 18 years of age; preservation of order and legal proceedings. These premises are a pub, a hotel, a guest house in which the business of a restaurant is carried on, a restaurant, or a refreshment room in public transport premises. This provision applies where the pavement café licence does not contain a condition prohibiting the consumption of alcohol in the pavement café area. In particular it

ensures that where an off sales section of a pub is not allowed to sell alcohol for consumption on the premises a similar prohibition applies to a pavement café area associated with the premises.

Article 76D provides that young persons under 18 years of age are not allowed in a pavement café area associated with a pub, a hotel, a guest house in which the business of a restaurant is carried on, a restaurant, or a refreshment room in public transport premises where that area is used exclusively or mainly for the consumption of intoxicating liquor. However a children's certificate in force for any part of the above premises will be treated as applying to the associated pavement café area. Following a complaint made under Part VIII of the Magistrates' Courts (Northern Ireland) Order 1981, a court may revoke a children's certificate relating to a pavement café area associated with any of the above mentioned premises.

Article 76E provides that it is an offence for any person who has purchased intoxicating liquor in an off licence premises (which includes supermarkets) to consume it in the pavement café area associated with such premises. It is also an offence for a licence holder if such consumption takes place with his or his servant's or agent's knowledge or consent.

Paragraph 3 amends Section 2 of the Street Trading (NI) Act 2001 to ensure that activity engaged in by a pavement café licence holder in the area covered by the pavement café licence (if this is done in the course of a business supplying food or drink to the public), is excluded from the need to obtain a street trading licence.

Paragraphs 4 and 5 amend Article 70 and Article 72 of the Criminal Justice (NI) Order 2008 to provide an exemption for certain pavement cafés from the restrictions on alcohol consumption in designated areas.

FINANCIAL EFFECTS OF THE BILL

8. The Bill is unlikely to lead to any significant increase in public expenditure. Although the provisions of the Bill will require district councils to incur administration and enforcement costs, these can be recovered through the fees charged for pavement café licences.

HUMAN RIGHTS ISSUES

9. The proposed statutory licensing scheme has been screened for compatibility with the European Convention on Human Rights. No human rights implications were identified.

EQUALITY IMPACT ASSESSMENT

10. In accordance with its duty under section 75 of the Northern Ireland Act 1998, the Department conducted a screening exercise on the proposal for a statutory licensing scheme, concluding that it did not have any significant implications for equality and that an equality impact was therefore not necessary.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

11. The Regulatory Impact Assessment (RIA) noted that the statutory licensing scheme will impact mainly on cafés, restaurants and pubs. There are around 2400 such premises in Northern Ireland, mostly small businesses (businesses with less than 50 employees). It proved difficult to source economic information on which to make an assessment of benefits and compliance costs. The introduction of a new statutory licensing scheme could provide a new revenue stream but ultimately it will be a commercial decision for business owners having regard to the costs of establishing a pavement café and the expected profit. In terms of compliance costs district councils will be able to charge a fee to cover scheme administration costs and may impose various conditions including the quality of street furniture etc. The RIA concluded that the expected benefits justify the costs of regulation.

LEGISLATIVE COMPETENCE

12. The Minister for Social Development had made the following statement under section 9 of the Northern Ireland Act 1998:

“In my view the Licensing of Pavement Cafés Bill would be within the legislative competence of the Northern Ireland Assembly.”