

Pavement Café Bill
Institute of Licensing Response

13 September 2013

Respondent Details

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General Comments

The Institute of Licensing (IoL) welcomes the Committee for Social Development's call for evidence to assist it with the scrutiny of the Pavement Café Bill.

By way of background, the Institute of licensing is the professional body for licensing practitioners, servicing the interests of licensing practitioners in local government, the police, private sector and the legal profession, the Institute operates throughout England, Wales, Scotland and Northern Ireland.

The Institute is fortunate in having access through its membership to well-known and respected licensing practitioners, including Philip Kolvin QC, Susanna Fitzgerald QC and Professor Colin Manchester.

This response has been drafted and agreed by members of the Northern Ireland Branch of the Institute of Licensing whose members are local authority licensing practitioners and members of the legal profession.

The Institute believes that developing a café culture can have a positive effect on urban environments, help promote town and city centres, make a difference in terms of attracting visitors and tourists and contribute to the general well-being of communities.

The Northern Ireland Branch of the Institute is aware that in GB many businesses who seek to benefit from pavement café permission are being frustrated by the hurdles being put in place by some local authorities, as there is no national legislative regime. Local Authorities are using highway consents that tend to cause the most confusion as the name of the consent required varies between different authorities. The names include a Highway Amenity licence, a Pavement Licence, a Street Café Agreement, a Tables and Chairs Licence and in places street trading legislation is used.

As such, the Institute welcomes and is very supportive of the introduction of regional legislation for all of the Province which enables and regulates pavement cafés, as it will provide a level for consistency across district councils and the Institute wishes to make constructive comments to help shape the Bill and offers its expertise, to work with the Department in producing any guidance documents or associated publications.

General comment

The Institute is in favour of an approach which favours approval and limits burdens on businesses. However there may well be a small number of traders who will not provide high quality, safe and appropriate facilities and district councils will need to be able to control these effectively.

When the Department is considering the commencement date for the Bill consideration should be given to a transitional period of implementation to allow councils an opportunity to consider applications from already established pavement cafés. Otherwise Councils may need to deal with a large number of applications within a short time period which will place a significant administrative and resource burden on both Members and Officers.

Reference is made in the Bill to the making of provisions by Regulation. It is recommended that the Department consider introducing some form of Regulations to help ensure consistency of approach and to provide clear guidance to councils on the intent of the legislation.

Committee are advised that a similar provision exists under the Local Government (Miscellaneous Provisions) (NI) Order 1985 which enables councils to issue an entertainments licence subject to such terms, conditions and restrictions as it may determine but in doing so must have regard to the model terms, conditions and restrictions published by the Department. Such model terms were drawn up by a working group which included council officers and have been an invaluable assistance in the administration of entertainments licences.

It is also recommended that any guidance documents issued by the Department have regard to the mobility difficulties of the disabled and the visually impaired and aim to balance this with the needs of local business and economic activities as well as the vibrancy of our town centres.

In introducing the Pavement Cafés Bill the Department should be mindful to avoid the potential for licensed areas to simply become smoking shelters or areas for 'mass vertical drinking'.

Specific Comments

1. Definition of areas that can be licensed.

In the Bill, Section (1) para (2) states - *In this Act "a public area" means a place in the open air to which the public has access, without payment, as of right and which is not in a market.*

On initial reading of the definition of 'a public area' in the Bill, it appears to be very broad and as such it may be argued that this cuts down on red tape and is to be welcomed if this minimises any burden on business.

The Institute would welcome clarification as to the intention of the Bill as regards privately owned land, as it would appear to suggest that the Bill will not apply to any privately owned land. However, the definition of a public area within the legislation is a place in the open air "to which the public has access, without payment, as of right". The Department will be aware that there are significant areas of land which are privately owned for example, Belfast Harbour Estate, Lanyon Place, portions of the Donegall Road and Lisburn Road in Belfast etc. These are however areas over which the public do have unfettered access over the land, it is most likely that the land has become a 'public area'.

Consideration also needs to be given by councils in determining any application to land with restrictive planning conditions or legal agreements regarding its use.

The definition of a public area to which the Bill will apply may result in a district council licensing some, but not all, premises on the same stretch of road where tables and chairs are placed on the footway depending if the portion of land is private or public.

For some premises this will result in no control on design, layout, operating times or control over alcohol consumption in the pavement café area; this is particularly important where there have been problems with disorder. This will lead to confusion and claims of unfairness for those affected. Conversely, premises with a Pavement Café Licence can allow patrons to consume alcohol without them breaching the Alcohol Bye-Laws whereas the premises that cannot be licensed because of the land issue will not be exempt from complying with the Alcohol Bye-Laws.

It is worth noting that in the Street Trading Act (N.I.) 2001, on which the Bill is modelled, there is a different definition of a public place. It is suggested that this definition should be considered as it would have deal with all of the above problems. An extract of the Street Trading Act is provided for clarity:

(3) In this Act "street" includes-

(a) any road or footpath within the meaning of Article 2(2) of the Road Traffic (Northern Ireland) Order 1995 (NI 18);

(b) any public place within the meaning of subsection (4); and

(c) any part of a street.

(4) In subsection (3) "public place" means a place in the open air within 10 metres of a road or footpath-

(a) to which the public has access without payment, but

(b) which is not within enclosed premises or the curtilage of a dwelling."

The Committee may wish to consider if the above issues, if not addressed, would support the policy objectives of the Bill.

"Roads Service generally 'tolerates' pavement cafés provided they do not restrict the free flow of pedestrians or vehicles or compromise public safety..... 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."

There is concern that if the licensing scheme does not regulate **all** pavement cafes then this will not support the creation of a vibrant daytime and evening economy for the general well-being of communities.

A final point relates to a 'market' being exempt from needing a licence. Clarification is sought whether a market must be actually taking place for the exemption to apply and that land which may host a market is not generally exempted.

2. Location of Pavement Café Furniture

It is the Institute's reading of the Bill that an area licensed as a pavement cafe does not need to adjoin the applicant premises. We believe this a sensible approach to allow councils a degree of flexibility as there may be premises that cannot place their furniture directly outside the frontage of their property.

However, we are concerned that this broad flexibility may also be exploited and cause future problems. We would request that the Department considers how controls on limits could be placed on inappropriate competition from businesses which, for example, apply for a licence in areas adjacent to other establishments and that the guidance considers how competing applications for the same area should be dealt with.

For example, a pub could apply for a pavement café licence some distance away from its premises – possibly the whole of a town square – thus gaining an economic advantage over competing pub premises. It is doubtful whether this is the intent of the legislators but is a matter that should be addressed so that councils' are not left with an unnecessary problem.

3. Fees

There is a concern that although the Bill allows a council to charge fees for a Licence application the actual cost of administering the scheme will far exceed what a council will be comfortable with charging already struggling businesses in their area. However, how will the function be funded? We suspect that in part at least, via the rates or from other sources such as a reduction in service in other areas of council work to fund this new function.

Apart from the application fee prospective applicants will need to invest in a reasonable standard of street furniture, produce a site drawing / plan, extend their public liability insurance and consider that the grant of a pavement cafe licence may also impact on the business rate liability of the associated property.

4. Temporary Furniture

Section (1) para (4) states - *For the purposes of this Act, furniture placed on a public area by or on behalf of a person is "temporary" if that person can remove, or cause to be removed, all of it in 20 minutes.*

The Institute accepts that if no time limit was placed here then furniture could effectively become permanent. However, if the applicant/licensee has a disability which restricts their ability to remove their furniture in the time permitted this may be seen as discriminatory. It should be for a council to determine what constitutes temporary furniture when considering the circumstances of each application otherwise our power of discretion is being fettered.

5. Publication of Representation Period by Councils

Section (10) para (4) states - *Where a council receives an application made in accordance with this Act, it must, by such means as it thinks appropriate*

(a) make the application available to be viewed by the public until the end of the period allowed for representations; and

(b) publicise the fact that representations relating to the application may be made in writing to the council until the end of that period.

Clarification is sought that the requirement to 'publicise' will be met by councils publishing a list of pavement café applications via such means as on their website. If the intent is otherwise and if, for example, a newspaper publication is required this is expensive and will add unnecessarily to the cost of obtaining a Pavement Café Licence.

6. Refusal/Control

The Institute is concerned that the grounds of refusal do not cover enough eventualities and as such weaken the option for district councils to bring about effective control. This may well be intentional and based on the 'light touch' approach favoured by central government but may prove problematic in the longer term. The Institute is in favour of an approach which favours approval and limits burdens on businesses. However there may well be a small number of traders who will not provide high quality, safe and appropriate facilities and district councils must be able to control these effectively.

Section 4 (2) (b) of the Bill refers to interference to persons or vehicles in the vicinity – there is no consideration for interference or inconvenience to adjacent premises in the vicinity.

At present there is no ground to refuse where the activity will cause environmental problems or detract from the amenities of the adjacent retailers/occupiers. For example, if there are smells from food/alcohol/smoke close to residential property or problems with noise from customers who cause nuisance or annoyance. The Institute is aware of the significant number of complaints regarding nuisance and disturbance arising from smoking shelters after the introduction of the smoking legislation.

There is no ground to refuse if the tables and chairs, etc. are not suitable for their use i.e. being of a stable and robust design and suitable for the intensity of use that they will receive on the street.

There is no ground to refuse the overall design if the design is an eyesore and not appropriate for the area or in keeping with the design of the streetscape, particularly if the area is of significant conservational importance. The Institute believes that the town centre regeneration schemes to improve the streetscape such as Streets Ahead project in Belfast or the promenade in Newcastle must have a pavement café design which compliments the scheme.

7. Enforcement

This Bill does not appear to comply with 'better regulation' principles in that there are no enforcement sanctions apart from revocation and suspension for breach of licence conditions.

A Fixed Penalty scheme would have been a sensible introduction and proportionate for minor breaches of licence conditions such as contained within the Street Trading Act.

Other recently introduced legislation includes provision for fixed penalty notices offering the person committing the offence the opportunity to discharge any liability to conviction for that offence by payment of a fixed penalty. This provides a less burdensome approach for councils and business. In addition, other new legislation has enabled district council's to use receipts from these penalties to assist with the costs of administering the function.

Suspending and Revoking a licence is not a function which is normally delegated to officers. Such a decision is not normally a delegated function from a council to officers. Should officers consider it necessary to bring a licensee before council to consider licence suspension or revocation it is estimated that this will take at least 6 to 8 weeks if not longer!

The Institute would suggest that an ability to prosecute for breach of a licence condition would also be helpful in the context of the potential revocation or suspension of a licence as it would provide

clear evidence to demonstrate whether a condition of licence has been complied with. It is respectfully suggested that a court hearing as opposed to a council hearing is a far more appropriate way of determining whether a licence condition has been breached.

It is recommended that consideration is given to the introduction of fixed penalties as a cost effective means of enforcing this piece of legislation and to include additional offences for non-compliance with licence conditions.

The Bill as drafted does not appear to provide any facility to deal with an imminent threat, or ongoing incidents, of disorder in relation to pavement cafes where alcohol may be consumed. Provision for this should be considered given that the process of suspension or revocation will be lengthy.

8. Alcohol

The Pavement Café licence can permit a person to consume alcohol legally in an area prohibited under the Alcohol Bye-Laws and that is welcomed.

Alcohol can only be consumed outside a public house, hotel, guest house which has restaurant, a restaurant, or a refreshment room in public transport premises. The Institute queries why conference centres, higher educational institutions and places of public entertainment were excluded – this exclusion would cause problems for these premises if they wanted tables and chairs outside.

We reiterate our comments made in section one of this submission where premises with a Pavement Café Licence can allow patrons to consume alcohol in a street without them breaching the Alcohol Bye-Laws whilst the premises that do not need to be licensed because of the land issue will be encouraging their patrons to breach the Alcohol Bye-Laws.

9. Duration of licence

If the Licence is open ended there is potential that it may become a tradable commodity if the licence is granted to a company. In addition, the Bill states that a licence cannot be transferred from one person to another person. It is not clear what the intent of this prohibition is but it would seem that the legislation gives scope to circumvent this in that a company can continue to exist even if the directors change through a sale; whilst it is still the same company in effect the licence has been transferred. It is presumed that a pavement cafe licence is not intended to be solely a personal licence and that a natural person or a legal entity can apply for a licence. However, this should be clarified in the Bill and the possibility for circumvention removed.

10. Amendments to other legislation

This Bill amends the Street Trading Act (N.I.) 2001 in that, where a pavement café licence is in force, any trading carried out in the area covered by the licence, is exempt if

- (i) the trading is done in the course of a business involving the supply of food or drink to members of the public, or of a section of the public, which is carried on by the licence holder at the premises specified in the licence; and
- (ii) the trading does not involve a contravention of the conditions of the licence.”

We understand the intention of the Licensing of Pavement Cafes Bill is to provide district councils with the power to licence occupiers of suitable premises to place tables and chairs on the pavement to facilitate their customers.

There is a concern that this could be a mechanism to allow pavement cafes to set up 'off the premises' barbecues, rotisseries, ice cream machines, drinks/food vending machines, coffee machines and other equipment for the sale of food and drink. The exemption may allow a café/bar to obtain a pavement café licence to effectively become a street trader.

It is our view that businesses eligible to operate an outdoor café should be required to provide food/drinks prepared inside the main premises. If a trader wishes to sell from barbecues, ice cream machines and drinks/food vending machines or alcohol from a temporary bar they should still require a street trading licence with all of the appropriate considerations and checks.

We understand that in other jurisdictions where they have the licensing of tables and chairs there is still a requirement to obtain a street trading licence.