

Belfast City Council Response to the Guide to the Licensing of Pavement Cafes Act (NI) 2014 produced by the Department of Social Development

Introduction

- Having considered the Department's working draft Guidelines on the Licensing of Pavement Cafes (NI) Act 2014, Belfast City Council ('the Council') would like to submit the following comments and recommendations for consideration in respect of the Guidelines.
- The Council is fully supportive of the need to regulate the operation of pavement cafes in its area. Developing a cafe culture can have a positive effect on urban environments, help to promote town and city centres, attract visitors and tourists and contribute to the general well-being of communities.
- The Council has previously commented on the Bill which is now law and would again reiterate those comments and recommendations. However, there are a number of matters, now that the Act is due to be implemented, that the Council would like to comment on.

Date of Implementation and Manner of Legislation

- The Council considers that the implementation date of 1st April 2016 is too soon given that most councils are still dealing with changes to their structure following reform. In Belfast it is expected that around 300 cafes will potentially make applications for pavement cafe licences once the legislation has been implemented. It is envisaged that it may take up to 12 months to licence all of them.
- Under the EU Services Directive if a council does not determine a licence application within a given time then it is considered that the application is granted. This will put considerable pressure on councils to deliver.
- These pressures must also be considered in light of the fact that prior to implementation, policies and procedures will have to be drawn up, application forms

and other documentation will need to be developed, and there is a need to raise awareness with affected parties.

- There may be implications for Councils in relation to budgetary provision for administering the legislation, decisions to be made around the level of fees to be set and equality issues to be considered.
- This task has been made considerably more difficult given that the Department has not drafted Model Terms and Conditions. To facilitate this the Council would recommend that the legislation is adoptive, with transitional arrangements to deal with applications from existing pavement café operators and for new operator applications.
- The Council considers this to be absolutely necessary as it would be impossible to process potentially several hundred applications at the one time. While previously DOE Roads Service has taken a pragmatic approach in Belfast provided pavement cafes do not restrict the free flow of pedestrians or vehicles or compromise public safety, once the Licensing of Pavement Cafes Act (NI) 2014 has been implemented then it automatically becomes an offence to operate a pavement cafe without a licence. The Council needs a transitional period so as to prepare for this.

Current DSD Consultation and required Consultees

- Concerns have been raised by the Council's Equality Section that there has been insufficient consultation on the guidance. It is important that councils, potential licensees and members of the public are aware of the full implications of the legislation prior to its implementation. It is the view of the Council that the guidelines are inadequate, particularly in relation to disabled access, and this inadequacy may be related to the fact that the consultation has not been wide enough.
- The Council believe the following agencies, in addition to others the DSD may determine, should be consulted with:
 - Transport NI;
 - PSNI;

- Land and Property Services;
- Planning Service;
- Disability Action Groups;
- The Royal National Institute for the Blind;
- Older people and people with dependants.

(Belfast City Council can provide an extensive list of disability related groups if requested).

Opinion on the DSD Guidance

- Despite the Department's reticence to establish a Model Terms working group, the Council is of the view that the guidance should be produced in conjunction with all interested parties such as town centre management, Hospitality Ulster, Police Service of Northern Ireland, Transport N.I. etc.
- The Council takes the view that the absence of Model Terms and Conditions is a retrograde step. Model Terms have proved extremely successful for entertainments licensing over a period of 30 years. It is likely that if Model Terms and Conditions are not produced, it will lead to differing standards within and across councils. It will also mean that more consultation will be required than should otherwise be necessary, i.e. consultation will be required for each application. Having agreed guidelines in place reduces the amount of red tape for applicants and ensures consistency across councils. It would also ensure an accountable and transparent framework to enable a cafe culture to develop in a sustainable way and which would facilitate regulation. Increased consultation on each application could be problematic given that a council is required to publish the length of time expected to process an application and to make the time period public in advance in accordance with the Provision of Services Regulations 2009.
- Model Terms would also be useful in establishing city-wide criteria on design. This would mean that any pavement cafes are aesthetically sensitive to the surrounding built environment and streetscape and that the infrastructure enhances the experience of living, working and visiting the city. While the guidance mentions at Para 1.6 the

importance of colour and design being appropriate to the locality and sensitive to those with visual impairments, it does not offer any further guidelines.

- From an equality perspective, having model terms would be welcomed by both customers and cafe owners as it would promote understanding of what is acceptable. For example, in terms of mobility rather than defining only a minimum passageway of 2 metres, model terms and conditions could state a maximum percentage of the footpath to be used, with no less than 2 metres left clear.

Interpretation

- There may be difficulties in interpretation of the legislation for councils that are not addressed in the guidance. For example, Section 1 defines furniture as umbrellas, barriers, heaters, etc. Under Section 2 it is an offence to place furniture on a public area without a pavement cafe licence. However, Section 2(1) qualifies the term 'furniture' by stating that it is 'for use for the consumption of food or drink.' It could be argued that this definition does not include barriers or heaters which 'facilitate the use...of tables and chairs.' It is unclear why Sections 1 and 2 have been drafted somewhat at odds with each other and further guidance would assist; the term 'facilitate the use of...' would have been preferable for both. The Council needs to be clear what exactly it is granting a licence for and whether it will be necessary to have recourse to other legislation, such as the Roads (NI) Order 1993 in order to prosecute for furniture remaining onsite, which does not meet this definition.
- Other terms that a council will need to define by policy and perhaps by empirical research are as follows:
 - Unsuitability;
 - Likelihood of resulting in disorder or inconvenience.
- The Council would appreciate further guidance on what has, to date, been an unregulated matter and it takes the view that the imposition of conditions is limited by the legislation.

- Section 30 defines premises. The definition could prove problematic given that it includes any place other than a public area, and any stall, moveable structure, vehicle or vessel. This means that a pavement cafe can be placed almost anywhere (except for outside off-licence premises), including outside a street trading stall. The Council needs to consider how it will determine such applications, particularly given that the grounds for refusal are vague. Again this is an area in respect of which further guidance or Model Terms and Conditions would be helpful.
- The Council, without Model Terms and Conditions, is being required to define such matters in considerable detail and it is the view of the Council that responsibility for doing so properly rests with the Department. The legislation requires a council to consider the grant or refusal of pavement cafes on an ad hoc basis which is extremely difficult without having an overall planned approach, 'District councils are best placed to make these decisions on a site by site basis, taking account of the characteristics of the site, the space available and the proposed layout of the cafe area.' Para 4.8.

Issues regarding public and private land

- The guidance lacks clarity in relation to planning issues, for example:
- Para 1.5, page 9, states "Any proposal to establish a pavement cafe on private land would be a matter best dealt with through the planning system". It continues by advising potential applicants to contact the relevant planning office for advice and guidance.
- Para 4.15, page 18, states "While it is unlikely that a pavement cafe established under the Act will need formal planning approval, such permission may be required depending on the nature and scale of the proposal."
- Belfast Planning Service has confirmed that planning permission is not likely to be required where it is proposed to place tables and chairs on private land associated with an existing restaurant i.e. within its curtilage, This would include, for example, its forecourt or other open land within the curtilage.

- Use of a public pavement or concourse outside of a restaurant or pub would cause there to be a material change of use to a mixed use of pub / restaurant and public highway. This would require a formal planning application.
- The guidance should advise anyone considering establishing a pavement cafe to contact the relevant planning office for advice/guidance. It should also emphasise that they should consult the planning office with full details of what they propose, including details of the size and layout, means of enclosure, any proposed canopies, awnings and signage.
- Furthermore, planning is not applicable where pavement cafes are on private land where they fall within the curtilage of a site that holds an overarching class use for that facility. It is imperative that the Department consults with DOE Planning Service in relation to this guidance, particularly since the guidance suggests that the Planning Service ought to offer advice and guidance in relation to this matter.
- It appears that the Act will not apply to privately owned land and privately owned land is not defined. As previously advised, there are significant areas of land within the Belfast City Council area which are privately owned, for example, Belfast Harbour Estate and Lanyon Place. However, the public do have access to such areas and some clarification as to whether such areas are intended to be excluded from the requirement to have a pavement cafe licence would be imperative. The term 'as of right' is unclear and the Council is of the view that the guidelines should offer further guidance. It must be remembered that the public will not always have access to private land as of right and if it is the intention to exclude such areas, the guidance should say so.
- Furthermore, some bars in Belfast city centre own the land upon which they have placed pavement cafe furniture, for example, Ten Square and Victoria's bar. It would appear that these premises would not be required to apply for a pavement cafe licence under the legislation.
- This may result in the Council licensing some but not all premises along the same stretch of road. If a pavement cafe licence is issued, the enforcement authority will be

the Council. If not, the enforcement authority for alcohol consumption, noise, nuisance etc will be the PSNI. This will lead to two different authorities and regimes regulating the same activity which will inevitably lead to inconsistencies. It will also mean that for some premises, there will be no control on design, layout or operating times in the pavement cafe area. A pavement cafe licence will exempt an area from the alcohol byelaws, but those areas which cannot be licensed cannot be rendered so exempt.

- The Council recommends that the definitions applied by the Street Trading (NI) Act 2001 would be more appropriate.

Section 25 of the Street Trading (NI) Act 2001 provides the following definitions:

(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.

Decision to zone/ restrict areas

- If it is the intention of the Department to zone areas, it is necessary to provide guidance to the councils as to what constitutes zoning. It would be prudent of the Department to establish criteria and the Council is of the view that Model Terms and Conditions would support this. However, it is noted that Para 4.4 of the guidelines stated that ‘a council cannot simply introduce a blanket ban on pavement cafes in its district’ but it can decide that ‘a particular street or location is unsuitable.’ The Council would appreciate some guidance as to how it can justify zoning under the legislation.
- The Act is not drafted in a manner that would facilitate zoning. A licence must be granted unless one of the grounds of refusal applies. The grounds of refusal set out in Section 4 appear to support the refusal of pavement cafes on a case-by-case basis

rather than providing powers to zone out areas. Cumulative impact is not a ground for refusal within Section 4. There is a risk that there will be a large number of applications in one area and the grounds of refusal are too vague to permit these to be addressed. There is also a duty to consult with DRD and the PSNI 'before deciding an application for a pavement cafe licence.' (S. 4(4)). This does not support the concept of zoning, given that applicants could potentially judicially review a council if their application was not individually consulted on and considered on its relevant merits.

Duration of licences and the introduction of indefinite licences

- Having indefinite licences is not considered an appropriate option at this stage. However, the Council appreciates that licences should be longer than a year. The Council would favour having pavement cafe licences of a duration of initially three years and then progressing to five years. While the Council does not oppose permanent licences, it takes the view that fees would need to be geared to include the initial application fee and a 'top-up' fee to deal with costs of regulation and enforcement.
- The default position appears to be that, under S.6, where a period has not been specified in a licence, that a licence shall remain valid indefinitely. Where there is an error on the licence, e.g. if a time period has by error not been specified, the Council would need a mechanism of rectifying this if it was not the intention to give the licensee an indefinite licence.

Equality Issues

- It is important that the free flow of pedestrians or vehicles is not impacted and that public safety is not compromised.
- There needs to be a conscious reconciliation between the needs of fostering the café culture without discouraging pedestrians from using the footpath.
- Consideration should be given to the increased placement of A – Boards. A board should be easily detectable and noticeable to pedestrians with visual impairments.

- Guide dogs are trained to avoid street clutter but many pathways do not leave enough space for guide dog and assistance dog partnerships to get through without having to step onto the road.
- It is essential that there is a consistent approach to regulation and enforcement across Northern Ireland as the lack of this causes confusion. The Council agrees with the recommendation from Imtac, that there should be a minimum of 2m unobstructed width around a pavement café. Para 4.11 of the draft guidance states: 2m as the 'ideal minimum footpath width, to allow 2 wheelchairs to pass each other comfortably. Where this is not possible, 1.5m or 1m is the absolute minimum'.
- The reference point for this guidance is given as the Inclusive Mobility Report carried out for Department for Transport (GB) 2005. Extracting from any report can lead to confusion when only parts of the relevant information are highlighted. To provide context this is an 89 page report based on ten years old research, during which time the understanding of disability legislation and issues has increased significantly. The report also provides extensive information on maximum length of restricted areas, Para 3.1 states the minimum under 'normal conditions' which the introduction of a pavement café should fall under (given that there are over 300 in Belfast), the following should apply:
 - (a) A clear width of 2000mm allows two wheelchairs to pass one another comfortably. This should be regarded as the minimum under normal circumstances. Where this is not possible because of physical constraints 1500mm could be regarded as the minimum acceptable under most circumstances, giving sufficient space for a wheelchair user and a walker to pass one another. The absolute minimum, where there is an obstacle, should be 1000mm clear space. The maximum length of restricted width should be 6 metres (see also Section 8.3). If there are local restrictions or obstacles causing this sort of reduction in width they should be grouped in a logical and regular pattern to assist visually impaired people
 - (b) Tactile paving and the lead up to it should not be obstructed in any way by the introduction of the café furniture onto the public highway.

(c) All café furniture on the public highway should be of conservative design and made of a non reflective material to limit sensory stimulation for people with autism spectrum disorders. Use of materials should not make it more difficult for blind and partially-sighted people to orientate themselves.

Additional specific Comments in relation to the Guidance

Temporary Furniture

- The guidance states that furniture is temporary if it can be removed within 20 minutes. The drafting is odd given that it refers to furniture that is capable of being removed within 20 minutes, as opposed to furniture that has not been removed after 20 minutes. An offence is committed under Section 2 if furniture remains on a public area – it does not state that an offence is committed if it remains there for more than 20 minutes after the licence expires for the day.
- The Council is concerned that where the licensee has a disability which restricts their ability to remove furniture within the time permitted this could be seen as discriminatory. It would be preferable to allow Councils to consider what amounts to temporary.
- Furthermore, it is only necessary for the applicant to remove the furniture from a public area. Parked vehicles may be used to remove furniture and this could cause further obstruction of the public highway. This matter would most likely fall to Transport NI and the Council cannot refuse a licence simply because there are inadequate storage facilities onsite.

Area for which licence is granted

- Under Section 5, where the plan changes, but remains within 75% of the area originally proposed, it is unclear whether it will be necessary to re-consult. An area could remain within 75%, yet depending on the new position of the cafe, it could have an impact on

various parties. The guidance states that ‘the needs of users of the pavement are paramount.’ This provision means that the Council will be licensing an area for use that was not in the plan. Because the 75% is entrenched in legislation, it is likely to mean that the Council will not be able to impose a condition which will require the pavement cafe to remain as it is on the plan. It may also mean that further plans, etc. could be required although the legislation does not state this. Further guidance on this matter would be of assistance.

Remote Cafes

- Consideration will have to be given to how food and drink will be transported from the premises in which the food/ drinks are being prepared and transported to the pavement café if it is remote and some distance from primary food premises. This aspect has not been considered in the guidance.

Smoking

- Para 4.12 of the guidance states that ‘the pavement cafe area should be enclosed’. This must be considered in the context of The Smoking (NI) Order 2006, which makes it an offence to smoke in a smoke free place. A smoke-free place is defined as those areas which are enclosed or substantially enclosed. This could potentially mean that it will not be lawful to smoke in a pavement cafe.