



21 June 2006

Caroline Flint MP
Parliamentary Under Secretary of State for Public Health
Department of Health
Richmond House
79 Whitehall
London
SW1A 2NL

Health Bill – Secondary Regulations

We understand, as a result of commitments given during debate in Grand Committee, that the Government will shortly be publishing for consultation draft regulations to implement the Health Bill. In advance of this, we wanted to draw your attention to the views and concerns of smaller, independent operators.

The signatories to this letter are:

- The Association of Licensed Multiple Retailers: - the only trade association solely dedicated to representing companies in the pub and bar sector – and especially those with up to 50 outlets.
- BII: - the professional body for the licensed retail sector. It is the fastest-growing membership organisation within the sector, with around 17,500 members.
- Federation of Licensed Victuallers' Associations: - the FLVA represents and supports individual self-employed licensees.

Between the 3 organisations we represent, directly or indirectly, more than 20,000 individual licensees. These are predominantly independent small businessmen, owning and operating community pubs in predominantly suburban or rural locations.

Community pubs are social spaces and play a vital and positive role in maintaining a social focus for local communities. They are often used as alternative community centres, hosting informal meetings, drawing together local sports teams and encouraging charitable events. These are not only the most socially valuable outlets, they are also the most economically vulnerable businesses within our sector – a quarter operate with an annual net income of less than £12,000 - and therefore stand to be the most affected by the implementation of a smoking ban. The fixed costs of the business make tenants or lessees especially vulnerable to changes in income. A reduction of 10% in turnover can lead to loss of 25% in net income, and – in many cases – closure or bankruptcy¹.

¹ FLVA/BII Survey 2005



Overview

As an industry, we understand and accept that the principle of a complete ban on smoking in enclosed public places has been agreed. We are committed to working with Government to deliver this and ensure its successful implementation on the ground. Our recommendations for the content, timing and delivery of the secondary Regulations are predicated on this premise and are designed to achieve a good outcome.

There is no doubt, however, that this will be a major challenge for individual businesses and community pubs in particular. Well over a third of regular pub customers are smokers and this figure rises to 46% of customers in community pubs. This is a much higher proportion of smokers than in the wider population. In addition, smokers tend to be vitally important 'regulars' in community pubs, and spend more in the outlet during an evening out, particular on gaming machines.

In the months immediately following the ban, we anticipate that there will be a significant downturn in trade, particularly in smaller, 'drinks-led' community pubs. This was certainly the experience in Ireland, where very many smaller community/rural pubs closed following the ban and employment levels slumped, taking around 2 years to recover. The challenge is to make this 'dip' in trade as shallow and as short as possible without compromising the public health aims of the Bill.

We believe that the timing of the regulations – both of their issue and implementation – and the clarity of their content will be critically important in ensuring that the negative social and commercial effect of the ban is minimised. Fair and proportionate regulations will, moreover, promote greater acceptance of the ban amongst the licensed trade and our customers.

Timing of the Regulations

We understand that the Government anticipates publishing draft Regulations for consultation shortly. This is to be welcomed and we look forward to commenting on the proposals in due course. Businesses need to see the detail of what is being proposed to enable them to assess the impact on their business and to make the necessary provisions to manage the adverse effects (see below).

Whilst early sight of the draft proposals is undoubtedly helpful, these details can change over the course of the consultation process and parliamentary debate. What small businesses crucially need is early **confirmation** of the detailed legal requirements, and a clear and confirmed timetable for their introduction.

It is important that the lessons are learnt both from the implementation of the smoking ban in Scotland, and also the introduction of the Licensing Act in England and Wales. In both cases, the detail of the regulations was only confirmed a matter of weeks before their implementation and as a result, licensees were unable to plan and respond commercially to the proposals. There was confusion and uncertainty on the part of both businesses and local authorities – something criticised recently by the ODPM Select Committee.

Late publication of regulations and, more importantly, a truncated period between their adoption and implementation disproportionately affect small businesses. These businesses do not have the legal or financial resources to respond quickly to legislative change – unlike their larger commercial rivals – and their slower response time inevitably means that they lose trade as a result. The experience in Ireland following the introduction of the ban shows that

the smaller, community pubs suffer the greatest down turn in trade and takes the longest time to recover.

We therefore recommend that there is a guaranteed minimum time period between the **adoption** of secondary legislation and its **implementation** – a principle recognised by the Government's Better Regulation Task Force. The implementation of the ban represents a major logistical challenge for the hospitality sector, and small community outlets in particular. For example, operators will want to put in place provision to deal with litter and noise, signage will need to be sourced and purchased and there will need to be communication with customers and staff. In addition, as noted below, we believe that many operators will want to provide some external facilities and these may require planning permissions.

All of this takes time, and we recommend that there should be at least 6 months between the adoption of final regulations and the implementation of the ban in the hospitality sector. If this is allowed, then we believe it will result in a more successful implementation, with the potential adverse effects – noise, litter, economic and commercial – being avoided and managed. This is certainly the lesson to be drawn from both Scotland and Ireland.

We understand and appreciate the Government's desire to press ahead rapidly with the implementation of the ban. These operational and logistical challenges and the consequent implementation timetable relate solely to the hospitality sector and to pubs and bars more specifically. We do not believe that our proposals would preclude the Government from pressing ahead in introducing a more general ban on smoking in other workplaces and public places more quickly. Indeed, as was proposed in the 2004 White Paper, there may be merit in adopting such an approach since it will enhance public awareness and acceptance. Moreover, most sides acknowledge that the implementation of a ban in the hospitality sector is season-sensitive and is most sensibly done during the spring or early summer.

Clarity of the requirements

Operators need timely and unambiguous regulations from which to make commercial decisions and investments. In particular it will be important for clear advice and guidance to be given on the provision of external smoking facilities and the possible requirements for planning permission.

Evidence from Scotland and Ireland suggests that smoking levels are likely to remain the same, at least initially, following the introduction of the ban. Given the high proportion of pub customers who smoke, it is important that smokers are managed and accommodated on site where possible to avoid causing the nuisance of smokers on the pavement and associated noise and litter outside the premises. Good planning can alleviate these problems and help to avoid them, but businesses need time to manage this.

Compliance with the smoking ban in the Irish licensed trade has been remarkably high. This is likely to be at least partly as a result of the growing provision of high quality facilities for customers who choose to continue to smoke. Crucially, the rules on construction of these facilities were clear some months before the ban was introduced. They were creatively interpreted by licensees and flexibly controlled by local authority representatives.

In contrast, in Scotland the regulations on smoking facilities were still only available in draft form just 4 weeks before the implementation date. This effectively provided no time at all for operators to draw up the necessary plans and gain permissions needed in order to undertake the work required. Moreover, the absence of clear national guidance meant that local authorities interpreted the national rules differently and there was confusion and uncertainty

on all sides. As a result, when the ban was introduced only 1% of licensees had successfully obtained permission for external shelters. As a result, there was no provision for customers but more importantly no tools in place to manage and control potential nuisance. It is imperative that such a situation is avoided in England.

We need clear rules for what is allowed, what requires planning permission and what does not, and how applications should be handled. This is particularly important in respect of the coverage of external areas with canopies or umbrellas. We strongly recommend that clear national guidance – possibly a planning policy guidance note – is circulated in advance of the ban. This note should make clear that:

- provision of litter bins for cigarette butts in or immediately outside licensed premises should not require specific planning permission. We estimate that around 32% of pubs are landlocked with no external area – smokers will therefore stand outside the premises or in a small back yard to smoke and litter bins will minimise nuisance.
- as in Scotland, 50% of the perimeter of a roofed area should be allowed to comprise walls, windows and doors without being considered substantially enclosed. This should be expanded to allow 50% roof coverage of an area whose perimeter is enclosed. The recent announcements about possible smoking prohibition ‘outside of workplaces’ will have to be consistent with Regulations on the arrangements permitted outside hospitality premises – themselves being workplaces.
- we firmly believe it is unnecessary to require signage in all outlets in the context of a general ban on smoking in workplaces and public places. We have no doubt that many licensees will choose to retain their existing signage or display new no-smoking signs within their premises, but this should not be a legal obligation. However, if signage is to remain within the Bill, we firmly believe that the size, colour wording and positioning of such signs should be left to the discretion of the licensee and should not be set out in Regulations. The legal requirement should simply to be to display the internationally recognised ‘no-smoking’ sign.

Provision of adequate facilities will be central to the continued welfare of many licensees, enabling them to minimise any potential drop in trade and avoid smokers going elsewhere. It is also crucial to reducing annoyance and disruption for neighbours. Clear, sensible and flexible national rules will enable retailers to deliver this and will crucially promote a greater acceptance of the ban amongst publicans and public alike.

Fairness and proportionality

The introduction of timely, clear and unambiguous regulations will go a long way towards ensuring that the ban is fair and its adverse effects do not fall disproportionately on the smaller, community operators. As noted above, larger, better capitalised businesses are able to respond quickly to legislative change and can invest speedily in external facilities. It can take smaller operators up to a year to respond in the same way.

However, the trade still believes that the section of the Bill dealing with penalties for non-compliance are disproportionate and place an unfair burden on them to police the ban. These sections of the Bill threaten to jeopardise any wider acceptance of the ban itself and could undermine its successful implementation.

Licensees and outlet operators will be responsible for communicating, implementing and enforcing the ban in their premises. A customer caught smoking faces a fine of £200; the licensee or operator faces one ten times that amount. During Grand Committee in the House

of Lords, the Minister gave assurances that these were maximum amounts and would only be applied to repeat offenders, but that is scant re-assurance for smaller operators for whom such an amount would be significant.

These operators fear inadvertently falling foul of the law or being penalised despite their best endeavours. We therefore believe that the Regulations and any accompanying guidance should make clear that a defence of due diligence will be acceptable and that the offence relates to **knowingly** allowing someone to smoke on the premises. The level of fine should be reduced for initial offences and a clear scale of fines should be introduced so that trade and enforcers alike are clear as to the level of punishment for a first time offence.

We also believe there would be merit in including within the Regulations a delay before these offences take effect and legal penalties applied. This approach has been successfully adopted in the context of the licensing of door supervisors and of houses of multiple occupation, for example, and would see the offence come into being at the same time as the ban is introduced, but a period of grace allowed before offences are prosecuted.

Conclusion

We strongly recommend that these proposals for the timely introduction of clear, unambiguous and above all business-sensitive regulations are taken into account in the drafting of secondary legislation. In particular, it is vital that an early timetable for the introduction of the ban is set out, and a minimum time frame allowed between the adoption and implementation of the Regulations to avoid unnecessary and substantial damage to the fabric of our industry and the communities that we serve.

This letter has also been sent to The Minister of State for NHS Delivery and will be copied to Ministers and officials in other relevant departments.

Yours sincerely,



Nick Bish, CMBII
Chief Executive
Association of Licensed
Multiple Retailers



John McNamara, CMBII
Chief Executive
BII



Tony Payne, CBE
Chief Executive
Federation of Licensed
Victuallers Associations