

# ASH Briefing for local authorities: Pavement licences and smoking

June 2023

## Introduction

1. This briefing sets out the legal, public health, and economic rationale for local authorities who want to impose a local 100% smokefree seating condition when determining pavement licences under the Business and Planning Act 2020.<sup>1</sup>
2. The Business and Planning Act 2020 sets out a fast-track process for pavement licenses allowing licence-holders to place removable furniture over certain highways adjacent to the premises. This was initially introduced as a temporary measure to help hospitality premises during the COVID-19 pandemic.
3. The pavement licence conditions in the Business and Planning Act 2020 will be made permanent via the Levelling Up and Regeneration Bill currently going through Parliament.<sup>2</sup>
4. Local authorities have two options on smoking: to implement the national condition to provide 'reasonable provision' for some smokefree seating; or to go further and make 100% smokefree seating a condition of licenses at local level.
5. When pavement licences were first introduced, arguments were put forward that 100% smokefree seating conditions would wreck the chances of the cafes, pubs and restaurants recovering from lockdown and could lead to thousands of job losses. This has not been the case; smokefree pavement licences have proved popular with the public and easy to implement.
6. 100% smokefree seating is clear and simple, easy to understand, easy to implement and easy to enforce. Making seating entirely smokefree seating meets the test for 'reasonable justification' because it is needed, wanted and workable.
7. The benefits of 100% smokefree outdoor seating are recognised in the 2022 [Khan Review: making smoking obsolete](#), commissioned by the Secretary of State to set out the measures needed to deliver a smokefree 2030. The Review recommends that the Government amend the 2006 Health Act to prohibit smoking on all premises where food or drink is served, outside as well as indoors. In addition, the Review calls for the introduction of more smokefree outdoor public spaces through a ban on smoking in all outdoor areas where children are present.
8. Smokefree pavement licensing is supported by the [Local Government Association](#) (LGA) which said that: *"it sets a level playing field for hospitality venues across the country and has a public health benefit of protecting people from unwanted secondhand smoke."* And that: *"If smoking is not prohibited, pavement areas will not become family-friendly spaces."* The LGA Community Wellbeing Board has confirmed this remains the LGA's position.

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## Legal Justification for smokefree pavement licences

9. A legal opinion for ASH has confirmed that a 100% council-wide prohibition on smoking is allowable under the legislation and the guidance in principle (as are 100% prohibitions on individual premises). Liverpool,<sup>3</sup> Manchester,<sup>4</sup> Newcastle<sup>5</sup>, Durham,<sup>6</sup> Northumberland,<sup>7</sup> Middlesbrough,<sup>8</sup> North Lincolnshire,<sup>9</sup> Brent,<sup>10</sup> Stevenage,<sup>11</sup> South Tyneside<sup>12</sup> and North Tyneside<sup>13</sup> Councils have implemented this, and others are considering doing so.
10. The guidance says (confirming what the Act implies) that local authorities can impose local conditions which are different from the national conditions, and that where the local authority does impose local conditions they take precedence where there is reasonable justification to do so.
11. However, councils need to provide “reasonable justification” where they set their own conditions. Therefore, in imposing a local condition which is different from a national condition, a local authority ought to set out the justification for doing so in its decision making process, for example in the officer’s report to the licensing committee.
12. Such a report should include evidenced public health justification making the link between the harm caused by smoking, why tackling this is a priority for the council and the harm that could arise from smoking in licensed pavement areas. The public health evidence is set out below.

### Needed: The public health justification

Supporting reductions in smoking prevalence (see Appendix 2 for further information)

13. The UK is a party to the WHO Framework Convention on Tobacco Control and its obligations apply to all parts of government including local authorities.<sup>14 15</sup>
  - Article 3 sets out the objective of the Treaty which is: *“to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.”*
  - Article 2 states that *“In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols”*.
  - Article 4, sets out the guiding principles which include:
    - *2(a) the need to take measures to protect all persons from exposure to tobacco smoke;*
    - *2(b) the need to take measures to prevent the initiation, to promote and support cessation, and to decrease the consumption of tobacco products in any form;*
14. The Prevention Green paper published in July 2019 lines up with our FCTC obligations, in setting out the Government’s ambition for England to be smokefree by 2030.<sup>16</sup> It recognised that delivering on this ambition would be *“extremely challenging”*, and require *“bold action to both discourage people from starting in the first place, and to support smokers to quit”*. It goes on to say: *“It will mean the government, both local and national, working with the health and care system, to put prevention at the centre of all our decision-making.”*
15. Following the passing of the Health and Social Care Act 2012, local authorities have, since 1 April 2013, been responsible for improving the health of their local population. Reducing smoking prevalence, both in preventing people starting smoking and supporting smokers to quit, is recognised as essential to improving population health and reducing health inequalities.

16. For those who smoke, smoking is the main modifiable risk to their health, reducing life expectancy and quality of life. 78,000 people die a year from smoking in England with an estimated thirty times as many suffering from serious smoking-related diseases.<sup>17 18</sup> Smoking is also responsible for half the difference in life expectancy between the richest and poorest in society.<sup>19</sup> Local data is provided by the Office for Health Improvement and Disparities (OHID) at: <https://fingertips.phe.org.uk/profile/tobacco-control>
17. Stopping smoking leads to immediate improvements in respiratory and cardiovascular health. Current smokers are:<sup>20 21</sup>
- More than five times as likely as non-smokers to have microbiologically confirmed influenza, and twice as likely to develop pneumonia, major factors in the winter bed crisis.
  - Twice as likely to suffer acute coronary events, and when they do, twice as likely to die from them.
  - Significantly more likely to be admitted to hospital than non-smokers, spend on average longer in hospital and are more likely to be re-admitted within 30 days of leaving hospital.

#### Creating family friendly spaces that denormalise smoking

18. As the Local Government Association has stated, where smoking is not prohibited completely pavement areas are not family-friendly spaces. Not just customers and staff, but neighbouring premises, particularly in cramped inner-city areas, will be exposed to the unpleasant smell of secondhand smoke, and the litter left behind.<sup>22</sup>
19. Furthermore children exposed to adults smoking around them are more likely to start smoking,<sup>23</sup> Children exposed to adults smoking around them are more likely to start smoking,<sup>23</sup> with two thirds of those experimenting with smoking going on to become daily smokers.<sup>24</sup>

#### Helping smokers quit and stay quit

20. As part of their responsibility to promote public health, local authorities provide stop smoking services to help smokers quit and stay smokefree. But relapse is common with many smokers taking as many as 30 attempts before they successfully quit long-term.<sup>25</sup>
21. Designating pavement licences as smokefree can provide a more supportive environment for smokers trying to quit and stay quit. A population representative longitudinal cohort study in Canada found that exposure to smoking on patios of a bar or restaurant was associated with a lower likelihood of success in a quit attempt. The conclusion was that instituting smokefree patio regulations may help smokers to avoid relapsing after quitting.<sup>26</sup>
22. If smoking is allowed, passers-by, customers and above all staff, who have no choice, will be exposed to significant amounts of tobacco smoke:
- Where patio smoking bans (very similar to pavement licences) were implemented in Canada secondhand smoke exposure went down by up to a quarter, while where there was no ban, it went up.<sup>27</sup>
  - Hospitality workers in places where smoking was allowed on patios in Canada were found to be exposed to significant levels of toxic chemicals associated with vascular injury.<sup>28</sup>

## Preventing harm caused by secondhand smoke

23. The scientific evidence indicates that there is no risk-free level of exposure to secondhand smoke.<sup>29</sup> Associated health effects include stroke, lung cancer, coronary heart disease, low birth weight, nasal irritation, middle ear disease, respiratory symptoms, impaired lung function, lower respiratory illness, and sudden infant death syndrome.<sup>30</sup>
24. Significant decreases in hospital admissions for worsening of chronic obstructive pulmonary disease (COPD) and for acute coronary syndrome have been found in numerous jurisdictions following the implementation of smoke-free policies.<sup>31 32 33</sup> This evidence supports eliminating exposure to secondhand smoke as a public health priority.
25. Following the COVID-19 pandemic, concerns about indoor exposure to viruses are greater, particularly for those with pre-existing respiratory problems, which increases the importance of access to smokefree outdoor areas to hospitality venues.<sup>34</sup>
26. Air quality studies have shown that where smoking is allowed in areas adjoining hospitality venues exposure outdoors can be significant, and smoke can, and does, migrate through the outdoor area as well as indoors.<sup>35</sup>
27. Just as with smoking indoors, the level of exposure is highly dependent on the number of cigarettes smoked. However, average outdoor tobacco smoke particle levels near active sources over the course of one or more cigarettes can be comparable with average indoor SHS particle levels observed to occur in living rooms or bedrooms during smoking.<sup>36</sup>
28. Another study of bars in Toronto with outdoor smoking patios tested levels of particulate polycyclic aromatic hydrocarbons (PPAH). Mixed model analysis showed that PPAH levels increased significantly with number of lit cigarettes per patio area. High levels of PPAH on patios may be associated with sustained vascular injury. The authors concluded that complete smoking bans including outdoor workspaces are needed to adequately protect hospitality workers from secondhand smoke.<sup>37</sup>
29. Where patio smoking bans (very similar to pavement licences) were implemented in Canada secondhand smoke exposure went down by up to a quarter, demonstrating that prohibiting smoking on patios was an effective public health measure.<sup>27</sup>

## **Wanted and workable: Public support and the economic case**

### UK evidence

30. Smokefree outdoor seating is supported by the vast majority of the public. Based on a 2022 Yougov survey of over 10,000 adults in England, 62% of adults support banning smoking in the outdoor seating areas of all restaurants, pubs and cafes, compared to 22% who are opposed.<sup>38</sup> Support for smokefree outdoor seating is consistent across all regions in England and supporters of the main political parties.
31. A 2012 survey of over 4,800 pub customers in Britain found one in five said they visited the pub more often after smokefree legislation was introduced, with 70% saying they were more likely to take their children. More than one in three said they actively avoided pubs with crowds of people smoking near the entrance.<sup>39</sup>
32. Fewer than one in seven adults smoke,<sup>40</sup> and people dislike being exposed to tobacco smoke. When Greater Manchester surveyed its population, over 70% wanted the areas immediately outside public buildings to be smokefree environments.<sup>41</sup>

33. Pavement licences exacerbate the problem as by definition they are designed to make it easier for bars, restaurants and pubs premises to serve food and drink to customers on the pavement immediately outside their premises.<sup>42</sup>
34. Smokefree laws were introduced in England in July 2007 and government statistics show that the number of premises with licenses to sell alcohol increased rather than decreased by 4,200 during that year.<sup>43 44</sup> While [Forest](#), the tobacco industry funded lobby group, still asserts that the legislation “*was a significant factor in thousands of pubs closing after it was introduced in 2007*”, the data show that there was an increase in licensed premises serving food, and the only decline was in the number of pubs that were drinking only establishments.<sup>45</sup>

### International evidence

35. A New South Wales Health survey found that 38% of males and 43% of females would frequent a venue ‘more often’ if it banned smoking in outdoor dining areas. Only 6% of males and 5% of females stated they would visit ‘less often, the remainder of the respondents indicated it would have no effect on their attendance.<sup>46</sup>
36. The evidence from Canada where 9 out of 13 provinces plus major cities like Vancouver have ‘patio smoking bans’ which cover the same areas as pavement licences, is that they are supported by the public.<sup>47</sup>
37. An international review, across 56 studies, of the financial impact of indoor smokefree policies for hospitality businesses found that: “An increase in the share of bar and restaurant sector sales in total retail sales was associated with smoking bans.”<sup>48</sup> A subsequent analysis of the impact on bars, cafes and restaurants in Europe concluded that smokefree laws had “improved public health without a corresponding negative impact on revenues and employment in the hospitality industry”.<sup>49</sup>
38. A survey of the impact of implementation of patio smoking bans across Canada found that:
- Compliance was high and enforcement was not an issue (as measured by complaints and charges)<sup>47 50</sup> In Ontario where 100% smoke-patios outside restaurants and bars were introduced in 2015 compliance based on inspections was 96% from the outset, higher than for enclosed workplaces and public places.<sup>50</sup>
  - There was no evidence of an adverse impact on business after the law came into effect. Fears some businesses had in advance of implementation that they would lose out, “turned out to be unfounded”.<sup>47</sup>
39. The hospitality trade has not been harmed by smoking bans to date either in the UK or any other country.

### **Appendix 1: Detail on pavement licences**

40. The detail is included in the Act and the Guidance both available online and summarised below.
41. A pavement licence is granted by the local authority to allow the licence-holder to place removable furniture over certain highways adjacent to the premises.
42. Pavement licences are presently granted under the Business and Planning Act 2020. The Act introduced a more streamlined process to allow businesses to secure pavement licences during the coronavirus pandemic. This streamlined system was initially introduced

as a temporary measure but will be made permanent by the Levelling Up and Regeneration Bill.

43. The fee for applying for a licence is capped at £100 and the consultation period is 7 days (excluding public holidays) starting the day after the application is sent electronically to the authority.
44. If the local authority does not determine the application before the end of the determination period (which is 7 days beginning with the first day after the end of the public consultation period, excluding public holidays), the licence is deemed to have been granted for a year (but not beyond 30 September 2023) and the business can place the proposed furniture such as tables and chairs within the area set out in the application for the purpose or purposes proposed.
45. The 2020 Act sets out two conditions which apply to pavement licences which are granted or deemed to be granted these are: a no-obstruction condition and a smoke-free seating condition. These apply only to licences granted under the Business and Planning Act 2020, not existing licences permitted under Part 7A of the Highways Act 1980, or other relevant legislation.
46. The smokefree seating condition in the legislation requires a licence-holder to make 'reasonable provision for seating where smoking is not permitted'. Guidance published by MHCLG<sup>51</sup> requires local authorities to assess whether the 'reasonable provision' test has been met. See below for relevant extracts from the guidance, which lacks specificity:
  - Reasonable provision means that where businesses provide for smokers, customers will also have the option of sitting in a non-smoking area.
  - Ways of meeting this condition could include:
    - Clear 'smoking' and 'non-smoking' areas, with 'no smoking' signage displayed in designated 'smoke-free' zones in accordance with Smoke-free (signs) regulations 2012 which can be viewed here.
    - No ash trays or similar receptacles to be provided or permitted to be left on furniture where smoke-free seating is identified.
    - Licence holders should provide a minimum 2M distance between non-smoking and smoking areas, wherever possible.
47. At a minimum therefore smoke-free seating must be provided, but councils can go further and require that seating be entirely smokefree. Where a local authority sets a local condition that covers the same matter as set out in national conditions, then the locally set condition would take precedence over the national condition where there is reasonable justification to do so.<sup>51</sup>

## **Appendix 2: Smokefree 2030 ambition and smoking prevalence**

48. Major public health benefits, including for workers, have been secured from banning smoking in enclosed public places.<sup>52 53</sup> In particular:
  - There was 98% smoke-free compliance from the outset and strong support for the legislation from the business community with 87% of businesses saying implementation had gone well, and 40% reporting a positive impact and only 3% reporting a negative impact.
  - Public perceptions of the personal, health and environmental benefits of being smoke-free grew, and the proportion of the public prohibiting smoking in their home grew. Approximately two-thirds (67%) said that smoking was not allowed at all in their home in 2007, compared to 61% in 2006.



- An additional 300,000 smokers in England tried to quit as a result of the legislation with the Stop Smoking Services reporting an increase of 22% in the number of successful quitters at 4 weeks.
- Support for the legislation grew after implementation, particularly for pubs and restaurants. In 2005 before the legislation was passed two thirds of the public supported the inclusion of pubs and restaurants. One year after the legislation was implemented 96% supported smoke-free restaurants and 75% smoke-free pubs.

49. However, banning smoking inside public places displaced secondhand smoke exposure to adjacent outdoor areas.<sup>54</sup> This exposes passers-by and those going into plumes of smoke, with staff worst affected.<sup>55</sup>

50. In 2019, the Government announced its ambition for England to be smokefree by 2030, with a commitment to bringing forward further proposals to deliver this ambition, recognising that it would require ‘bold action’ to achieve its vision.<sup>16</sup> In 2022, the Government commissioned the [Khan review: making smoking obsolete](#) which set out the measures needed to achieve the smokefree 2030 ambition. In April 2023, the Government announced new measures on [‘Achieving a smokefree 2030: cutting smoking and stopping kids vaping’](#) but stopped short of publishing a new Tobacco Control Plan. Only 1 of the 4 ‘must do’ Khan recommendations has been taken forward in full, leaving the smokefree 2030 ambition in jeopardy.

51. Smoking rates have declined but smoking remains the leading cause of preventable premature death, killing 77,800 adults in England and 96,000 in the UK every year,<sup>56</sup> that’s more than 200 every day in England and 250 every day in the UK.

52. Although the most recent data for 2021 shows that smoking rates are declining year on year still more than one in ten of the adult population smokes.<sup>57</sup> The figure is 13% for England, amounting to around 5.4 million adults and 13.3% for the UK, amounting to around 6.6 million.

53. Smoking rates in children under-16 have declined significantly since the millennium as tobacco and smoking has been regulated to a greater and greater extent. In 2000, 19% of 11-15 year olds smoked by 2021 it was only 3%.<sup>58</sup> Despite declining smoking prevalence among 11-15 year olds, over half (52%) reported being exposed to secondhand smoke in the home or car in the last year, while one in ten reported being exposed to secondhand smoke in their home/someone else’s home at least weekly. Children who smoke are much more likely to report being exposed to secondhand smoke in the home or car than children who don’t smoke.

### **Appendix 3: Quotes from supportive councils**

#### **Mark Adams, Director of Public Health, Middlesbrough Council**

*“In Middlesbrough we recognise that supporting smokefree outdoor environments protects non-smokers and children from secondhand smoke as well as encouraging smokers to quit. It’s reasonable for customers to expect outdoor eating and drinking areas to be free from smoke. Smokefree outdoor spaces are an important part of our strategy to create an environment where ‘smokefree’ is the norm and they help to promote a wide strong smokefree message.”*

## **Tom Hall, Director of Public Health, South Tyneside Council**

*“South Tyneside Council, as part of its vision and values, is committed to improving the health and quality of life of its residents and believe it is reasonable and preferable for outdoor eating and drinking areas to be smokefree. Following the extension of temporary pavement café areas post-pandemic, the Council contacted every pavement café proprietor and asked their opinions and observations about introducing a no smoking condition, and no objections were received, with a number being very supportive of the more consistent approach which is easier to comply with and requiring little to no enforcement.*

*“Creating and supporting smokefree environments benefits individuals, the wider community and businesses – supporting those trying to quit the habit, promoting positive role modelling for children and young people, and reducing the harm from second-hand smoke. Smoking rates in South Tyneside are still far too high at 16.3% and the harm is felt most acutely in our most deprived communities so this measure, alongside wider support to help people to quit or switch to alternatives such as vaping, have a key role in improving health and wellbeing across the borough. Smokefree outdoor places is therefore an important part of our overall strategy to improve the health and wellbeing of our population and tackle health inequalities.*

*“South Tyneside Council recently endorsed the All Party Parliamentary Group report on Smoking, and strongly supports the recommendations from the Khan Review around the bold steps needed to make smoking history and achieve a smokefree generation of less than 5% prevalence across all populations groups by 2030, and this requires national action including a comprehensive Tobacco Control Plan for England.”*

## **Councillor Thomas F. Robinson, Executive Member for Healthy Manchester and Social Care, Labour Councillor for Clayton and Openshaw Ward**

*“In the city of Manchester, we continue to create environments where smoking is not the cultural norm; where we do everything we can to prevent young people from getting addicted to tobacco, help smokers to quit and stay quit, and protect people from the harms of second hand smoke.*

*Since the pandemic, more and more businesses in the city are expanding outside where the public increasingly expect and enjoy smokefree spaces. We have recently endorsed the smokefree space initiative at our new inner city Mayfield Park, and are looking at new opportunities across the city to ensure we can go further and faster with this approach.*

*Since successfully introducing smokefree pavements across Manchester in 2020, we have demonstrated that by working in partnership with our vibrant cafes, bars, and restaurants, and with wider businesses and communities, we are driving forward our vision for a smokefree future.”*

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