

BIRMINGHAM CITY COUNCIL

REPORT OF THE ACTING DIRECTOR OF REGULATION AND ENFORCEMENT TO THE LICENSING AND PUBLIC PROTECTION COMMITTEE

15 NOVEMBER 2017
ALL WARDS

PROPOSED STRATEGY FOR VENUES OPERATING AS SHISHA PREMISES IN BIRMINGHAM

1. Summary

- 1.1 This report sets out a draft Strategy for your Committee's consideration regarding the multi-agency activities, including those carried out by Regulation and Enforcement, surrounding venues operating as Shisha premises and Shisha smoking in Birmingham.
- 1.2 This draft Strategy consolidates the approaches, led by officers of Regulation and Enforcement, in assisting Shisha premises to be compliant, safe, and have minimal impact on the wider community. The draft Strategy includes activities to inform consumers on the health risks associated with Shisha smoking.

2. Recommendations

- 2.1 Subject to any proposed amendments made by members of the Committee, officers are instructed to undertake a wider consultation with key stakeholders on the adoption of the attached draft Strategy. A public consultation will be then undertaken for a period of not less than 8 weeks.
- 2.2 Officers to present the outcome of the consultation at a future meeting of Committee, with their recommendations on a finalised Strategy for this Committee's approval.
- 2.3 That the Chair of Licensing and Public Protection Committee, writes to the Parliamentary Under Secretary of State for Public Health and Primary Care urging the Government to bring in a Licensing Regime for Shisha premises.

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3. Background

- 3.1 Tobacco smoking is still the biggest cause of preventable disease, death and contributor of health inequalities¹. Tobacco shisha smoking is smoking, similar to tobacco cigarette smoking and, therefore, has the same potential health harms as tobacco cigarette smoking. This method of smoking is also called hookah, narghile, water pipe, or hubble bubble smoking – is a way of smoking tobacco, sometimes mixed with fruit or molasses sugar, through a bowl and hose or tube². Electronic shisha is now available to consumers which are usually in the form of shisha pens or electronic shisha pipes. Electronic shisha is similar to electronic cigarettes in that tobacco is not burnt and vapour is the by-product, not smoke. This report is concerned with shisha tobacco smoking and, therefore, includes venues operating as shisha premises (or commonly known as lounges).
- 3.2 Your officers continue to be at the forefront of tackling issues surrounding shisha activities within Birmingham and nationally. A combination of interventions currently include: partnership working, business support, enforcement activities, collaborative research, raising awareness to consumers and maintaining the priority around shisha interventions assist in making Birmingham's work relevant, effective and shared at a Regional and National level. All intervention outcomes are aimed at assisting premises to be safe, compliant and have minimal impact in their neighbourhood.
- 3.3 There are many partners involved with this work within Birmingham namely; Public Health England, Planning, West Midlands Fire Authority, West Midlands Police, Trading Standards, Public Health and Licensing all coordinated and lead by Environmental Health.
- 3.4 The number of known Shisha operational premises within the City continues to rise (see Figure 1 below). There are 37 shisha businesses known to be currently trading in Birmingham located predominantly in the south east of the City in Digbeth, Sparkbrook, Selly Oak, Hall Green, Nechells and Ladywood Wards. A further 17 premises have been identified as potential Shisha lounges and are under investigation. These are mainly situated in the Lozells and East Handsworth and Aston Wards.
- 3.5 Despite the considerable multi-agency supporting actions and interventions to enable lawful trading of these premises, there continues to be high profile anti-social behaviour; criminal activity; non-compliance with the smoke free legislation; and fire regulations; together with a disproportionate resource demand from all agencies. All of the activity is to ensure customer safety and reduce impacts from associated activities on surrounding communities. This high demand demonstrates the inadequacies of current legislative framework surrounding Shisha premises i.e. no sole piece of legislation is effective in

¹ Professor John Britton, Director, UK Centre for tobacco & alcohol studies, Uni of Nottingham; Tim Baxter, DH and Steve Brine MP .PHE Towards a smoke free Generation: Making it happen here conference. Birmingham November 2017

² <https://www.bhf.org.uk/heart-health/risk-factors/smoking/shisha>

controlling the impact of a poorly/inconsiderately operated premises with this no one agency takes the lead.

- 3.6 In addition, many Shisha premises in Birmingham are expanding their business offer and size to include licensable (e.g. public entertainment – DJ's, performers, music) and non-licensable activities (e.g. food/ restaurants; electronic shisha; street entertainment). In some cases this has a significant effect in the way the premises operate and trade leading them to be akin to nightclub status. This can lead to an adverse impact on the locality.
- 3.7 Dip sample research with university student's³, higher education students⁴ and researchers⁵ reveal that Shisha premises in Birmingham are becoming more mainstream, having a wider diversity of clientele then previously found frequenting them. Many young people (e.g.18 to 24 years) from around the region state that they travel to Birmingham to visit Shisha premises².
- 3.8 Further, this insight reveals many young people continue to believe that Shisha tobacco smoking is less harmful than cigarette smoking (or do not understand that Shisha tobacco smoking is in fact smoking). In addition a number of students² state that they believed Shisha tobacco pipes to be the same as electronic Shisha pens due to the smell of the smoke/vapour given off being the same². Such misunderstanding is anecdotally attributed in part to a lack of messages informing users of any negative health impacts in mainstream media, social media or other platforms. The draft Strategy includes a harm reduction campaign, which could be undertaken at a regional level, that provide messages to remind users of the potential harms Shisha tobacco can pose.
- 3.9 Birmingham Environmental Health was invited to Westminster City Council's Shisha symposium in February 2017 to present its experience of Shisha harm reduction campaign and enforcement interventions as well as report on the research undertaken in 2014 (detailed within Committee report February 2016).
- 3.10 This symposium found many other local authorities, namely Westminster, Brent and Ealing have very similar experiences to Birmingham in terms of legislative challenges, health observations, and anti-social behaviour type impacts. Multi-agency interventions undertaken in these local authorities were also similar. The numbers and types of premises and business offers differ in these areas, in that in general Birmingham now has the fourth highest number of premises in the UK after Westminster, Ealing and Brent Councils.
- 3.11 The aforementioned local authorities have each published Shisha strategy outlining the regulatory, business support and health interventions and outcomes each Local Authority is striving for.

³ University of Birmingham Medical Students research around attitudes towards shisha smoking, discussion February 2017

⁴ Walsall College open day October 2017

⁵ University of Birmingham Physics and Public Health research staff, discussion, February 2017

- 3.12 The recently published tobacco control plan for England – Towards a Smoke free Generation (published 18/07/17) does not offer any additional legislation nor interventions that would reduce the impact Shisha is having on health and communities, particularly relating to young adults.

4. Current Legislative Provisions for Shisha Venues

- 4.1 Shisha premises are businesses that have to comply with legislation like any other business. There is no legal requirement for the business or the operators to be authorised, licensed or registered to open and operate as a shisha premises. There is no legal requirement for shisha businesses to inform the Local Authority that they are trading other than to gain planning permission and if they serve food and/or drinks to register as a food business with Environmental Health.
- 4.2 Smoking is the main activity within shisha venues. The majority of venues known to agencies currently offer tobacco shisha to customers and therefore there is responsibilities of the operators to comply with tobacco and smoke free related legislation. Trading Standards focus on tobacco containing products illegally sold to persons under 18 years old and the steps take to comply with this such as a refusal register and correct labelling of products. In the past there have been claims that underage sales of shisha take place in lounges, however, test purchasing using children has not been explored due to the risk of exposure to the children from tobacco smoke. There appears to be no other Local Authority that has gone down this route.
- 4.3 The Smoke Free Legislation (the Health Act 2006 and related Regulations) was enacted in 2007 to protect workers and the public from second hand smoke. It is an offence to smoke in “enclosed premises” or “substantially enclosed” premises and was drafted and enacted prior to the rise in Shisha premises in the UK. To be deemed a smoking shelter or open to the air 50% of the area must be open. The 50% rule⁶ applying to the ‘openness’ of the premises is often frustrated by the interpretation of this provision especially where the open part of the structure is close to a solid structure such as a wall.
- 4.4 The maximum fine for offences under the Smoke free legislation are £2,500 per offence, which in comparison to the income received by premises is not significant and, therefore, this legislation does not act as a deterrent.

⁶ Under Smoke free (Premises & Enforcement) Regulations 2006 nearly all public places and work places that are enclosed or substantially enclosed must be smoke free. The definition of “Enclosed and substantially enclosed” premises:

(1) Premises are enclosed if they (a) have a ceiling or roof; and (b) except for doors, windows and passageways, are wholly enclosed either permanently or temporarily.

(2) premises are substantially enclosed if they have a ceiling or roof but there is—

(a) an opening in the walls; or (b) an aggregate area of openings in the walls, which is less than half of the area of the walls, including other structures that serve the purpose of walls and constitute the perimeter of the premises.

- 4.5 Many of the activities associated with Shisha premises are deemed as 'high risk' with regards to smoking; potential carbon monoxide levels and potential infection control issues from sharing pipes; potential for underage sales and concerns around means of escape in the event of a fire (due to the numbers of ignition sources). Often these high risks cause the public and many agencies to believe there are closure powers available to close shisha premises. This is not the case as the Health Act 2006 does not contain powers to close down or prohibit shisha premises. The Fire Authority has powers to prohibit premises under the Regulatory Reform (Fire Safety) Order 2005 around lack of provision for means of escape. These powers have been used on a number of occasions in Birmingham's Shisha premises, though once the works required under this legislation have been carried out the premises are allowed to reopen.
- 4.6 A number of Shisha premises have Premises Licences for Late Night Refreshment (under the Licensing Act 2003) for the sale of hot food and hot drinks between the hours of 11pm and 5am, however, these do not impose any requirements or conditions (unless volunteered by the applicant at the time of their application) and neither does this change the opening hours of the business from what is stipulated within their planning permission. To date none of the premises have a licence for the sale of alcohol which would impose other conditions on the business and require the Police to be consulted when considering such a licence.
- 4.7 During 2016/2017 there were only 2 planning applications both for the same premises and both eventually withdrawn, this is despite 22 further premises being found in the last 6 months. Since 2011 all planning applications relating to Shisha premises are referred to Environmental Health to ensure the premises comply at the planning application stage, with the Health Act 2006 and the Environmental Protection Act 1990 with regard to the impact on the amenity of local residents such as noise from activities associated with the premises.
- 4.8 Planning only allows planning permission to be given when a Shisha premises can demonstrate compliance with the Smokefree legislation. However, of late, Environmental Health officers have found that new developments have not adhered to the original approved planning application plans, particularly in relation to the internal design which is crucial in order to comply with the smokefree legislation. These have been referred to the Planning Enforcement Team. Planning legislation does not allow planning applications to be rejected on the basis of being a risk to public health. Environmental Health has a close working relationship with Planning and Planning Enforcement on these issues.
- 4.9 Your officers are working with other local authorities, and there is a consensus it is considered that the best option for effectively dealing with shisha premises to ensure compliance is to introduce a licensing scheme which would consolidate interventions to reduce the current issues and impacts apparent with many of the venues. It is envisaged that such a scheme has

the potential to assist premises with compliance and reducing impacts as all the requirements would be under one regime rather than several. Provisions could be made to have enhanced controls to ensure safety of consumers and employees; ensure minimal impact on local areas and legislate a preventative role in reducing uptake of smoking in the under 18 year olds.

- 4.10 The City Council has written to the Minister for Health on three occasions asking the Government to bring in a Licensing Regime to provide better control of shisha premises, as have other local authorities, but to date, this has not been accepted.

5. The Draft Strategy

- 5.1 In response to issues outlined, a draft Shisha strategy has been prepared, as in the attached appendix, which consolidates current actions and interventions by the city's agencies whose legislation shisha premises must comply with. Further it advises on potential addition interventions in the future for consideration.
- 5.2 The overriding outcome of this draft strategy is for venues operating as shisha premises to be safe, compliant, have minimal impact on the wider community, that they do not encourage under 18 year old uptake and use, and that shisha users have the facts surrounding the potential harmful effects of shisha tobacco smoking to make informed choices on their activity.
- 5.3 The aim of drafting this strategy is for all agencies involved with shisha premises to:
- a) review the current position and reassess their operational, systematic and legislative interventions currently undertaken within and between agencies to;
 - b) whether or not the position or interventions are assisting in achieving the objectives and outcomes within the strategy;
 - c) whether or not additional or alternative interventions should be considered such as a new consolidative legislation regime and lastly;
 - d) If this approach could and should be applied within the region.
- 5.4 Birmingham currently has the greatest number of premises within the region, however, businesses are now being found in Walsall, Wolverhampton and Sandwell. This draft strategy goes some way to ensure there is a consistent approach to businesses within the West Midlands region.
- 5.5 The Lead agencies identified in 3.3 have contributed to the strategy and are sighted on it.

6. Consultation

- 6.1 As part of the formal consultation exercise, this report will be referred to the Cabinet Member for Health and Wellbeing; the Chair of the Planning

Committee; Birmingham Public Health, Public Health England, West Midlands Fire Authority and West Midlands Police.

6.2 This report is to be referred to the Association of Directors of Public Health (APDH) West Midlands Network and Environmental Health Chief Officers for West Midlands to consider adoption of this strategy on a regional basis.

6.3 A public consultation on the final draft will occur for an eight week period. If required a full equality assessment will also be drawn up.

7. Implications for Resources

7.1 The work identified in the report was undertaken within the resources available to your Committee. The current interventions detailed within the draft strategy, undertaken by officers of Regulation and Enforcement, are currently undertaken within the same resource. Further resource for any potential regional work will be considered through funding outside of this committee.

7.2 Any enforcement actions taken in relation to Shisha are subject to the considerations in Regulation and Enforcements enforcement policy.

8. Implications for Policy Priorities

8.1 The work identified in the report contributes to the “succeed economically” strategic outcome, ensuring that all traders conduct their business in a fair and equitable trading environment.

8.2 The work particularly addresses the Council plan priority “To tackle inequality and deprivation, promote social cohesion across all communities in Birmingham and ensure dignity, in particular for our elderly and safeguarding for children”. The work further addresses the Council plan priority “Creating a healthier environment For Birmingham”.

9. Public Sector Equality Duty

9.1 The actions identified in this report were taken in accordance with the Enforcement Policy of the Licensing and Public Protection Committee which ensures that equality issues have been addressed.

ACTING DIRECTOR OF REGULATION AND ENFORCEMENT

Background Papers:

1. Towards a Smoke free Generation. A Tobacco Control Plan for England. July 2017 Department of Health
<https://www.gov.uk/government/publications/towards-a-smoke-free-generation-tobacco-control-plan-for-england>

Figure 1

