

## There's no smoke without a fine.... or is there?

This article deals with the potential for criminal conviction of Landlords whose customers do not observe the smoking ban. It contrasts the position of those facing prosecution for breach of Alcohol Licensing law with those facing prosecution under the Smoking Ban legislation. There is a considerable difference between the two.

In Wales the ban on smoking was introduced by the Smoke-Free Premises etc (Wales) Regulations 2007 which were made under powers created by the Health Act 2006. The ban came into force on 2<sup>nd</sup> April 2007. In England the relevant provisions are mirrored within the Smoke-free (Premises and Enforcement) Regulations 2006 which came into force on 1<sup>st</sup> July 2007.

Section 7 of the Health Act creates an offence where an individual fails to observe the ban.

From a Landlord's point of view, it is Section 8 which is of greater significance. This creates a liability on the part of the landlord but it is a narrower liability than that which landlords are used to facing in the sphere of alcohol sales.

For the sake of comparison we will focus on the position of a hypothetical landlord (Mr Perry) who faces prosecution by his local council because of incidents that took place on the evening of 1<sup>st</sup> April 2008.

Mr Perry is the landlord of the Troopers Arms. He is also, for the purposes of alcohol licensing, the Premises Licensee and the Designated Premises Supervisor. He is present behind the bar most of the time. On 1<sup>st</sup> April he was behind the bar until 9pm. He went home at that point leaving his Bar Manager Ms Jordan to look after the pub until closing at midnight.

Officers of the council had received complaints about smoking within the Troopers Arms and visited posing as customers at 10pm. At 10:15pm they saw Jones the Chimney, one of the regulars smoking at the bar in full view of Ms Jordan the Bar Manageress who did nothing to prevent him doing so.

Whilst they were present the officers also became concerned about one of the young men (known locally as "Bad Manners") who was hurriedly and somewhat furtively downing a pint of Snakebite and Black in the corner of the lounge bar. In the opinion of the officers, there was reason to doubt that he was old enough to be drinking.

The young man was later interviewed and confirmed that he was 17 years old and had been served alcohol without having been asked for proof of age.

Jones the Chimney was not challenged.

Mr Perry was later summoned to attend his local Magistrates' Court and answer to two offences. The first was brought under Section 146 of the Licensing Act 2003 and alleged that Mr Perry as Premises Licensee and DPS had served alcohol to someone under the age of 18. The second brought under Section 8 of the Health Act alleged that Mr Perry had failed to prevent someone smoking within his pub.

## Serving underage

The fact that Mr Perry was not present when Bad Manners was served is of little significance. In order to successfully defend the allegation he must demonstrate that he exercised “all due diligence” to prevent the commission of an offence. The burden of proof will rest on him. He will have to establish on the balance of probabilities that he had put in place a thorough system to prevent underage sales. The key elements of such a system are of course well-known to most licensees. Important features will include:

- Thorough and well recorded training of Ms Jordan
- Prominent signs displaying the law or the policy used in the Troopers Arms in relation to underage sales
- An age related refusals register (ideally cross-referenced with a CCTV system)
- Increasingly, adoption of the Challenge 21 scheme will be significant.

If Mr Perry cannot establish, so that the Magistrates are 51% sure, that his system passed muster then he will be convicted. He will face a fine of up to £5,000 and the conviction might be taken into account on any review of his licence.

## Failure to observe the smoking ban

The fact that Mr Perry was not present and therefore did not see Jones the Chimney smoking is highly significant. Section 8(5)(b) provides his defence. Mr Perry will successfully defend the allegation providing that he shows that that he did not know, and could not reasonably have been expected to know, that Jones the Chimney was smoking,.

An irresponsible Landlord who was flouting the ban might still face conviction notwithstanding his absence. This defence is unlikely to help those few Landlords who put ashtrays on tables!

Notwithstanding that qualification, it can be seen that Mr Perry and other Landlords in a similar position are far less vulnerable to conviction under the legislation pertaining to smoking than that pertaining to drinking.

This difference is not always immediately understood by licensees nor by those in Local Authority enforcement sections.

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