



The mandatory code: a lawyer writes

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Summary of mandatory conditions:

1. Irresponsible promotions.
2. The dentist's chair.
3. Free tap water.
4. Age verification policy.
5. Alcohol in small measures.

Alongside all the brouhaha about the necessity, utility and proportionality of the mandatory code, there is a set of humdrum, but ultimately more important, questions about their legality, practicability and workability. Lawyers' questions I know, but none the less fascinating, because on them rides the issue of whether the entire exercise has been not just an expensive waste of time but a monumental distraction.

The mandatory code will graft five new conditions onto premises licences and club premises certificates. In relation to off-licences, only the fourth condition is attached.

The main problem with the mandatory code is that rather than simply applying the conditions to the licence in a form such as "free tap water shall be made available on request", it attempts to cast duties directly on "the responsible person" by using the formula "the responsible person shall...." The sole exception is the fourth condition which casts the duty on the premises licence holder or club premises certificate holder.

"Responsible person" is then defined by reference to section 153 of the Licensing Act 2003, not a good idea because that section deals with unsupervised sales of alcohol by children. So, "responsible person" means in relation to premises licences, the holder of the licence, the DPS and any individual aged 18 or over who is authorised "for the purposes of the section by such a holder or supervisor." The last part of the definition is plainly irrelevant and unhelpful when applied to licensed activities in general. In respect of club premises, "responsible person" is defined as any member or officer of the club present on the premises in a capacity which enables him to prevent the supply in question, again all very well in the context of section 153 but meaningless in the context of the mandatory code. I.e. the basic definition in the mandatory code is lazy and ill thought out.

This in turn gives rise to a fundamental set of difficulties. While the code purports to cast legal duties on this vaguely defined and shifting set of individuals, there is no clear legal mechanism available for it to do so. For breach of the code is only punishable under section 136 of the Act, the main offence-creating provision in the legislation. Section 136 does not cast a duty on the responsible person at all. It directs its fire at persons who carry on or attempt to carry on a licensable activity otherwise than in accordance with the licence, and persons who knowingly allow such an activity to be carried on. The effect of this section was demonstrated in *Hall & Woodhouse v Poole Borough Council*, where the Administrative Court quashed the conviction of a brewery which held the premises licences but was not actually carrying on the licensable activities being performed in breach of the licence by its tenant.

The already uneasy relationship between section 136 and the realities of licensing is likely to throw up all manner of difficulties in trying to enforce this code. Is a DPS not on the premises carrying on the



activities? Probably not, so he cannot be prosecuted. Is a premises licence holder automatically responsible for any default by a responsible person? Arguably not, because the code is attempting to cast responsibility directly on the defaulting responsible person, not to imbue the premises licence holder with ministerial responsibility for the acts of others. The multiplicity of persons taking the mantle of “responsible person” may itself cause difficulties. What if one responsible person is behaving responsibly and the other not? Is the one the keeper of his brother? When a duty is cast as “the responsible person shall ensure” it looks as though he is. If his brother defaults, then the innocent party might raise a due diligence defence, but is Parliament really to be taken as casting a criminal liability on a person with absolutely no responsibility for the state of affairs complained of?

Regarding the substantive content of the code, the main difficulty is the first condition, which is so convoluted as to be unworkable. The condition strikes at six activities. [PETER ARE THESE GOING TO BE SET OUT IN MORE DETAIL SOMEWHERE ELSE?]. Taking just the first of these, to secure a conviction, the prosecution would need to prove each of the following beyond reasonable doubt: that 1) a responsible person was 2) carrying on licensable activities 3) without having taken all reasonable steps to ensure that staff 4) do not carry out, arrange or participate in 5) games or other activities 6) which require or encourage or are designed to encourage, individuals, 7) to drink a quantity of alcohol within a time limit 8) other than to drink alcohol before the bar is required to close 9) and the games or other activities were carried on for the purpose of encouraging the sale or supply of alcohol for consumption on the premises 10) in a manner which carries a significant risk of leading to or contributing to crime an disorder, prejudice to public safety, public nuisance or harm to children.

The torrent of language apart, vague concepts such as “significant risk of contributing to public nuisance” risk breaching the human rights requirement of certainty in the context of criminal offences. However, it is the sheer number of things which would have to be satisfied to secure a conviction which will deter all but the most doughty authorities from using the provision to prosecute, thus rendering the showpiece of the code a dead letter before the Hansard print is dry. And, in the example just given, the express ability to sidestep the code by simply inviting people to play games which involve drinking before closing time rather than within a time limit means that the code will fail to deter the irresponsible, remembering that the responsible don’t need to be deterred.

There is much more that might be said about this from a legal point of view. My view, however, is that it would be far more sensible for the Secretary of State to issue proper guidance on the topic of promotions, which has still never been done, and for individual licensing authorities to review the licences of irresponsible operators and place targeted conditions on their licences. If a blanket code is to be adopted – and I have not been remotely convinced that it is needed – it needs to be far clearer, cleaner and simply expressed than the linguistic and conceptual miasma which has emerged so far. Perhaps Parliament will still act to improve the draft. Then again....