

Smoke gets in your eyes

David Clifton, director of **Clifton Davies Consultancy Limited**, explains why complying with smoking regulations can be a fag

E-cigarettes: a marvel of our age or a nuisance that you don't want next to you? It all really depends on your personal point of view.

Research conducted by the BBC last year revealed that just over a third of the public want e-cigarettes banned in public places. They are supported by the BMA, who were quoted as saying that e-cigarettes "normalise behaviour that has become socially unacceptable" and that their "biggest concern is that something that looks like smoking becomes glamorous again and may be attractive to children".

Despite the fact that e-cigarettes escape the smoking ban because there is no tobacco and no smoke, instead merely vaporised liquid nicotine, Wetherspoons were amongst the first to ban their use because bar staff were finding it difficult to distinguish e-cigarettes from the real thing. They were followed by Fuller's, Stonegate and other managed house operators. By way of contrast, Enterprise Inns has entered into a deal enabling its tenants to offer Nicolites to their customers at "a market competitive rate".

With such disparity of approach, perhaps it's not surprising that legislators are showing an interest in swooping in with new prohibitions. The Welsh Assembly has been the first off the starting blocks, with a suggested ban on e-cigarettes in public places set out in its White Paper "Listening to you – Your health matters". If you want to respond to that consultation you have until 24 June to do so.

All of this serves to focus attention once again on the smoking ban and smoking shelters.

Although pub and bar operators are under no obligation to provide such shelters for their customers, it can obviously make good business sense to do so if you have space available, rather than risk running into potential public nuisance problems associated with your customers and staff smoking outside in the street.

Here are some considerations to bear

firmly in mind when thinking about providing a smoking shelter:

- If it has a ceiling/roof and more than 50% of the perimeter is made up of walls, windows or doors, the shelter will be regarded under the Smoke-free (Premises and Enforcement) Regulations 2006 as "enclosed or substantially enclosed" – smoking within it won't be permitted.
- If balustrading, lattice work or netting is used to form any part of the walls, the area of each of the open and closed parts will need to be taken into account when assessing the structure under the 50% rule.
- It should not be located so close to the wall of a nearby building or other structure that it prevents proper air-flow through the shelter; some councils regard a 1.5m distance as a minimum to ensure adequate ventilation in such circumstances, but you should check whether your local authority has expressed any view as there is no nationwide consistency of approach.
- In any event, the position of the shelter should not result in secondhand smoke drifting into smoke-free areas of your pub or bar, which could give rise to complaints.
- Bear in mind that planning and building control consents may be required; an application to vary your premises licence may also be needed.
- You may encounter problems with neighbours if noise is caused by smokers talking or chatting on their mobile phones, particularly if it is late at night.
- Another potential nuisance problem is litter, so it's advisable to provide suitable litter receptacles in the shelter.

Ensuring compliance with the rules on smoking shelters can be a complex exercise, involving some very complicated measurements. Do please get in touch if you need further advice. ☎



Questions & Answers



Q: Has the ban on sale of alcohol below the cost of duty plus VAT now come into effect?

A: Yes, on 28 May. The prohibition on such sales is now a mandatory licence condition applicable to all licensed premises in England and Wales. You can find the Home Office guidance on the gov.uk website. It is primarily aimed at supermarkets and off-licences selling alcohol at heavily discounted prices, but it's nevertheless worth checking the multi-buy promotion and inclusive drink deal aspects. However, the provision of genuinely free drinks to customers will not be regarded as sales because in such circumstances the customer will not have paid anything for the drink.

Q: A pub near me that has been a constant source of nuisance recently applied to extend its hours. Some of my neighbours and I objected to the application, but it was granted. What more can I do?

A: Under the Licensing Act 2003, both applicants and those who have objected initially can appeal to the magistrates court against such a decision. The notice of appeal must be given in writing within 21 days of you being notified of the result of the hearing. I suggest you contact the licensing authority and ask them to confirm the last date for lodging the appeal so that you don't miss any deadline.

Q: Are Scottish licensing laws about to change?

A: Not immediately, but on 14 May the Scottish Government published the Air Weapons and Licensing (Scotland) Bill. This will contain proposed amendments to the Licensing (Scotland) Act 2005, including the reintroduction of the "fit and proper" test, the creation of new offences to counter under-age drinking, changes in relation to "over-provision", a nine month deemed grant provision for licensing applications and a new sexual entertainment venue licensing regime. You'll find more details on the scottish.parliament.uk website.

Clifton Davies Consultancy Ltd



Clifton Davies Consultancy Limited is a consultancy business (not a law firm) which specialises in all licensing, gambling and regulatory issues affecting the pub and bar industry. David Clifton and Suzanne Davies are also consultants to Joelson Wilson LLP. The views expressed are given without any assumption of responsibility on their part. If you have any questions, do get in touch and they will be pleased to provide answers, either via this page or direct.

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