

Review

Licensing Without Hiccups



Briefing Note

TEST PURCHASING FOR SALE OF ALCOHOL TO A PERSON WHO IS DRUNK

The Publican reported in November that North Wales police were employing actors to test purchase the sale of alcohol to drunks, which is of course an offence under the Licensing Act 2003. This came on the back of reports in June that a similar initiative had been undertaken in Bexley, Kent.

We understand that both forces were employing actors to enter licensed premises, act in a drunken manner, tell the bar staff that they were drunk and then try to purchase alcohol.

It is an offence under section 141 of the Licensing Act 2003 to sell or attempt to sell alcohol to a person who is drunk, or to knowingly allow alcohol to be sold to such a person. This offence is arguably the 'forgotten offence' within the hospitality and leisure industry as there have been so few prosecutions, perhaps because of the difficulty in establishing proof of the offence, potential confusion surrounding the meaning of 'drunk' and the fact that it is unlikely that the offence will be reported.

However, the offence is punishable by a fine of up to £1,000. Additionally, the offence may lead to a Review of the Premises Licence by the police on the basis of Crime and Disorder. If a Review application is made, the Licensing Committee will be required to consider the Premises Licence at a hearing and have a wide discretion, including restrictions of hours, additional conditions, removal of the DPS, suspension of the Licence for up to three months and, ultimately, revocation.

The legality of test purchasing the sale of alcohol to drunks has not yet been tested in the courts, but perhaps the best protection is to take steps to prevent all persons involved in the sale of alcohol from committing the offence.

Test purchasing has been a method used for many years in relation to sales of alcohol to persons under the age of 18. Section 154 of the Licensing Act 2003 specifically provides the right for a weights and measures inspector to make, or authorise someone else to make, purchases to determine whether the provisions in relation to sale of alcohol to children are being complied with, and there are many sources of guidance available in relation to test purchases in this area, including the Crown Prosecution Service (CPS) and Local Government Regulation (formerly LACORS).

The Police may argue that test purchases for the sale of alcohol to drunk persons are no different to the use of test purchases for sales to persons that are underage. This is of course not true; there is no specific provision in the Licensing Act 2003 for test purchases to be used in relation to drunk persons, whereas there is an express provision in relation to the sale of alcohol to a minor. This provides a possible argument that the Police are acting beyond their powers.

Perhaps more fundamentally, in the case of underage persons, the offence is actually being committed i.e. the test purchasers are aged under 18 so a sale is taking place in contravention of the Act. However, if the Police are employing actors that are pretending to be drunk and are not actually drunk, the offence itself has surely not been committed.

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More generally, businesses may claim that extended use of test purchases is entrapment and therefore an abuse of process. However, this may not be the case: Police are allowed to present an unexceptional opportunity to commit a crime, as long as they do no more than this. Alternative arguments may be made that the Police are acting as an "Agent Provocateur", enticing another to commit an offence they would not otherwise have committed and then prosecuting them. This again is not likely to be relevant as the fact that the offence has only been committed because of the actions of the test purchaser is not a defence.

In relation to both the 'entrapment' and the 'agent provocateur' argument, test purchases have generally been deemed to be acceptable (DPP v Marshall [1988]) on the basis that they aim to collect evidence of criminal acts in which a suspect is already engaged. The Police are however only allowed to present an unexceptional opportunity, with test purchasers acting in the same way as any ordinary customer would do. They are not able to incite / induce / lure a person to commit a crime that they would not otherwise commit and as such, test purchasers for underage sales will normally state their true age if they are challenged by staff.

So what does this mean for operators in practice? One thing is certain: this use of test purchases shows that the Police are taking a particular interest in drunk and disorderly conduct and are stepping up their attempts to obtain evidence, presumably with a view to increasing the number of prosecutions. All persons involved in the sale of alcohol should therefore take care that they do not serve alcohol to a person who is clearly drunk. Licence holders should ensure that they have procedures in place in relation to who can be served alcohol, that members of staff are appropriately trained and that proper monitoring takes place to ensure compliance.

If you would like advice on a failed test purchase please contact Stephanie or Nicola in the first instance.

FURTHER INFORMATION

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