

Mental Health Law Briefing

Number 126

Smoke-Free Legislation – Time Runs out for Mental Health Units

Those who frequent pubs and restaurants will now be familiar with the smoke-free regime introduced by the Health Act 2006 which results in smoke-free environments inside such establishments and sends smokers to eat and drink outdoors, apparently regardless of the season! Due to the Smoke-Free (Exemptions and Vehicles) Regulations, Mental Health Units have not been subject to the smoke-free legislation, although those responsible for overseeing such Units should be aware that the exemption from the smoke-free legislation will come to an end on 1 July 2008.

Mental Health NHS Trusts and Private Hospitals will need to put in place arrangements to ensure that the smoke-free legislation is complied with, otherwise they will face the risk of criminal prosecution.

Section 8(1) of the Health Act 2006 imposes a duty on “any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop smoking”. Where a person fails to discharge that duty he will commit an offence. There are, however, a number of defences to a person charged with such an offence, namely:

(a) that he took reasonable steps to cause the person in question to stop smoking;

(b) that he did not know and could not reasonably have been expected to know that the person in question was smoking; or
(c) that on other grounds it was reasonable for him not to comply with the duty.

A Landlord of a pub, where no smoking signs were displayed has been successfully prosecuted in the criminal courts because he had failed to take *active* steps to stop his customers smoking. The question thus arises as to what steps hospitals will be required to take in order to avoid criminal prosecution; much will depend on what will be considered “reasonable” in the circumstances, having regard to the mental condition of the patient, the risks posed to staff and the resources available to the hospital.

Hospital staff should be trained to encourage patients to stop smoking and make them aware that they may be committing a criminal offence by smoking, provided this does not put the staff at risk of attack. If the patient continues to smoke and it is considered inappropriate to take steps to stop him smoking then staff should record in the notes what attempts have been made to stop the person smoking and why it was reasonable to go no further, for example, due to the risk of violence that the staff might face from a patient.

If a Hospital is charged with an offence then the onus will be on the Hospital to adduce evidence which will be sufficient to raise an issue with respect of the defence; the court must then *assume* that the defence is satisfied unless the prosecution prove beyond reasonable doubt that it is not. It will therefore be necessary for the courts to consider the situations of individual patients on a case by case basis and this highlights the need to keep good records about the circumstances in which steps have been taken to stop the patient smoking.

Section 9 of the Health Act 2006 provides that an authorised officer of an enforcement authority who has reason to believe that a person has committed an offence in breach of the Act may give that person a “penalty notice” in respect of the offence. Such a penalty notice is a notice offering a person the opportunity to discharge any liability to conviction for the offence to which the notice relates by paying a penalty, which will usually be a lower figure than the courts might otherwise award if the case came before the court. The reference to “enforcement authorities” effectively means the local

council for the relevant area. There is no “penalty notice” available for the offence of failing to prevent smoking in a smoke-free place and therefore hospitals are unlikely to be able to minimise fines in this way.

It should also be noted that there is a fixed-penalty notice of £200 for a failure to display no smoking signs (reduced to £150 if paid within 15 days) imposed on a person responsible for managing smoke-free premises. If the matter comes before a court, this offence can attract a maximum fine of £1,000 if the person is prosecuted and convicted by the court.

Those involved in the management of Mental Health Units are now advised to raise issues about dealing with uncooperative smoking patients in training. Consideration should also be given as to whether hospitals should publish guidance on the legal position for both patients and hospital staff.

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April 2008

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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