

Exclusion Orders – Summary of Legal Requirements and Best Practice

Obligation to Approach Problem Gamblers and Provide Information or Advice

A venue manager, or person acting on behalf of the venue manager, after identifying a person that he or she has reasonable grounds to believe is a problem gambler, must approach that person and offer information or advice about problem gambling. The information or advice must include a description of the self-exclusion procedure available: s 309.

Venue-initiated Exclusion Orders

The venue manager, or person acting on behalf of the venue manager, after offering the information or advice, **may** issue an exclusion order to that person prohibiting the person from entering the gambling area for a period of up to two years: s 309. In the *Dunedin Casino decision GC29/06*, the Commission confirmed that there is no obligation to issue an exclusion order if the person approached declines to self-exclude. The issue of an exclusion order in such circumstances is discretionary. The Commission stated:

In contrast to the legal obligation to issue a self-exclusion order once elected, the holder of the operator's licence is not obliged under section 309 (or elsewhere) to issue an exclusion order if self-exclusion is declined, and there is no criminal sanction for failing to do so. Section 309(3) confers a discretion on the venue manager or holder of the casino operator's licence as to whether or not to exclude the person.

Self-initiated Exclusion Orders

Any person who identifies themselves as a problem gambler and requests to be excluded, **must** be promptly issued with an exclusion order: s 310.

Venue Manager Must Issue the Exclusion Order

Only a venue manager, or person acting on behalf of the venue manager, can issue an exclusion order: ss 309(1) and 310(1). The Department's guidelines note that any person that can demonstrate authority to act on behalf of the venue manager is entitled to issue an exclusion order. There have been cases where a treatment provider has been appointed by a particular venue to act on its behalf and issue exclusion orders. The guidelines record that in order for the exclusion order to be enforceable, there should be clear evidence of the person's right to act on behalf of the particular venue. Such evidence might consist of a letter from the venue to the nominated person, or an exclusion order that clearly notes the person's authority to act on behalf of the venue manager.

The venue manager, or person acting on behalf of the venue manager, can only issue an exclusion order for their venue, not other venues which they are not formally associated with or authorised to act for. A society cannot issue an exclusion order that covers all its venues, unless the multi-venue exclusion order has been authorised by each particular venue manager.

No Requirement for a Problem Gambler to Sign an Exclusion Order

There is no legal requirement for a problem gambler to sign the exclusion order issued to them. The Department's recommended exclusion order format, does not include a place for the problem gambler to sign.

Exclusion Order Requests Not Made in Person

A person may request to be excluded, without physically visiting the venue. An exclusion order must be issued if a request is made in writing or by phone (subject to the ability to refuse to issue an exclusion order if identification information and a quality photo is not provided – as discussed below).

The Department's guidelines state that an exclusion order should not be issued when the request is made by a third party, and not the problem gambler. In the December 2005 edition of Gambits, the Department stated:

If a person other than a problem gambler requests an exclusion order for a patron known to them, you cannot issue an exclusion order simply on the basis of that request. First you have to satisfy yourself that the person may be a problem gambler.

The Department's August 2015 document, Gambling Harm Prevention and Minimisation Guidelines, advises that venue staff should treat third party notification as a significant indicator that someone is experiencing harm, and begin observation of the person against the problem gambling identification policy.

The Department's website advises if a person other than a problem gambler requests that an exclusion order is issued to a problem gambler known to them, it is reasonable to do the following:

- thank them for the information;
- assure them that the information they provide will be treated in confidence;
- ask for the name and any available identification of the potential problem gambler;
- advise them that the venue has a policy for identifying actual or potential problem gamblers;
- inform them that the venue will assess the behaviour of the potential problem gambler against its policy, and approach the person if their behaviour indicates actual or potential harm arising from gambling. Alternatively, if staff know the gambler, the venue staff may wish to advise that the gambler will be approached and provided with problem gambling information;
- provide them with problem gambling information and details of how to obtain support for problem gambling;
- provide them with a copy of the venue harm minimisation policy;
- if the venue staff are still concerned that the potential problem gambler may be experiencing problems, the venue manager can then issue a venue-initiated exclusion under section 309 or 309A.

The Department then advises that it is not acceptable to do any of the following:

- say there is nothing you can do;
- ignore the advice; or
- discuss the personal details of the potential problem gambler unless the potential problem gambler has given permission to do so.

If a third party, for example a Problem Gambling Foundation employee, requests that an exclusion order be issued and has with them a written request from the problem gambler, an exclusion order should be issued.

Exclusion Orders Non-revocable

Once an exclusion order is issued, its term cannot be revoked, rescinded, cancelled, withdrawn or re-negotiated for a shorter period.

Requirement to “Issue” an Exclusion Order

Sections 309(3) and 310(1) require the venue manager, or a person acting on behalf of the venue manager, to issue an exclusion order to certain persons. The wording “issue an exclusion order to” suggests that it is mandatory to give the problem gambler a paper copy of the exclusion order.

Ability to Refuse to Issue an Exclusion Order – Lack of Information – Poor Quality Photo

Section 310(1A) permits a venue manager, or person acting on behalf of the venue manager, to refuse to issue an exclusion order if the person requesting the exclusion order fails or refuses to comply with a request to:

- provide the person’s name and date of birth; and
- either provide a recent photograph of the person or consent to a photograph of him or her being taken.

It is also permissible to refuse to issue an exclusion order if the photograph provided is of poor quality: s 310(1A)(b).

Exclusion Order Record Keeping

Venue managers (under game rule 92) are required to keep a record of every person issued with an exclusion order at their venue, including a record of any conditions of re-entry. These venue records must be retained for the duration of the exclusion order term.

Requirement to Remove Excluded Persons

Any person who enters a venue in breach of an exclusion order must be removed from the venue by the venue manager, or a person acting on behalf of the venue manager: s 311(1). If the gaming area has been defined, an exclusion order only

prevents the excluded person from entering the defined gaming area (typically the gaming lounge), not the entire venue.

A constable may be called to assist in removing an excluded person, using reasonable force if necessary: s 311(2).

Exclusion Order Offence Provisions

An excluded person commits an offence punishable by a fine of up to \$500.00 if they enter a venue in breach of their exclusion order: s 312(1).

A venue manager, or a person acting on behalf of the venue manager, commits an offence punishable by a fine of up to \$5,000.00 by failing to issue an exclusion order to a person who has identified themselves as a problem gambler and has requested to be excluded: s 312(2).

It was previously a criminal offence for the venue manager, or person acting on behalf of the venue manager, to knowingly allow a person who was issued an exclusion order under section 310 (self-initiated exclusion) to enter the gambling area of the venue.

Section 312 now provides for a stricter offence. In respect of people who have been issued with an exclusion order under section 310 (self-initiated exclusion), it is now a criminal offence if the venue manager, or person acting on behalf of the venue manager:

- allows the excluded person to enter the gambling area of the venue; or
- fails to remove the excluded person who has entered the gambling area.

There is no requirement that the venue manager, or person acting on behalf of the venue manager, must have known that the person was excluded and was in the gambling area. The venue manager, or person acting on behalf of the venue manager, does, however, have a defence if they can prove that:

- there were procedures in place at the venue to prevent excluded persons from entering, or remaining in, the gambling area;
- they had reasonable grounds to believe that those procedures would be effective in preventing an excluded person from entering, or remaining in, the gambling area; and
- despite the breach, they took all reasonable steps to ensure that those procedures were complied with.

Breach of the above is a criminal offence punishable by a fine of up to \$5,000.00.

Section 311 imposes a statutory obligation on the venue manager, or person acting on behalf of the venue manager, to remove any person that is in the gambling area in breach of an exclusion order (both self-initiated exclusion orders and venue-initiated exclusion orders). The criminal offence in section 312 only applies however when the exclusion order in question is a self-initiated exclusion order.

In Gambits: Issue 58 (March 2015), the Department discussed the offence provision wording as follows:

New wording for offences

The Act provides new wording for section 312 of the Gambling Act, which sets out the offences relating to breaches of the exclusion order requirements.

The new wording changes the onus of proof for a charge relating to an exclusion order. Previously, it was an offence to allow a self-excluded gambler to enter the gambling area of a venue, but only if a person **knowingly** allowed this to happen. This high standard of proof is usually associated with truly criminal offences with high penalties, rather than public welfare type offences like section 312.

The limited scope of the old wording meant that venue personnel who made little attempt to put in place procedures to monitor the exclusion orders they had issued, may not have been held liable if excluded gamblers enter the premises undetected as a result. This undermined the purpose and effectiveness of the exclusion regime.

Accordingly, the nature of the offence has been changed so that an offence is committed if a person who is subject to an exclusion order enters the gambling area of a casino or Class 4 venue. However, there will be “an absence of fault defence” for situations where the defendant (venue manager or holder of a casino operator’s licence or a person acting on behalf of either of those persons) has acted reasonably (that is they had reasonable grounds to believe there were effective procedures in place to prevent excluded gamblers from entering the venue and took all reasonable steps to ensure that the procedures were complied with). This is consistent with the Act’s approach to under-age gambling offences.

Exclusion Order Prosecution Example

In late 2013, a patron was convicted of three charges of breaching an exclusion order under section 312. The patron was convicted and fined \$250.00 plus ordered to pay court costs of \$130.00 in respect of one of the charges, and convicted and discharged on the other two charges. The patron had received prior warnings from the Department. The prosecution is mentioned in the December 2013 edition of Gambits.

Exclusion Orders – Best Practice

In February 2012, the Department presented a number of regional forums. Included in the presentation were some exclusion order best practice guidelines.

The presenters recommended that a venue have a maximum of 20-30 excluded persons at any one time and that exclusion orders be issued for a period of between three to six months.

It was also recommended that two digital colour photos be obtained of the excluded person, a photo face on and a photo taken at a three quarter angle. The photos should ideally have good contrast between light and dark areas. The two photos of approximately A5 size should be printed onto an A4 page. The A4 page should also include the excluded person’s name and the expiry date of their exclusion order. An

example photo sheet (provided by Dr Philip Townshend) can be viewed on the online version of the New Zealand Gambling Law Guide – www.gamblinglaw.co.nz.

Some of the comments made in the forum were reiterated in the March 2012 edition of Gambits where it was stated:

Best practice

Some areas of best practice for treatment providers have emerged that can improve the effectiveness of exclusion orders; perhaps the most important is to regard exclusion as a process not an event. Rather than thinking of exclusion as a one-off, fix-it solution, think of it as a treatment tool that will be used as part of an ongoing treatment plan for the gambler that requires active review and may require renewal and tweaking of the venues involved.

One of the key areas to arise is the importance of limiting the number of venues that the problem gambler will be excluded from. Exclusion orders will always work best when the client is confident that they will be enforced by venue staff. From this it follows that they will be most effective in venues where the gambler is known and frequents the most. As well as venues where the gambler often gambles, the orders can be useful in preventing the gambler from gambling in other likely or at risk venues.

However the practice of large scale or 'blanket' exclusions should be discouraged as this may dilute the effectiveness of the orders for both current and future clients by making them unenforceable by venues. The counsellor or MVE coordinator should encourage the client to first identify venues where they are regulars or at risk and initially go with as few venues as possible.

Duration

Exclusions can be renewed as often as required. There are no limits, so it may be better to do shorter exclusions more frequently than a long exclusion. The rationale is that if a new exclusion request arrives at the venue every three to six months it will keep that person in the minds of staff and staff will be more likely to enforce it. It will also make the exclusion more prominent in the gambler's mind making it more likely they will comply with it. Once again "less is more" in that the shorter duration, the more benefit for the client. Durations of around three to six months is recommended as a working guide.

The Department's website recommends against fixed non-negotiable exclusion periods, and suggests that the term of the exclusion period should be set after consultation with the person that wishes to be excluded. The website states:

Some policies reviewed by the Department provide for exclusion orders to be issued for the maximum period of two years, whilst others set minimum periods of 3, 6 or 12 months. It is important to be aware that for some people, very long, non-negotiable exclusion periods, whilst potentially very beneficial for the person, may deter the person from requesting self-exclusion because the length of the period feels unmanageable. Trained staff should consult with a self-identified problem gambler to determine the period of exclusion.

October 2015