



Northern Ireland
Assembly

Committee for Health, Social Services and
Public Safety

OFFICIAL REPORT (Hansard)

Tobacco Retailers Bill: Northern Ireland
Local Government Association/Chief
Environmental Health Officers Group

22 May 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Ms Sue Ramsey (Chairperson)
Mr Jim Wells (Deputy Chairperson)
Mr Roy Beggs
Ms Paula Bradley
Mr Mickey Brady
Mr Gordon Dunne
Mr Samuel Gardiner
Mr Kieran McCarthy
Ms Maeve McLaughlin

Witnesses:

Ms Patricia Allen	Chief Environmental Health Officers Group
Mr Sean Martin	Chief Environmental Health Officers Group
Ms Jenny Palmer	Northern Ireland Local Government Association
Mrs Karen Smyth	Northern Ireland Local Government Association

The Chairperson: Thanks very much for coming to the Committee. Jenny, are you heading this up? I will let you introduce your team and hand it over for a presentation. Afterwards, we will open it up for questions and comments from members. Thank you very much for coming in front of us today.

Ms Jenny Palmer (Northern Ireland Local Government Association): Thank you, Chairman. I will make the introductions. Sean Martin and Patricia Allen are the technical officers who are present. Karen Smyth is representing the Northern Ireland Local Government Association (NILGA). I am the vice-chair of the environment committee in NILGA. I thank you and the Committee for allowing us to give evidence from local government on the issue, which we take very seriously.

Councils have a keen interest in protecting and enhancing the health and well-being of their citizens. We have worked in an integrated way at local level for many years to develop leisure, play and sporting facilities to encourage the public to lead healthy lifestyles, while actively promoting health messages to encourage healthy eating and smoking cessation. We hope that our partnership relationship with the Department, developed through Investing for Health, can be further enhanced through the implementation of the recently published Fit and Well strategy, making best use of the new community planning powers that will come to councils under the reform of local government legislation. Our officers have been actively involved in tobacco control work for some years, including participation in developing the tobacco control strategy; enforcement of smoke-free legislation, of course; and reduction of illegal sales of cigarettes to children. NILGA welcomes the strengthening of legislation to assist councils in that area of work. We are here, hopefully, in an advisory capacity to

offer you the assistance that you require in bringing about the Bill. As such, if you do not mind, Chairperson, I will hand over to our two technical experts to deal with the clauses.

The Chairperson: To confuse us even more?

Ms Palmer: Yes. *[Laughter.]* Thank you, Chair.

Ms Patricia Allen (Chief Environmental Health Officers Group): Chair and members, on behalf of the Chief Environmental Health Officers Group (CEHOG), my colleague and I welcome the additional powers that are introduced by the Tobacco Retailers Bill. Thank you for providing us with the opportunity to give evidence. Strong legislation that is backed up by tough sanctions sends clear messages, to tobacco retailers and regulators, that underage sales of tobacco are unacceptable.

We estimate that there are 2,500 premises in Northern Ireland that sell tobacco. Data that was collected between 2008 and 2012 shows that councils test purchased at, on average, 18% of tobacco businesses each year. That is only one aspect of the enforcement approach that we take. Annually, councils also visit, on average, 52% of tobacco businesses and correspond with at least 69% of those businesses in connection with their tobacco responsibilities. Over time, that level of activity has delivered a reduction in underage sales. However, we know that the further improvement that we want is not guaranteed. In that regard, we are encouraged that the Tobacco Retailers Bill will enable us to improve the efficiency of our enforcement processes; target our tobacco control resources more effectively; and, ultimately, allow us to work with retailers to restrict the sales of tobacco to persons under 18 years of age.

I will now ask my colleague to take you through the Bill's clauses.

Mr Sean Martin (Chief Environmental Health Officers Group): If you are happy enough, Chair, I will start working my way through the clauses that we have commented on.

I will start by commenting on clause 1, which deals with the register of tobacco retailers. Broadly speaking, CEHOG's view is that councils are the bodies that, in the main, are responsible for tobacco control functions and for dealing with underage sales of tobacco. As such, we believe that it is appropriate that they hold the register. We have registers for other things, such as food control. We register food businesses, cosmetic services, pollution prevention and control permits, and dog licences. The actual process of putting a register in place and registering businesses would not be difficult for councils. They would be able to do that in a cost-effective way.

If the Committee were of the view that it would be advantageous to have a central point of information, there could be a duty placed on councils to share that with a central body, rather than, perhaps, setting up a central body as being responsible for the register. Another possibility, even without a requirement, is if one council was prepared to accept the information from others and host it on their behalf. If there were a feeling that there was a need to centralise the information and that that would be useful, there are a number of different ways in which it could be done, but councils are probably the right bodies to hold the initial registration. It is a fairly common function for them, and something that they would be able to do fairly easily.

Clause 2 deals with the application for registration. We have a comment about the wording. It states that a person "may apply to the council". Given that it is, obviously, an offence not to register, we thought that the wording should be slightly stronger and say "shall" or "must". That is the terminology that is generally used for a legal requirement to register. Clause 2(1) currently reads:

"at which the person proposes to carry on a tobacco business".

We thought that, for clarity's sake, it should perhaps say: "at which the person carries on or proposes to carry on a tobacco business". That is just for the sake of clarifying that it applies to those businesses that are already operating when it comes into force.

With regard to clause 2(2)(a), it looks as though the registration process requires people to register themselves and then to register businesses that they operate; that is, to provide the names and addresses of those businesses. Yet, there also seems to be a requirement for the person to notify an address. Our question is whether that is, indeed, a business address or a personal address. Given the fact that the register is available, if it were a personal address, should that not be removed from the register before that information is made public? We have a question mark over what the intention

is there. Our experience is that, certainly for food businesses, it is business addresses that are registered, and there is very little personal or private address information on the register. It is something that we will certainly seek clarification on, as well as on the implications of it. Again, the requirement to register is that of a person. What that means for companies, and so on, is that, in law, "a person" has a legal definition, and a company is a person. I think that is how it is intended to apply, but we will just seek some clarity on that and how it applies to companies.

We have a comment to make on whether the Committee felt it would be beneficial, through the registration process, to seek a person registering to provide details of their supply relationship and who supplies their tobacco products, and whether that would be of any benefit to another agency in the illicit sale of tobacco. We have not fully worked through the detail, but the Committee might want to consider whether that would be of any benefit.

Clause 3, on the duty to notify changes, is fairly straightforward. The only comment we will make on that is that three months seems an awfully long period of time to have to notify the changes listed in 3(1). If we want an accurate and up-to-date register, it seems rather a long period. Perhaps a 28-day period would, therefore, be more appropriate for the changes that are listed to be notified to the council. There are requirements on councils to maintain the register, and it says that they should do things forthwith and in a speedy fashion, yet we have a clause there that allows someone to have three months to notify changes in their business details.

In relation to clause 4, on changes to and removal from the register, there is a requirement on the council to remove premises from the register that are subject to a restricted premises order, yet there does not appear to be a similar provision anywhere in the Bill in relation to a person who has been subjected to a restricted sales order. Given that the registration process appears to register a person and then the businesses from which they trade, it would seem appropriate that there is a similar provision that puts a duty on councils to remove any person issued with a restricted sales order from the register, and for the council that obtains that to notify the other councils that are maintaining registers so that that information is removed from the register. That would be quite important to make the whole restricted sales order and restricted premises order process work effectively, so that the registers are up to date and reflect any orders that the court has made.

On clause 5, I just reiterate the comments that I made earlier — that if someone did register a private address, there would be a need to ensure that that information was removed from the register before it would be made available to the public. As I said, we would normally do things like that for most of the registers that we maintain, but, again, there is a question around what the registration requirement is for the person. What are they expected to register?

We have no particular issue with clause 6 on the requirement to share information. However — and clause 6 may not be the appropriate place for this — an additional requirement placed on enforcement agencies to share information on fixed penalty notices or convictions would perhaps make the system work more appropriately. If the Committee makes any recommendations on illicit tobacco and whether offences in relation to that are relevant offences, it would be quite important for a council to know that in determining whether three offences have been committed within the three-year period. One of the things that could be looked at is whether there should be a proactive duty on those agencies, councils and HMRC to share information on the relevant offences so that all agencies are aware whenever that third offence has happened and, therefore, when an application for a restricted premises order or restricted sales order can be made. A requirement of that nature would make the process work much more effectively.

I will deal with clauses 7 and 8 together. Those are at the heart of the Bill in the additional powers that are being granted to councils to make the application to the court. I reiterate the comments that I made earlier: on the issue of a restricted premises order, there seems to be a requirement that the premises is removed from the register, yet there does not seem to be a requirement for the person to be removed from the register where a restricted sales order has been issued by the court. Again, to make the whole process of applying for the order work effectively, there is the need for that sharing of information between agencies to ensure that the council is aware of all the relevant offences. As we read it, the three offences do not have to happen in any particular council area, so, again, there is a need for that information to be shared. If my council takes a prosecution and it is successful, we would share that information with the other enforcement agencies. That will make the process much more robust.

On the length of time, it may be appropriate in some cases that the maximum period is more than 12 months. Obviously, that is at the discretion of the court. The Bill, as it stands, says that the maximum

period for either a restricted premises order or a restricted sales order is 12 months. Should that be a longer period, based on the evidence that councils submit to the courts? We thought that perhaps a longer period, perhaps up to a maximum of three years, would be appropriate.

One other thing that we thought might be considered is whether premises subject to a restricted premises order should be required to display a notice on the premises, saying that they are subject to a restricted premises order for the sale of tobacco from the date of x and to the date that that expires. Again, that makes it very clear what has happened.

Again, we would welcome an inclusion in the Bill of a requirement for those premises subject to a restricted premises order to remove tobacco from the premises for the period of that order. That would prevent any inadvertent breach of that order and certainly would aid the enforcement from our point of view, because if there was an order issued, all we would need to check is that the premises does not have tobacco. Otherwise, to prove a breach of the order, we would have to see a sale of tobacco taking place and be able to produce the evidence of that. So, it would be useful if a clause was inserted that requires the removal of the tobacco from the premises during the period in which the restricted premises order applies.

Again, with regard to the offences under clause 10, if there are new offences inserted by virtue of some of the comments, like the requirement to remove tobacco from the premises, there just needs to be corresponding offences inserted in clause 10 and subsequent fixed penalty powers in clause 13. In the main, the offences as listed are appropriate.

The powers of entry are somewhat similar to those in most pieces of legislation that we have to deal with. Clause 12 sets those out. We have a question around the effect of clause 12(2), which is something that the Committee discussed last week. We are unclear as to exactly what it means, but our concern is that it is not a restriction of the powers that are given in clause 12(1) and does not hamper us in what we have to do. It is not something that we have seen in similar legislation, so we query what the clause actually means and what the effect on the powers in clause 12(1) will be.

Clause 15 deals with the withdrawal of fixed penalty notices. It is appropriate for any person given a fixed penalty notice to be able to make representation in relation to that and for the council to consider that. However, the clause should be much clearer in that that representation should be made within the 28 days, which is the period for the payment of the notice. It should not be permitted for persons to make representation when the notice has expired. If someone wishes to make a representation, that should happen within the 28-day period. The council will then obviously set that period aside with regard to the notice and deal with any representations. If it decides to withdraw the notice, that is fine, and if it upholds it, it would give the person a subsequent period to make payment of the notice if they wish to do so. Greater clarity is needed in the clause that restricts the time period so that we do not get a situation further down the line where someone who has paid a fixed penalty or is in the mouth of a court for the offence then decides to make representation. That would make the enforcement process much more difficult from our point of view.

Clause 16 deals with the obstruction of authorised officers. We have no particular issues with the detail of the clause, just the penalty. We believe that the obstruction of an officer is a very serious offence and that perhaps a level 5 penalty would be more appropriate. Preventing officers from doing their job needs to be viewed seriously.

On clause 18, we felt that perhaps the insertion of a fixed penalty provision for the offence under clause 4(a) of the Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991 might be beneficial given that this is a relevant tobacco offence for the purposes of the restricted sales order; that is the offence of supplying from a vending machine. The inclusion of a fixed penalty offence for that might be beneficial.

Not directly related to any of the clauses, and something for the Committee to consider, is whether it believes that the current penalty for underage sales — a level 4 penalty is the maximum fine that is available for selling tobacco to a person under the age of 18, which is £2,500 — is an appropriate penalty for that offence. That was obviously set back in the Health and Personal Social Services (Northern Ireland) Order 1978. CEHOG's view is that that seems particularly low in comparison to some of the other offences that we are aware of, and we wonder whether the Bill could be amended to include a clause that amends the penalty contained within the 1978 order, again to set the marker down that this is an offence that is quite serious. The supply of tobacco to persons under the age of 18 is a serious issue. We have still got a problem with smoking prevalence generally in Northern Ireland and we need to do more to prevent the uptake of smoking by young people.

The Chairperson: Sorry, I was just checking something that you mentioned there. I was trying to read the notes on it. OK, that is quite interesting. It is probably useful for me to declare everybody with the exception of Mickey, unless I am wrong, as either former councillors or current councillors, so that is the declaration of interest out of the way. Does that cover it?

The Committee Clerk: No, members will need to declare if they are currently members of councils.

The Chairperson: I think it is useful that, when we were all councillors, NILGA was involved in it as well. We need to mention that for the record.

Mr Beggs: I declare that my dad is a current councillor.

Mr Dunne: I am a councillor on North Down Borough Council.

The Chairperson: You do not need to mention the council.

Mr Dunne: I am proud to be a double-jobber.

The Chairperson: OK, it is just for the record.

Mr McCarthy: I am a member of Ards Council.

The Chairperson: OK. That presentation was quite useful. I take it you read closely the stuff from last week and were able to come back on some of the issues that the departmental officials gave us. That is useful to us in our role to try to get this legislation right. I just want to tease out some of the stuff. Patricia and Jenny gave statistics in the initial presentation. We have received some submissions, and Ballymena Borough Council said that there are currently 90 premises selling tobacco in that area, and each year, in and around 20% are visited as part of a test purchase exercise. However, the environmental health officers estimate that there are in and around — and I know you gave these figures — 2,500 premises selling tobacco, and then councils in general visit between 15% and 20%, and I think the figure of 19% came up there. In its submission, Chest, Heart and Stroke told us that the current level of test purchasing and the three-month notification that the retailers receive will be extremely rare in that any retailer will be banned in that scenario with the three-year stuff.

I will go into some of the questions. In your submission, you advised that the council visits between 15% and 20%. Does that mean that, within the three years, only 45% to 60% of premises are subject to a least one test-purchasing exercise?

Mr Martin: Yes, that would be the position for those retailers who operate in one council area only. However, there are many retailers who operate across boundaries and who would, therefore, be subject in other council areas to a visit in some of their other premises. If it was a business operating solely in one council, I think that they would be visited once every five years. That said, if the council had intelligence, or if the premises had a history, they would be on the next test-purchase rota. In general terms, although you can say that premises will be visited only once every five years, that does not take account of the targeting process that goes on behind the scenes. Neither does it take account of the fact that many retailers trade across council boundaries.

The Chairperson: I appreciate that. What we are trying to do is get the legislation right. Therefore, the scenario as it sits is that there is a possibility that there could be only one test-purchase exercise. You may be in two council boundaries, but how often does lightning strike twice — although, in this weather — so that the same shop is targeted in a different council area? Based on the legislation before us, what is the likelihood of premises being convicted of committing an offence three times in three years?

Mr Martin: In relation to a multi-site retailer, there is a fair chance that if they do not have appropriate systems and procedures to prevent sales, they would fall foul of it, given the current level of activity. For a business with a small number of outlets, whether in one council area or across several, at current levels of activity, it probably would not be the case that it would have committed three offences within three years. I think that it is fair to say that.

The Chairperson: Would NILGA support the change in legislation from three years to five years?

Mrs Karen Smyth (Northern Ireland Local Government Association): I think that we would take a specific request like that back to the executive committee. I do not see any reason why we should not support an increase in that, but I would need to refer to the elected members in NILGA.

Ms Palmer: It also allows time for the due process involved in getting a conviction in the first place — testing the market, doing all the preparation work, getting it to the courts and getting the conviction. A great deal of time is caught up in due process anyway, which would probably be more beneficial to councils.

The Chairperson: I appreciate that you need to take that back, and we have a couple of weeks, so you can come back to us on that. If more funding was made available by the Department to carry out tests — this is a question that you need to bring back to the NILGA executive as well — would you look at a lower threshold of three offences in two or three years? If you could talk to your members about that, it would be useful.

Ms Palmer: Certainly, Chair. Funding is always an issue at local government. It is a small pot of money, and our ratepayers are usually the people who have to top it up, so it would be very helpful if we knew that the Department was going to give us the right budget to put in place the mechanisms so that we can deliver on the Bill.

The Chairperson: Sean, you mentioned that it depends on local knowledge or intelligence. If premises are convicted of one offence, is it procedure for them to be tested more frequently?

Mr Martin: I will give you my personal experience as one who is involved in the management of the function. We would spend a lot of time with that business after the conviction to explain what we expect it to put in place to ensure that it does not happen again. The next time we undertook a test-purchase exercise, we would usually programme in a visit to those premises, along with any others that are indicated to us, through intelligence from parents or other sources of information that we have, to be selling. There is a certain amount of targeting. If there was a persistent offender, there would be the possibility of three offences within the three years. In general terms, if you look at the activity level, you would say that it is not possible, but, with the processes that go on behind that, such as targeting and listening to intelligence and focusing resources, it would be possible.

The Chairperson: Is it a year later that there is a possibility that they will get another visit? Or could it happen sooner?

Mr Martin: If there was specific intelligence on particular premises, certain activities are planned but can be brought forward. Most councils operate at least one exercise each year; some do more. If you look at the pattern, it tends to be at least one exercise every year. Therefore, if they were part of that exercise, there would be three offences within the three years, as the Bill stands.

The Chairperson: Do some councils do more than is expected of them, while others just do what is expected?

Mr Martin: There is a limit to the number of premises that you can visit in a day, and, therefore, those councils that are much larger and have many more premises are required to do it on a number of days in order to do a reasonable proportion of them. So, yes, I think that the activity level reflects the number of premises in an area. The council that I work for has 40-odd premises on the register. Ballymena, which says that it has 90, has twice as many premises on the register. Belfast has hundreds of premises on the register, so the number of days on which Belfast undertakes test purchasing will be greater than Larne.

The Chairperson: Therefore, in general, if you are taking on board local intelligence or information brought to your attention, is there a standard policy or criterion across all councils that decides how shops are selected?

Mr Martin: The selection process depends on whether there is intelligence, from parents, children or other groups. We engage with such groups if there are indications that shops are selling tobacco to people underage. It also depends on when the shops were last visited and their history of compliance in previous test-purchase exercises. Such factors determine that. There is a desire to get round all

the premises in the borough within a period, but that is added to by intelligence and there is specific targeting of premises that have a history or where intelligence suggests that there is sale of tobacco to persons under 18.

Mr Beggs: I have a question for the environmental health officers. Do you accept that if the criterion was three sales within a five-year period, it would be easier for you to get a conviction and greater rigour would be required by the retailer to ensure that no sales were being made to underage people?

Mr Martin: However long the period is, it is no easier to obtain a conviction, but it is easier to get a restricted sales or restricted premises order, which I think is what you are asking. The longer the period, the wider the window, then, yes, the ability to apply for that order would mean that a greater number of premises would be likely to fall foul of that provision and, therefore, we could apply for an order against more premises.

Mr Wells: The councils have come out in favour of separate registers for each district council area. At the moment, that is 26, but we suspect that it will soon be 11. Why have you gone for that rather than having one Province-wide register?

Mr Martin: We have a system already. We hold many registers for businesses: pollution prevention and control permits, dog licence registers. Many registers are held by councils, and councils have the systems and procedures already there to set them up and deal with them, at little or no cost. We would have no difficulty with a requirement for a central register. However, the issue would be communication from that central register, because the targeting and registering of tobacco retailers will assist councils in their tobacco sales control functions. It is our view that it is much better for the register to be held by the council. Then, if there was a need for a council to share it with others through a central register, it could be made available. We would have no difficulty with that, or with one council holding the register for all. However, keeping the register up to date is important, and I think that would be easier for a council to do.

Mr Wells: Councils in Scotland quoted a figure of £50,000 to have a central register. Can I make a suggestion that will save £49,500 of that? Every council could have a separate register that could be brought together on one website. Whether 26 or 11, someone could go in and see them all listed, at no more work than a click of a button to the council. At least then one could check, if they are not clear about what area they live in, whether Willy or Seamus's shop on the corner is on the register. There is something clearly wrong with me, because that is so blindingly obvious. Why can that not be done?

Mr Martin: I made this point about clause 1: councils would have no difficulty sending the information containing the register through to be held by a central body on a central website and for that to be uploaded and accessible. I do not think that that would be problematic. A clause could be inserted requiring a council to notify the register and any changes to it and then to update the website. If we move to that scenario by agreement, one council could perhaps do that on behalf of all 11. Provided that there are sufficient powers in the Bill to enable us to share information in that way, I see no difficulty in doing that.

Mr Wells: If it is in the public domain in your council, I cannot see what is wrong with putting it in the public domain and making it available to everyone. You represent Larne Council; say someone has been subject to an offence or a fixed penalty in Ballymena, for example, how would you know that and how would you know about it in the future?

Mr Martin: Fixed penalty requirements are contained in the Bill for most of the offences that we are looking at here, so we are really looking at prosecutions for underage sales, and those go through the courts. We have a fairly tight network of information sharing in tobacco control. However, there should be a proactive duty in the Bill requiring councils on either the payment of a fixed penalty if a fixed penalty notice has been issued and paid or on conviction to notify that offence and the details of that offender to other agencies. That would make it very clear. To make the Bill work effectively, there is a need for communication of information.

Mr Wells: Many tobacconists now are parts of supermarket or newsagents chains, so gone are the days when it was a man and his wife running a corner shop. It is good that you have dealt with that. What about someone who has had a restricted sales order made against him or her in one council

area who tries to move across the boundary into another council area: how would you know that he is bringing that baggage with him?

Mr Martin: That is missing from the Bill. If a premises has a restricted premises order, there is a requirement in the Bill for that premises to be removed from the register. We believe that there needs to be a clear clause in the Bill stating that if the person is subject to a restricted sales order, they have to be removed from the register. The council that sought the order should then notify all other councils so that they are aware and the person will be removed from the register in those council areas as well.

Mr Wells: As you are moving to the 11-council model, the logistics is much easier.

Mr Martin: Yes. Electronic communication makes it fairly straightforward to establish a key point of contact in each council responsible for the maintenance of the register and the sharing of that information.

Mr Wells: So, you envisage a situation where, at the push of a button, a member of the public could find out whether a tobacconist is on the register to start with and what convictions or restrictions have been imposed on him or her, and that information could be shared between all district councils. Do you see any data protection problems with that?

Mr Martin: I do not particularly. These things are subject to court process; my only caveat is around fixed penalty notices. My understanding is that because that is the discharge for the liability for an offence without the court process, there is some restriction on the sharing of that information generally with the public. However, there would be no difficulty in sharing information on convictions or the restricted sales order. I do not think that there would be any difficulty with sharing information on fixed penalty information between agencies, HMRC and those charged with responsibilities in councils.

Mr Gardiner: What authority under legislation do councils have to carry out test-purchasing exercises?

Mr Martin: The Health and Personal Social Services (Northern Ireland) Order 1978 places a duty on councils, and, under section 3, it makes it an offence to sell tobacco products to persons under 18. That order requires councils to consider their activities in respect of that duty, so the offence of selling to a person under 18 and the activity come from the 1978 order.

Mr Gardiner: Has the use of a test-purchase exercise in bringing a case against a retailer ever been challenged in the courts?

Mr Martin: In broad terms, test purchasing is used for a range of products, not just tobacco. There have been challenges to that under similar legislation up through the courts in other jurisdictions. However, it has been clearly held that a test purchase merely replicates an everyday activity; there is no legal reason why a council cannot carry it out. It is not entrapment; it is just the recreation of an everyday event. The retailer has every opportunity to refuse to sell or to ask for ID as the law requires.

Mr Wells: I have come in late, so if this has been answered, shoot me down. At the last Committee meeting, we were told that you have to give three months' notice of a test purchase.

Mr Martin: That specifically relates to the Regulation of Investigatory Powers Act 2000, which deals with covert surveillance, the use of covert human intelligence sources, and so on, which, again, is a means of gathering data. It does not say anywhere in legislation that we have to give three months' notice.

We tend to provide notification in advance to all retailers in an area saying that the council intends to carry out a test-purchase exercise. We do that to take us outside the scope of the Regulation of Investigatory Powers Act, which has quite a rigorous process for approval. Under the Act, you have to go before a court to get approval for carrying that out. Councils have an internal process: if they say, "Yes, it is appropriate for you to do this; you have the appropriate systems and procedures in place", you have to make an application to the court for its approval. If we did not send the letter, we would have to follow that process.

Mr Wells: So a letter is not just sent to Willie John saying, "We are coming to see you within three months"; it is sent to all the tobacconists.

Mr Martin: Yes; absolutely.

Mr Wells: Is that done annually? Is it just a general circular? I know, for instance, that you do not get three months' notice for VAT inspections; they just arrive at your door and demand to see the books. That is a similar parallel.

Mr Martin: We would rather not have to do that. However, we are constrained by the guidance that indicates that, for the purposes of the Regulation of Investigatory Powers Act, test purchasing, as we do it, is surveillance. Therefore, we have to deal with the outcome of that. Would it be easier and simpler for us if that were not the case? Yes, absolutely.

Mr Wells: If it is on that level, I am not so worried. If it is just a general circular, that is fine. Thanks.

The Chairperson: I am glad that you have settled the Deputy Chair. I was getting a wee bit upset that he was upset.

Mr Brady: Thanks for the presentation. I just want to get clarity on the circumstances under which councils would apply for a restricted premises order as opposed to a restricted sales order, and vice versa.

Mr Martin: The wording of the orders in respect of the actual legal requirement is, in essence, very similar. Restricted premises orders are for the premises on which the relevant offence, which is the third offence, takes place. Therefore, if there had been two previous offences — again, it does not say that they have to be on that premises; the definition in both clauses applies to the offender — and that person is convicted of their third offence, you can ask for a restricted premises order at the premises on which the offence occurred. Restricted sales orders are fairly straightforward in that if the person has committed a third offence, you can make an application to the court. Restricted premises orders, however, are specifically for the premises on which the third offence occurs.

Mr Brady: Is one of more benefit than the other?

Mr Martin: We see them working in tandem, in that you could make an application for both. A restricted premises order relates specifically and only to the premises. Our reading of the Bill is that if you are a multi-site retailer with a number of premises, a restricted sales order would restrict you from running a tobacco business from all those premises.

Mr Brady: To go back to Jim's example of Willie and Seamus, if two offences —

Mr Wells: Willie is mine; Seamus is yours.

Mr Brady: That is what I thought. You are getting very equal in these things. If a council was aware that two offences happened in one council area and a third in another council area, or that there was one offence in each of three different council areas, could a council apply for a restricted premises order on that person or those premises?

Mr Martin: Our reading of the Bill is that it does not say that the previous two offences have to happen in that council area: it is only the third offence. Therefore, our reading is that, yes, you can take account of offences in other council areas.

Mr Brady: It is really like a topping-up procedure.

Mr Martin: Yes.

The Chairperson: What happens if you do not know? What happens if the list is not the regional list?

Mr Martin: That is one of the critical things. In the comments that we submitted in writing through the Chief Environmental Health Officers Group to the Committee, we said that there is an absolute need for the sharing of information on the fixed penalty notice and convictions for the system to work, particularly if the Committee is considering offences for the illicit sale of tobacco as being relevant offences for the purposes of the Bill, as you are then talking about HMRC providing information.

Therefore, the requirement to share information between agencies is critical to the Bill working effectively.

Ms Maeve McLaughlin: I would like some clarification on the test purchasing and the figure of between 15% and 20% and the back work that has been done in relation to the visits, which you said was at 52%. Are you suggesting that the reason why the figure for test purchasing is so low is because of the restrictions on guidance with regard to the internal processes in councils and the external process? I want to be clear. Is that what I am hearing?

Ms Allen: We are suggesting that there are many logistical issues that restrict how many test-purchase exercises can be conducted annually. The point that I was trying to make is that low test purchasing is the only way of securing a conviction, because you have to witness the sale. We use the visits to check on compliance and we use our correspondence to remind businesses of the responsibilities to keep the pressure on. It is not a case of their saying, "Well, I have not been visited, and I don't suppose that I will be visited for the next five years." There is a constant reminder, and there is face-to-face contact with businesses to ensure that they know what is expected of them, to stress the standards that we expect and to remind them that there could still be test purchasing.

Ms Maeve McLaughlin: I accept that. However, the point was made that it is viewed as surveillance, so there are specific criteria to address. The suggestion is that it is quite restrictive and that is why the figure is low.

Mr Martin: That is not the only factor. We get round that by the correspondence that goes out beforehand to prevent us having to go through the process of seeking authorisation internally and then to the court. The correspondence that goes out beforehand negates that. One of the issues is finding suitable children. Generally, children of that age go to school for most of the year. When choosing children, we try to pick a child who looks appropriate for their age. We are not trying to dupe anyone; we just want retailers to ask for ID before they sell tobacco. Rather than necessarily using our resource only with regard to the number of officers — a test-purchase exercise is generally carried out by three or four officers, depending on how it is done, and one or two children — it is accessing an appropriate child, which sometimes restricts activity levels. However, that is not the only factor.

With regard to the evidence that my colleague presented, over the past number of years that we have been pursuing, the activity level of sales has gone down and down, but it has not indicated to us that it has plateaued at its lowest level. Therefore, it is working. If we did more, would it help? Yes, it probably would. However, the powers in the Bill will assist in making the clear point that the sale of tobacco to persons under 18 is unacceptable. The fixed penalty provisions will make the enforcement process much more straightforward for us. Furthermore, they will free up resources, which can be redirected to more proactive contact with businesses, through advising them of what we expect to see, for instance, or more test purchasing.

Ms Maeve McLaughlin: Currently, probably more so from NILGA's perspective, there is no requirement on councils to charge fees to register. Do councils envisage that changing or do they envisage a time when they will have to consider fees for registering a tobacco business?

Mr Martin: The Bill contains the ability to introduce a requirement for councils to recover the cost of that. It is a "may". Do I think there are large costs associated with the back-office system? I do not think so. I think that most councils' current database systems could cope with this. There would probably be initial costs associated with the set-up. It is probably a question for each council as to whether it would be prepared to absorb that cost, or, if power was granted, to recover it.

Registration fees are generally quite small, because it is a case of taking the data, verifying it and adding it to the register once you have the database set up. They are not on the same scale as licensing fees, which have a much more robust process behind them. I do not see it being an expensive process, even if charging were introduced. I do not think I could speak on behalf of all councils on whether they would seek to recover that, but I think it is prudent to put the requirement in the Bill and consider the issue at a later date through secondary legislation.

Mrs Smyth: Chair, I will come in on this issue. Cost recovery is a major issue for councils in a number of areas. Councils are very good at working collaboratively, particularly on environmental health work, an area in which they are already working in group systems and looking at how to redesign that collaborative working post-reform. Twenty-six councils are working on an improvement, collaboration and efficiency programme to look at efficiencies, cost savings, how we deliver services and how to

improve service delivery to our citizens. Part of that is to improve ICT systems. That goes back to Mr Wells's earlier point about how we improve the software and technology that we use to cut costs. I anticipate that this will be part of that work.

Ms Maeve McLaughlin: Finally, in a similar vein; I listened carefully about what was said about the Department setting aside a budget and to your conversation about some councils, perhaps, being able to absorb this. As it stands, with the additional requirements as part of this Bill, can councils, on their own, absorb the additional costs, or is there a view taken on —

The Chairperson: Jenny, you were in very quickly.

Ms Palmer: I was. It is the view of the councils that they are finding it very difficult to maintain the costs of delivering the programme of work that is needed on the ground for a lot of the legislation that is coming to them, even that which has been brokered to councils. You only have to look at the veterinary aspect of the Welfare of Animals Act (Northern Ireland) 2011, in which there were a lot of associated costs. We have even heard the talk about the transfer of road closures to councils and the costs associated with administering that.

Obviously, no matter what happens through the Bill, we welcome the fact that it gives councils the powers to deal with tobacco testing, but if we are going to enhance the process in the way that the Assembly would like us to at a local level, we certainly need some funding from the Department to cover costs. Even when we merge into our new, reformed councils, I believe that there will be a requirement for extra funding to facilitate the necessary officers and commitment.

One difficulty that has been highlighted is accessing the use of a child of 15 years of age to go through the process, because that is quite cumbersome. It takes hours. In Lisburn, we have been able to recoup our costs by asking the courts to award the council costs for bringing the prosecution in the first place. We have been very successful in the courts agreeing to that over the past six months, which is a bonus.

Ms Maeve McLaughlin: Thank you. That is very clear.

Mrs Smyth: If I could add something to that; there is an issue in relation to the shape of funding on the form. If we are looking at a programme over a period of years and if we are looking at a circular and ongoing approach to the inspection of premises, there is a difficulty if the funding is year-on-year. If we can look at this on a programme basis over a period of time, I think that would be much more helpful.

The Chairperson: Sam, did you want to come in on this point?

Mr Gardiner: On something similar: what is the time lag between an official reporting an irregularity and the case being brought to court?

Mr Martin: The cases get to court probably within six or seven months.

Mr Gardiner: Sorry, but that is ridiculous. That is far too long. We have no jurisdiction over it, as you can appreciate.

Mr Martin: It is not necessarily the fault of the courts' process. After a test purchase happens, there is a follow-up process, which involves giving the offender the opportunity to be interviewed under caution, the interview being carried out and the evidence being taken into account. In many councils, legal proceedings are still not issued unless the council approves the decision, so then there is a council report process. The information is then sent to that council, the council makes a decision and the information goes to the legal people, so, the restriction in initiation is six months. My best estimate is that most cases are listed with the courts probably in four or five months; it would take that period of time. If they are dealt with on first hearing, the process will be dealt with probably within six months. If they are contested, it could run to 12 months before the case is heard and dealt with.

Mr Gardiner: Could the council official do another inspection within that six months or 12 months?

Mr Martin: There is nothing in any of the provisions to prevent you from doing another inspection during the period in which the other legal process is ongoing.

Mr Gardiner: Are you aware that they do it?

Mr Martin: Most councils would go back to give advice and to try to help the business by making sure that the failures evidenced by virtue of the sale were being rectified rather than leave it to the other side. They would probably not do another test purchase until the initial legal proceedings were dealt with.

The Chairperson: Sean, are you aware of any businesses that do their own test purchasing?

Mr Martin: My understanding, again from conversations that we have, is that businesses come together and do their own test purchases to test whether their systems are working. I do not have any specific details, but just from conversations —

The Chairperson: The reason I ask is because I know that some premises in my constituency did that with alcohol sales.

Mr Martin: It is my understanding that it is also done by some of the multi-site companies in order to test whether their systems are working and to help them to improve their performance. Certainly, that is some of the information considered in reaching a conclusion. There is a defence of due diligence in the legislation, and those are some of the factors that we would look at in considering whether the business has —

The Chairperson: There is not even a legal aspect to this. It means that they can deal internally with the person who has done it. Unfortunately, it always seems to be young men who were carried away with young women coming in. *[Laughter.]*

Mr Dunne: I welcome the panel here today. I know that the councils do a good job in many aspects. Some do better than others, but we will not go there today. As regards the requirement to display a notice advising the ban, do you see benefits in displaying a notice saying that the premises are restricted or have a restricted premises order on them? Do you think that that would act as a good deterrent?

Mr Martin: We believe that it would be appropriate. To get a restricted premises order, there have to have been three offences, and the court would have obviously weighed up the circumstances leading to the application. If it grants an order, I think it would be appropriate to require it to be displayed. It makes it very clear that those premises cannot sell tobacco. It also makes it easier for the premises, in that people coming in will not be asking for tobacco. Those premises will have been restricted from selling tobacco for the period of the notice, and we certainly believe that it would be appropriate to display that.

Mr Dunne: So, legally, they would have to do it? They would have to clear the shelves, I take it.

Mr Martin: Those are some of the comments that we have made in a written submission from CEHOG. Those things are currently not in the Bill, and we believe it would be advantageous to require the display of the notice and for the tobacco to be removed from the premises to prevent inadvertent sales and make enforcement easier from our point of view. I think they would be welcome additions to the Bill.

Mr Dunne: I have just one other point. You are suggesting that the restriction be increased from one year to three years. How do you justify that? It sounds fairly drastic.

Mr Martin: Our experience of the court process is that a court would rarely ever apply the maximum on the first time of hearing an application such as this. It looks at the scale and applies a penalty on that scale; so we are saying that the court should be given greater latitude. You have to cross the bar of three offences before you can make an application, but if there are many more offences than that and someone is not taking their responsibility seriously, we are saying that the court should be given latitude to decide where that sits on the scale of things and make a decision on it. It is worth considering whether the scale of between one week and 52 weeks is sufficient for someone when there is evidence to suggest that there is a persistent problem with that retailer, and whether a greater scale is needed.

Mr Dunne: Do you feel that it should be up to three years?

Mr Martin: That is what we have suggested in our submission. Again, it is a court decision. The councils' role is to put the matter before the court and make the application for an order. We think that the court should be given greater scope regarding the scale, of between zero and three years. That would send out a very strong message about how seriously the issue of selling tobacco to under-18s is as regards the long-term health consequences if people become addicted to the product and find it difficult to give up.

Mr Dunne: I want to make a point about surveillance. Are you carrying out risk-based surveillance? Is it based on history or your knowledge of a premises or similar premises within an area? I take it there would be some audits done as well. Are those carried out based on risk? You obviously have limited resources, as Jenny has said. If so, you have to use them where the risk is highest; so is it the case that surveillance is risk-based?

Mr Martin: It is a bit of both. There is a level of routine activity, in that we like to get round most premises, but there is specific targeting where there is intelligence to suggest that particular premises are a problem or where there is a previous history of non-compliance. There is a level of ongoing activity and a level of targeting to make sure that our resources are used to best effect. It is a combination of those in the current level of activity.

There will never be unlimited resources, so it is important that we use those we have to best effect, and targeting is important. We are hoping to undertake a piece of work — we are just trying to get it off the ground — to look at whether there is any difference in the type of retailer involved, whether it is a petrol station, a multi-site operation or a convenience store. We are hoping to do a little piece of broad targeting to see whether there is any difference. It may well be that there is not, but, at some point this year, we hope to do a bit of work to see whether that will help us in our targeting and use of resources more effectively.

Mr Dunne: So, at the moment, your resources are hitting about 18% or 20%. It seems relatively low.

Mr Martin: As regards the information my colleague presented, that is not the only contact that we have with a business. That is the test purchase level of activity.

Mr Dunne: You are also carrying out surveillance over and above that.

Mr Martin: Most of the other visits are really to provide information. They are calls to the premises to make sure that they understand the law, to check that they are training their staff, to check that they have —

Mr Dunne: Is that an audit as such?

Mr Martin: Absolutely; it is a bit of an audit to check their system but without the actual test purchase. The test purchase is to check that the system that you have audited is working. It is a bit of both. We have the figure here: we visit and actually contact in and around 50% of premises and give advice and audit them, as opposed to the 18% that we are referring to now with regard to an actual test purchase visit.

Mr Wells: If you do a succession of test purchase visits and the shop gets a completely clean bill of health, do you tell the shop?

Mr Martin: Absolutely.

Mr Wells: So it is not completely blind in that sense.

Mrs Smyth: I want to emphasise that although we are inspecting and test purchasing between 15% and 20%, the officers would be keen to point out that there is an ongoing improvement — a demonstrable improvement — in the situation as time goes forward. We are working, but resources are somewhat of a barrier.

Ms Palmer: When we decided to do the test-purchasing exercise in the Lisburn City Council area a few years ago, councillors were very keen at the very outset that we would name and shame immediately. We did some work to educate all our retail outlets about their responsibilities in serving underage children with cigarettes, and we warned them that we would be going out to test purchase. Year-on-year, we are seeing a reduction in the number who breach the regulations on selling to young people. That is a response to the council officers in environmental health going out and talking to those retailers, giving them advice, doing the audit with them and offering them assistance. We do name and shame those that we have taken to court. We publicise it in the local press so that everybody knows that they have breached it, and that is a reminder to everyone else to comply. Good work is being done out there through the councils.

The Chairperson: I do not think that anybody is criticising. Since my time on council, the work that the environmental health officers carry out, even around litter, has moved on. It is not perfect, but the proactive approach from councils and council officers has helped. Therefore, I agree with you.

Jenny, with regard to the point that you made about test purchasing, you talked earlier about recovering costs in a recent court case. Was that the full cost, and was it from the very start of the process to the end of the process?

Ms Palmer: I am not 100% sure on that. On many occasions, we discussed the costs associated with councils going to court to get the prosecution and the fact that they were not recovering the full costs. In the last two court cases, the full cost has been recovered.

The Chairperson: Can you get us more details on whether councils can recover costs from the start of the test purchase and the average cost of the money recovered? This is not specific to this issue but, in general, when you hear of somebody being brought to court, and it might take £2,000, £3,000 or £10,000 to get to that point, it is a bit frustrating when the person is fined £250. That information would be useful for us —

Ms Palmer: That is because of whoever is kindly on the judiciary at the time.

The Chairperson: I appreciate that, but I am talking about it from a constituency point of view.

Mrs Smyth: NILGA did a bit of lobbying a number of years ago, because a limit was placed on the magistrates' rules as to how much of the cost councils could recover. A change was made to that last year, so that situation has improved greatly. However, I will get you the figures for the cost.

The Chairperson: We have a unique opportunity, when drafting this Bill, to deal with some of those points that have come up — if we can, legally — and we will be guided by our own legal team.

Mr Beggs: I have a question about clause 3 and the duty to notify certain changes to the register. The chief environmental health officer's report indicates a preference for 28 days rather than the period of three months to notify any change. Will you elaborate on why you prefer the shorter period?

Mr Martin: It really is about keeping the register accurate and up to date. Given what the changes actually are, three months seems like a very long period to be allowed to notify of them. We felt that we could allow a bit of a time lag. However, if it is felt important to have a register and for it to be up to date and accurate, we feel that 28 days would be more appropriate. If you look at the wording on councils' responsibility to maintain the register, it is much sharper than three months.

Mr Beggs: Is there a danger of people getting drawn into court or receiving penalty notices over just a few days? Are you getting into too much bureaucracy?

Mr Martin: Councils tend to be pragmatic in how they use their powers. It is just about impressing on the business the need to keep the register up to date and to notify changes. I do not envisage fixed penalties being issued.

Mr Beggs: Would the 28 days fit in more with other requirements to notify councils? What is the requirement for changes to entertainments, food hygiene or whatever? Would it fit in more naturally? Is it a more familiar time limit?

Mr Martin: It is a much more familiar time limit. I think that some people might even be fairly clear that they are supposed to do it when the change happens. I think that allowing a period of 28 days is appropriate. Again, it is notification of changes. If we are to have a registration requirement and if the register is to be useful, it needs to be reasonably up to date and accurate in order for it to be useful. For us, three months seems a long time.

Regarding the fact that not notifying would be an offence, I do not envisage that it would be used for enforcement in that way. We tend to phone people up. If we are aware that a change is happening — say, a business has changed its name or there has been a change of ownership — we ask the owners to notify us of the changes. We usually send them a form and get them to fill it in. If we are out there, we get them to fill it in and we take it with us. I do not envisage that leading to enforcement action. However, it is about impressing on people the need to notify the council of the changes and to maintain an accurate register.

Mr Beggs: Is there a danger that if it sits at three months, it will be considered to be not really that important?

Mr Martin: That is the point that we are trying to make.

The Chairperson: It has been a very useful session. We are at an early stage of the legislation and the Committee's work on it. I thought that it was important that we got the presentation at the start of our work. I appreciate that you seem to have taken time to look at what we were told last week and what the Department is saying. That was actually quite useful.

We have asked for different pieces of information. It would be useful if we could get that sooner rather than later. If you feel that there is other information that we might need or require, feel free to send it in to guide us in our work. We are not here to put pressure on, or criticise, anyone: we are trying to ensure that the legislation is real, right and actually works. We live in the real world.

Mrs Smyth: Just to let you know, Chair, the next NILGA executive meeting is on 14 June. I anticipate that we would get back to you with decisions.

The Chairperson: OK. That is fair enough. Thanks very much for the presentation. It cleared up some of the questions that I had in my head on a lot of those issues. On behalf of the Committee, thank you.

Ms Palmer: Chair, we thank you and, of course, the Committee for inviting us along. Certainly, it is a pleasure to share information from local government with you as you go forward to bring about what, hopefully, will be a perfect Bill — although I have not seen very many of those. *[Laughter.]* There is always the first. That is your challenge.

The Chairperson: There is always the first. This Committee amazes people all the time.

Ms Palmer: Certainly, we are here to assist. Thank you, Chair.