



Northern Ireland
Assembly

Committee for Health, Social Services and
Public Safety

OFFICIAL REPORT (Hansard)

Illicit Tobacco Sales: DHSSPS Briefing

30 January 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Ms Sue Ramsey (Chairperson)
Mr Roy Beggs
Ms Paula Bradley
Mr Mickey Brady
Ms Pam Brown
Mr Gordon Dunne
Mr Samuel Gardiner
Mr Kieran McCarthy
Mr Conall McDevitt
Ms Maeve McLaughlin

Witnesses:

Mr Gerard Collins	Department of Health, Social Services and Public Safety
Ms Jenny McAlarney	Department of Health, Social Services and Public Safety
Dr Elizabeth Mitchell	Department of Health, Social Services and Public Safety

The Chairperson: Thanks very much for coming today, Elizabeth, Gerard and Jenny. You are more than welcome. I will hand straight over to you to make your introduction and presentation. I will then open it up for questions or comments.

Dr Elizabeth Mitchell (Department of Health, Social Services and Public Safety): Thank you, Sue, for inviting us back to discuss the important topic of illicit tobacco sales in Northern Ireland. You will remember that, on 24 October, we provided an initial briefing to the Committee on the forthcoming tobacco retailers Bill, which will include a provision allowing the courts to ban retailers from selling tobacco products for a set period of time following a number of underage sales offences. At that evidence session, some members expressed concern about the level of illicit tobacco sales and how that was undermining attempts to reduce the prevalence of smoking. Members raised the possibility of including an additional provision in the tobacco Bill that would allow the courts to ban retailers caught selling illicit tobacco from selling any tobacco products for a set period of time. It was agreed that officials would seek advice from the Departmental Solicitor's Office to clarify whether it was within the remit of our Department to include such a provision, and to come back to the Health Committee with information.

Following the discussion with the Department's legal advisers, it was established that a similar power already exists in the Tobacco Products Duty Act 1979, which applies to Northern Ireland. Section 8H(4) of that UK-wide Act states that a manager who allows premises to be used for the sale of illicit tobacco commits an offence and that the court can make an order to prohibit the use of premises for the purposes of selling tobacco for a specified period of time. Given that that power exists in an Act

that applies to Northern Ireland, the legal advice that we have received is that there would be no good reason for duplicating that legislation in the tobacco retailers Bill. We were also advised that any provision in relation to illicit tobacco sales would likely be an excepted matter in that it would relate to taxes and duties. The powers of the Northern Ireland Assembly do not extend to such matters.

On 21 November, the Health Minister wrote to inform the Committee of the existence of the 1979 Act and to provide information as requested by the Committee about fixed penalty notices that are issued under the smoke-free legislation. Further correspondence was issued on behalf of the Committee on 10 December enquiring as to whether the Tobacco Products Duty Act 1979 had ever been used in Northern Ireland. That request was forwarded to HM Revenue and Customs, which has responsibility for enforcing legislation relating to illicit tobacco, and to the Department of Justice (DOJ). HMRC and DOJ separately advised the Department that the information is not collated. That response was relayed to you by the Minister.

Although illicit tobacco is primarily a matter for HMRC, its existence concerns the Department, as the cheaper price of the products undoubtedly undermines our efforts to reduce smoking prevalence rates. In recognition of that, the Department invited representation from HMRC onto the working group that is involved in the development of the 10-year tobacco control strategy, which the Minister launched last February. A tobacco strategy implementation steering group has been established by the Public Health Agency to deliver on the objectives of the new strategy. Its membership includes representation from the Organised Crime Task Force, with particular responsibility for illicit tobacco. I also understand that there are existing links on the ground between district councils and HMRC, whereby council officers are able to alert HMRC to any illicit tobacco sales that they discover as part of their routine enforcement or investigations.

The Department's view is that, rather than amending the tobacco retailers Bill to duplicate existing legislation, we should continue to work with HMRC and the other organisations that are engaged in tackling the problem of illicit tobacco. In that way, we can seek to ensure the more active enforcement of the existing provisions in the Tobacco Products Duty Act 1979. We will raise that issue at the next meeting of the tobacco strategy implementation steering group to see what else we can do in that regard.

The Chairperson: Thanks very much, Liz. Thanks for coming back and clearing up some of the points.

Mr Beggs: Thanks for your presentation. Those who sell illegal tobacco for profit obviously have no qualms about selling it to anybody; their main motive is to profiteer from that illegal sale. My concern is that there is no information about the legislation being used to ban that sale. Can local government have a stronger role in trying to make sure that that is applied? That could be incorporated into further legislation, through which local government could govern the registration of those who can sell tobacco. Is there a mechanism by which local government can report the pressures and concerns in order to better the health of local communities?

Dr Mitchell: We envisage that the guidance that will accompany the Tobacco Retailer Sanctions Bill, and subsequent Act, will highlight the issue of illicit tobacco sales. We will highlight that the route for tackling it is for environmental health officers and district council officers to report it to HMRC and to work closely with it to try to control illicit sales. Obviously, a lot of HMRC's attention is on trying to stop the import of large quantities of smuggled tobacco. It has had some successes, but we need to make sure that that is accompanied by action at local level for the kind of issue that you mentioned.

Mr Beggs: There is a perception that some difficulties are associated with mobile premises. I went back to the original legislation, and my understanding is that the definition of premises includes mobile vans. Is that the case?

Dr Mitchell: Yes. My understanding is that the legislation includes mobile vans — for example, ice cream vans or generic vans. I will check that with colleagues.

Mr Gerard Collins (Department of Health, Social Services and Public Safety): That also includes market stalls. All those things are covered under the definition of premises.

Mr Beggs: If people want to sell tobacco from a market stall, which will be at a certain location only infrequently, will they be required to seek permission and register through the local council?

Ms Jenny McAlarney (Department of Health, Social Services and Public Safety): Yes, they would. People who sell from such places will not want to register, so we hope that the legislation will catch those illicit retailers. If people are caught and are not registered, district councils can fine them up to £5,000 for not being registered, as well as any other penalties that HMRC can impose if the tobacco is illicit. In that way, hopefully, the legislation will catch some illegal traders.

Mr Beggs: I am trying to understand why, under existing legislation, there is no record of any prosecutions or of the law being applied. Is there a reason for that? If HMRC is not using that legislation, can councils use it? If a council were taking a case on underage selling, can it use the same legislation if it found evidence of illegal tobacco being sold?

Dr Mitchell: As Jenny said, if council officers found that a market stall was selling illicit tobacco and was not registered, those traders can be fined. They can also report that to HMRC for any other penalties that it may be able to apply.

Mr Beggs: In making a judgement on whether a retailer needs a licence to sell tobacco, can the court take into consideration not only evidence of selling to underage people but the fact that an individual or organisation was selling illegal tobacco? Would that be discounted in any decision? I would like to know about that. When a council takes a court action, and there is a recommendation to stop a retailer from selling, can those two issues be joined together?

Dr Mitchell: The first question is: are those retailers registered to sell tobacco? If they are not registered, that is an offence. If they are selling to underage people, that is a separate offence. If, through test purchasing, they were caught selling to underage people, that is a separate offence.

Mr Beggs: If retailers were found to be selling to underage people, they might get a slap on the wrist at first. If they were then found to be selling illegal tobacco, that would be chalked up as another concern. Those same retailers are also found to be selling to under-16s. Can all three offences be taken into consideration in the council's recommendation to discontinue, or is it only selling to under-16s that is an offence under the proposed legislation? In court, can all illegal tobacco sales be considered?

Ms McAlarney: For the purposes of this legislation, a court can issue a banning order only if a person has been found guilty of three tobacco offences, which are not illicit tobacco offences. Those offences are: not registering; failing to notify changes to the register; or selling to underage people. Any of those could count as a single offence. If someone commits three offences —

Mr Beggs: Can you include illegal tobacco sales?

Ms McAlarney: We would have to speak to our legal advisers because taxes and duties are a separate issue. I am not sure whether we could include provisions about an excepted matter in our Bill.

Dr Mitchell: Do you want us to explore whether that can be taken into account in respect of the three strikes policy?

Mr Beggs: Would that count as three strikes, or would it count as only two because the other offence would not be included under the new legislation?

Mr Collins: If that were the case, a district council would need to know whether a retailer had been prosecuted for selling illicit tobacco. There would need to be a protocol whereby that information is fed back. We do not have information at the minute on which retailers, if any, have been prosecuted for selling illicit tobacco.

Work is ongoing in England to develop a protocol between local authorities and Revenue and Customs. Perhaps we could consider doing that here. Through the implementation of the tobacco action plan, a written protocol could be being developed to ensure more information sharing and different agencies being directed to retailers suspected of either underage sales or illicit sales. That might be a practical way to take the issue forward.

Mr Beggs: I want the legislation to allow sensible decisions. Is the person someone of standing who can be allowed to continue to retail tobacco? If he or she has committed multiple tobacco sales offences, surely all offences should be allowed to be taken into consideration.

Dr Mitchell: That is a very good point, and we will certainly follow it up. Thank you for drawing it to our attention.

Mr Gardiner: You are very welcome. It is nice to see you all again. In the last evidence-gathering session in October last year, I said that there was an issue with enforcement of the new law. At that time, Dr Mitchell, you promised an enforcement schedule for the final Bill, and your colleague Mr Collins, who is also with you today, said that the "three strikes in three years" policy would lead to a ban on sales in such cases. What progress has been made in drawing up those schedules? Are they to be included as an addendum to the Bill? Can you give details of the plans to raise council awareness of the responsibilities? What plans are in place to ensure that the law is enforced evenly across Northern Ireland?

Dr Mitchell: Gerard, will you start with the progress that we are making on the Bill? We obviously cannot produce guidance for local councils until we have the Bill. We will give you an update on where we are with that.

Mr Collins: We have sent the Bill to the Attorney General for his opinion on whether it is within the legal competency of the Assembly for us to make the legislation. We expect a response on that.

Mr Gardiner: When do you expect that?

Mr Collins: It was sent last week. Normally, there is quite a quick turnaround from the Attorney General, so we expect that pretty shortly.

We will then bring the Bill through its Committee Stage and a number of other stages. If we can get through those stages before the summer recess, we expect the Bill to receive Royal Assent in September. If the Bill does not go through all the stages until after the summer recess, we would expect Royal Assent in November.

The provisions on the three fixed penalty notices are in the Bill. We think that that provides the pathway towards eventually banning someone who has received three fixed penalty notices.

Mr Gardiner: So you are saying that, come September, when Royal Assent has been received, you will enforce this and go to war on the issue?

Dr Mitchell: Part of the process will be to develop guidance for council enforcement officers on how to implement the legislation. We will work closely with a group of environmental health officers who are engaged in the work to develop the guidance. That is where I think that we can also highlight the issue of illicit sales and how to deal with that in the guidance. Work on developing the guidance will continue as we get clarity on the Bill's provisions. Obviously, the Bill will come back to you for discussion on the clauses at Committee Stage, when you will get a detailed look at it.

Mr Gardiner: I assure you that I will keep the pressure on you and make sure that you stick to everything that you said.

Mr Collins: We work closely with the tobacco task group, which is made up of tobacco control officers in various council groups. We work with it to inform the public, develop guidance and make sure that retailers are aware of their new responsibilities under the forthcoming legislation.

Mr Gardiner: We need action on the issue, desperately and urgently.

The Chairperson: What is the proposed date for First Stage?

Dr Mitchell: We hope to ask the Executive for clearance to introduce the Bill to the Assembly at the end of February or the beginning of March. That means that we would issue the Bill to the Speaker for scrutiny by 13 March and introduce the Bill to the Assembly on 8 April. The Second Stage would then

take place on 16 April, and the Committee Stage would begin on 17 April. Obviously, those dates depend on our getting a response from the Attorney General and Executive clearance without delay.

Mr McDevitt: Good afternoon. Am I right in understanding that this is a DHSSPS Bill primarily because of the public health issues around tobacco? Basically, tobacco is bad for you. Legit tobacco kills you, which is why we are debating the consequences. Is it not also the case that illicit or contraband tobacco is often even more dangerous?

Dr Mitchell: From our point of view, tobacco is dangerous and damages your health, regardless of whether it is illicit.

Mr McDevitt: It is a matter of fact that quite a lot of illicit tobacco has been doctored or laced and has a higher chemical content. That is not conjecture; it is well proven.

Dr Mitchell: We do not want to give a mixed message that legitimate tobacco is OK for your health. That is where we —

Mr McDevitt: Let me put it on the record. Legitimate tobacco kills you, and illicit tobacco is even more toxic —

Dr Mitchell: Potentially.

Mr McDevitt: —than legitimate tobacco. It is even more toxic than an already exceptionally toxic drug, which is legitimate tobacco.

Mr Collins: We have had conversations with Action Cancer and the Ulster Cancer Foundation, and those organisations were adamant that to give out a message that —

Mr McDevitt: That is not the message that I am about to give out, Gerard. I am trying to understand why we have proposals for a Bill that properly deals with tobacco, which is a lethal, toxic drug, but which seems to be sidestepping the issue of so-called illicit or contraband tobacco because that is captured under tax dodging. The issue with illicit tobacco is not whether people have paid duty on it. I know that that is, technically, how you classify it. The issue is whether it is there, for sale, and whether we are going to make it a crime to sell illicit tobacco.

Dr Mitchell: It already is a crime.

Mr McDevitt: We know from your enquiries that no one has been prosecuted because, trust me, if anyone had been prosecuted, they would have told you. I am willing to put on a pretty big wager with everyone in this room that if there was a single HMRC or DOJ prosecution under the 1979 Act, you would have been told about it. The fact is that you were not told and, therefore, for what it is worth, I am willing to surmise that that is because no one has been prosecuted.

The reason that no one has been prosecuted may be because it is very difficult to prosecute people under tax law. That is often the case, and anyone who has looked at tax law will know it. So I am asking all of us to step back and return to the fundamental objective of the Bill, which is to make it more difficult for people to get their hands on tobacco, and for retailers who are mis-selling or abusing the privilege bestowed on them of selling tobacco to face tough consequences.

We must capture all types of tobacco sale, including the sale of contraband and illicit tobacco. Through your jurisdiction in DHSSPS, you could certainly capture so-called illicit tobacco under public health measures. It would be perfectly possible to say that all tobacco applies — whether duty has been paid on it or not is academic to us — whether it has been sold on that premise, and whether, following a basic chemical analysis, it can be proven in court to be tobacco.

Dr Mitchell: I think that that is a fair point, and we will take it back.

Mr McDevitt: Do you know what I am saying?

Dr Mitchell: Yes, I know what you are saying.

Mr McDevitt: For legislation such as this to have credibility, we really need to be able to say that. As to issues about duty, I understand that that is how you prove that duty has not been paid and, therefore, technically, it is contraband or illicit. That, however, is not the issue from our point of view.

Mr Collins: We have to be careful —

Dr Mitchell: We have to be guided by legal advice. However, we will take that point back because we fundamentally agree with you on the aim of the Bill.

The Chairperson: Let us not get into the issue of the Bill. Some queries were raised when the officials were here the last time, and we have asked them to come back and answer. Their points are valid and relevant. If we have cleared up some of those issues, the Department will take that back. If we are being told that the proposed date for First Stage will be at the start of April, I assume that it has been drafted and is with the Attorney General.

Dr Mitchell: We have not consulted on that issue, and having to go back and consult might delay the overall timescale. I hear what you are saying, and we do not want to discount that. We take what you are saying seriously and think that it is a serious issue. We will see what we can do.

Mr McDevitt: I am not a lawyer: I am just a humble MLA. If you were to change the fundamental definition of tobacco in the Bill from "tobacco that has had duty paid on it" to "tobacco", I do not see how you would need to reconsult.

Mr Collins: I am not sure that we would need to do that. The purpose of the Bill is to introduce tougher sanctions on retailers who sell tobacco, whether it is legal or illicit tobacco, to people under the age of 18. So whether retailers sell illicit or legal tobacco is not really an issue because the purpose of the Bill is to address the selling of tobacco to children.

Mr McDevitt: Let us take ourselves back three steps. The 15-minute exchange with Roy was, unless I misheard it, about the fact that the Bill did not make it specific that illicit tobacco is also captured under the Bill's provisions and that you would need, therefore, to introduce a clause to reflect that.

Mr Collins: The product is tobacco.

Mr McDevitt: Therefore, the issue is —

Ms McAlarney: Roy's point was more that, under the Tobacco Products Duty Act, people caught selling illegal tobacco in their shop can be banned from selling any kind of tobacco. Roy was asking whether that could count as a strike in our three strikes policy, which it does not at the minute.

Dr Mitchell: There is also the separate issue of sales of tobacco to underage people, which is what the Bill addresses.

Mr McDevitt: That deals with whether the duty has been paid on the tobacco, but I presume that, once a whole load of tobacco is confiscated, it is chemically tested. To prove whether it is tobacco in a court of law, you would need to come back with a pretty hefty toxicology report.

Ms McAlarney: To convict somebody of selling tobacco to an underage person, the tobacco itself would not be tested.

Mr McDevitt: Is it just taken for granted that it is tobacco?

Ms McAlarney: A test purchasing exercise would be carried out. An environmental health department would have an underage person go into a shop and ask to buy a packet of cigarettes. If that person is sold a packet of cigarettes, the retailer would be accused of selling tobacco to someone who is underage.

Mr McDevitt: That is interesting.

The Chairperson: We need to be careful that we are not giving people a get-out clause.

Thanks very much for the presentation. Will you keep us updated on whether the proposed date for First Stage is on schedule? If it is not, you can let us know.