



Northern Ireland
Assembly

Committee for Health, Social Services and
Public Safety

OFFICIAL REPORT (Hansard)

Tobacco Retailers Bill: DHSSPS Briefing

15 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
Ms Pam Brown
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
Mr Nigel McMahon	Department of Health, Social Services and Public Safety

The Chairperson: I take the opportunity to welcome Jenny, Gerard and Nigel. Gerard, I take it that you will take the lead, and I invite you to brief the members on the clauses of the Bill. I want you to take the Committee through a number of clauses and then pause and allow us to ask questions on them. We will then move on to the next set. Is that OK with you?

Mr Gerard Collins (Department of Health, Social Services and Public Safety): That is fine, Chair. Thank you for inviting us to go through the Bill's clauses in some detail. I am Gerard Collins from the investing for health unit in the Department. Normally, Dr Mitchell leads on this type of presentation, but Dr Mitchell is not available today. However, we have Nigel McMahon, the chief environmental health officer in the Department, who has long experience of the application of legislation by district councils. We also have Jenny McAlarney from investing for health branch, who has been the most closely involved in the drafting of the legislation.

We had intended to go through each clause, taking the sections in turn, and if it is fine with the Committee, we will stop at the end of each section and invite questions. That is maybe the best way to do it. I had not intended to go through the previous briefing on the purpose and scope of the Bill. As it has recently gone through its Second Stage, we are quite pleased with the Bill's progress to date, and we look forward to engaging with the Committee through the Committee Stage, which I understand has now been extended until mid-October. There was quite a bit of support for the Bill during the Second Stage debate, particularly from members of the Health Committee. Some concerns were raised by Assembly Members, and we addressed those in the briefing paper that we provided in

advance of this session. The Minister also comprehensively addressed some of the concerns in his summing-up speech. So, I will not cover the same ground today in the opening remarks.

I will make an exception, however, for the issue of illicit tobacco. Committee members have expressed their views on that issue on a number of occasions. It was raised during the Second Stage debate, and it became clear that those views were shared by other Assembly Members. You will of course remember that we had sought legal advice from departmental advisers as to whether it would be possible to include a provision in the Bill that would allow the courts to include a conviction for selling illicit tobacco as one of the three strikes that would lead to a banning order. Initial advice from solicitors pointed to that being an excepted matter and, therefore, outside the remit of the Assembly. However, following the Second Stage debate, we decided to seek further clarification on the issue. The advice that we have received points towards the view that such an amendment would only be giving effect to the fact that someone has a conviction and would not be interfering with the nature of the tax offence or its enforcement, which are matters that are outside the competence of the Assembly. In light of that, and subject to further legal advice, the Department will give consideration to a ministerial amendment to the Bill. The amendment would amend the relevant clauses to include offences under the Tobacco Products Duty Act 1979 and/or the Customs and Excise Management Act 1979. We intend to keep Committee members fully informed of developments in that regard as we look at amending the Bill.

The Chairperson: That is quite useful, because it is an issue that came up a few times at the Committee. It is useful that, at this early stage, you are going to act. Well done on that.

Mr Collins: It was further news to us. Once we found that it was likely to be possible, of course we would go forward and see how we could amend the Bill accordingly.

Today's main item of business is the clause-by-clause breakdown of the Bill. As I said, we will go through each of the clause headings and pause at the end to take any comments or questions that members have.

The first heading is, "Register of tobacco retailers". That section contains six clauses and deals with the requirement for all tobacco retailers to register with their local council. The main aim behind introducing a registration system is to assist enforcement officers in their duties by providing them with a list of all tobacco retailers in their area. Jenny will talk us through the individual clauses in the Bill, beginning with this section on registration.

Ms Jenny McAlarney (Department of Health, Social Services and Public Safety): Good afternoon, Chair and Committee members.

The first clause is entitled, "Register of tobacco retailers". That clause states that each district council in Northern Ireland must keep a register of all the tobacco businesses its area. The definition of a "tobacco business" can be found in the interpretation section of the Bill, which is in clause 22.

The second clause is entitled, "Application for registration". That clause deals with applications for registration and states that a person may apply to be registered or to add further premises to an existing entry in a register. It also states that, when making an application, the applicant must provide his or her name and address and the addresses of all the premises from which he or she proposes to sell tobacco products. That is the information that will be retained by the council on the register. The council may also include other information that it considers to be appropriate. The council is obliged to grant an application unless all the requested information has not been provided or the applicant is subject to a banning order at that time. The council must inform the applicant of its decision within 28 days of the application being made.

Clause 2 also contains three regulation-making powers. The first allows the Department to determine the form and manner of the application to ensure that there is consistency in the information provided and to tie in the application form with the format of the register. The second provides a power for the Department to request further information from the retailer if it is decided in future that that would be beneficial. The third allows for the making of regulations to permit the charging of fees for making an application. There are no plans to make regulations for the charging of fees. We anticipate that it will be free to register.

Clause 3 is entitled, "Duty to notify certain changes". That clause simply requires a registered person to notify the council if there are any changes that should be made to the register. Those changes

relate to the person's name or address or if the person is no longer carrying on in the tobacco business. Clause 3 requires changes to be notified within three months of the date of the change.

Clause 4 is entitled, "Changes to and removal from the Register". This clause permits a council to make corrections to the register as it considers appropriate; for example, following notification of a change under clause 3. The clause also requires that councils must remove from the register premises that are subject to a restricted premises order. That is, if the premises has been banned by the court from selling tobacco. A court may remove a person from the register if it is not satisfied that the person is carrying on a tobacco business. However, it is required to reinstate that person's entry in the register if the relevant person notifies the council within a set period that he or she is still carrying on a tobacco business. A council is required to notify a registered person of any changes to his or her entry as soon as is reasonably practicable.

Clause 5 is entitled "Inspection of the Register". This clause allows the register to be inspected by the public, either at the council offices or any other place that the council deems appropriate. A regulation-making power has been included in this clause if, in the future, the council wishes to charge for copies of the register to be taken.

Clause 6 is "Access by Department and councils to the Register". This clause requires each council to make information in the register available to the Department and to other councils. This information is to be used only by the Department or other councils to enable or assist them to perform their functions under the Bill.

That completes the clauses under the heading "Register of tobacco retailers". I am happy to take any questions or comments on this section.

The Chairperson: OK. I ask members to indicate whether they wish to comment on this section.

Clause 6(1) states that each council must make available information contained in the register to other councils or the Department. Does that mean that there will not be a regional list?

Ms McAlarney: No. We do not anticipate that there would be a regional list. It is more the case that if a council wanted to look at a registration from another council, the other council would have to make that information available.

The Chairperson: OK. I just thought about that on the back of some other things that have happened, where decisions were made in one area and there was not a regional approach.

What happens if someone is banned in one council area but owns premises in another council area? What impact would that have?

Mr Collins: Clause 6(1) states:

"Every council must make available to every other council and the Department such information contained in the Register as the other council or, as the case may be, the Department may require."

That allows councils to ask for information about the registers of other councils. If someone new is applying, councils would be able to ask for that information to see whether that person has been served with any sort of offence in the other council area in which they were operating.

The Chairperson: Yes, but what happens if that individual commits an offence in one council area but has premises in another council area? Does that mean that, in one council area, that person —

Mr Collins: The Bill, as drafted, relates to the council area, because the council has to bring the complaint to the court.

Ms McAlarney: I do not think that if someone had committed an offence in a premises in one council area, it would relate to their premises in another council area. If the person was to be banned from selling tobacco, it would be in relation to the premises on which the offence had been committed. For example, if a person owned two shops, the shop in which the offence had been committed or the sales had been made would be the subject of a banning order. It would not apply to both shops.

Mr Nigel McMahon (Department of Health, Social Services and Public Safety): I will just add to that, Chairperson —

The Chairperson: I just want you to expand on that point. It is the individual who is banned rather than the premises?

Ms McAlarney: There are two different things. There is a restricted sale order and a restricted premises order. The restricted premises order applies to the premises where three offences have been committed on those premises. A restricted sale order would more likely apply in a case where, say, a manager could prove that he or she had done everything possible to prevent a shop assistant from selling to underage persons — that the shop assistant had been trained and had been given all the information — but that assistant had committed a number of offences. It would not be fair on the manager in that case for his premises to be banned, and, therefore, the shop assistant would be banned from selling tobacco. Even if that person moved on to a different premises, he or she would not be allowed to sell from those premises either.

The Chairperson: Even if it is a different council area?

Ms McAlarney: Yes.

The Chairperson: I apologise, Nigel; I cut across you there.

Mr McMahon: I was going to say that if we are talking about a restricted sale order that applies to an individual, my interpretation is that if a council became aware from other councils that an individual had committed offences in other council areas — at least two other offences, allowing for the three strikes — that council could consider going to court to seek a banning order against that individual, even if all three offences had not occurred in their council area.

The Chairperson: Does that not entail the said council being proactive?

Mr McMahon: It does.

The Chairperson: Because there is no regional list?

Mr McMahon: That is correct, yes. We have had early discussions about that. There is a regional tobacco control group. We have had early, tentative discussions about how that might work in providing an administrative process for keeping each other informed.

The Chairperson: What is the reason for not having a regional list?

Ms McAlarney: We decided against a centralised system because we wanted to have the least bureaucracy possible on the registration side of things for district councils and for retailers and to keep the expense of it down. Scotland has a regional, centralised system and so does the South of Ireland. Scotland said that the centralised system cost £50,000 to establish, and the centralised system is held by the Department and not the councils. When we spoke to the councils, they indicated their preference for a council-by-council registration system, such as that which operates for food licensing.

The Chairperson: Is this based on the 26 district councils?

Ms McAlarney: It is at the minute, but, obviously, they will be moving to 11 councils. As with their other functions, such as food registration, they will have to make changes.

The Chairperson: Let me bring in Mickey.

Mr Brady: My question is on clause 7, which deals with the three strikes.

The Chairperson: Mickey, we are dealing with clauses 1 to 6 at the minute.

Mr Brady: Exactly. My question is on clause 7.

The Chairperson: Sorry. I will bring you in in the next round.

Mr McDevitt: I have questions on a couple of areas. First, the regulations that are mentioned in clause 6 will all be subject to negative resolution, will they not?

Ms McAlarney: In clauses 1 to 6?

Mr McDevitt: My apologies, Jenny. In clause 2. A whole bunch of regulations are mentioned in clause 2.

Ms McAlarney: The regulations in relation to the charging of fees will be draft affirmative, because, obviously, there is a cost associated with it. The other two will be negative.

Mr McDevitt: OK, so fees would be draft affirmative.

Ms McAlarney: Yes.

Mr McDevitt: On the Chair's point about the merits of having a regional list versus the more decentralised approach, it strikes me that what is missing when you go for the decentralised approach is a duty on councils to share the information with everyone else. If we stay with it as we currently have it in clause 6, we are saying that they are entitled to the information, and that is obviously right and proper, but that they have to go looking for it. Surely, to ensure that the law of unintended consequences does not kick in, we need to put something in there that either requires councils, when they are considering an application, to actively seek information or that places a duty on councils to share. We need to think about what the most efficient, effective and safest way of doing that is. It strikes me that, if we leave it the way that it is, you have the possibility that people will get through the net, if you like, because a council or some authority did not ask. That would be unfortunate. What are your preliminary thoughts on that?

Mr McMahon: That is a fair point, and, in the early discussions, the council group mentioned that. I guess that it is down to a question of whether they indicate that they are confident that their existing system of information sharing will suffice or whether, in fact, there is merit in considering the addition of something that makes that sharing a mandatory requirement.

Mr McDevitt: From the legislature's perspective, Nigel, given the very substantial amount of change that will take place in local government in the next three or four years, it seems to me that we should be thinking about what the duty will be or what the requirement will be, depending on what way you want to frame it. If it is a duty on all councils to share information with all other councils, you might have the bureaucratic nightmare that you are trying to avoid. You are effectively creating a regional list then, so why not just have a regional list? Or, you can place a requirement on councils to seek information from all other councils or a requirement for an applicant to disclose the council areas that he or she may have worked or been operational in and, therefore, place a requirement on the council to seek information from those. In my opinion, you will have to put something in statute that prevents people from slipping through that loophole.

Mr Collins: Once we get over the initial registration for existing retailers, we will probably find it more manageable. Obviously, there will not be the same volume of new applications coming into the system, so that will probably be more doable after we get through the initial period of registration of existing tobacco retailers.

Mr McDevitt: It is premises-centred and not individual-centred, so there is a real risk that unscrupulous individuals will play the system.

Mr Beggs: I am concerned about this issue of councils making the information available to other councils or the Department, for instance if somebody were banned. I agree that it is useful that you keep everything as bureaucratically light as possible. However, have you not considered other mechanisms to prevent somebody convicted of selling three times in a three-year period, which does not happen by accident, from walking across the street and taking the trade with them, perhaps including young people, to another establishment? Is an easier mechanism to prevent that happening

not simply to ban them from selling tobacco in Northern Ireland rather than in any specific council area?

Ms McAlarney: If you thought that there was a possibility of that happening, you could apply for a restricted sale order and a restricted premises order on the same person. So the premises could be banned from selling, plus that person could be banned from selling, if you felt that there was a risk that that person would just abandon the premises and move to another premises.

Mr Beggs: But that would apply in a council area, if I picked you up right.

Ms McAlarney: It would apply throughout; one council would take the case, but it would apply throughout Northern Ireland.

Mr Beggs: OK. Thank you.

Mr Gardiner: I note that although council environmental health officers will be expected to enforce the Bill, there is no actual requirement for councils to use such officers. Why is that omitted?

Mr McMahon: In framing the legislation, it would be normal to make that a duty of the district council. It is in effect then a decision for the council corporately as to how it applies the legislation. We fully expect that it will be environmental health officers; they already do all the tobacco control work. In England and the rest of mainland Great Britain, for example, such work is done by trading standards officers, whereas tobacco control is largely a function for environmental health in councils in Northern Ireland. I do not suspect that it will be anything other than environmental health, but that is essentially a council decision.

Mr Gardiner: Might councils appoint a dedicated enforcement officer, separate from environmental health officers?

Mr McMahon: That could certainly happen; indeed, it does in relation to other council functions.

Mr Gardiner: If that were the case, has the additional cost been factored in? Is it a cost-neutral measure?

Mr McMahon: The Bill's focus is largely around providing additional enforcement tools to officers who are already engaged in this work. Councils and environmental health departments have been involved in preventing underage sales for a long time. So there is no reason to expect that a council would choose, at this point, to go down a different route of enforcing in a different way using different staff or, indeed, would need to have additional staff.

Mr Collins: We mentioned previously that the Department funds the councils to provide tobacco control. A lot of past efforts have been directed towards enforcing the smoke-free public places legislation. There are very high rates of compliance with that legislation. As that embeds into mainstream practice, the need for enforcement in that area reduces and the resources can be directed to the new tobacco control measures.

Mr Gardiner: Is there a possibility that councils may not delegate this enforcement to anybody if the duty to make the environmental health officer responsible is omitted?

Mr McMahon: Gerard referred to the funding from the Department that goes through the Public Health Agency (PHA) to commission the tobacco control work that happens now. I know that some councils employ what they call tobacco control officers to do that work. Some are from environmental health backgrounds and some have other professional enforcement backgrounds but have come into this work. So, even at present, there are individuals working in tobacco control in councils who are not environmental-health trained.

Mr Gardiner: I think that there are some points there that you need to look at a wee bit more closely.

Ms P Bradley: I should probably declare an interest as a local councillor. It probably follows on from what Sam said, but you said earlier that councils had wanted to do this themselves rather than have one register. Is that correct? Is that what you said?

Ms McAlarney: The consultation responses indicated that, yes, they would prefer to keep a register by council rather than —

Ms P Bradley: A consultation was done and that is what the councils came back and said. I find that quite unusual. As a local councillor, I know that as more powers get handed down to local councils, they are wondering how they are going to cope and deal with that. We had the registration of landlords quite recently through the Department for Social Development (DSD), and because of the problems to do with local councils and information sharing, the Social Development Committee felt that the way forward was that one register should be put in place.

In respect of the £50,000, I make no apologies for saying that that is nothing if it prevents our children taking up smoking early and stops people from buying illegal tobacco. That is a drop in the ocean compared with the ramifications that smoking has in later life. So, I think that that needs to be addressed. From what everybody has said, if there was one central register, a lot of our concerns would be alleviated.

The Chairperson: The £50,000 was based on the 26-council model. Do you have a figure based on the 11-council model?

Ms McAlarney: No; that was just based on information from Scotland.

The Chairperson: Will you give us an idea of that later if you can?

Ms McAlarney: Yes.

Mr Wells: I am in the wrong business. I will set it up for you for half that amount. Frankly, what we are talking about here is one internet page where all the 26 or 11 councils simply post their list. If you were to pay me £25,000 to do that, I would do it.

Ms McAlarney: Their system included somebody centralised in the Department in Scotland, so the figure included the costs of an admin person who maintained the system and dealt with the registrations.

Mr Wells: We are not requiring everyone to register centrally. We are just requiring that the average man on the street can acquire a list of all the tobacco sellers in Northern Ireland on one site. That means that the 11 councils, in addition to compiling a list, push a button and put it on to a central site that anyone can look at. The PHA could run it. That would cost about £50, not £50,000. Where is the other £49,950 coming from? It is as simple as that. It would mean that everybody in Northern Ireland would not have to work out which boundary they are in. We are moving into a new 11-council area, and people may not know which council they are in. They can push a button and find out whether Willie John has a licence to sell tobacco. I am missing something here, am I not? It cannot be that simple. What am I missing?

Mr McMahon: I do not think that you are — *[Inaudible.]* The feedback from councils was that they hold a whole range of registers for different things in their area, and that helps them to schedule and programme their enforcement visits.

The Chairperson: Nobody is disputing that, but the reality is that we have a Minister, we have a regional Department, we have a regional board, and we have individual trusts. I do not want to go over this again, but we have come out of the care home stuff where individual trusts were making decisions and now they are looking at regional approaches. So, if we are doing regional approaches on one thing, why can we not do it across all of it?

Mr Collins: In respect of updating the register, an applicant would apply to the local council, so the council would have to make that change to the register. It is the technical details of how that change should then be filtered through to one central regional register.

Mr Wells: Push two buttons on your computer then rather than one.

Mr Collins: I am not sure of the technology behind it, but it is something that we should look into. If it is technologically feasible, at minimum cost, it would be worth pursuing.

The Chairperson: I know that councils fall under a different Department, but, in our Department, we have the Business Services Organisation where we have all sorts of lists, technology, IT and everything. I am sure that somebody there could come up with a solution. What I am suggesting is based on what members are saying. Do you really want this battle with the Committee on a council list versus a regional list? You should be looking at it.

Mr Collins: We can go away and look at the feasibility and technology behind it to do it cheaply. If it can be achieved cheaply, and it is what the Committee wishes, it is something that we would have to pursue.

Mr Wells: I was out of the room, unfortunately, so you may have dealt with this, and, if you have, you can ignore me. There was quite a bit of debate in the Assembly about the definition of a tobacco provider. I am sure that you were in the Chamber when Mr Allister raised the issue about social clubs, sports clubs and hotels. Are you content that they all fall into the definition in clause 1?

Mr Collins: The response that the Minister gave to that was that clause 22 on interpretation defines "tobacco business" as:

"a business involving the sale of tobacco or cigarette papers by retail."

The solicitors felt that that was a sufficient definition. Clause 22 defines "premises" as including:

"any place and any vehicle, vessel, stall or moveable structure".

That is quite a wide definition of premises, which is intended to cover market stalls and vans. We think that it is well enough covered in the interpretation.

Mr Wells: So, something such as a chip van or an ice-cream van —

Mr Collins: That is a moveable structure.

Mr Wells: Even though, technically, what they are doing is probably illegal, they would still have to register.

Mr Collins: Yes, they would have to register. As we said before, they are unlikely to register if they are selling illicit tobacco, but if they are not registered, they can be convicted and fined under this legislation, which is another deterrent.

Mr Wells: What about the situation at some hotels, I understand, where they keep a supply under the counter for when a resident is absolutely desperate for a cigarette at two in the morning? They do not display and advertise them; they are hidden in brown paper bags, and you can go and buy a packet of cigarettes. Would that still be captured under —

Ms P Bradley: What kind of hotels do you stay in? *[Laughter.]*

Mr Wells: They sell toothpaste and other things as well, but cigarettes are supplied on that basis.

Mr Gardiner: I bet that you are more interested in the cigarettes than in the toothpaste.

Mr Wells: No, I am not. I would not touch them.

Ms McAlarney: If they are selling them, it is covered.

Mr Collins: If they are charging for them, it is retail, and they are covered. They are a premises, and if they sell to a guest —

Ms McAlarney: They should be registered.

Mr Wells: What about the individual who sells cigarettes around pubs and social outlets?

Mr Collins: Again, that is a moveable structure; we discussed this. Some time ago, a number of people were going around with trays of cigarettes to sell to clients in pubs. Again, we think that that would be captured as a moveable structure.

Mr Wells: What if there is no structure because he has them in a briefcase?

Mr McDevitt: That is a structure.

Mr Wells: Is he still covered? A lot of people buy their cigarettes in the back of a pub.

Ms McAlarney: Sellers should be registered. They can be done for not being registered.

Mr Wells: Whether those cigarettes are illicit is a different issue. That is often where they are bought cheaply.

Mr Collins: It is a different issue, but we think that they are covered. When we talk about moveable structures, we mean that someone is going to have to have some form of container that they hawk round pubs with them if they are selling cigarettes.

The Chairperson: Shall we move on to the next set of clauses? We are dealing with clause 7 to clause 9.

Ms McAlarney: The next heading is the "Persistent commission of tobacco offences". There are only three clauses under this heading. However, they deal with a very important aspect of the Bill, as they provide for councils to apply to the courts to ban retailers from selling tobacco. It is intended that this sanction will deter retailers from selling to under-18s, thereby making it harder for that age group to access tobacco products. Clauses 7 to 9 are very similar to those that appear in legislation enacted in England and Wales.

Clause 7 deals with restricted premises orders. It provides for a court to make a restricted premises order banning the sale of tobacco or cigarette papers on a premises if three or more relevant offences have been committed on that premises within a three-year period. The order has effect for a maximum period of one year. It applies when the offender has been in receipt of three fixed penalty notices, three convictions — that is, he has been prosecuted in court — or a mixture of both in relation to relevant tobacco offences. The ban also applies to any machines that may be held on the premises for the sale of cigarettes.

Clause 7 requires the council to notify each person who would be affected by the application for a restricted premises order and provides them with the opportunity to make representations to the court as to why the order should not be made. It also sets out the circumstances under which a court may change or discharge the restricted premises order. While a restricted premises order is in place, it is a statutory charge. That means that it is tied to the premises. Therefore, if the premises is sold while under a restricted premises order, the new owner will not be allowed to sell tobacco until the period of the order expires.

For the purposes of the Bill, a tobacco offence is defined as:

"an offence committed under Article 3 of the Health and Personal Social Services (Northern Ireland) Order 1978".

That relates to selling tobacco to a person under the age of 18. It is also defined as:

"an offence committed under Article 4 of the Health and Personal Social Services (Northern Ireland) Order 1978".

That relates to the sale of tobacco from a vending machine to a person under the age of 18. It is also defined as:

"an offence committed under Article 4A of the Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991".

That relates to the sale of tobacco from a vending machine to anyone regardless of their age. A tobacco offence is also defined as an offence committed under clause 10 of the Bill in respect of any premises. I will go through the offences under clause 10 when we get to that stage.

We are aware that Committee members will be keen to see a conviction for selling illicit tobacco included as a relevant tobacco offence for the purposes of the Bill. Gerard mentioned in his opening presentation that we are looking into a ministerial amendment on that issue. If that is possible, we imagine that it will be included in this clause.

Clause 8 is on restricted sale orders and is very similar to clause 7. However, it differs in that it provides for a court to make a restricted sale order banning a particular individual from selling tobacco or having any management functions in relation to the sale of tobacco if the individual has committed three or more relevant offences within a three-year period. Sales may still be made from that premises as long as the person who is subject to a restricted sale order has no involvement with the sale of tobacco. The order has effect for a maximum period of one year. As with clause 7, the council can make an application for a restricted sale order if the offender has received three fixed penalty notices, three convictions or a mixture of both in relation to relevant tobacco offences.

Clause 9 is entitled, "Appeal against the making of an order under section 7 or 8". It provides for appeals to be made against a restricted sale order or a restricted premises order. An appeal can be made within 21 days of the order being made, and the order will not have effect until the 21-day period has expired or, if an appeal has been made, until the appeal has been determined or withdrawn.

That concludes that section. Does anybody have any questions?

The Chairperson: If there were two people in a shop and one was banned, does that mean that the other one can continue to sell but the one who is banned can continue to work in the shop but not sell tobacco?

Ms McAlarney: Yes. That person cannot have anything to do with the sale of tobacco.

Mr Brady: Jim had already saved £49,950 by the time we had gone through six clauses. Imagine what he will save when he is Minister.

The original proposal was that it would be three offences within two years, and the rationale for extending that to three years seems to be to give the councils time to organise their governance of that. Is that the rationale or is there any logic, or illogic, for changing it from two years to three years? Is it purely an administrative issue? I have not been a councillor. I am surrounded by ex-councillors and some current councillors who may be much more knowledgeable about the issues, but it seems that there has been a period in which councils have been given advance notice, in a sense. If there are to be 11 councils through RPA, there will be a whole new administrative system anyhow. I certainly welcome the proposals on illicit tobacco, because that is a big issue in my constituency, but I am wondering about the three offences in two years. Presumably, if you commit two offences in three years and go into a fourth year and commit another one, you are back into that cycle again. Or do you have to commit another two offences in the three years?

Mr McMahon: There is quite a lot of resource and logistics involved in councils organising test purchases, which is, realistically, the only way that they can test whether owners are taking on board the advice about the measures to put in place not to sell to underage people. The feedback from councils during the consultation was that it was unlikely that they would do more than one major exercise on that in a business year. So, to gather evidence for three offences within two years might mean that, in practical terms, no banning orders were ever sought simply because of the amount of time and resource involved in putting that together. They suggested that moving to three years would mean that it was more likely for a persistent offender to be caught within that period.

Mr Brady: If councils are geared up for that, are the logistics of organising it that complicated or complex? Presumably, they have a pattern for doing that, and there has been a lot of publicity, adverse or otherwise, because 15- and 16-year-olds have been sent into shops by the PSNI and other organisations to purchase cigarettes illegally, and the retailer has, presumably, been prosecuted. Are the logistics that complicated in that sense?

Mr McMahon: It is a fairly significant task, in the sense of recruiting the children to work with the officers and, in some cases, the training of the officers and the children involved. All the premises in the area in which the council is going to conduct the exercise are usually contacted about three months in advance by writing, and sometimes in person as well, to remind them of their responsibilities and to advise them that, at some stage within that time period, the council will be coming around and doing test purchase exercises. That is to make sure that the activity is entirely overt and transparent, so that the premises cannot use the excuse that they have been entrapped or duped into it by some sort of sting-type covert operation by the council. They are reminded in advance of what their responsibilities are and advised that, at some point, that sort of exercise will happen. That in itself builds in, usually, a two- or three-month timescale before it happens.

Mr Brady: There are tobacco control officers — you mentioned them in relation to the enforcement of the smoking ban. If they are trained and that is part of their job, does that not make it more realistic for them to do a cyclical thing?

Mr McMahon: It is, and they do. Generally speaking, it probably is the same officers who are involved in any given exercise. It depends, from council to council, on how easily or not they can recruit the children to help with it. Sometimes, it might be one child and two officers. Ideally, it would be two children, so that they have a bit of support, and three officers who are trained in different roles for the exercise, both for the child's welfare and gathering the evidence.

Mr Brady: Obviously that is a big issue, because the Minister is committed under the tobacco strategy to bringing the percentage of children who smoke down to about 3%. With the amalgamation of councils under RPA, will there not be more resources available for the officers who carry out those checks? We are going from 26 to 11.

Mr McMahon: Yes, there is a possibility that, with the reduction in the number of councils, more of the officers who specialise in that would be able to work together on such exercises.

Mr Beggs: I am quite concerned about what you said when you indicated that most councils carry out the exercise only once a year. Essentially, in order to get a conviction here, someone will have to have failed the only test that is there, three years in a row. They would have to have a 100% failure rate. I think that even some failure rate should warrant some degree of punishment. Did you consider three failures in four years or five years, so that there is a higher threshold? It would be virtually impossible for someone to be convicted, I would have thought. They would need to be deliberately selling to every child that is tested. Is that not a very high threshold if there is only an annual test?

Mr McMahon: I did mention an annual test; I do not think that I quite meant to say that. It is fair to say that the range of activity varies from council area to council area. Some do more than others, but, given the timescale involved in organising it, some councils may not engage in more than one such exercise per year. It varies, and some do more and are more proactive on it than others. In relation to the three years, as we said, the original proposal was for three offences within two years, which was in line with the rest of the UK. However, again, the feedback from councils was that they would like that to be extended to three years, and we responded to that.

Mr Collins: I think that the threshold is worth looking at. If it was three failures in four or five years, that would lower the threshold. For the sake of argument, if there were five inspections in five years and you failed three fifths of those, it is certainly a much lower threshold than failing 100% of the inspections.

Mr Beggs: If I picked it up right, you have indicated that the councils wanted it to be three in three years rather than three in two years. Did any council suggest three in four years or three in five years? That would actually raise the standards further.

Ms McAlarney: I do not think that that was suggested in the consultation. I think that, because England, Scotland and Wales had all gone for the two years, they looked at that and thought that it was too tight a time frame, so they mentioned three. As Gerard said, it is worth looking at extending that.

Mr Beggs: It all depends on how frequently you do the test purchases. That is the big factor.

Ms McAlarney: I think, though, that in a case where somebody had failed twice, the council would be, while not proactively trying to catch them, looking at that shop or premises with a view to carrying out further test purchasing exercises. Would you not agree?

Mr Beggs: I have a further question, on a different line but in the same area. You indicated that you are looking at bringing illicit tobacco sales offences into consideration. Will you be looking at the degree of illicit tobacco sales offences and how they can be compared? If someone has been caught with £1 million worth of cigarettes, surely that should be on a different scale from one young person having bought a packet of cigarettes? Will you ensure that the degree of the offence of illicit tobacco sales can be taken into consideration?

Mr Collins: We had not really thought about that. To be honest, someone who is caught with £1 million worth of cigarettes is probably unlikely to be a retailer.

Mr Beggs: At this time, he could be. He just has to pass his name and address to the local council. Is that not right?

Mr Collins: If Revenue and Customs intercept such a large consignment of illicit tobacco, it is likely to be part of organised criminal activity, as opposed to a local retailer having that in their store —

Mr Beggs: The point I am making, or trying to make, is that an individual who may be convicted of such offences could simply pass their name and address and become a local tobacco retailer. Is there anything in this legislation that would stop them doing that?

Mr Collins: Not in this legislation, as it stands.

Mr Beggs: Yes, there is nothing that would stop someone who has committed a very significant offence involving tobacco automatically becoming a retailer.

Mr Collins: No, but I would imagine that, if they are convicted of an offence under avoidance of tax or smuggling, they will receive a conviction under the relevant legislation that, for smuggling on that scale —

Mr Beggs: I would hope that they would be convicted, but I also would not wish them to become a tobacco retailer in the future. Do you not think it reasonable that the scale of any illicit tobacco offence should be taken into consideration in determining whether a person is suitable to become a tobacco retailer?

Mr Collins: We will have to go away and think about that. We had not given that any thought whatsoever, because it is not an issue that has arisen yet with this legislation.

Mr Beggs: OK. Thank you.

Mr Wells: So the entire legislation is based on the fact that, clearly, councils could not be bothered. Some 9% of the children in Northern Ireland under 16 are smokers; that is three times above the Government's stated target. Some 82% of those who take up smoking do so in their teenage years, and 2,300 of those people die agonising deaths, often at the end of a very short life, as a result of smoking. The entire basis of this policy is that councils could not be bothered to check every two years. In other words, they want a policy of "three strikes and you're out" after three years; in Scotland, England and Wales, it is "three strikes and you're out" after two. The basis of this is that the councils have written back to say that they do not want to be bothered to do it. Is that not right? Is that not why we are where we are today?

Mr Collins: Well, I would not say that the councils could not be bothered —

Mr Wells: That is what they have said to you. They do not want the bother of having to do it more often.

Mr Collins: They are saying that, given their resources and their ability to conduct large-scale test purchasing exercises, they would find difficulty in undertaking three such exercises within a two-year period.

Mr Wells: Or they do not want to, which is more likely. They do not want to. And now we have learned that they actually give the tobacco retailer three months' notice. Do Revenue and Customs do that when they are raiding a diesel laundering plant, for example?

Mr Collins: I would imagine not.

Mr Wells: No. We have a situation where a retailer is warned three months in advance that the council is coming. That is a big deterrent, I have to say. Clearly, they can clean up their act in that three months. So, the chances of them being caught are quite remote to start with, and now we are making it more difficult to catch them in this part of the United Kingdom than anywhere else. Where is the logic in that?

Ms McAlarney: The purpose of writing out to the retailer in advance is that we do not want them to sell to underage people. Therefore, you are giving them a chance to turn their behaviour around and not sell to underage people. If you did not write out, retailers would probably carry on doing that. If you write out, they are more likely to stop.

Mr Wells: Yes; they will stop for three months, and guess what they will do once those three months are up?

Ms McAlarney: As well as that, councils are concerned about accusations of entrapment.

Mr McMahon: Yes, there is another legislative consideration. If a council engages in anything that is considered to be remotely covert, it brings in the regulation of investigatory —

Mr McDevitt: Regulation of Investigatory Powers Act 2000 (RIPA).

Mr McMahon: — RIPA, and councils are into an entirely different ball game. Permission is required to carry out that work. They need authorisations to enable them to do that. By sending out warnings in advance, without giving a specific date on which the check might happen, councils are turning it into what is effectively an overt operation, and the requirements of the RIPA legislation do not kick in.

Mr Wells: We are told that they are written to and told that test purchasing will occur within three months. Obviously they will play ball for three months and then go back to their old ways. Why would they not? The chances of them getting another visit under what you are suggesting — based on the enthusiasm from the councils — is remote.

The Chairperson: Six years.

Mr Wells: Yes. Are we taking this seriously? Do we regard tobacco as a huge, wasted loss of life that kills half all its users and traps young people from an early age into being hooked on the product, or do we just regard the visits as an add-on to a council that it can do if it feels like it? How seriously are we taking the whole issue? It does not seem to be taken very seriously. The original proposal was three times in two years. The only reason that you are giving me for that change in policy is that the councils do not want to do it. That is the only reason. There is no other practical point. Councils in England, Scotland and Wales can do it quite easily, but our councils —

Ms McAlarney: Perhaps it is more of a practical issue. The legislation has been in place in England since 2009. There have been only three convictions since that time. That might lead you to think that they have not been able to get people within the two-year period.

Mr Wells: Or perhaps we need to make certain that our legislation is stronger than that in the rest of the UK because we regard this much more seriously. You need to introduce a suite of measures to try to bring down the number of young people who are getting hooked on the product. The Committee will need to look at anything that we can do to strengthen it and make the law better here than in the rest of the UK, rather than weaker. This is certainly weaker; there is no question about that.

There is reference made to vending machines. Has that been superseded by the fact that the vending machine legislation has gone through, and those are now technically illegal?

Mr Collins: There are certain types of machines that are used in shops in other jurisdictions because of the display ban. Some larger shops use machines that are covered so you cannot see the product. The shopkeeper operates that if somebody asks for 20 of whatever. It is not sales from vending machines that we —

Ms McAlarney: They are called retail vending machines.

Mr Collins: It is a different type. It is behind the counter in a shop.

Mr Wells: My understanding is that there is no set of circumstances in which you can use a vending machine anywhere in Northern Ireland.

Mr Collins: You cannot have a vending machine accessed by the public.

Ms McAlarney: We also wanted to include an offence in case there are people in a pub in God knows where which still has a vending machine, even though it should not have. If people are caught, we want that to count as an offence towards a banning order.

Mr Wells: Can they register the vending machine with their local council even though it is illegal?

Ms McAlarney: No. If they were registered for selling tobacco behind the bar or something, and then somebody found that they had a vending machine as well, they could —

Mr Wells: My understanding is that that legislation has been very successful. There have not been any examples of vending machines being used.

Ms McAlarney: It has.

Mr Wells: That shows you that, where there is a will, there is a way of clamping down on this.

The Chairperson: Can a vending machine not be behind the bar?

Ms McAlarney: Yes.

The Chairperson: Customers cannot get to it.

Ms McAlarney: Yes. You are right. It can be behind a bar.

The Chairperson: You need to be careful.

Mr Wells: But the customer cannot access the machine.

Ms McAlarney: Yes, that is right.

The Chairperson: It is quite useful at Committee Stage for you to have an idea of where the Committee is going with this. You need to take that on board as well. We do not want a battle when we are finalising the Bill. If there is any update on what you propose to do when we are scrutinising the legislation, you need to inform us at every opportunity.

Mr McDevitt: This is perhaps an opportunity to reflect on a couple of levels on the earlier debate around test purchasing. It is natural justice to warn people that test purchasing is going to happen, because it is not illegal to sell tobacco if you have a licence to sell it. Therefore, it is a different category from fuel laundering, for example. It is illegal to sell tobacco only in an illegal manner. While we are doing this, it may be worth our while to think about the way in which councils serve that notice and the period for which it is valid. Saying, by way of correspondence, that somebody may be subject to a test purchase in the next three months might give rise to some of the behaviour that Jim is concerned about, which includes the person complying for three months and then getting back to business. I would be happier if we set ourselves a tough statutory limit and then worked on the councils to figure out a test-purchasing regime that delivered within that tight statutory limit, rather than surrendering to resource implications or something, or perhaps a culture, or perhaps just the window

of notice. I doubt that that is a statutory thing. I suspect that it is just policy or convention that you give them a window of time.

I was curious to ask you about clauses 7 and 8, and the period for which an order may last. On both occasions, you say that the period may not exceed one year. Basically, the maximum time that either someone or a premises will be out of business is one calendar year. Is that just because that is the way that it has been done elsewhere, or is there another reason for that?

Ms McAlarney: It was more based on the rest of the UK to keep a standardised approach. In the South of Ireland, the maximum period is only 90 days. From speaking to the Office of Tobacco Control, I know that it has serious problems with magistrates giving anything nearly as long as 90 days. There have been banning orders for one day or one week. Three weeks is the longest that the office has managed to get a magistrate to give so far.

Mr McDevitt: In the Republic?

Ms McAlarney: Yes. So we thought that one year was probably reasonable.

Mr McDevitt: On the individual restricted sale orders or the orders that apply to the human being, I guess that one year might be pretty punitive for your career, if your career is in retail. Considering that, when you look at the premises, the whole point is that it sticks with the premises even if someone tries to flip it or sell it on to avoid the order. A year is not a long time. In the lifetime of a business, it is something that you could weather very easily.

Mr Collins: I am not sure. From the feedback that we got when we consulted on the display ban regulations, a lot of the retailers were very emphatic that they were largely dependent on the tobacco trade footfall that came through their door. They do not make a lot of money on their tobacco sales; rather, it is what the customers who purchase tobacco also buy. Given the feedback from the retailers on that consultation, I would have said that a ban for a year would be quite significant for any retailer who relies a lot on cigarette purchases.

Mr McDevitt: It is interesting that you should bring that up. How long has the display ban legislation been in force?

Ms McAlarney: Since the end of October for large shops.

Mr McDevitt: Have we evidence of any large shops going out of business?

Mr Collins: No.

Mr McDevitt: From memory, I think that all the large retailers have published increased sales in the last quarter.

Ms McAlarney: Tobacco sales are not as much of a consideration for supermarkets or larger shops anyway.

Mr McDevitt: I am talking about general turnover. I am not aware that it has had any impact on turnover. The retailers will say that, will they not?

Mr Collins: Of course, yes, but it seemed to be a very significant issue for them. Removing even the display of tobacco, let alone the right to sell tobacco, was seen as being quite a punitive measure.

Mr McDevitt: When would we expect to see some robust data as to what impact, if any, this has had on the independent retail sector, never mind the multiples?

Mr Collins: Sorry, the impact of the display ban?

Mr McDevitt: Yes.

Mr Collins: We would be talking about two to three years. It would be three years down the line, I think, before we got reasonable data.

Mr McDevitt: In the context of the legislation, could we, for now, think of making the provision subject to review? If it has been demonstrated that it has no impact, as I believe it probably will, then there is no reason to stick with the one-year penalty on a premises. It would be done by simply making provision by way of regulation for that to be reviewed from time to time. I accept that a one-year penalty against an individual is severe. However, against a business, it just does not feel equitable. It seems to me that you should be harder on the business than you would be on the individual. Paula may disagree.

Ms P Bradley: May I just come in there? I make a declaration of interest as a smoker.

That is why you go into certain shops. You are perfectly right; it is not the cigarettes, as shops make so little on the cigarettes. It is everything else that you buy when you walk in. A year is a long time.

Ms McAlarney: Even if we extend it to two years, I think that there would be very few magistrates who would issue a penalty of anywhere near that. From what we are seeing in other places, and in England as well —

The Chairperson: But you do not know.

Ms McAlarney: You do not know, but experience shows that, so far, in England, the longest ban out of the three has been a month.

The Chairperson: Yes, but we also have devolved government here, and we are in control of justice. There is stuff happening, so you do not know.

Mr McDevitt: This is the stage at which to think about all these things. Is there a case for us making clause 7(6) read "for a period not less than and not in excess of"? When we are down at Magistrates' Court level, we are talking about pretty junior members of the judiciary. If there is an issue with junior members of the judiciary issuing pithy orders, we as legislators could form a view that we want a minimum period to apply.

The Chairperson: You need to pick your battles, and sometimes you need to consider whether you want to get involved on some of this stuff. That is to the Department, not to Committee members.

Mr McDevitt: Anyway, that is just my view.

Mr Collins: It is a good point. After three years, when we evaluate the impact of the policy, will it be considered good policy if there has not been much of an impact? I do not know whether there will have been that many one-year bans in that period anyway, but it is good policy to evaluate and leave yourself future-proofed by leaving it open to review.

Mr McDevitt: To finish, Gerard, let us say that, after three years, it turns that all the people who used to go in to buy tobacco still do so. If that is the case, the change in display regulations will not have had the impact on convenience stores that it is expected to have. Shops will still be turning over, and there will not have been a whole load of independent small retailers that have gone out of business. Then, the argument on which this is based holds less water than it does today, when we simply do not know.

Mr Collins: Our aim is not to put small retailers out of business.

Mr McDevitt: Absolutely not. No one's is.

Mr Collins: Our aim is to reduce the prevalence of smoking.

Mr McDevitt: I am challenging what I think is a myth that, if you restrict the sale of tobacco, you will put people out of business. I do not believe that you will. I think that they will remain in business, legitimately, selling tobacco.

Ms McAlarney: We will not know about smaller shops for a while, because the display ban does not come in for small shops until April 2015. Obviously, you will need to wait for a period after that to see

the impact. With a display ban, people can still buy cigarettes, so it is different from banning cigarettes and not having them for sale at all.

Mr McDevitt: Of course, but you will get banned only if you screw up three times in a period. You are not getting banned for the craic but because you have broken the law on numerous occasions.

The Chairperson: In Scotland, do shops display that they have been banned?

Ms McAlarney: The display ban was introduced in Scotland in April this year.

The Chairperson: Are premises that have been served with a restricted premises order required to display that they have been?

Ms McAlarney: We do not have anything to that effect in this legislation. We talked about that, but we decided against including something that said that they had to put up a notice displaying a banning order. In the Scottish legislation, there is a requirement to display it.

The Chairperson: Why did you come with that?

Mr Wells: Because the councils did not want it.

Ms McAlarney: No. We could easily fit that in. It was felt more that, if you were in a shop that did not have any tobacco, the reason would be obvious without there being the need for a sign saying that the shop was banned from selling it.

The Chairperson: Take the example of a couple who own a shop. It is normally the man who does things wrong, so if he were banned —

Mr Beggs: Sexist remark.

The Chairperson: Of course it is, but it is true. If he were banned and the wife were not, would there be a sign to say that he had been punished?

Ms McAlarney: No, I do not think that they have that in Scotland either.

The Chairperson: If Scotland has a sign saying that the premises has been fined, or whatever, what made you not think of doing what Scotland is doing and perhaps taking it a bit further? If the shop is still allowed to sell, but one person is not and the other person is, there is no real punishment as such.

Mr Collins: Again, the only punishment is if one of the tobacco control officers goes into that shop and observes the person who is banned making a sale.

The Chairperson: I appreciate that, Gerard. However, if I, for example, owned a shop with my partner, and my partner had been banned from selling tobacco, there would be no punishment because two of us own the shop. You are not allowed to sell tobacco for a year, but if you are only doing —

Ms McAlarney: I do not think that it would happen in that case.

Mr Collins: I know what you mean.

Ms McAlarney: It would be more in the case of a young member of staff who had already been trained in the shop but perhaps continues to sell or who had already received a fixed penalty notice in a different shop before working in that shop. In that case, you cannot really punish the manager or owner of the shop if it can be proved that due diligence was applied in training that person, by saying, "Look, you know that this is the law," and, therefore, everything possible was done to stop that person selling.

The Chairperson: But what if two people own it?

Ms McAlarney: If they own it, that is different. There is a clause on bodies corporate that states that if you are a partner in a business and if it can be proven that you consented or complied —

The Chairperson: Sorry, what if the husband owns it and the wife just works there?

Ms McAlarney: Do you mean if the wife committed the offence as opposed to the husband who owns it?

The Chairperson: Yes.

Ms McAlarney: In that case, unless you can actively prove that the person who owns the shop has done everything possible to try to prevent the sale, that person would be banned.

Mr Collins: I know of no legislation under which a person who is convicted of whatever offence has to display a sign saying, "I cannot do x, y or z". I am sure that there would be issues there around personal rights and whatnot.

The Chairperson: Is it not the case that premises served with a restricted premises order in Scotland are required to display a sign?

Mr Collins: On the premises, yes. We did not go for that because we thought that going to hand out notices and making sure that they are up would add another piece of bureaucracy.

Mr Wells: A deterrent — we could not have that.

Mr Collins: Not entirely. We thought that it would be obvious. If somebody sees no cigarettes for sale in a shop and, on asking for cigarettes, is told, "Sorry, we are not allowed to sell cigarettes", that message comes across.

Mr Wells: Would it not send shockwaves around other retailers if such a sign had to go up? Can you imagine the ignominy and the embarrassment of having that? That would send out a very clear signal that society just will not tolerate this happening. It is a sign on a shop window, remember.

Mr McDevitt: Chair, may I make a point on that? If it turns out that the courts are lenient — even if an order of up to a year is allowed under statute, let us say that the courts never give orders beyond two or three weeks, or, occasionally, a couple of months — there is an argument for notification, because you want that brief period of exclusion from sale and the market to have the desired impact on the store and its customers base. If it is for a whole year, I think that Gerard's argument holds up, because people will get the message that the shop is basically out of business for the sale of tobacco. However, if, as you expect, the courts make more reasonable orders from a legal perspective, I think that there is a case for signage.

The Chairperson: Putting to one side respectable, proactive, responsible shopkeepers — there are a lot of them out there — if there are not restricted premises orders, like the ones used in Scotland, only those who are looking to buy tobacco will know that they cannot get it because there has been an order made.

Mr Collins: That is right.

The Chairperson: But if other people in the shop who are not buying tobacco see the sign, they may say, "I am not shopping here because that person was not responsible", and that is their added punishment.

Ms McAlarney: It would be easy enough to put something in.

The Chairperson: I like your style, Jenny — "easy enough" to do it. Then why are we not doing it?

Mr Collins: It was not a big issue. We were trying to reduce any sort of administration.

The Chairperson: We will leave it at that. It is easy enough to do.

Mr Collins: May I make one final point on inspections within two years and three offences in two years? The legislation could certainly provide for three inspections within two years, but if councils were not able to do three inspections in that period, it would be counterproductive, and you would get fewer banning orders.

Mr Wells: Then require them to do regular inspections.

Ms McAlarney: Every six months.

Mr Collins: You would have to accompany that with a requirement on councils to inspect three times in two years. That is one option. The other option is three convictions in five years, which is a lower threshold.

The Chairperson: Then perhaps councils would become relevant to communities, because they would be being proactive.

Mr Beggs: We need to be careful that we do not put a lot of bureaucracy in place. The vast majority of retailers will be straight and will do it right. They do not need to be inspected every three or six months as long as those who need to be concentrated on are inspected regularly. Therefore, we need to be careful that we do not regulate for people walking in and carrying out unnecessary duties. It is burdensome on the retailer and on councils. However, we want to ensure that there is an appropriate level of scrutiny where it is needed.

The Chairperson: OK. Jenny, do you want to take us through the next clause? We are only on clause 10.

Ms McAlarney: There is only clause 10 under the heading of "Offences". The clause covers all the new tobacco offences that will be created as a result of the Bill. As I mentioned earlier, offences under the clause can count as one of three relevant tobacco offences that could lead to a restricted sale or premises order. Offences relate to both the register and breaching a restricted premises or sale order. The different levels of penalties for offences are set out.

These are the offences that are created under clause 10. The first is carrying on a tobacco business without being registered. Then, there is carrying on a tobacco business at a premises other than that which is noted in the person's entry in the register. A person who is found guilty of either of those offences is liable to a fine of up to £5,000. Failure to notify of changes to the register is an offence with an associated penalty on conviction of up to £1,000. The selling of tobacco in contravention of a restricted sale or premises order is an offence that is liable on summary conviction to a fine not exceeding £20,000.

The Chairperson: OK. Are there any questions on that?

Mr McDevitt: This is an observation, rather than a question, particularly about the fine. We know what the maximum fine will be. However, the Bill leaves it entirely open to the judiciary to dispose of people, if they wish, with a nominal fine. The question is whether we think that that sends out a strong enough signal.

The Chairperson: OK. We will leave that there. We will talk about it.

Mr Wells: Can I get an explanation of subsection (2), which states:

"A person is not required under subsection (1) to answer any question or to produce any item mentioned in subsection (1)(c)(i) which the person would be entitled to refuse to answer or produce in or for the purpose of proceedings in a court in Northern Ireland."

What is that doing to help council officers to pursue a prosecution?

The Chairperson: Is that clause 12, Jim? We are still on clause 10.

Mr Wells: We are still on clause 10? Well, you have had warning of what is coming. *[Laughter.]*

The Chairperson: OK. We will move on to clause 11.

Ms McAlarney: The heading of "Enforcement powers, etc." covers seven clauses and relates to the enforcement of the provisions in the Bill, including powers of entry for authorised officers. The enforcement powers are relatively standard and are similar to those that you would see in comparable legislation, such as the Smoking (Northern Ireland) Order 2006 or the Sunbeds Act (Northern Ireland) 2011. The clauses under that heading also outline fixed penalty notices for certain offences and deal with the obstruction of enforcement officers and offences by corporate bodies.

Clause 11 deals with enforcement by councils. The clause simply places a duty on a council to enforce the provisions of the Bill in its own district.

Clause 12 deals with powers of entry. It provides for authorised officers, which are defined in clause 22, to have powers of entry for the purpose of enforcing the provisions in the Bill. The powers do not extend to private houses. Through the clause, officers are entitled to remove documents and records. They can require other people to provide them with information and assistance as they believe necessary. They can also apply for a warrant to gain admittance to a property.

Clause 13 deals with fixed penalties for certain offences. The clause provides for the issuance of fixed penalty notices to a person if an authorised officer believes that the person has committed any of the following three offences: carrying on a tobacco business without being registered; carrying on a tobacco business at a premises other than that which is noted in the person's entry in the register; or failing to notify of changes to the register. When the fixed penalty notice has been paid, any liability to conviction for that offence is discharged. The clause sets out the information that a fixed penalty notice is required to contain, including information on the amount that is payable, the deadline for payment and a discount of 25% for early payment. Two regulation-making powers are contained in the clause. The first allows the Department to make regulations detailing the form of a fixed penalty notice. The second allows the Department to specify the amount of the fixed penalty notice. It is currently anticipated that the levels will vary from £50 to £200, according to the offence in question.

Clause 14 deals with the use of fixed penalty receipts. It requires that the council may use payments that are received from fixed penalty notices only for the purposes of its functions under the Bill; that is, for action on underage tobacco sales. It also places a duty on councils to provide the Department with information on the use of payments if required. Two regulation-making powers are contained in the clause. The first allows the Department to specify the functions for which payments that are received from fixed penalty notices should be used. The second power allows the Department to make provision for what the councils do with payments, either before they are used for functions under the Bill or, if they are not used for such functions, within a specified time. It also makes provisions for accounting arrangements for the council's fixed penalty receipts. All the clauses relating to fixed penalty notices are fairly standard and can be found in similar pieces of legislation, such as the Smoking (Northern Ireland) Order 2006.

Clause 15 deals with withdrawal of fixed penalty notices. The clause provides for a council to withdraw a fixed penalty notice if it decides that it ought not to have been given.

Clause 16 deals with obstruction, and so on, of authorised officers. Again, that is a fairly standard clause, which provides that anyone who intentionally instructs an authorised officer from carrying out his functions under the Bill commits an offence. It also states that failure to comply with the requirements or giving false information is an offence. A person found guilty of either offence can be fined up to £1,000.

Clause 17 deals with offences by bodies corporate. It provides that if an offence under the Bill is committed either with the consent of or due to the neglect of a partner of a body corporate, that partner, as well as the partnership, is guilty of the offence.

Mr Wells: I will go back again subsection (2), which seems to provide an escape route to those who are selling tobacco products. What does the subsection mean? It basically states that he or she is not required to answer any question or produce any item.

The Chairperson: What clause is that?

Mr Wells: Clause 12(2).

Mr Collins: I think that that is fairly standard in all legislation relating to powers of entry. A right not to reveal evidence is probably in keeping with other legislation.

Ms McAlarney: Human rights.

Mr Collins: That is why it states:

"for the purpose of proceedings in a court in Northern Ireland."

However, if a person refused to answer those questions or produce the relevant books, that would then go against them when it came to the council's decision on whether to apply a fixed penalty notice.

Mr Wells: What if he either refuses to say who sold the cigarettes or cannot remember who sold them? What would the council officer do in those circumstances?

Mr Collins: It is done through test purchasing. That is the normal way. Therefore, the council officer would identify the person who made the sale to the underage person.

Mr Wells: But what if the person who owns the shop refused to identify that person? It looks as though he does not have to under the legislation.

Mr Collins: No, but the tobacco control officer will have identified that person.

Mr Wells: But how will the officer know who the person is?

Mr Collins: The officer will be there observing the test purchase.

Mr Wells: Yes, but if the member of staff in charge of the shop says, "I am not telling you who that is", what would happen?

Mr McDevitt: That is covered in 1 clause 2(1).

Mr Wells: He is under no obligation under clause 12(2) to say anything.

Mr McDevitt: No, that is not what it says, Jim. It says that he is under no obligation to say something that he would not have to say in a court of law. In other words, if it were my shop and they asked me for all my ledgers on the sale of tobacco and all that sort of stuff, and then they asked for a copy of my bank account statement, I could say that my personal bank account statement was immaterial to this and that they could not have a copy. I can refuse to produce that, but I cannot refuse to produce something that I would be reasonably expected to produce in a court of law.

The Chairperson: What we will do is get that checked by our legal people. That is not to say that I do not trust you, Mr McDevitt, but —

Mr McDevitt: I am glad to hear that. The First Minister did not trust us all yesterday, remember?

The Chairperson: We will get that checked with our legal people. Are there any other comments on those clauses?

Ms McAlarney: The next heading is "Supplementary" and covers three clauses. The clauses provide for an amendment to be made to the Health and Personal Social Services (Northern Ireland) Order 1978, an amendment to the Land Registration Act (Northern Ireland) 1970 and a regulation-making power for the application of the legislation for vehicles, vessels, and so on.

Clause 18 deals with the amendment to the 1978 order, which includes provisions that make it an offence to sell tobacco products to persons under the age of 18. We were amending the 1978 order to provide for the issuing of fixed penalty notices for underage sales offences, so it was felt that it was an appropriate time to bring the enforcement powers up to date with those in similar pieces of legislation, such as the Smoking (Northern Ireland) Order 2006. The provisions in clause 18 on powers of entry,

fixed penalty notices, obstruction of officers and offences by bodies corporate are almost identical to those contained in clauses 12 to 17, so I will not repeat the detail.

Clause 19 deals with statutory charges. The clause amends the 1970 Act to allow a restricted premises order, while it has effect, to be recorded as a statutory charge. That is to ensure that a person who is subject to such an order does not try to transfer ownership of the business to, for example, a relative for the duration of the order.

Clause 20 deals with vehicles, vessels, and so on. It provides for a power allowing for regulations to be made to modify the final Act on how it applies to vehicles, vessels, and so on. At present, the Department believes that the provisions meet the main policy objective of preventing underage sales. However, that power will enable the Department to respond to any unforeseen circumstances that may necessitate change in its application to vehicles, vessels, stalls or movable structures. A similar provision was included in the Scottish legislation.

The Chairperson: Any questions, comments or input? No. OK.

Ms McAlarney: The last heading is "General" and consists of six clauses making provision in respect of the delivery of notices in electronic form, the interpretation of the Bill and information on subordinate legislation. It also sets out the title and commencement dates.

Clause 21 relates to the serving of electronic notices and provides that relevant notices may be delivered electronically by councils rather than by hand or post; that can be done only with the agreement of the recipients. The relevant notices for the purposes of the Bill are in relation to the register and are mainly to do with the provision of information or notification of changes to information. Two regulation-making powers are included in the clause: the first provides the Department with a discretionary power to amend the circumstances under which an electronic notice may be served; the second allows the Department to amend the day and time by which an electronic notice is deemed to have been delivered.

Clause 22 (Interpretation) defines a number of terms used in the Bill.

Clause 23 (Transitional provision) ensures that specified clauses do not apply where any of the offences mentioned in them were committed before the clauses were commenced.

Clause 24 (Regulations and orders) sets out the procedures for making regulations under the Bill. Most of the regulation-making powers in the Bill are subject to negative resolution procedure. However, any powers concerned with charging or fees, or of such significant concern as to require debate in the Assembly, will be subject to draft affirmative resolution procedure.

Clause 25 (Commencement) provides that all the clauses, with the exception of clauses 22, 24 and 26 will come into operation on the day or days appointed by the Department.

Clause 26 (Short title) specifies the title of the Bill.

Mr Beggs: Clause 24 (2) defines how regulations altering, for instance, fees, must have a draft regulation placed and approved by the Assembly. That allows the future-proofing of the legislation to a degree. Going back to the issue of appropriate sentences and whether sufficient deterrents are handed out, would it not be better to future-proof against that also, by having something in the primary legislation that defines a review? If we find that the judiciary awards one-week bans when there is a maximum of one year, that would provide a mechanism for giving greater direction to the judiciary without having to go back to primary legislation, so that stiffer sentences and a stronger message could be sent out.

Ms McAlarney: We will look into that.

Mr Collins: We can put in something along the lines of: this provision will be subject to review after 12 months.

Mr McDevitt: And the fine levels. They are the two aspects.

The Chairperson: That covers that part of the legislation. Thank you very much. A number of issues have come up, and I would appreciate it, if you are looking at making changes, you took on board the Committee's comments. Let us know at the earliest opportunity.

Mr Collins: Thank you, Chair. We will have to speak again with the legal advisers, to district councils and to our colleagues in other jurisdictions on the issues that have been raised.

The Chairperson: The reason I ask you to keep us up to date is that, based on the conversation, you do not want us to be trying to do stuff when you could be coming back and saying "Listen, we are taking on board the comments, and we will make suggested changes." It is so that we are working together on this.

Mr Collins: Certainly. We will provide a formal briefing for the Committee as soon as we know.

The Chairperson: Thank you.