



Northern Ireland
Assembly

Committee for Health, Social Services and
Public Safety

OFFICIAL REPORT (Hansard)

Tobacco Retailers Bill: DHSSPS Briefing

26 June 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Ms Sue Ramsey (Chairperson)
Mr Roy Beggs
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
Mr Nigel McMahon	Department of Health, Social Services and Public Safety

The Chairperson: Gerard, Jenny and Nigel, you are more than welcome. Thank you very much. We got you out of the Department.

Mr Gerard Collins (Department of Health, Social Services and Public Safety): It is good to be out and about.

The Chairperson: Before you start your submission, I advise you that the Committee received 24 written submissions about the Bill. We held evidence sessions with seven organisations. So, we have gathered a substantial amount of information. Some groups raised objections to certain clauses and others raised questions or are just seeking clarification on clauses. Committee members, as you are well aware, have other issues in relation to the Bill.

We want to go through the clauses with you and seek the Department's views on the issues that we raise. I hope that by listening to the evidence to date, you will be in a position to give us the Department's view on a number of issues. There may be issues that you need to go back to the Department and seek the Minister's view on, so we have scheduled another evidence session with you for next week so that you can come back to us on that.

We will take each clause in turn. I will relay to you the issue raised in relation to each clause and ask you to respond. Members will then come in with supplementary questions. It could be a long session, so we may take a short break after an hour or so, depending on how far we have got.

Do you want to make any remarks before we start or will I just go into the clauses?

Mr Collins: Well, Chair, thank you for inviting us again. We went through in detail the Hansard transcripts of the sessions that the Committee had with a range of bodies. We noted that a lot of the issues that were raised were raised by the Committee with us in the first session, which, believe it or not, was on 24 April. Time has gone at a fast pace. Those issues included proxy purchasing; frequency of test purchasing; duration of the period over which test purchasing takes place; minimum periods for bans; extending the maximum period for a ban; maximum levels of fine; illicit trade; requirement for information-sharing between councils and enforcement agencies; potential for a central register; and requirement for signs that a restricted premises order is in place. There were one or two new things that we did not expect, such as sales from private dwellings, which the Independent Retail Trade Association brought up.

The Chairperson: OK, we will go through the Bill clause by clause, Gerard, so that we can highlight for you the points that were made to us, and you can then come back to them.

Mr Collins: Yes. We thought it best to put together a package to the Minister of what is proposed rather than go back on an individual basis. Hopefully, we will be able to do that next week. The package will be what the Committee proposes and what the departmental position may be, and we will see what the Minister says in response.

The Chairperson: OK. Let me start with clause 1. I will give you some of the background based on the information that we received. The majority of stakeholders were content for councils to gather information for their own registers. There were concerns that there needed to be a central register or database to bring together the information on the 26 separate registers. The register would hold the details of people convicted of, or given a fixed penalty notice for, tobacco offences and people convicted of illicit tobacco offences. It would detail who was subject to a restricted premises or restricted sales order.

The Committee's initial view is that we are leaning on the side of having a central registration process, as in Scotland. We are concerned that having 26 separate council registers and also having a central information point would be a duplication of work. What is the Department's position on that; what is the thinking behind having 26 different registers maintained by the councils; and what does the Department hope to achieve by that?

Mr Collins: In the first instance, the completion of information at council level means that each council will have a register of some sort anyway. We can see the advantages of councils sharing information on enforcement, convictions and fixed penalty notices because that is the information that a council needs in order to see whether someone with retail premises in more than one council area has more than one fixed penalty notice. We are not so sure about the advantages that a central register per se would bring. A central register more in relation to enforcement is key. The register, as it stands, would not have information on enforcement.

The Chairperson: On the basis that the Committee was leaning towards one central register, people said that they did not see a problem with having one central register. Would it not be easier for the Department to do that rather than face a battle at the next stage of the Bill?

Mr Collins: One council indicated that one of the councils could hold a central register. Nigel, you spoke before about the difficulty in Scotland about interrogating the register just to find, for example, who has premises and where.

Mr Nigel McMahon (Department of Health, Social Services and Public Safety): The Scottish register can be interrogated only by local authority, so it would take a long time to search across Scotland for someone who may be registered in more than one area. You talk about a central register. The Scottish register is set up on a council-by-council basis, albeit that central government hold the register.

The other point that councils made to us through the Chief Environmental Health Officers Group is that they already maintain quite a few registers for other things and have the systems to do that. In terms of being able to set that up and the cost of doing that, the feeling was that such a register could easily sit alongside other registers that they have. From an enforcement and inspection point of view, it has the advantage of allowing inspection programmes to be co-ordinated. Obviously, you are trying to reduce the burden on business as far as possible. If it is possible to visit premises and consider more

than one issue at a time, they would rather do that. Holding their own registers would allow them to do that very much more than if the Department was holding the information.

Mr McDevitt: I appreciate Nigel's insight on the practicalities of this. However, we are dealing not with the design of the register but with the point of law: should there be a register or registers? A question that springs to my mind is this: why is there a register in the first place? From what I read in the Bill, it is there so that you know who to inspect; there is transparency about who is trading and, therefore, is eligible for inspection. During the Committee Stage, the issue of enforcement has become a significant aspect or characteristic of a potential register. It seems to me that, because of technology and simple logic, it makes sense that there be a single register; that it be designed in such a way that it is easily segregated by local authority area; but that it serves the basic purpose, which has been identified during this Committee Stage, of being able to identify individuals or entities that may be playing the system, frankly, and seeking to trade in one area when, in fact, they may be limited or disqualified from trading in another.

There is nothing in Nigel's answer that says to me that you cannot have a single register, and that you cannot design it using — one would think — technology, which is what we would expect you to be using, in such a way that it allows all the functionality that you have outlined. In other words, it still allows each council to have, effectively, its own sub-register and still ensures that councils are maximising opportunities to double-up on inspections and to do all that practical stuff. Nothing you have said to me is a case against an integrated register. In fact, when we think about it, it is an even bigger case for an integrated register that is properly designed.

Mr Collins: OK. I think that the key issue there is the information that would be held on the register. This is the issue about enforcement information on convictions. It is important that councils are aware of cases in which a retailer has a conviction in one area and has premises in another or has multiple premises. The other issue is that the register, as it stands, is to be open for viewing to the public. If information on conviction details is contained in a register, issues arise about the retailer's right to a private life. So what is contained in the register is at issue.

Mr McDevitt: I would like to take legal advice on that, because, last time I checked, a conviction is a public proceeding in a court of law. I was not aware that, as a citizen, I had protection from society knowing what convictions I had. It is quite the opposite, I believe, as a cursory search through court records would tell me. The question is whether we live in a society that wants to make it difficult for people to access information, or in an open and transparent one. If you have a conviction that relates to your standing as a trader — it is not a parking fine that we are talking about here; this relates to your carrying out your profession — it is in the public interest that people understand that. That is the application in all other professions. It is unthought of that we would not wish to ensure that that information be available to the public.

Mr Collins: We would have to check that with the departmental solicitors. As the Bill is drafted, the registers are to contain information on premises. They are not to contain information on convictions. We appreciate that it is important that councils share information on convictions, so that councils know, but the intention was not to include details of convictions on registers that are open to the public.

Mr Gardiner: I am concerned that no specific official in the council is named as the enforcement officer for this Bill. Why is that? My follow-up question is this: what checks are there that councils will enforce it properly?

Mr McMahon: It is common legal practice to make enforcement a function of the district council. The council will then determine how to discharge that. I am not aware of any example of legislation that specifies a type of officer or post-holder in the council who would discharge the enforcement function. We fully expect that it will fall to environmental health departments in councils, primarily because that is the case in respect of all other tobacco control activity at the moment. We have no reason to expect that that would not be the case.

You asked about proper enforcement. Ultimately, as things stand, complaints about such things tend to go to the local government ombudsman. If a citizen or anybody else believes that the council is not discharging its functions as per the legislation, they can register a complaint and ask for an investigation.

Mr Gardiner: From what you are telling me, the Department cannot —

The Chairperson: Nigel and Sam, can we come back to that? We need to stick with clause 1. That can be a general point at the end.

Mr Gardiner: OK.

The Chairperson: We should specifically deal with the legislation as it sits. Are there any other questions on clause 1?

The Committee discussed the issue of whether certain people should be prevented from registering as a tobacco retailer. We think that for someone to be allowed to sell tobacco, they must demonstrate that they are a fit person. We are considering whether someone who has a serious conviction for selling illicit tobacco should be prevented from registering as a tobacco retailer. What is the Department's position on that?

Mr Collins: The question is how we define a serious conviction. We would need some definition of what a serious conviction is in the context of illicit sales. There is also an issue about duration. Should somebody be banned for their lifetime from registering as a tobacco retailer if they have a previous conviction for selling illicit or smuggled tobacco? Is there an issue about offender rehabilitation? We would need to take the views of an organisation such as the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO) about the rehabilitation of offenders. It likes to make sure that offenders have access to employment. So, should an offender who has served a penalty of some sort, be it a fine or a prison sentence, be denied the opportunity to establish a retail business?

The Chairperson: Does anybody want to come in on that?

Mr Beggs: What is the risk to the public and to young people of a person reoffending? There has to be a balance to all this. I accept that, at some point, you have to allow people to move on from past behaviour, but if you have no restriction, you are endangering young people.

Mr Collins: That is making an assumption that someone who has sold tobacco on which no duty has been paid is a person who would sell tobacco to an underage person. It is an assumption, and we do not have evidence that it is the case.

Mr Beggs: I am aware from my time on the Public Accounts Committee that those who committed one type of fraud were very likely to also breach some other form of law or to commit another fraud. I understand that it is widely accepted in government that, when someone breaches one law, there is a high risk that they will easily be happy to breach another law for equal profit.

Mr McDevitt: The definition of a serious conviction is well established in law. Maybe officials could clarify that their understanding of a serious conviction is the same as the one that we could establish if we were to do a Google search right now, like I just have, and come back to us. There is a clear body of convictions that are considered serious beyond question, and the question remains about whether officials are, in principle, agreeable to including a disqualification of someone who is or has been found guilty of a serious conviction.

Mr Collins: We can certainly put that to the Minister. We would like to have an opportunity to discuss it with some of the offender rehabilitation charities first to get their view.

The Chairperson: When will you do that, Gerard? Over the summer?

Mr Collins: Yes. We can do that over the summer and come back on it. As well as that, we could take the Committee's views on the duration for which such a ban should apply. Should it be two years after conviction for an illicit-tobacco offence? Should it be five years or 10 years?

The Chairperson: Before I bring Paula in, I think that it is important to clarify where we stop and where the lines are. You should be presenting options to us. You should be telling us that you have an option that is based on having gone down the road of the Committee's thinking. You say that you want to talk to the likes of NIACRO. I want you to clarify that you will talk to NIACRO over the summer. On the issues that we have raised, I want you to clarify that you will come back to us with

more information, answers and proposals on what the Department will do to deal with Committee members' concerns about some of the clauses.

Mr Collins: That is fine. We will speak to NIACRO. We will give some thought to whether there should be a lifetime or time-bound ban from registering as a tobacco retailer. We will look at HMRC's definition as to the seriousness of an illicit-tobacco offence.

Ms P Bradley: That is exactly what I was going to suggest. Perhaps we need to look at a timescale for that.

I definitely agree with the rehabilitation of offenders. However, there are many professions and jobs out there that you will never be able to work in if you have committed an offence. It could be working with vulnerable adults or children, for example. If you have committed a certain offence, you have no hope of ever working in that profession. We are protecting children through this law as well. So, we have to take it a little bit more seriously. That is why we need to have those things in place. I think that we all feel quite strongly about that. Something needs to be put in place to deal with people who have past offences, especially with regard to illicit tobacco. In my experience, as somebody who lives in the community — as we all do — those people really do not care who they sell it to. They are definitely selling it to children as well as adults. There is no doubt about that.

I would be interested to hear what NIACRO has to say. We could maybe look at some sort of time-bound ban to be put on that. I agree that, if someone commits a crime, and that person is then crime-free for so many years, they should be given a chance. However, there are plenty of professions out there where people are not. This is no different.

The Chairperson: You are aware of the Committee's feelings on that, so will you come back us?

Mr Collins: Yes.

The Chairperson: Unless there are any other issues on clause 1, I will move to clause 2.

The main issue with clause 2 is the fact that it allows for regulations to be made to allow councils to charge a registration fee. Councils have told us that they support that potential power. Retailers do not support it. Is a fee charged in Scotland or in other places for registration?

Ms Jenny McAlarney (Department of Health, Social Services and Public Safety): In the Republic of Ireland, there is a €50 charge for registering. Scotland does not charge. However, they have retained a power to be able to charge in the future if they decide to do so. I suppose that our view is that we would like to retain the power. However, that is decided through affirmative resolution by the Assembly. So, the Assembly would, obviously, have a chance to vote on it if we decided to go with something like that.

The Chairperson: Jenny, is there any thinking on the circumstances in which you see the Department using the powers in clause 2(7) and making a regulation to allow a fee to be charged?

Ms McAlarney: If the councils were holding the registers, as is intended in the Bill, I would not see that we would, because it would be a very cheap option for them and there would not be any costs associated with it. If we were to move to a central registration system, there might be a case for having a charge in that instance.

Ms P Bradley: I was not here at the beginning of the meeting. I should have declared an interest as a member of a borough council.

The Chairperson: OK. We will use the opportunity to get others to declare if they need to do so.

Ms Brown: I declare an interest — *[Inaudible.]*

Mr Beggs: I declare an interest. My dad is a local councillor.

Mr McCarthy: I am a member of Ards Borough Council.

Mr Dunne: I am a council member.

Ms P Bradley: In Scotland, someone has to be paying for this somewhere. Is the Department in Scotland paying for it?

Ms McAlarney: Yes. The Department paid the costs of the register.

Ms P Bradley: OK. I know from working in local council that any added work that has to be done has to be paid for from somewhere, whether it be by ratepayers or whomever. So, someone has to be paying for there to be a register in Scotland. I am neither for nor against a charge, but someone has to pay for it. Councils, or ratepayers in general, cannot just be expected to pick up the tab.

Mr Collins: As far as I know, in Scotland, there is a set-up charge and an ongoing, annual charge.

Ms McAlarney: Yes; there is a £5,000 maintenance fee plus the cost of a part-time admin person. I think that £35,000 was the cost of setting up the register.

Ms P Bradley: And that is from the Department?

Ms McAlarney: Yes.

The Chairperson: There is another issue relating to the wording of clause 2(1). A range of stakeholders suggested that the word "may" should be changed to "shall" or "must". Can you explain why you decided to word it in the way that you did?

Mr Collins: We went back to the Departmental Solicitor's Office about that and got a legal explanation, which I hope Jenny has to hand.

Ms McAlarney: I do. The Office of the Legislative Counsel (OLC) gave us this reason for using the word "may":

"This may help to illustrate the effect that 'must' would have on clause on 2(1)(b). If 'must' appeared in clause 2(1) and a person had no further premises to add to the register, a duty to add further premises would apply to them under clause 2(1)(b) regardless of whether he had further premises or not. The intention behind clause 2 is to give a power to apply to be registered, not a duty to apply. If we place a duty on persons who are proposing to carry on a tobacco business to apply to be registered, it would technically have the effect of obliging persons who are thinking of carrying on a tobacco business to apply to be registered. This would beg the question how seriously would you have to be thinking about carrying on a tobacco business before the duty to apply to be registered had effect."

The Chairperson: May we have a copy of that so that we can refer back to it?

Ms McAlarney: Yes.

The Chairperson: We will come back to that.

Still on clause 2(1), stakeholders queried why the wording is:

"proposes to carry on a tobacco business".

Why is it not "carries on" a tobacco business? In other words, why does it apply just in the future? Can you explain why the clause is worded in that way?

Ms McAlarney: This is slightly complicated. The reason that the OLC gave me for having "proposes to" is that we will give existing retailers a set period of time in which to register. However, once the legislation commences, anybody who is considering setting up a tobacco business must register before they set up the business rather than set up their business and then, once they are carrying on that business, decide that they, too, will join the register. That is why it has been set out in that way. If you are considering setting up a tobacco business, you should register before the business is set up.

The Chairperson: May we have a copy of that as well?

Ms McAlarney: Yes.

Mr Collins: As regards implementation of the legislation, there will obviously be a period of a few months for existing tobacco retailers to apply; it allows for that.

The Chairperson: Is the address referred to in clause 2(2)(a) a business or private address?

Ms McAlarney: It has been left as an address, and it will then be for the Department to decide through regulations. Clause 2(d) states that the application form can:

"be made in such form and manner as may be prescribed".

Clause 2(e) states that it can:

"contain such other information as may be prescribed."

The Department will draft regulations setting the form of the application form and asking for an address. It has been left open so that we can decide, through the regulations, whether it is a business or personal address.

The Chairperson: What names and addresses will be provided by companies like Sainsbury's or Tesco?

Ms McAlarney: We will probably go with the Scottish version. They ask for the head office address in the first place and then the address and the name of the manager of each premises.

Mr McDevitt: That will all be in the regulations?

Ms McAlarney: Yes.

Mr McDevitt: So we can come back to that at a future date.

The Chairperson: Some of the stakeholders who responded to us suggested that, when someone is registering, they should be required to provide details of their tobacco supplier. Has the Department any view on that?

Ms McAlarney: That will also be for the regulations on the application. In the South of Ireland, they ask for details of suppliers. We would probably not put that on a register that people will see, but we will probably ask to have it for our information and the council's information.

The Chairperson: There are no other questions on clause 2. On clause 3, some stakeholders suggested that the period for notifying a change of name or address or notifying that a tobacco business is no longer being carried out at that premises should be changed from three months to 28 days. What is the Department's view on that?

Ms McAlarney: If the Committee feels that that is appropriate, we will be happy to consider it and seek the Minister's agreement to shorten that period.

The Chairperson: There are no other issues on clause 3.

Clause 4(2) states that a premises that is subject to a restricted premises order must be removed from the register. Some stakeholders have asked why people who are subject to a restricted sales order do not have to be removed from the register if they are registered as an owner of a shop. Is that because someone who has a registered sales order against them can still own a business that sells tobacco as long as they personally are not selling the tobacco or have management functions in relation to the tobacco aspect of the business?

Ms McAlarney: Yes; that is true. Several restricted sales orders may be against staff members of the shop who do not have their name on the register anyway. The register will just ask for details of owners and will obviously not contain the details of all the staff who work in the shop.

The Chairperson: There are no more questions on clause 4.

Mr McDevitt: That is something that we might want to return to.

The Chairperson: Clause 5 allows for people to take copies of the register. Who do you think is most likely to want to obtain copies of the register?

Mr Collins: Another enforcement agency, for example, might want to have copies. Other businesses might want to have copies to know where competition lies. It could be someone who sees tobacco being sold from a certain premises and has a concern that that premises is not registered. An informed citizen might want to know whether that premises is licensed to sell tobacco. There is whole variety of reasons why people might want to see it.

Mr McDevitt: What physical form does the register take in Scotland?

Ms McAlarney: It is a website.

Mr McDevitt: That is what I thought. It would be a bit bizarre if it were some book somewhere. *[Laughter.]* I presume that you guys are not proposing telling councils that you want them to keep a ledger in a dusty room and lock it away at 5.00 pm every day and that, in fact, it will be online. Is clause 5 really appropriate? When I, as a reasonable person, read clause 5, I think that a lot of this would not apply if the register were online because, by definition, it would always be available to everyone.

Mr Collins: We are hearing that a lot of small retailers, especially older retailers, do not have access to computers or the internet. In those cases, if someone is interested in viewing the register, there will still be a need to be able to get a hard copy of it printed off.

Mr McDevitt: I accept that. You would probably do that by going into a public office somewhere and getting some poor official to print off either part of it or the whole thing for you. Let us just say, for argument's sake, that we win the argument on the regional register; I am not asking you to express an opinion. If we are making a law, surely you would just say that there will be a register, that it will be online, that it will be available to everyone, and, that, if you cannot access it online for whatever reason, councils have a duty to make copies available to you.

Ms McAlarney: When we were drafting this legislation, we were looking at a council-held register. While some councils may put it online, a lot of them will probably just keep an Excel spreadsheet-type thing on their own computers. That clause is there to allow the public to have access to the register and to give them that power if they wish to have it.

Mr McMahon: It is also a fairly standard clause. As we mentioned earlier, councils already hold a range of registers. In all the legislation that supports those, there will be a fairly standard clause like this that allows a member of the public to go to a council office and inspect the register.

Mr McDevitt: Nigel, you must accept that, if you are setting up a register in 2013 — and it is public register not a private register — there is an absolute expectation that it will be something that I, for example, could Google right now and ask you questions about in real time. I would feel really disappointed if we were thinking about anything else, because it does not feel like modern Government, never mind law.

Mr McMahon: I do not think that it prevents that from happening, but if some individual who did not have internet access decided, for whatever reason, that they wanted to go to the council and ask for that information, it seems that the provision supports that or requires the council to make that information available in hard copy to them at their premises at the time.

Mr Collins: I suppose that it goes back to the question again about a central register and how any central register would be maintained and held. A central register that could be held online, with details

by council area, might be the appropriate way to go. I know that the Committee is strongly in favour of a central register, and maybe it could be held online.

Mr Dunne: Would there be an issue of freedom of information in relation to that if it were online? I suppose that depends on what information is held.

Mr Collins: I suppose that it is more a case of data protection than freedom of information. As Nigel said, a variety of registers are held and are open to public inspection. It might be publicly available information. It depends on the nature of the information that is held.

Mr McMahon: In some other registers, some information is withheld. For example, in registers around industrial pollution control, any information that is deemed to be commercial in confidence, which may be required in the register from the regulator's point of view, is not made available on the public version of it, but all the other information is available.

In the Scottish register for the equivalent of this proposed legislation, as part of the application, they ask for the details of an individual representing the business, but on the public website, you can only get the company details and address details, you cannot get online the details of the individual who made the application.

Ms Brown: This is more of a comment than a question. The deeper we go into this, the more it seems to be complete common sense to have one central register. I agree wholeheartedly with Conall about the online aspect of it. In this day and age, our local libraries have internet access. It is accessible to everyone, and anyone who does not go down that route at this stage will probably ask their sons, daughters or grandchildren to do it for them. I do not see a barrier to accessing online information.

Mr Beggs: Do you concur that if the publicly available information were online, it would avoid the additional bureaucracy and costs of freedom of information access requirements because you would just be able to say, "as per the website?" It would cut out that level of bureaucracy and somebody having to think about what does and does not get released and individually accessing that information. So, I can see long-term savings and avoiding that cost to local government if it is simply online. Do you agree with that, or can you see that point of view?

Mr Collins: I certainly do. If any information that is held online is published, we can simply refer people to the website if a freedom of information request comes in.

The Chairperson: OK. We will move on to clause 6. As this clause is drafted, it simply states that councils must provide to other councils and the Department, if requested, the information contained in their tobacco register. Many stakeholders are concerned that this clause is not strong enough to ensure that all the relevant information is shared by all the relevant agencies to ensure that the legislation can be properly enforced. Stakeholders want one central information point that brings together the information on the 26 separate registers and holds details of people who are convicted of or given fixed-penalty notices for tobacco offences and people convicted of illicit tobacco offences. It would also detail who is subject to a restricted premises or restricted sales order.

Putting aside the issues from clause 1 and whether there would be 26 separate council registers or one central register, does the Department agree that there should be one central information point where all the information that I have listed is kept and available to those who need to see it?

Mr Collins: We looked at that and discussed it earlier. It is something that we will go away and think about. It is clear that that is something that the Committee is very keen on, and it is something that we would work to see. I am sure that it is feasible. There will be a charge of some description, and the Department will probably have to meet that charge, at least in respect of setting up a central register. There will be technical issues, but it is done in Scotland.

As to the information that the register holds in respect of enforcement, fixed-penalty notices, convictions and what not, I would like the opportunity to go back to speak to the solicitors about that to see whether that sort of information could be put on to a public register.

The Chairperson: Can you also come back to us with information on what organisations would be suitable for collating the information if it is agreed? On the back of the last discussion, it would be

helpful if you could try to get as much information as possible for when you come back the next time about what information can be made available, who would be on the register, details about who has been subject to an offence or a fixed-penalty notice and things like that.

There are a number of issues in relation to clause 7. As drafted, the Bill states that three offences committed in three years will result in a restricted premises order. You are well aware of the discussions that we have had around that. Given the frequency of test purchasing, we are coming to a view that three offences in five years would be more realistic in respect of securing the restricted premises order and would also act as a better deterrent. The charities agree with that position, as does the Northern Ireland Local Government Association (NILGA). What is the Department's view on that proposal?

Mr Collins: We think that that is an extremely good idea, and it is something that we will put to the Minister.

The Chairperson: OK. Thank you. I like this part. *[Laughter.]* Also, there is concern around the length of the restricted premises order. Currently, the Bill states that the maximum penalty for a banning order is one year. Some stakeholders have suggested to us that there should be a minimum period specified of three months. What is the Department's view on that proposal?

Mr Collins: We took advice from the solicitors, and the response was that there is no problem in setting a minimum period for an order to exist. It is more common for guidance to be issued to courts as to a minimum period rather than be prescriptive, but if we wish to specify a minimum period in the Bill, that can be done.

Mr McDevitt: This is a very brief observation, and I know that Gerard and colleagues will know this, but low-level judges would be considering that type of banning order, and they have a record of sometimes giving very low penalties. I think that there is a case for a minimum here rather than relying on guidance, even though the minimum may or may not be the 90 days that have been suggested. I think that there is a strong case for a minimum.

Mr Collins: Again, that is something that we would be happy to put to the Minister.

The Chairperson: Do you have an idea what period is specified in the Scottish or Irish legislation?

Ms McAlarney: In Ireland, they have no minimum limit, and the maximum is 90 days, but I was speaking to the chief executive of the Office of Tobacco Control just last week, and she was saying that, because of the small periods that the courts are handing out, they are considering amending the legislation. They are thinking about a minimum period of one month to six weeks.

Mr Beggs: As members will know, I have been keen to tighten up a lot of aspects of this, but we have to get a balance, and I have a concern that if there were a three-month ban, some smaller shops could close completely. I am not sure that 90 days would be appropriate as a minimum limit.

Mr McDevitt: There has to be a minimum of some sort.

Mr Beggs: I still want a minimum.

The Chairperson: The Department will look at that and come back, so we can look into the time period then. There has also been a suggestion that the maximum should be increased to three years. What is the Department's proposal? Do you have any information on what is specified in the Scottish and Irish legislation?

Ms McAlarney: I do not think that Ireland is looking at extending the maximum, which is only 90 days. In Scotland, it is two years. In England and Wales, it is one year, which is the same as we have proposed, but we would be happy enough to look at extending it beyond a year.

The Chairperson: It has been suggested that a premises should have to display a notice stating that they are subject to a restricted premises order. We generally support this view because we think that it would act as a good deterrent and make the public aware that a premises had broken the law. What is the Department's view on this proposal?

Mr Collins: Again, we would be happy to put that to the Minister. We accept the argument of the deterrent impact of a sign.

Mr Dunne: Would there be requirement to display a sign?

Mr Collins: We would put a clause in.

The Chairperson: We previously discussed whether an offence for illicit tobacco should count towards the three offences. At the evidence session on 15 May, you said that you would look at tabling an amendment to include reference to an offence committed under the Tobacco Products Duty Act 1979 and the Customs and Excise Management Act 1979. In general, the Committee would welcome such an amendment. Is this still the Department's intention? If so, what progress have you made on looking into the issues and drafting a possible amendment?

Mr Collins: We have drafted a possible amendment. Have we put that to the Minister?

Ms McAlarney: No, not yet.

Mr Collins: We will put it to him and seek his approval when we have a package of proposed amendments and changes.

The Chairperson: That is interesting.

We also have some questions around convictions made under the Tobacco Products Duty Act 1979 and the Customs and Excise Management Act 1979. Can you provide us with information on the behaviour that someone would have to be engaged in for HMRC to seek a prosecution under either of these Acts? If someone were caught selling 10 packets of illicit cigarettes, for example, would he or she be prosecuted?

Mr Collins: We have not sought that information from HMRC. To be honest, I am not sure whether there have been too many convictions under either of those Acts. We do not have the evidence to make a decision on what type of behaviour would count towards a conviction.

The Chairperson: There have been convictions. We have a letter from the DOJ stating that there have been around 12.

Ms McAlarney: I went back to our contact in the Department of Justice to ask whether he was aware of the specific nature of those offences. He told me that he did not have the information but that he would go back to HMRC and try to find out for me. I have not heard; he has not had time to come back to me.

The Chairperson: I appreciate that this is complex, but at Second Stage, the Minister said that he was looking at the issue, and at the evidence session in May, you made it clear that you would look into tabling an amendment. I ask you to look at it again and write to us over the summer telling us what you find out.

We also received correspondence from the DOJ — we will send you a copy — regarding whether a premises or person can be banned from selling tobacco as part of their conviction under those Acts. We would be grateful if you could consider its implications for the proposed amendment to include an offence for illicit tobacco as part of the Bill. We need you to do that over the summer.

Mr Collins: I suppose that there is an issue with the Bill. We can specify that councils must share information on enforcement, but I am not sure whether we have the remit to specify that HMRC would have to share or be required to share information on its enforcement activity and convictions with the councils. That may have to be worked up in a protocol of good will.

The Chairperson: Gerard, you need to tease that out and find out. The Minister said that he would look at it, and the DOJ has written to us. If there are other issues, we need to know about them before we get to the next stage of the Bill.

Mr McDevitt: I understand what Gerard is saying, because HMRC is not a devolved authority. However, if HMRC takes a prosecution against someone in this jurisdiction, the conviction becomes a matter of record in the Courts and Tribunals Service. Therefore, it does not really matter what you are convicted of; it is where you are convicted. If you are convicted in Northern Ireland, the fact of your conviction falls within our jurisdiction, and the detail is available through a devolved authority, which is the Northern Ireland Courts and Tribunals Service.

No one has the power to ask HMRC whom it is investigating; that would be totally inappropriate. However, we are not interested in that information. We are just interested in those who have been convicted.

Mr Collins: We will seek a legal view on that.

The Chairperson: We will get you that letter from the DOJ.

Some stakeholders suggested that a premises that is subject to a restricted premises order should be required to remove tobacco products from the premises to prevent any breach of the order. That would also make it easier for councils to check that a premises was complying with the order. Has the Department any view on that proposal?

Mr Collins: Yes. There is an issue about where the retailer would have to move the tobacco products to. We agree that, when there is a restricted premises order, the tobacco products should be removed from the retail area and perhaps put in a locked storeroom on the premises. However, if a small retailer had to remove stock — it does not take a lot of stock to amount to a large amount of money — and bring it to their private dwelling or home, there could be an issue with their becoming targets for potential break-ins. It would concern us if they had to remove the tobacco products from the shop entirely, and we would perhaps prefer it if they had to remove it from the retail areas. Every shop has a lockable storeroom somewhere.

The Chairperson: Would that be under a restricted premises order?

Mr Collins: Yes, when there is a restricted premises order, and someone is banned from selling tobacco products.

The Chairperson: So if a retailer did not remove the tobacco when a restricted premises order is in place, would that create an offence under clause 10?

Mr Collins: As it stands under clause 10, if a retailer sells tobacco when a restricted premises order is in place, that would be a further offence. However, as far as I understand it, having tobacco on the premises would not be an offence.

Ms McAlarney: No, not at the minute.

Mr Collins: I think that it is a question of balance —

The Chairperson: Sorry, Jenny, what do you mean by "not at the minute"? Are you looking at that?

Ms McAlarney: We have raised that with the OLC. It came back with a few extra questions for us to consider about the circumstances.

Mr Collins: I think that there is a need for balance. It would probably be good practice to have the tobacco removed entirely from the retail area. However, it is about whether it can be kept in a locked storeroom in the shop rather than owners putting it in their own private premises.

The Chairperson: Will you keep us updated on the outstanding points that you might get answers to?

A question was asked about clause 7(7), which requires councils to give notice of their application for a restricted premises order to every person who appears to be affected by the application. Could that mean, for example, that councils would have to ensure that they had given notice to every employee in a large supermarket?

Ms McAlarney: No. I presume that it would mean people with a management responsibility.

Mr McMahon: The persons affected are defined in clause 7(13)(b). It would be the occupier of the premises and any other person who has an estate in the premises.

The Chairperson: So in the case of large supermarkets, it would be only management who would get the notice.

Mr McMahon: In that scenario, I would image that it would be —

Mr Collins: Management and head office.

Mr McMahon: — management and head office. If someone rents shop premises, it would be the business operator and the landlord.

The Chairperson: There is also a query about clause 7(8), which requires that the three offences have to be by the same offender on the same premises. Will you clarify who the offender is when a fixed penalty notice or conviction is made when tobacco is sold to someone who is under the age of 18? Is the offender the owner of the premises or the individual who made the sale?

Mr Collins: It can be either or both. It will be at the discretion of the tobacco control officer.

The Chairperson: OK.

Mr McMahon: In the majority of cases, it is more likely to be the owner or operator. As Gerard said, it could also be the person who made the sale. However, in existing enforcement activity, councils tend to focus more on operators and the systems that they have in place to prevent underage sales. Some councils will also give a warning or caution to the seller. In some circumstances, when it is fairly obvious that the seller has, for whatever reason, made a deliberate decision to ignore the advice that has been given by the operator, they would perhaps go for the seller. I am thinking of a case that was quoted to me in which a child in the test purchase approached a seller, and the seller asked the child to come back later in the afternoon when the manager would not be there. The officer returned and tried the test purchase again, and the sale was made in the afternoon. The feeling then was that, obviously, you would go for a conviction in that case against the seller as opposed to the manager who was not present.

The Chairperson: Do you have a breakdown of those statistics, Nigel?

Mr McMahon: We did ask the councils. Unfortunately, I was unable to get statistics for each council, but the general feedback from them was that, in the majority of cases, action would generally be taken against the owner or proprietor rather than the seller. In some cases, however, councils would also warn the individual seller.

The Chairperson: Could you get us that information over the summer?

Mr McMahon: I can certainly ask the question. The initial response was that it was not held in a way that could be easily provided.

The Chairperson: If you could check for us and find out whether it is one or the other or both, it would be interesting for us in our deliberations.

There are a number of issues around clause 8 that are similar to those that we raised on clause 7 on the minimum and maximum period, the idea of including an offence for illicit tobacco and changing the threshold to three offences in five years. Is your position on clause 8 the same as it is on clause 7?

Mr McMahon: Yes.

Mr Collins: Yes. The same issues apply.

The Chairperson: There are other separate issues in clause 8. Can you clarify the purpose of having restricted sales orders?

Ms McAlarney: I will give you some examples of the main reasons for restricted sales orders. If you were concerned that serving a restricted premises order on a shop owner for a longer period resulted in him or her simply opening a new premises, you would want to have a sales order to prevent that person from opening a new premises and selling tobacco again.

If you felt that a member of staff had been selling persistently but that the shop owner could not be blamed and you did not want to serve a restricted premises notice on the owner, you could serve an order on the salesperson.

The Chairperson: Does the legislation in Scotland or in the rest of Ireland contain provisions for restricted sales orders?

Ms McAlarney: I do not think that the legislation in the South of Ireland has those provisions. Scotland has ancillary banning orders, which prevent a business owner from getting a spouse to take on the business instead. So someone who is associated with the owner cannot open a business. It is a similar type of thing, but England and Wales have sales orders and premises orders, which are similar to what we are proposing.

The Chairperson: Who is the offender as defined in clause 8(1)?

Ms McAlarney: The definition in clause 8(1) is similar to clause 7(1). It would be either the owner or the person who sold the tobacco, or both, depending on who you felt should be to blame. If the culture in the shop was that the manager turned a blind eye and was happy enough to sell to underage customers, it would be the owner. However, if you felt that the manager had done everything possible, trained the staff and warned them not to sell, but the person had done so anyway, it would be the salesperson.

The Chairperson: The councils have an understanding that they would be able to seek a restricted sales order as well as a restricted premises order against the same person at the same time if the three offences were committed in the same shop. That would suggest that they see the offenders being the owner of the shop in relation to a restricted premises order and a restricted sales order. Is that the intention of the legislation?

Ms McAlarney: The intention of the legislation is that they could seek a restricted sales order and a restricted premises order against the same person for the same three offences on the same premises. As I said, that is to prevent that person from opening up another business and selling somewhere else.

Mr Collins: In most cases, we would see the owner being the main person against whom we would seek a restricted sales order. However, for whatever reason, we need flexibility in the Bill so that if an employee flagrantly ignores the training and guidance of the owner or manager of a shop, councils will have the ability to apply for a restricted sales order against an employee, given the circumstances of the case.

The Chairperson: They also have the understanding that a restricted sales order is to deal with a situation in which a person owns a number of shops. If tobacco offences are committed across those shops, they envisage bringing a restricted sales order against the owner of the shops. That is the purpose of the legislation.

Mr Collins: That would prevent the owner of a shop from selling tobacco in another of their shops in the same area or even in a different council area. That is another aspect of a restricted sales order

The Chairperson: If somebody is convicted and is then subject to a restricted sales order, what happens if he or she has three or four shops?

Mr Collins: That person cannot sell in any of those shops.

The Chairperson: If the person is not the seller, can the shop still operate?

Mr Collins: Yes. A restricted premises order applies solely to that shop, and a restricted sales order applies to the person. So if that person works in a number of shops, he or she cannot personally sell tobacco in any of those shops. However, if another of their shops is not subject to a restricted premises order, that shop, apart from that person, can sell tobacco legally.

The Chairperson: Does that mean that the owner of the shop is not personally allowed to sell tobacco in any of the shops that he or she owns?

Mr Collins: If there is a restricted sales order against them — yes. However, someone else in the shop could sell the tobacco.

Mr McDevitt: What about a situation in which the owner is found personally guilty? If the owner of a business that sells tobacco — for argument's sake, let us say that that person has three retail outlets — is found personally guilty of selling tobacco, why should any of his or her businesses be allowed to sell tobacco? That guy or woman is the owner of the business. The point, as I figure it out, of the restricted sales order is to protect owners against the misdemeanours of staff when they have taken all reasonable steps. However, when the owner is guilty, why should his business be protected? He is the person responsible, and he owns the business. He has committed a crime and has a restricted sales order against him personally. Why should his business not be affected?

Ms McAlarney: That person may be subject to a restricted premises order because he had sold the tobacco three times in one premises, but he also received a restricted sales order to stop him from selling it and moving on. In that case, he may have worked mostly out of one shop and had two other shops with managers in place. I suppose that you are affecting the businesses and the staff in those businesses and putting their livelihoods at risk. The Bill could include something to say that if you are subject to a restricted premises order, it affects all the premises that you own. It seems quite harsh.

Mr McDevitt: An owner has a greater duty than the staff. Although I am sympathetic to your argument about having loads of staff, it would be helpful to find a way to really put a burden on the owner not only to take responsibility for his or her staff, which is important, but to make sure that they are never found breaking the law.

The Chairperson: You can appreciate the confusion about where it stops and starts and who it impacts and does not impact. In the context of the purpose of the legislation, do you think that restricted sales orders, given the way in which they will operate and their purpose, are necessary to achieve the aim of the legislation, which is to make it harder for young people to access tobacco? That seems to be where the restricted sales order comes in. The point was made that, if someone owns three or four shops but is restricted in only one, it adds more confusion. If I am looking at only three offences in so many years, it seems harder.

Mr Collins: Can we have some time to think about that? If we apply a restricted sales order to every premises owned by a multiple owner, that is quite a move away from the initial draft Bill. We need some time to think that one over. It is important that we retain the restricted sales order for employees because it is a deterrent.

The Chairperson: I appreciate that. Some witnesses have also suggested that a notice should be displayed stating that someone on the premises is subject to a restricted sales order. What is the Department's view on that proposal? Are you aware of any human rights issues that may be involved?

Ms McAlarney: We sought an opinion on that from the Departmental Solicitor's Office (DSO). The solicitor said that there may be potential for a challenge, based on article 8 of the European Convention on Human Rights, which is the right to respect for private life. Even when an individual is not named, in a small shop with only a few employees, there is the potential, effectively, of branding that employee because it would probably be quite obvious to whom in the shop it referred. Article 8 is a qualified right, and it may be subject to limitation on one or more grounds. The question is, therefore, whether this is necessary in the interests of national security, public safety or the economic well-being of the country; for the prevention of disorder or crime; for the protection of health or morals; for the protection of the rights and freedoms of others; and whether the action is proportionate. Finally, the solicitor thought that there was a real risk of a challenge over competency.

Mr McDevitt: My view is that we should get a more definitive opinion because article 8 is qualified, health is listed and this is public health legislation, first and foremost, if you think about its fundamental intent.

Ms McAlarney: I can understand it if the notice states that a shop is subject to a restricted premises order. However, if the notice specifies an individual in the shop, how would it benefit the public?

The Chairperson: Perhaps you need to look at the restricted premises issue versus an individual. If the notice were worded correctly, it could serve both.

Mr Collins: In all honesty, in most cases, if councils go for a restricted sales order against an owner or part-owner, they would also go for a restricted premises order. So it might be a moot point.

The Chairperson: Retailers also suggested a list should be available of those who had been subject to a restricted sales order. Their issue is about pre-employment checks to avoid employing such persons. Are you thinking about that?

Mr Collins: That goes back to the information that is held on the central register and whether information on offences can be held on such a register. If that is the case and such information can be held, employers would de facto have access to such information.

Mr Beggs: If employers cannot have access to that information, will there be a means by which they can determine whether the person to whom they are considering offering a job is on the register? They might not be able to see all the names, but could they ring up and ask whether Joe Bloggs is on the register and is banned? It would be bad if an employer were to give someone a job and was unaware that he or she had a banning order.

Mr Collins: I would like the opportunity to bring that up with the solicitor. We would have to give greater consideration to lists of people with offences and employers' access to them and get legal advice.

The Chairperson: No issues were raised with the Committee on clause 9. Have you anything that you want to add?

Mr Collins: No.

The Chairperson: Clause 10 relates to the level of fines associated with offences. The fine for not registering is a fixed penalty notice of £200 or a maximum fine of £5,000. However, in Scotland, the maximum fine is £20,000, and there is the possibility of a six-month prison sentence. Why did the Department decide not to follow Scotland's example?

Ms McAlarney: We looked at fines in legislation for similar offences and found that £5,000 was equivalent. We thought that a £20,000 fine was quite severe for the level of offence — that is, for not registering. We discussed it with the Department of Justice. There was an issue with the maximum fine in a court of summary jurisdiction, whereas it would be £5,000 unless there were exceptional circumstances. We felt that £5,000 was more proportionate.

The Chairperson: The fine for not notifying a change to the register is a fixed penalty notice of £50, which can be discounted to £30. In Scotland, the fixed penalty notice is £200. Do you not think that a fine of £30 is so low that people will not heed the requirement to notify a change of name or address to the council?

Ms McAlarney: You are referring to the fixed penalty notice. Those are the amounts that we are looking at, but they are not set in stone. They will be set out in the regulations, so we will consider them in more detail then. However, I thought that most of our fixed penalty notices were similar to those in Scotland.

The Chairperson: Will you provide a comparison with Scotland? Did you say that Scotland was similar?

Ms McAlarney: I thought that we had based most of our fixed penalty notices on a level similar to Scotland's.

The Chairperson: Will you come back to us with the details?

Ms McAlarney: Yes.

The Chairperson: We move on to clause 11. No issues have been raised by the Committee. Has the Department any issues to raise?

Mr Collins: No, we have no issues under clause 11.

The Chairperson: We move on to clause 12. The retailers queried why premises used only as a private dwelling house would be out of bounds to council officers under clause 12(1). Will you explain why councils are not permitted to access premises used only as a private dwelling house? Does that allow them access to a premises if the owner of a shop lives above it?

Mr Collins: The feedback from the solicitors is that removing the words:

"other than premises used only as a private dwelling"

from the clause would leave the legislation open to a human rights challenge. Under human rights law, entering a dwelling requires a court warrant; hence the exception of dwellings from the automatic right of entry provisions. There is a further issue: if someone is using a private dwelling to sell — to retail — tobacco, whether that is duty-paid tobacco or not, it is questionable whether that is still a private dwelling or has become a retail premises. In theory, if a tobacco control officer was aware of someone selling tobacco from their living room, they could go in and carry out a test purchase. If that person was not registered under the order, they could be fined under the Bill.

Mr Beggs: I can see the difficulty with the sale of illicit tobacco, which is more likely to be sold from private houses, and it is unlikely that a stranger to an area would be given access to that. It is more likely that people familiar with an area would be the purchasers. As such, it would be very difficult to get a conviction against someone selling illicit tobacco without access to search the property. Why do you not simply build in a provision so that authorised officers could search a property for evidence of the sale of tobacco with an appropriate warrant? As with other legislation, why not put in a provision whereby they could get a court order, the signature of a justice of the peace or whatever other process was needed so that they could gain access to a private property to stop the sale of illicit tobacco from there?

Mr Collins: I do not know what the provisions are under the Tobacco Products Duty Act or whether HMRC has the ability to —

Mr Beggs: I am thinking of provisions in the Dangerous Wild Animals Act. Having been on other Committees in the past few years, I know that there is a process whereby a private property can be accessed after going through a system of approval. Where there was reasonable concern, you could convince an appropriate officer that there was a likelihood of illegal tobacco being sold from a private house. You may have intelligence or have watched people going in and out of a house. Would that not be more likely to bring the sales to an end and stop the sale of tobacco to young people?

Ms McAlarney: If it was just illicit tobacco sales, that would be an issue for the police or HMRC, not environmental health officers. I cannot see a situation in which an environmental health officer would seek a warrant to go into a house to do a bust on illicit tobacco trade.

Ms P Bradley: Not without the police being present anyway.

Ms McAlarney: Yes.

Ms P Bradley: In that case, it would be the police who went in.

Mr Beggs: It could be with police accompaniment, but there is simply not sufficient action by HMRC on this problem, so can we use local intelligence from local people and then have local police solve it?

Mr Collins: The issue for environmental health officers would not be whether the tobacco was illicit but that someone was trading as a tobacco retailer without being registered under the order. However, I imagine that environmental health officers may have concerns about seeking a warrant to go into a house in which an illicit trade was taking place.

It was the Dangerous Dogs Act that sprang to my mind. That is slightly different, in that keeping a dangerous dog does not usually involve organised crime.

Mr Beggs: If environmental health officers have a genuine concern, we could empower them to go in with the support of the local police to deal with it. Otherwise, that trade will be hidden and sales will continue.

The Chairperson: You can gather more detail on that, Gerard, and get back to us over the summer because there is a concern about that. Maybe you could look at legislation in other Departments.

Mr Collins: We need to look at examples of other legislation and the powers of council officers.

The Chairperson: We are nearly finished, so I ask people to remain focused on clause 12(2).

Ms P Bradley: Quite often, the people who sell illicit tobacco are involved in organised crime. We cannot put a council officer in the dangerous position of going into a house where organised crime may be involved.

The Chairperson: We can learn the lessons of other legislation. We are trying to stop young people from accessing tobacco, so we need to look at tobacco sold in other places.

Queries were raised about whether clause 12(2) would prevent councils from being able to undertake enforcement. Will you explain the purpose of the clause and whether it exists in other similar legislation?

Mr Collins: The legal advice is that this is a common provision in powers-of-entry clauses. It gives a statutory base to a person's right to refuse to answer a question or provide an item to an authorised officer if that person would be entitled to refuse to answer the question or provide the item in court. It preserves the right against self-incrimination and also covers, for example, documents subject to legal privilege.

The Chairperson: Can we access the information that you have?

Mr Collins: We will e-mail it to the Clerk of the Committee.

The Chairperson: Retailers suggested that clause 13 be used to create a fixed penalty notice for an offence under the Tobacco Products Duty Act 1979. Given that that is HMRC legislation, am I right in assuming that it would not be appropriate to use this Bill to deal with penalties for illicit tobacco offences?

Ms McAlarney: Sorry, what did the retailers want?

The Chairperson: They said that the legislation could be used to create a fixed penalty notice for an offence under the Tobacco Products Duty Act 1979. However, if we are saying that that is an issue for HMRC, and it is HMRC legislation, it would not be appropriate to use this Bill to deal with penalties for illicit tobacco offences.

Mr Collins: This Bill is not about illicit tobacco. Someone fined or convicted under this Bill for selling to someone underage is a different issue from the HMRC legislation, which covers the sale of illicit tobacco.

The Chairperson: The point was raised as part of our consultation, so it is important that we raise it with you.

No issues were raised with the Committee about clause 14. Do you have any issues to raise?

Mr Collins: No, we have nothing further.

The Chairperson: Councils raised queries about clause 15(4) and the length of time that someone has to make a representation against a fixed penalty notice. Why does clause 15(4) not specify a period within which any representation must be made? Does the clause allow for someone who has already paid a fixed penalty notice to subsequently make a representation to try to have it withdrawn?

Ms McAlarney: We discussed this with the OLC. Again, this is a standard clause that appears in any legislation that deals with fixed penalty notices.

I think that the councils were concerned that somebody would pay a fixed penalty notice and, down the line, when facing a banning order, they would say that they should not have paid and intended to appeal. The departmental solicitor said that, if someone accepts and pays a fixed penalty notice, they accept that they have committed that offence and, therefore, discharge any right of appeal. If someone did not pay within 28 days, it would go to the courts, and they would have a chance to put their case for appeal then. The departmental solicitor said that the appeal must be made within 28 days; paying before the 28 days is up means no right of appeal.

Mr Beggs: I would like you to clarify that: are you agreeing that you will include in the Bill that the penalty notice should be paid within 28 days?

Ms McAlarney: Sorry?

Mr Beggs: Did you agree that the penalty notice should be paid —

Ms McAlarney: It says elsewhere in the Bill that, if a fixed penalty notice is not paid within 28 days, it will be automatically referred to the court.

Mr Collins: We are sticking with the 28 days.

Mr Beggs: Thank you.

The Chairperson: Under clause 16, the fine for obstructing an authorised officer is "not exceeding level 3". What is a level 3 fine?

Ms McAlarney: It is £1,000.

The Chairperson: The councils believe that a level 5 fine would be more appropriate, which, I understand, is a maximum of £5,000.

Ms McAlarney: Level 3 is the standard fine for this type of offence. The obstruction of an authorised officer is a pretty standard offence. We have it at level 3 in the Smoking (Northern Ireland) Order 2006, and our solicitor said that it was also level 3 in other legislation. She said that, if it were changed to level 5, someone convicted of obstructing an officer under this Bill would get a level 5 fine, whereas someone else convicted of obstructing an officer under the Smoking (Northern Ireland) Order 2006 would get a level 3 fine. There is no difference in the offences, but someone would be penalised differently just because it was different legislation. The solicitor said that it would be a potential human rights issue.

Mr Beggs: Might there be a need to increase the fines in other provisions? *[Laughter.]*

Mr Collins: That would be a lot of work.

Mr Beggs: I am being serious. Just because the fine is set at a certain level in other legislation does not mean that it is right. We want to give a very clear message. Such obstruction could stop the gathering of essential information and prevent someone being found guilty.

Ms McAlarney: Nigel, you have a council background. Do you have a view on that?

The Chairperson: Why not give it some thought and come back to us?

Mr Collins: There is probably an awful lot of legislation with obstruction offences, some of it beyond the Health Department. The more usual way would be that, as amendments are made to the other legislation, thought would be given to the level of offences rather than having a blanket approach and changing all legislation on that point.

Mr McDevitt: Chair, that is the argument for doing it here and getting into the habit of increasing the penalty. You always run the risk that someone may challenge a conviction, but they will not strike down the law. The courts will say, "until the laws are amended", which would be an incentive to amend anyway.

Ms McAlarney: If the Committee is really —

The Chairperson: Be radical.

Ms McAlarney: We can put it to the Minister.

The Chairperson: Roy, they will put it to the Minister.

Mr Beggs: The issue is not just that an individual may be breaking the smoking order; it is that young people will be accessing smoking and becoming addicted to it. That is why level 3 is not a sufficient fine for those who obstruct the gathering of evidence that could prevent such access.

The Chairperson: No issues have been raised with the Committee about clause 17. Do you have anything that you want to raise?

Mr Collins: No.

Ms McAlarney: No, I have nothing.

The Chairperson: On clause 18, the councils and others have the view that the penalty currently available to the courts for a breach of article 3 of the Health and Personal Social Services Order 1978, which is about selling tobacco to under-18s, is too low. It is currently a level 4 fine, which is a sum not exceeding £2,500. You propose to introduce a fixed penalty of £200, discounted to £150 if paid early. The councils and charities suggest that this level of fine is too low to act as a deterrent against selling tobacco to children.

Ms McAlarney: Were they talking about the level of fine or the level of the fixed penalty notice?

The Chairperson: They said that level 4 does not exceed £2,500. You propose to introduce a fixed penalty notice of £200, which will be discounted to £150 if paid early. They suggest that that is too low to act as a deterrent against selling tobacco to children, and that is what the legislation is about in the first place.

Mr Collins: The fixed penalty notice is primarily a pathway to conviction, as well as being a deterrent in its own right. In most cases, the fines for fixed penalty notices are fairly low. The more important issue is probably the level of fine on conviction.

The Chairperson: The councils and charities suggest that it is too low, so I ask you to take it to the Minister and come back to us.

Ms McAlarney: Yes.

Mr Collins: OK.

The Chairperson: The only issue that I want to raise about clauses 19 to 26 is on clause 24(3). It allows for any regulations made under this legislation to contain other provisions as appear to the Department to be "necessary or expedient." What is meant by that? Why is the power necessary?

Ms McAlarney: That is a pretty standard clause in any provision for the making of regulations or orders. We have set out the regulation-making powers in the Bill, so it is not that we will be able to make any regulations other than those that we have identified. As you know, some of the regulations will be passed by negative resolution, but the majority will be passed by affirmative resolution and debated by the Assembly. It just means that, if we were making regulations, we could decide what they should include. We would then put those forward for approval by the Assembly under the normal procedure.

Mr Collins: Again, the legal advice — it is important not to look at the final six or seven words, which appear to give the Department any powers that it cares to take on board — *[Laughter.]*

The Chairperson: Was that the legal advice, Gerard?

Mr Collins: The regulations will be confined to the Act. Any regulations have to go through a process. We were advised by the departmental solicitor that this is a long-established provision in legislation to facilitate the making of effective regulations and orders. What they are saying is that it is nothing to be worried about.

The Chairperson: Right.

Mr McDevitt: Chair, this may be a standard provision, but I think —

The Chairperson: It does not make it right.

Mr McDevitt: It gives the Department the power to do practically whatever it wants.

The Chairperson: It will still need to come in front of the Committee.

Mr McDevitt: Yes, but we went over this not too long ago with the Sunbeds Act and others. I ask the Department to question whether it really needs that general provision. Is it absolutely necessary?

Ms McAlarney: Do you mean that we should take out the entire provision or parts of it?

Mr McDevitt: I do not think that clause 24(3) is necessary. You give yourselves the powers to make regulations throughout the Bill. In clause 24(1) and 24(2), you qualify those powers by recording which regulations will be made under affirmative resolution, which is good. However, if you needed to make a substantial change to the Act in future, you should do so by way of amendment.

This is a really antiquated provision, and I think that it goes back to the days of direct rule when they did not have the power to amend. In fact, I think that we received advice at some stage to that effect. They did not have access to a Parliament to make amendments all the time.

I ask that you question whether we really need this provision in a devolved Assembly. If you were going to make a substantial change, you would come back to the Assembly with an amendment.

Mr Collins: OK.

Ms McAlarney: We will ask the question.

The Chairperson: A couple of other issues came up. The first is the fixed penalty notices for the sale of tobacco from vending machines. The councils and others suggested that the Bill be amended to allow for a fixed penalty notice to be issued for an offence under article 4A of the Children and Young Persons (Protection from Tobacco) Order 1991. That legislation allows the Department to make regulations on the sale of tobacco from vending machines, and such regulations were made in 2012. What is the Department's view on that suggestion?

Ms McAlarney: We see no reason why we could not. We will ask the Minister.

The Chairperson: *[Inaudible.]*

Ms McAlarney: Yes, we will do that as well, but it seems reasonable.

The Chairperson: Retailers and manufacturers, as well as the cancer charities, propose that the Bill create an offence for an adult to purchase tobacco on behalf of someone under the age of 18. That has been introduced in Scotland. What is the Department's view?

Mr Collins: A clause on proxy purchasing could be included, but I remind the Committee that the enforcement of a provision on proxy purchasing by tobacco control officers would be very, very difficult. The officers would need to observe children giving money to an adult and the adult going into a shop. They would need to stop that adult and seek his or her identity.

The Chairperson: Is there any big issue with doing it?

Mr Collins: Technically, there is no big issue with including it, but enforcement would be very difficult.

Mr Beggs: Do you agree that, with such a measure, you would be more likely to stop the practice of proxy purchasing than if you did nothing about it? Some adults, perhaps, would not make such purchases if they knew it was illegal. At present —

Mr Collins: There is that potential. Also, it would allow for shops to display signs telling customers that anyone who proxy purchases may be liable to a fine, so there is a deterrent merit in such an inclusion.

The Chairperson: That ends the evidence session at this stage of the legislation. On some issues, you need to get details over the summer and bring them back to us after the recess. Thank you very much for attending.

Mr Collins: Thank you, Chair. Thank you, members.