

<b>UNDERAGE SALES TEST PURCHASE EXERCISE PROTOCOL</b>	<b>7<sup>th</sup> February 2017</b>
<b>TO: ENVIRONMENTAL SERVICES COMMITTEE</b>	
<b>FOR DECISION</b>	

<b>Linkage to Council Strategy (2015-19)</b>	
<b>Strategic Theme</b>	Resilient Healthy and Engaged Communities
<b>Outcome</b>	To advise members of legal advice obtained in relation to a proposed change to procedures for conducting test purchase exercises aimed at raising awareness and assessing compliance of age restricted legislation in relation to sale of tobacco products and volatile substances.
<b>Lead Officer</b>	Bryan Edgar
<b>Cost: (If applicable)</b>	N/A

## **1.0 Background**

Causeway Coast and Glens Borough Council enforces legislation relating to the sale of certain age-restricted goods and services such as cigarettes, tobacco products and volatile substances such as butane cigarette lighter refill products together with the hire of sunbeds.

At the Environmental Services Committee meeting on 4th October 2016 members were advised of the outcome of the first of these planned initiatives which was carried out within the Coleraine legacy Council area. The Committee subsequently recommended that Council amends its test purchasing protocol to not inform retailers in advance of the proposed date range in which a test purchase exercise is to take place. This recommendation was later ratified by Council on 25<sup>th</sup> October 2016.

To ensure there were no legal implications for Council under the Regulation of Investigatory Powers Act 2000 in this departure from procedure and to consider any implications for the success of future legal proceedings, such as challenges in court from accusations of entrapment or in admissibility of evidence, a legal opinion was sought on the matter. In the legal opinion consideration was also given to changing the test purchase procedure during the course of the financial year to which the service's business plan adheres and if this disadvantages retailers in certain areas of the Borough.

## 1.1 Legal Opinion Summary

A summary of the salient points within the legal opinion are as follows:

- (i) The Regulation of Investigatory Powers Act 2000 sets out a regulatory framework for the use of covert investigatory techniques by public bodies, which includes local authorities. This places any such intrusion on a statutory footing so that any interference with a person's privacy is made only in defined circumstances and in the public interest and always balances the seriousness of the intrusion against the human rights of the individual; particularly Article 8 of the European Convention on Human Rights, the right to respect for private and family life.

It does not appear that any future lack of warning as to test purchases will lead to implications for the Council under the 2000 Act. Provided that the child is merely acting in the role of a normal customer, previously unknown to the retailer, such actions will not fall under the terms of the legislation.

- (ii) There appears no reason why lack of notice of a properly conducted test purchase would lead to a stay in any flowing prosecution or exclusion of evidence. Such activities are carried out for worthy reason in the interest of the public. Retailers should be aware of their responsibilities under legislation when it comes to the sale age restricted products. It is noted that Tobacco Task Group Guidelines of March 2011 set out training for children who act as test purchasers. Under such they should be instructed to answer questions truthfully and leave immediately upon refusal, never making a repeated request for goods. As long as the child acts as a normal customer, and does not overstep the mark in encouraging the sale, any argument for a stay or exclusion of evidence based on fairness is very unlikely to succeed.

Despite the lack of legal necessity for warning the Council may nonetheless still wish to consider issuing some form of notification to retailers. Amongst the primary objectives of test purchasing are presumably deterrence and raising awareness. The approach of Belfast City Council in informing retailers at the beginning of the year that test purchases will be carried out without notice over the next 12 months, would appear to strike the correct balance when one takes into account what the Council seeks to achieve through its procedures.

- (iii) With regard to a change in policy for pre-notification of retailers the success of any prosecution could be jeopardised if the Council is viewed as having acted improperly. If retailers have been led to believe that they would get advance notice of a test purchase and this does not occur it would almost inevitably lead to arguments that such misrepresentation should bring about stays or exclusion of evidence. Such applications would not necessarily be successful as the retailer may find it difficult to establish how a lack of warning resulted in any unfairness. A balancing exercise of countervailing considerations would need to be carried out by any Judge making such a decision.

To avoid such a situation, where the Council could be accused of bringing the administration of justice into disrepute, it would be prudent and highly advisable that, before carrying out any unwarned test purchase exercises, retailers are informed that there has been a change in policy that means they will no longer receive notice in future.

## **1.2 Conclusion**

In light of the legal opinion obtained it is the advice of Council's legal team that the remaining test purchase exercises planned for 2016/17 are completed in the same manner as the first carried out in September 2016 i.e. as per existing procedures giving prior notification. On completion of these and at commencement of the financial year when service plans for the year ahead are formulated, the Council should adopt an approach similar to that of Belfast City Council whereby retailers are informed at the beginning of the year (i.e. April) that test purchases will be carried out without notice over the next 12 months.

## **1.3 Recommendation**

It is recommended that Council adopts the approach advised by Council's legal team as outlined in 1.2 above for test purchase exercises for tobacco products and volatile substances only.