

EAST AYRSHIRE COUNCIL

CABINET – 22 OCTOBER 2008

TOBACCO SALES ENFORCEMENT

Report by Head of Legal, Procurement & Regulatory Services

1. PURPOSE OF REPORT

- 1.1 To advise the Cabinet of recent changes in policy by the Lord Advocate to allow the use of young people to test purchase age restricted products, including cigarettes, and seek Cabinet decision on policy on the use of minors for such purposes

2. BACKGROUND

- 2.1 Legislation prohibiting the sale of tobacco products to minors has been in place since 1908. In recent years however the profile and awareness of associated problems relating to the sale of tobacco products has been raised. This has been in part due to the introduction of health initiatives by successive Governments. Although the trading standards service is responsible for enforcing legislation restricting the sale of a range of age restricted products, concern regarding the sale of tobacco products and in particular the sale of cigarettes to young people has risen further up the political agenda.
- 2.2 The Lord Advocate has historically blocked the use of children for test purchasing for the purpose of gathering evidence for prosecutions and Scottish Office Home & Health Department guidance issued in 1992 suggested that their use in surveys to estimate the extent of illegal purchasing should be used “only as a last resort.” That guidance stated; “The voluntarily involvement of children in test purchasing may be considered as part of surveys or exercises to determine the extent of over the counter sales to children under 16 in a specific area information collected by the participation of children in this way must not be used in preparing a case for subsequent prosecution..... trading standards officers must obtain the evidence for a prosecution from a completely separate exercise.”
- 2.3 Although the use of children for test purchasing of cigarettes and other age restricted products had been common in England for a number of years it was not until 2002 that a pilot study was agreed and was conducted by trading standards services in Moray, Stirling, South Ayrshire and Edinburgh and only after wide consultation subsequent to this study did the Lord Advocate announce in 2005 that prosecutions for the sale of

cigarettes as a result of test purchases by under-age child volunteers would be permitted.

- 2.4 Having due regard to the moral, legal and practical implications it has not previously been this Council's policy to use children for the purposes of test purchasing and this policy was in line with guidance issued by the Lord Advocate. However, since the Lord Advocate has revised this guidance to allow the "employment" of minors to test purchase age restricted products, the issue is open to further consideration.

3. CURRENT ENFORCEMENT ACTIVITIES

- 3.1 Where information is received to the effect that a trader is illegally selling age restricted goods to young persons and it can be proven, to the necessary evidential standard required for criminal prosecution, instances of illegal sales will be reported to the Procurator Fiscal.
- 3.2 Otherwise, where there is cause to suspect that a retailer is selling cigarettes to children, covert surveillance is carried out, in co-operation with the police where appropriate, and instances of illegal sales will be reported to the Procurator Fiscal.
- 3.3 Trading standards further enforce legislation relating to the sale of age restricted products by a programme of visits to retail premises to ensure compliance with legislation relating to the display of warning notices and raising traders awareness of the penalties for improperly supplying age restricted products, supplemented by advice and assistance including the distribution of a trader information pack. This covers the sale of a number of age restricted products including cigarettes, fireworks, solvents, aerosol paints, videos, knives, alcohol and lottery tickets and includes a refusal book, refusal cards and a window sticker.

4. DISCUSSION

- 4.1 Despite age restriction for selling cigarettes being raised to 18 years, the implementation of a test purchase regime for cigarettes in accordance with Scottish Government guidance would require the services of volunteers under the age of legal majority.
- 4.2 The Scottish Government have published a document entitled "A Practical Guide to Test Purchasing in Scotland", perusal of which will confirm that the introduction of a test purchase programme is not a cheap or easy option. Using minors for such initiatives properly requires adherence to a strict code of conduct and is costly in terms of human resources. However, recent developments including the allocation of new additional funding of £34,386 per annum to East Ayrshire intended for allocation to the trading standards budget, provides a funding opportunity to develop a

- test purchasing programme for cigarettes, which could also include addressing sales of other age restricted products.
- 4.3 On the basis of LACORS full cost recovery estimates for officer time, each half-day/evening test purchase exercise will cost around £1,000. There would be further initial costs in training trading standards and perhaps other staff on the implementation of the test purchase protocol, along with the cost of recruiting and retaining volunteer minors as well as reimbursing reasonable expenses or gratuities in line with the Scottish Government Guidance “A Practical Guide to Test Purchasing in Scotland” paragraph 3.6.2.
- 4.4 Should Cabinet decide that a test purchasing regime for cigarettes (and other age restricted products) is appropriate; this raises the question of recruitment of volunteers. The Scottish Government guidelines state that volunteers should be at least 18 months younger than the restricted age for that product. For cigarettes the age limit is now 18, therefore volunteers would have to be under the age of 16 ½ years. In practice, to comply with this guidance, volunteers would have to be recruited around the age of 15 to allow time for risk assessment, training and then a useful period of “employment”.
- 4.5 All officers undertaking work with children would be required to complete a Disclosure Scotland enhanced check. Local Authority Social Services or Human Resources staff should be able to assist with this process.

5. RECRUITMENT OF VOLUNTEERS

- 5.1 Recruitment of school age children would have to be done in conjunction with Educational & Social Services staff. The recruitment of young persons over the age of 16 would leave little time for risk assessment and training before being employed in accordance with the Scottish Government guidelines. This recruitment could be initiated through individual secondary schools guidance teachers or via the Dialogue Youth project, or an alternative would be to invite Council staff members to volunteer their school age children for such an initiative.
- 5.2 A further alternative, not strictly in accordance with Scottish Government guidance, would be to use Council staff members under the age of 18 to conduct test purchases. The sale of cigarettes to persons under the age of 18 is an absolute offence and any defendant would have to show that he/she took all reasonable precautions and exercised all due diligence to avoid commission of the offence. Any trader who failed to ask the age of a young person purchasing cigarettes would find it difficult to rely on that defence. Although this option would not be in strict accordance with the guidelines, in terms of the age of the test purchaser, it would be for the Procurator Fiscal to decide whether the circumstances merited

prosecution. This option has particular advantages in terms of recruitment, health & safety and insurance considerations.

5.3 The Practical Guide to Test Purchasing in Scotland issued by the Scottish Government recommends that volunteers should be at least 18 months younger than the legal minimum age for the purchase of the product in question but also states that the actual age of the young person selected is a matter for each Local Authority.

5.4 In summary, possible options for recruiting test purchase volunteers are: -

- In conjunction with education services, identifying school children between the ages of 15 and 16 ½ willing to participate.
- Identifying the offspring of Council employees within that age group who would be in a position to conduct test purchases.
- Identifying members of the Dialogue Youth project willing to participate.
- Identifying Council employees under the age of 18 willing to participate.

6. POLICY IMPLICATIONS

6.1 It has previously been the policy of this Council not to involve children in test purchasing exercises in the interest of their general welfare and in accordance with guidance previously issued by the Lord Advocate. The proposed test purchase programme reflects the decision on the matter announced by the Lord Advocate in February 2005 and current Scottish Government policy.

7. LEGAL IMPLICATIONS

7.1 The proposals are in accordance with the statutory responsibilities and powers of the Authority.

8. FINANCIAL IMPLICATIONS

8.1 Test purchasing exercises are costly in terms of human resources. However the Scottish Government has committed £34,386 per annum for at least three years to assist East Ayrshire Trading Standards conduct a test purchasing programme.

9. CONCLUSIONS

9.1 Trading Standards currently carry out an enforcement programme in respect of the ban on the sale of cigarettes to persons under 18 years of

age as outline in paragraphs 3.1 – 3.3. This programme should be supplemented by a test purchasing regime for cigarettes and other age restricted products.

10. RECOMMENDATIONS

10.1 a. It is recommended that;

- (i) Cabinet approve the proposed change of policy in respect of use of minors for test purchasing of cigarettes and other age restricted products;

- (ii) Instruct the Director of Corporate Support to consider and implement any or all of the options summarised in paragraph 5.4 above, for recruitment of volunteers as most appropriate.

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DM/JD/JM

29th September 2008

LIST OF BACKGROUND PAPERS

“A Practical Guide To Test Purchasing”

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