

Tobacco Test Purchasing

Report by Ian Johnson, Head of Communities and Economy

1 Purpose of Report

- 1.1** To provide an update to Cabinet on the enforcement of legislation relating to tobacco test purchasing for under-age sales.

1.2 Tobacco Test Purchasing

The Trading Standards section is obliged to organize test purchasing exercises to check whether Midlothian's registered tobacco retailers are complying with the law which prohibits the sale of tobacco, primarily cigarettes, to young people under the age of 18.

2 Background

2.1 Legal Framework

All retailers who wish to sell tobacco products are required to register with the Scottish Government.

For reasons of Public Health, there is legislation in place which prohibits the sale of tobacco to persons younger than the minimum age limit for these products, which is 18 years of age.

Section 4 of the Tobacco and Primary Medical Services (Scotland) Act 2010, makes it a criminal offence to supply tobacco products to anyone under the age of 18. Under Section 25 of the Act, Midlothian Council has a legal duty to enforce the provisions of the legislation and under Section 26 it must carry out a "programme of enforcement action" in its area every 12 months. Trading Standards carries out this enforcement role.

Visiting retailers on a regular basis to inspect their premises and procedures, is part of the Council's enforcement duties, but the only effective enforcement action to gauge tobacco retailers' compliance with the law, is to conduct test purchasing. This is generally performed by 16 year old volunteers, under the scrutiny of Trading Standards Officers.

Trading Standards places statistical information, on a quarterly basis, onto a Tobacco database operated by SCOTSS (Society of Chief Officers of Trading Standards in Scotland). Information from this database is forwarded to the Tobacco Control Team within the Scottish Government. This information covers a range of tobacco control topics, including advisory visits to retailers, test purchasing, seizures of tobacco and fixed penalty notices issued.

3 Current Enforcement Situation

- 3.1** Midlothian has 121 shops registered to sell tobacco products. As a matter of comparison, in 2011 there were 258 retailers registered. The decrease in number can in part be accounted for by the removal of all cigarette vending machines, when they became outlawed in the autumn of 2011. Also, the subsequent ban on tobacco display advertising, where all retailers are now required to 'hide' all tobacco products from view, has also accounted for some of that decrease. Tobacco retailers are routinely inspected to check for compliance with tobacco legislation. Advice and or warnings are given as required, especially in relation to tobacco displays, packaging and age-restricted sales.
- 3.2** Midlothian Trading Standards has conducted tobacco test purchasing exercises since 2005. As resources have been limited however, it has not been possible to organise test purchasing in each year since then. Prior to the most recent exercise (November 2016), the last programme of test purchasing was in 2014. On that occasion and to gauge compliance with the law in Midlothian, as best possible, 'informal' test purchasing was conducted (see below for explanations). An officer accompanied a 16 year old volunteer to 58 shops. There were six sales, a failure rate of 10%.

NB. i) Formal Test Purchasing. Usually, 'formal' test purchasing is adopted. This is where the test purchasing is undertaken with the intention of taking formal enforcement action (issuing of fixed penalty notices, or reporting to the Procurator Fiscal), should cigarettes be sold to an under-aged volunteer. This type of test purchasing exercise is resource intensive, in terms of staff time, recruitment and training of young volunteers etc. At least two officers are required, plus a female chaperone if the volunteer is female. The volunteer is always within sight of the officers and for purposes of corroboration, two officers must witness the attempted purchase.

ii) Informal Test Purchasing. Sometimes called 'integrity' testing, this is a quicker method of test purchasing, where officer(s) and volunteer(s) proceed relatively quickly from shop to shop. The officer(s) are not present in the shop, so there is no witnessing of any sales and therefore no formal action will be taken against a retailer, if a sale takes place. However, using this method a lot of ground is covered and more retailers can be checked, giving a better indication of compliance. If any retailers sell, then they would be contacted and advised strongly, but as stated, no formal action would, or could be taken.

- 3.3** Trading Standards officers were in the process of organising formal test purchasing for Autumn/Winter 2016, when a letter from Professor McCallum, Director of Public Health and Health Policy, Lothian NHS Board was sent to all Lothian local authorities' Chief Executives, including Kenneth Lawrie. This letter (**Appendix 1**) highlighted that although there had been a decline in recent years in the number of young people (aged between 13 and 15) in the Lothians, claiming to be regular smokers, there was still a high proportion of those young

people reporting that they could buy cigarettes in shops. Professor McCallum asked for Midlothian's plans for test purchasing. As Midlothian Trading Standards is now in partnership with East Lothian Trading Standards, a letter of reply (**Appendix 2**) was sent jointly under the names of both authorities' Chief Executives.

- 3.4** A 16 year old female volunteer was recruited and trained to assist officers in conducting test purchases. Twenty retail premises were selected for visiting and formal test purchasing was carried out on three dates during November 2016.
- 3.5** Ultimately, of the twenty premises initially identified for visiting, twelve were visited. This is because four shops sold cigarettes to our volunteer. This resulted in time spent cautioning the sellers and taking witness statements, prior to deciding formal enforcement action. Legislation now allows for fixed penalty notices (FPNs) to be issued and as such, six FPNs were issued (four to the actual sellers and in addition two to shop proprietors). All of the FPNs were paid. It should be noted that if penalties are not paid, reports can be presented to the Procurator Fiscal.
- 3.6** The ramifications for shop staff can be very serious. As a consequence of selling to an underage person, retailers generally take internal disciplinary action against the actual seller, according to their company's policies and on occasion that disciplinary action can mean staff are dismissed. We are aware that this exercise generated formal disciplinary action against two of the sellers, one of whom we are told was likely to be dismissed as a result.
- 3.7** Four sales of cigarettes out of twelve test purchase attempts is, at a failure rate of 33%, most disappointing. Further test purchasing will be arranged in due course.
- 3.8** On completion of the test purchasing exercise, our volunteer was presented with a certificate and some vouchers, to thank her.
- 3.9** The Trading Standards section intends to continue organising tobacco test purchasing annually, as resources permit. Routine inspection of tobacco retailers is part of the regular visits to all Midlothian traders, risk assessed for inspection.

4 Report Implications

4.1 Resource

There are no major resource implications in doing this work. Routine inspection of trade premises is a vital part of the work of Trading Standards. Albeit sometimes difficult to arrange, test purchasing is now an embedded part of Trading Standards' duties. Staff time is required to train volunteers and organise any test purchasing programme. All costs are met from within existing budgets. A Fixed Penalty Notice generates £150 income, if settled within 14 days, if not the full penalty of £200 applies. This latest exercise resulted in £1,000 income.

4.2 Risk

All trade premises in Midlothian which are subject to routine Trading Standards visits, are risk assessed. The vast majority can be visited by officers without concern. For test purchasing exercises and primarily due to the use of young volunteers, any premises selected for visiting are independently risk assessed to a greater degree and as officers are always watching the volunteers, when in their care, RIP(S)A surveillance authorisations are always sought for such exercises, as directed surveillance is employed whilst on trade premises. Before any volunteer finally agrees to assist Trading Standards, or is accepted, there is a meeting arranged with their parents and official documentation is signed. Nationally agreed guidelines on Test Purchasing are fully abided by.

4.3 Single Midlothian Plan and Business Transformation

Themes addressed in this report:

Community Safety
Adult Health, Care and Housing
Getting It Right for every Midlothian Child
Improving Opportunities in Midlothian

4.4 Key Priorities within the Single Midlothian Plan

- i) **Getting It Right for every Midlothian Child** and
- ii) **Improving Opportunities in Midlothian**

Tobacco test purchasing is a key part of the Scottish Government's Tobacco Control Strategy – *Creating a Tobacco-Free Generation*, which has as its key themes, *health inequalities, prevention, protection* and *cessation*. The creation of a healthier population begins with the younger generation and any preventative action on under-age tobacco sales will hopefully contribute in some way to better health outcomes for the children and young people of Midlothian as they progress into adulthood.

4.5 Impact on Performance and Outcomes

The Tobacco Control targets for Trading Standards are currently set at 10% of retailers to be subject to test purchasing per annum and 20% to advisory visits. For the present reporting year of 2016/17, as at Q3 the values are sitting at 9.9% test purchases and 31.4% of retailers visited and advice given. For the previous year (2015/16) the totals were 0% test purchases and 21% advisory visits, where the total number of registered premises that year was recorded as 135.

4.6 Adopting a Preventative Approach

Trading Standards will continue both its routine inspection programme and test purchase programme. Traders will always be offered advice and guidance on the legislation, when required, but should legislation be breached, appropriate action will be taken.

4.7 Involving Communities and Other Stakeholders

Trading Standards regularly attends the NHS Lothian Tobacco Prevention Sub-Group, to provide an update on ongoing tobacco control work in the area. With some funding from NHS Lothian a Lothian-wide poster campaign was undertaken on 'Proxy Sales' in 2015, to bring to the attention of the community and remind the trade that adults who purchase cigarettes at the request of young people are themselves committing an offence. A Lothian stakeholder event is held annually, with Trading Standards representation.

4.8 Ensuring Equalities

There are no implications, as a consequence of this report, regarding Equalities issues.

4.9 Supporting Sustainable Development

The regular inspection of registered tobacco retailers is conducted to ensure they are displaying their tobacco and cigarettes according to the legislation, that warning signs are displayed regarding the age-limit for buying tobacco products and that management and the staff who sell tobacco products are fully aware of this legislation, their obligations and the risk of enforcement action as a consequence of any sales that might be made to young people under the age of 18, during a test purchasing exercise.

4.10 IT Issues

There are no IT issues relating to this report.

5 Recommendations

It is recommended that Cabinet:

- i) note the work of Trading Standards in relation to the enforcement of tobacco legislation, and
- ii) note that the Trading Standards section will continue with its tobacco test purchasing, resources permitting.

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Appendices

Appendix 1: Letter from Professor McCallum, NHS Lothian.

Appendix 2: Letter of reply to Prof. McCallum from Midlothian and East Lothian Chief Executives.