

Decision Session
Executive Member for Culture, Leisure and
Tourism

15 April 2016

Report of the Assistant Director – Housing and Community Safety

Underage Sales Report 2016

Summary

1. To inform the Executive Member of the work undertaken by City of York Council (CYC) Public Protection Service to prevent the illegal sales of age-restricted products.
2. To seek the required Member approval for the programme of action for the next 12 months regarding the enforcement of:
 - i) The Children and Young Persons (Protection from Tobacco) Act 1991 in relation to cigarettes/tobacco.
 - ii) The Anti-Social Behaviour Act 2003 in relation to aerosol paint.

Recommendations

3. That the Executive Member notes the report and adopts the programme of education and enforcement action for the next 12 months set out in paragraph 7.

Reason: To minimise the level of illegal underage sales in the city.

Background

4. Legislation exists to help to prevent a range of products which are dangerous and/or often associated with anti-social behaviour being accessible to young people. The products regulated with age-restrictions include alcohol (minimum age 18), cigarettes (18), fireworks (18), knives (18), and aerosol paint (16).

On October 1st 2015 it also became an offence to sell nicotine inhaling products i.e. e-cigarettes and e-liquids containing nicotine to anyone under the age of 18. Annex 1 is a list of the main age restricted products. In January 2013, The Better Regulation Delivery Office (BRDO) published a 'Code of Practice for Regulatory Delivery in Support of the Age Restricted Products and Services Framework' (the Code of Practice) which we use to guide our activities.

Existing programme of education and enforcement

5. The intended outcomes of our education and enforcement work are to protect young people from harm, keep communities safe, and support law abiding businesses. Annex 2 is a summary of the education and enforcement action taken since the last report on 22 December 2014.
6. At the Decision Session – Cabinet Member for Crime & Stronger Communities, on 22 December 2014, it was decided that the council should continue with a programme of education and enforcement, adopting a flexible approach to taking formal action against offenders. It was also decided that the council should follow the latest guidelines to ensure that test purchasing more closely mirrors reality. The programme of education and enforcement is as follows:
 - Visits to premises and other publicity as appropriate to advise on legal requirements and the steps that may be taken to avoid illegal sales for example to ask for proof of age of anyone who appears to be under 21 (some shops go further and adopt a challenge 25 policy). We also advise on other legal requirements to ensure, for example, that products are stored correctly and that notices are properly displayed. Furthermore, from May 2016 packaging manufactured for the UK market is to be plain and the sale of plain packs is to be compulsory from May 2017.
 - Responding to complaints made by residents and intelligence from the police, other council departments and enforcement bodies about illegal sales.
 - Conducting test purchases (see below) using volunteer children, under the supervision of officers, to check compliance and take appropriate enforcement action following illegal sales. This includes test purchasing at premises where intelligence suggests that illegal sales are taking place.

- Enforcement action will be taken following the principles of Environmental Health, Trading Standards, Licensing, Street Environment and Enforcement Services enforcement policy.
- Targeted publicity about underage sales work.

Working with others

7. Through the following groups we ensure our work compliments the activities of our partners.

- We are a member of the Safer York Partnership's Alcohol, Violence and Night Time Economy Group which consists of representatives from the Police, York District Hospital, the Universities and other CYC services such as the Substance Misuse team.
- Through our Licensing team we attend the regular meetings with similar teams across North Yorkshire to identify emerging issues.
- We attend the Yorkshire and Humber Trading Standards Alcohol and Tobacco Group to ensure our approach to underage sales is consistent with other services in the area.
- We are part of the Yorkshire & Humber Region Public Health Group which co-ordinates the activities with other Regulators delivering public health outcomes in the Region. This Group is also attended by Director's of Public Health.
- We are also part of the West Yorkshire and York Illicit Tobacco Alliance which is aimed at reducing the prevalence of illegal, cheap tobacco in the City.

Test Purchases

8. Test purchases are conducted in accordance with the Code of Practice. This means, amongst other things, that test purchasers do not appear older than their true age (13-17 years old) and they are always instructed to answer any questions the seller may ask about their age truthfully. They dress in a manner which is appropriate for the venue being visited.
9. The young volunteers are observed by officers (either in person or by remote camera). This helps to ensure that the child's welfare is not compromised and that a trader is not tricked into making a sale that they wouldn't have made. Businesses are always informed of the outcome of an attempted test purchase.

10. The table in Annex 3 shows the number of attempted test purchases and the number of sales for each product over the last thirteen years (since the introduction of the Licensing Act). In this time, the number of illegal sales has been generally decreasing although there was an increase in sales last year.

The application of the Regulation of Investigatory Powers Act 2000 (RIPA)

11. Investigators must have regard to the principles of RIPA in the course of their operations. By complying with RIPA, we are more likely to be able to defend any challenge that our action has contravened a person's human right to a 'private life'. The Surveillance Commissioner has issued guidance (2011) on the applicability of RIPA to test purchases. The guidance states that a 'directed surveillance' authorisation is 'desirable' and consideration must also be given as to whether the purchaser is acting as a 'covert human intelligence source' (which requires separate authorisation). It is unlikely that in the normal course of events a young test purchaser will be deemed to be a 'covert human intelligence source'.
12. On 1 November 2012 there were significant changes introduced governing how local authorities use RIPA. Firstly, authorisations require a magistrates court order before they can take effect. Secondly, Local Authorities will only be granted an authorisation under RIPA in certain investigations. These are criminal offences which attract a maximum custodial sentence of six months or more or criminal offences relating to the underage sale of alcohol or tobacco (now also includes nicotine inhaling products). This means that RIPA authorisations cannot be given for test purchases of products such as spray paint and sun bed sessions. Any test purchasing in these areas would not therefore have the protection of RIPA in the event of a 'human rights' challenge but is not in itself unlawful.

Consultation

13. In October 2009, The Talk About panel (Survey 33) were asked to prioritise issues for environmental health and trading standards services.
14. The issues they were asked about were those that the council has a discretion over the level of service it can provide (i.e. although

enforcement is a duty, no minimum criteria is specified). 27% of respondents said that the top priority for the trading standards service was preventing the sale of alcohol, cigarettes and fireworks to children. This is down from 60% in the last Talk About Survey (April 2004).

Options

15. Option 1: The Council continue with the programme of education and enforcement action set out in paragraph 7 for the next 12 months.
16. Option 2: The Council may adopt a different programme of education and enforcement.

Analysis

17. Option 1 will permit officers to continue with a programme of which provides support to legitimate businesses and has resulted in a general reduction in underage sales. Our figures show that when no test purchasing is undertaken half of all businesses will sell age restricted products to children. This and academic studies such as the Cochrane Review (2008) shows a connection between enforcement and a reduction in retailers selling age restricted products.
18. Option 2: If an alternative programme is chosen, the council have to consider the impact it would make in reducing sales of age restricted products and the level of business support.

Council Plan

19. The work on tackling illegal sales of age restricted supports the Council plan 2015-19 in respect of the following aims:
 - Every child has the opportunity to get the best possible start in life
 - Residents are encouraged and supported to live healthily
 - Residents are protected from harm, with a low risk of crime

Implications

- **Financial**

20. There are no financial implications associated with this report.

- **Human Resources (HR)**

21. There are no HR implications associated with this report.

- **Equalities**

22. A communities impact assessment accompanies this report.

- **Legal**

23. There is no legal duty to undertake test purchasing, the Council are however obliged to consider its activities in relation to tackling underage sales of cigarettes and spray paints each year. The Executive Member is being asked to make a decision on our action.

24. Legislation gives officers the power to undertake test purchase operations so there are no issues surrounding 'entrapment'.

25. There is a risk that any 'test purchasing' operations in relation to the sale of spray paint and sun bed sessions will attract a challenge under human rights legislation as such activity cannot be authorised under the protection of RIPA.

- **Crime and Disorder**

26. The links to tackling crime and disorder have been highlighted earlier in this report.

- **Information Technology (IT)**

27. There are no IT implications associated with this report.

- **Property**

28. There are no property implications associated with this report.

- **Other**

29. There are no other implications to consider.

Risk Management

30. There is a risk of carrying out test purchasing operations in 'on-licensed' premises if the support of North Yorkshire police is withdrawn. Their services are required to respond to any breach of the peace that may arise.
31. The safety and welfare of the test purchasers involved is fully risk assessed and appropriate control measures are put in place.
32. There is a risk that fewer routine 'test purchases' to check general compliance will be possible as Magistrates may require intelligence about illegal sales before authorising surveillance activities under RIPA.

Contact Details

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**Report
Approved**



Date 30 April
2016

Specialist Implications Officer(s) *None*

Wards Affected:

All

For further information please contact the author of the report

Background Papers:

Decision Session – Cabinet Member for Crime & Stronger Communities,
22 December 2014

<http://modgov.york.gov.uk/ieListDocuments.aspx?CId=735&MIId=8808&Ver=4>

Environmental Health, Trading Standards, Licensing, Street Environment and Enforcement Services enforcement policy

Cochrane Review; Interventions for preventing tobacco sales to minors (Review)

www.thecochranelibrary.com/userfiles/ccoch/file/.../CD001497.pdf

Annexes:

Annex 1 – List of Age Restricted Products

Annex 2 - Summary of key work undertaken since the December 2014 report

Annex 3 - The Results of Test Purchasing Activity 2003-2016

Annex 1 – List of age restricted products.

An age restricted product is any product that can only legally be sold to a person of a certain age. Below is a list of the main age restricted products and the legal age a person must be to purchase them:

Age Restricted Products	
Product	Age
Alcohol	18 or over
Tobacco (and nicotine inhaling products)	18 or over
Knives	18 or over
Fireworks	18 or over
DVD's	12,15 or 18
Video Games	12,15 or 18
Gas Lighter Refills	18 or over
Sun beds	18 or over
Solvents	18 or over
Lottery Tickets	16 or over
Spray Paints	16 or over
Petrol	16 or over

Annex 2 - Summary of key work undertaken since the December 2014 report

Alcohol

There has been an increase in the number of illegal sales in 15-16. One premise has sold to two separate occasions and investigations into the causes for the sales are on-going. It is notable that because we have had relatively low numbers of illegal sales in recent years we have scaled back our advisory visits to traders. However, we are due to recruit four part time licensing officers in the near future who will deal with advising the trade on systems to avoid illegal sales as part of their duties.

Tobacco

In 2014-15 we joined the West Yorkshire & York Illicit Tobacco Project ('the project'), the purpose of which is to identify the prevalence of cheap and illicit tobacco in the City and take enforcement action to reduce its availability. Cheap tobacco undermines the Government's strategy to reduce smoking through price – making smoking less affordable. Furthermore, foreign products often do not contain the health warnings – including the pictorial warnings – designed to be a blunt reminder to smokers about the health implications every time they reach for a cigarette.

According to the HMRC, unregulated distribution networks associated with smuggling make tobacco more accessible to children and young people, and perpetuate health inequalities between different social groups. And, research in the North of England showed that over half of smokers aged 14 to 17 have been offered illicit tobacco, and that buying rates amongst these age groups are higher than amongst older smokers.

A study of smokers as part of the project identified that York's smokers consume on average 12 cigarettes a day (2 lower than the average across West Yorkshire and York). And 14% of smokers buy illicit tobacco compared with 17% for the study area as a whole. This is the equivalent in a loss of £4.5m loss of duty each year. We are intending to commission this survey again in 2016.

In 2015, we took our first prosecution for the sale of illegal tobacco and there are a further two cases in the pipeline. We have also issued a number of warnings following the execution of warrants.

There were no illegal sales of tobacco to the underage test purchaser in our 'test purchasing' visits conducted at retail premises in 2015-16. Having received no complaints about the sale of tobacco to children we switched our focus to nicotine inhaling products.

Nicotine Inhaling Products

On October 2015 it became illegal to sell Nicotine Inhaling Products (commonly known as e-cigarettes and e-liquids) to a person under the age of 18 except in certain limited circumstances such as where they have prescribed by a doctor. We issued a press release about the changes to the law. In January – February 2016 we checked compliance using underage volunteers to attempt to make 'test purchases'. Those premises that were to be checked were written to and advised of the law and guidance on compliance. Of the five premises visited, three sold to our volunteers (60%). This is consistent with the high results obtained when a new product/industry is regulated. All premises were complaint when re-tested, bringing the overall figure down to 37.5%. Investigations into the illegal sales are on-going.

Fireworks

Businesses must register with the Council if they wish to sell and/or store fireworks. As part of this process, they are sent a guidance leaflet on all aspects of the law relating to firework sales with their registration certificate. Officers visit retailers to check storage conditions, check for the sale of 'banned' fireworks i.e. those not complying with noise limit requirements and those which are 'unsafe'. Verbal advice is given on preventing underage sales, and checks are made to ensure the correct notices are displayed.

Aerosol Paint

Officers receive very little 'intelligence' on businesses illegally selling spray paint to children either from the public or other sources. Investigations into the problem of graffiti have indicated that the majority of the paint is believed to be stolen and many of the known offenders are 16 years or more and are therefore legally able to buy it.

Annex 3 - The Results of Test Purchasing Activity 2003-2016

The Results of Test Purchasing Activity 2003-2016

Product	2003/4		2004/5	
	No of visits	Illegal Sales	No. of visits	Illegal Sales
Alcohol	62	21 (34%)	64	11 (17%)
Tobacco	4	0	8	0
Fireworks	17	0	35	4 (11%)
Spray Paint	0	0	0	0
Computer Games	0	0	0	0
Knives	0	0	0	0
Solvents	0	0	6	3 (50%)

Product	2005/6		2006/7	
	No. of visits	Illegal Sales	No of visits	Illegal Sales
Alcohol	195	29 (15%)	272	33 (12.1%)
Tobacco	3	0	10	0
Fireworks	28	0	31	6 (19.4%)
Spray Paint	38	0	7	0
Computer Games	7	0	0	0
Knives	0	0	21	2 (9.5%)
Solvents	0	0	0	0

Product	2007/8		2008/9	
	No. of visits	Illegal Sales	No of visits	Illegal Sales
Alcohol	291	23 (8%)	71	6 (8.45%)
Tobacco	11	0 (0%)	61	11 (18%)
Fireworks	13	2 (15%)	10	0
Spray Paint	1	0 (0%)	0	0
Computer Games	0	0	0	0
Knives	0	0	25	1 (4%)

Product	2009/10		2010/11	
	No. of visits	Illegal Sales	No of visits	Illegal Sales
Alcohol	35	1 (2.9%)	26	1 (3.85%)
Tobacco	18	1 (5.6%)	41	5 (12.19%)
Fireworks	9	0	6	0
Spray Paint	0	0	0	0
Computer Games	7	0	0	0
Knives	25	2 (8%)	0	0

Product	2011/12		2012/13	
	No. of visits	Illegal Sales	No of visits	Illegal Sales
Alcohol	73	1 (1.37%)	16	4 (25%)
Tobacco	30	1 (3.3%)	4	1 (25%)
Fireworks	4	1 (25%)	4	0
Spray Paint	0	0	0	0
Knives	5	0	1	0

Product	2013/14		2014/15	
	No. of visits	Illegal Sales	No of visits	Illegal Sales
Alcohol	19	1 (5.26%)	4	0
Tobacco	3	0	5	0
Fireworks	0	0	0	0
Spray Paint	0	0	0	0
Knives	0	0	0	0

Product	2015/16	
	No. of visits	Illegal sales
Alcohol	11	4 (36.4%)
Tobacco	0	0
Fireworks	0	0
Spray Paint	0	0
Knives	0	0
Nicotine Inhaling Products	8	3 (37.5%)