

General Minute to Legal Staff 1/05

TEST PURCHASING BY CHILDREN AND PERSONS UNDER 18 YEARS OLD

Purpose

1. To advise all legal staff that after careful consideration the Lord Advocate has concluded that the test purchasing of age restricted goods, where the purchaser is not committing a separate offence, should be rolled out on a national basis by local authorities and Trading Standards departments, provided that test purchasing arrangements and protocols are adhered to with the safety of the children involved in the scheme as the paramount concern.

What is test purchasing?

2. Prior to the Lord Advocate's decision, prosecution policy did not permit test purchasing as an investigative tool for the purposes of obtaining evidence for prosecution. Test purchases are, and have been for some time, carried out by trading standards officers in relation to a number of different age related products, whereby children under the legal age for the sale of particular goods enter commercial premises and attempt to purchase those goods. These children are given a "script" and are instructed not to deviate from that script in any way. Before now, the purpose of these test purchases was not to ingather evidence for the purposes of submitting a report to the Procurator Fiscal but to obtain statistics and to satisfy legislative duties placed upon Trading Standards/Local Authorities.

3. Therefore, as a result of the Lord Advocate's decision, evidence obtained from a test purchasing exercise can now be taken into consideration in reports alleging the illegal sale of tobacco, solvents, fireworks and spray paint devices.

Background

4. A consultation exercise took place on the issue of test purchasing in 2001. In light of the exercise, and after a review of current policy and an examination of the practice in England & Wales where test purchasing is presently allowed, the Lord Advocate agreed in November 2001 to revise prosecution policy for the purposes of a pilot scheme to assess whether test purchasing by children can work safely and fairly in a Scottish context to help achieve more effective enforcement of the law prohibiting the sale of age-restricted goods.

5. As a result 4 pilot sites were selected and it was agreed that initially the pilots would relate solely to tobacco products. There was an intention that the results will be read across to other age-restricted products.

6. The four pilot areas were:

- Edinburgh-large urban area
- Moray-rural area
- South Ayrshire-geographic mix with proof of age card; and
- Stirling-geographic mix without proof of age card

Result of test purchasing pilot

7. The evaluation report is in positive terms and indicates that the pilots were a success. The general consensus from trading standards officials involved in the pilots was that the project had been successful both in raising awareness of the role of trading standards, and as an effective means of reminding traders that they have serious responsibilities under the legislation. Enforcement strategies employing test purchasing emphasised working constructively with the retail sector on education and prevention, leaving criminal proceedings as a last resort.

8. Trading Standards will now submit cases to Procurators Fiscal where there has been a test purchase for consideration of prosecution.

Evidential considerations

9. In Scotland, the position on exclusion of evidence is governed by the general common law rules on the admissibility of evidence in criminal proceedings which require there to be an assessment on whether the admission of the evidence will be fair to the accused. In the context of test purchasing, Scots law recognises that certain evidence of the commission of a crime is inadmissible where it has been obtained by entrapment e.g. a police officer inciting the accused to commit a crime.

10. However, such an argument is only likely to succeed where it can be said that the accused would not have committed the offence but for the instigation or persuasion of another and was not already predisposed or willing to commit crimes of the kind involved. For instance, it has been noted in Renton & Brown's Criminal Procedure 6th edition paragraph 9-20.1 that entrapment "does not exist in the type of case where the police approach a person who is already engaged in illegal activities, such as drug dealing, and ask him to sell them drugs, that being regarded as merely seeking to detect and confirm that offences were being committed".

11. As the test purchasers have been instructed to simply ask for the goods to be sold to them it is unlikely that the seller will have been incited to do anything that he/she would not otherwise have done and, consequently, it is not considered that a defence of entrapment could be successfully argued.

12. The issue of entrapment was considered by the High Court in the case of *Brown v HMA 2002 SCCR 684*.

Test purchasing of alcohol

13. The Lord Advocate has decided that test purchasing will not extend to alcohol meantime.

14. This is due to the existence of a number of additional factors that must be taken into account when considering the issues surrounding alcohol that do not arise in relation to other age related goods. For example:

- under the Licensing (Scotland) Act 1976 it is an offence for a person under 18 to buy or attempt to buy alcoholic liquor in licensed premises or to consume alcoholic liquor in a bar
- although test purchasers are likely to be aged 16 and 17, therefore legally "adult" there are still welfare concerns in relation to both the premises that young persons would be expected to visit as part of any pilot, and the fact that they may be more likely to be called to give evidence if the Procurator Fiscal decides to take proceedings.

15. Therefore, the police (who are responsible for enforcing the legislation regarding alcohol) should not submit reports for consideration of prosecution where there has been a test purchase.

16. Further discussions are required with our criminal justice partners aimed at developing a national approach to ensure that any test purchasing of alcohol is proportionate, justifiable and that the welfare of the child/young person is paramount.

17. Any questions or concerns arising from the above circular should be directed to Victims & Witnesses Team, Policy Group.

MORAG McLAUGHLIN
Head of Policy Group

25 February 2005