

## **ENFORCEMENT POLICY**

### **REGULATORY SERVICES DIVISION**



## **1 THE AIM**

1.1 That action taken by an enforcement officer will be transparent, accountable, proportionate and consistent; and targeted at cases where it is needed.

## **2 THE PURPOSE**

2.1 Set out the decision making process, for all enforcement actions taken by properly authorised Officers working for the Council in Regulatory Services.

2.2 Promote efficient and effective approaches to enforcement, which improve regulatory outcomes without imposing unnecessary burdens.

## **3 INTRODUCTION**

3.1 An Officer is authorised in writing, in accordance with the Councils scheme of delegation, to carry out enforcement activities on behalf of the Council.

3.2 The enforcement activities that this policy relates to are:

- Animal Health and Welfare
- Building Control
- Car Parks and Residential Parking
- Environmental Protection and Nuisance control
- Food Safety
- Residential Accommodation
- Health and Safety at Work
- Licensing (including issue of permits, registrations and consents)
- Pest Control
- Public Health
- Trading Standards

3.3 The Council is committed to using the minimum enforcement action that is necessary to ensure compliance with the law, avoiding undue burdens on businesses, and individuals and making best use of its' resources.

3.4 When developing policies and operational procedures that guide regulatory activities officers will have regard to the Regulators' Code. The Regulators Code is available at: <http://www.bis.gov.uk/brdo/regulators-code>

3.5 An enforcement officer may, in certain instances, conclude that a provision in The Regulators' Code is either not relevant or is outweighed by another relevant consideration. Any decision to depart from the Code will be properly reasoned, based upon material evidence and recorded on the file.

3.6 Officers will strive to be fair, independent and objective in their enforcement activities. In particular, all officers will serve the community equally and fairly,

irrespective of ethnic or national origin, sex, religious beliefs, political views or the sexual orientation of the suspect, victim, witness or alleged offender.

3.7 The identity of witnesses who wish to remain anonymous will be protected during an ongoing investigation. Officers will make clear to these witnesses that in providing evidence their identity may have to be disclosed to the alleged offender in the event of court proceedings.

3.8 The range of enforcement options available to the Council and/or authorised Officers of the Council when contraventions of Legislation are found are:

- No action
- Informal action - Verbal/Written warning and advice
- Statutory notice and fixed penalty notice (where legislation allows).
- Seizure, forfeiture proceedings (where legislation allows).
- Simple caution.
- Conditional Grant, refusal to grant, revocation or suspension of a licence, registration or permit.
- Requirement to undertake a specific course of action e.g. Driver Improvement Scheme/Legislation Test/Age Restricted Products training.
- Request a review of the Licence by the relevant Council Committee (which could lead to suspension or revocation of licence).
- Prosecution.
- Injunction.

(Special Note: not all options are available to all officers)

3.9 Officers will have a range of enforcement styles that they can adopt, and always consider the least intrusive means, to achieve their objective. They will have regard to the Powers of Entry – Code of Practice when exercising any functions to which the Code relates including those circumstances where entry is exercised with the informed consent of an occupier.

3.10 Some Officers are authorised to enforce specific legislation that provides enforcement powers to enter property without seeking consent, or a warrant e.g. Health and Safety at Work etc. Act 1974. This allows officers a choice between inspecting premises/vehicles/land with, or without, prior arrangement. Officers will not adopt a fixed pattern of always giving prior notice or always making unannounced visits. Entry into buildings or onto land without the owner's consent will only be carried out where the legislation allows.

3.11 Officers will always clearly distinguish between requirements to meet good practice and requirements to meet legal standards. For requirements to meet legal standards, they will provide confirmation in writing using plain English. When the recipient does not have English as a first language, the Officer will take all reasonable measures to ensure that when correspondence in English is sent there is a clear indication, in the recipient's first language, that the documents are important and that the recipient should make arrangements to have them translated. Where key information relating to contraventions needs to be given verbally the services of a recognised translation service will be used by telephone.

3.12 On some occasions Officers of the Council may act in parallel to enforce against the same individual or company. In these circumstances they will work in close co-operation with the Council's Solicitor to co-ordinate the Council's objectives and heighten the effectiveness of the joint enforcement action.

3.13 Enforcement can sometimes cover a wide geographical area beyond the Council's boundaries, or involve enforcement by one or more other local authorities or other organisations. The Council's Enforcement Officers will, subject to any legal controls, work in close co-operation with these organisations to co-ordinate effective enforcement outcomes.

3.14 Natural justice requires that any case is investigated properly, and that any prospective defendant is kept informed by the case officer and given the opportunity to comment. Officers will work to prevent investigation and decision-making being unduly prolonged or delayed. Witnesses, complainants or other interested parties will also be kept informed of decisions reached.

3.15 Statutory rights of appeal against a Council decision will be brought to the attention of relevant persons.

3.16 Officers considering prosecution, or issue of a simple caution, will ensure that the Enforcement Policy, Police and Criminal Evidence Act (PACE), Criminal Procedures and Investigation Act (CPIA), Regulation of Investigatory Powers Act (RIPA), the Home Office Circular 012/2013, the relevant parts of the Code for Crown Prosecutors, and the Human Rights Act are taken into account during the investigative and decision-making procedures. Relevant national Codes of Practice or guidance notes issued by Central Government will also be taken into account.

3.17 Simple cautions and prosecutions are seen generally as a last resort but also an essential part of the enforcement role. Once the decision to prosecute is confirmed by the relevant service manager, a case file containing all relevant details will be passed to Legal Services. Officers are provided with detailed notes relating to the legislation being enforced on how to prepare and present this case file.

3.18 The Council is a major employer, organiser and landowner. Officers will occasionally receive complaints about the actions of the Council; the partners of the Council; its contractors; Town or Parish Councils; or voluntary groups with whom the Council has a close affinity. Also, Officers may occasionally need to act towards elected Members in their private or business lives. Where the Council has a statutory enforcement duty for the matter complained about, an Officer will act quickly, effectively and without favour towards the Council. Officers have to be aware and recognise that some in the Community may accuse them of treating the Council's activities or interests differently and perhaps more favourably. In these circumstances, the Officer will clearly signal the extent of its enforcement duties to their Director who will report to the Chief Executive on any instances when there could be a clash of interests or where there is a reasonable chance the public might sense there to be. Officers and Members shall act in accordance with the particular Codes of Conduct that apply to Local Government Officers and Members.

3.19 The Council has a formalised complaint procedure enabling those dissatisfied with any Council service they have received to have a review of the case. To start the

process contact should be made with the manager responsible for the service and, where a dispute cannot be resolved, any right of complaint or appeal will be explained, with details of the process and the likely time scales involved. Copies of the procedure are available from the Council's website at [www.darlington.gov.uk](http://www.darlington.gov.uk) or an information leaflet is available from Council reception counters. This information can also be made available in Braille or large type or in audio format. It can also be provided in other languages on request. For further information on the Council's Complaints, Compliments & Comments Procedure contact: Complaints & Information Governance Team, Town Hall, Darlington DL1 5QT. Telephone: (01325) 406777 Email: [complaints@darlington.gov.uk](mailto:complaints@darlington.gov.uk)

#### **4 FACTORS TAKEN INTO ACCOUNT WHEN OFFICERS MAKE DECISIONS ON ENFORCEMENT**

4.1 The Human Rights Act 1998 requires decision makers to consider:

- Whether the decision affects an individual, group or company's Human Rights as set out in the Convention; and
- If it does, whether the interference with those rights is permissible by reason of the justifications set out in the Convention; and
- Whether the interference is proportionate to the general purpose.

4.2 Officers are expected to consult with Legal Services if they are unsure in making a decision taking into account the effects of the Convention.

#### **5 OPTION - TAKING NO FURTHER ACTION**

5.1 When investigating complaints, an Officer may find that there is insufficient evidence to justify any further action or after considering the circumstances decide that formal enforcement is inappropriate. Examples of where it would be inappropriate would be a minor breach that was not causing any harmful effects.

5.2 In these cases the decision and reason will be recorded; the complainant informed; and the investigation recorded as closed. The investigating officer will only re-open the investigation if the circumstances of the case change sufficiently to warrant further action.

#### **6 OPTION - TAKING INFORMAL ACTION**

6.1 Generally informal action should be considered where:

- issue of a fixed penalty notice or statutory notice is not an option and/or
- the case is not serious and/or
- the previous history is good and/or
- the company or individual is willing to prevent recurrence and/or
- there is little public benefit in legal proceedings or other formal action.

6.2 Informal action shall always be considered where:

- there is a good likelihood of a statutory defence (e.g. "due diligence" or "best practicable means") being upheld;
- witnesses are unable or unwilling to support formal action.
- the matter can be successfully resolved without further action.

6.3 Officers have the discretion to deal with minor breaches of the law that are trivial, or due to minor lapses, by issuing verbal warnings when they judge the circumstances to be suitable. The offender will be clearly advised of the contravention and how to put it right within a specified time. By definition, an Officer does not make a written record of an informal verbal warning. Its effectiveness is therefore limited and other Officers may not be aware that one has been issued. For these reasons, informal verbal warnings are of limited effectiveness and Officers often follow them up with a written warning. Officers give informal verbal warnings when:

- in the Officer's judgement, the offence is unlikely to be repeated; and
- the offender admits the error; and
- no other offences are apparent; and
- there is no previous similar offence; and
- the public interest test has not been met.

6.4 Officers will use written warnings for minor offences or when it has been decided not to continue formal action. Written warnings can range from a confirmation of a verbal warning to a strong warning telling the offender he has narrowly avoided a simple caution or prosecution. The written warning will differentiate between contraventions and advice. Failure to comply with this informal action may lead to formal action. The courts do not usually allow past written warnings as admissible evidence. The service will therefore only use written warnings:

- in circumstances when a simple caution is a disproportionate response.
- a further offence is unlikely.
- when a simple caution could cause unwarranted distress.

6.5 The Officer will also take into account the likely response of the offender to a warning.

6.6 Following a written warning or verbal warning an Officer may revisit to check the offence has been corrected depending upon the health, safety, environmental damage or nuisance implications of the contravention.

## **7 OPTION - SERVING ENFORCEMENT NOTICES**

### **(a) Fixed Penalty Notices**

7.1 A Fixed Penalty Notice is a formal document served on an offender giving him details of the offence, the penalty due and the time period for payment.

7.2 Using Fixed Penalty Notices, where the legislation allows, provides a quick and effective way of dealing with a wide variety of enforcement problems. It has the benefit of providing precise written confirmation of the offence and gives the recipient the choice of paying the penalty or challenging the Council's actions through an independent appeals mechanism.

7.3 An Officer will always provide written details of the method of appealing against the requirements of the Notice at the time of service.

7.4 When a fixed penalty notice is not paid an Officer will always pursue prosecution of the original offence, unless other significant facts indicate another line of action.

## **(b) Statutory Notices**

7.5 In some circumstances, the Council can serve a Notice in accordance with the provisions of the legislation on a person specifying the action needed to correct a defect or procedure within a specified time. The Council believes using Notices often provides a quick and effective way of dealing with a wide variety of enforcement problems. It has the benefit of providing precise written confirmation of the defect and often gives the recipient the choice of satisfying the Notice by other, equally acceptable means. Importantly too, the Notice always provides an opportunity to appeal to an independent body to challenge the Council's actions. For these reasons Officers will:

- consider at an early stage the service of a Notice when that choice exists in law;
- try to agree the contents of a Notice and the time allowed for compliance with the affected parties;
- in cases where the parties cannot agree, the service will seek to give alternative ways of achieving the same outcome;
- provide a reasonable time period for compliance, balancing the needs of all the affected parties, and taking account of any legal requirements.

7.6 An Officer will always provide written details of the method of appealing against the requirements of the Notice.

7.7 The most common reasons for failing to meet the requirements of a Notice are:

- The work is not done.
- The works is done only in part, or done only to a poor standard.
- The work is not done in the time specified.
- The measures required to resolve the problem are implemented but then relaxed and the problem recurs.

7.8 Where the requirements of a Notice are not met, a decision to prosecute, offer a simple caution, or take another form of action then arises. The main differences compared to other decisions not involving a Notice, are:

- The service of a Notice already means that an offence is being committed.
- Most recipients of a Notice are advised in advance that one may be served on them and what it is likely to require and the time allowed for compliance.
- A Notice sets out in detail the work, or action required, and gives time for compliance.
- All Notices have an independent appeals mechanism and the recipient has been advised how this works.
- Many Notices allow for a formal approach to the Council to extend the time allowed or to offer a different way of achieving compliance.

7.9 An Officer will always consider prosecution for non-compliance with a Notice as an early option. Generally, prosecution will be considered as the norm; unless other significant facts indicate another line of action; or the Crown Prosecution Guidelines suggest otherwise.

7.10 Works in Default is a formal legal procedure, allowing the Council to put right a defect in place of the person more usually responsible. Usually a Notice will need to be served first and not complied with before the Council will carry out any Works in default, unless legislation states otherwise. Works in default is not a form of

punishment but is a way to ensure completion of essential works when other means have failed. The Council will try to recover all reasonable costs incurred including any supervisory or administrative costs. The Council will, where the legislation allows, recover these costs by placing a charge on a property whenever it cannot recover them by other means.

### **(c) Action under the Enterprise Act 2002**

7.11 Officers will use the Enterprise Act 2002 to stop rogue traders from infringing or threatening to infringe specific Consumer Protection legislation. Proceedings will include either the signing of a formal legal document by a trader in which he agrees to cease the infringement or to apply to the County Court/High Court for an “Enforcement Order”, which requires the trader to cease the infringement. Failure to comply with an Order will be viewed as contempt of court.

## **8 SEIZURE OF GOODS**

8.1 Officers may act, where legislation specifically allows, to seize goods, equipment or documents required as evidence. Officers will issue a receipt when seizing any items to take away.

## **9 OPTION - ISSUING SIMPLE CAUTIONS/ CONDITIONAL CAUTIONS**

9.1 Simple cautions/conditional cautions, will only be considered when:

- there is adequate evidence to support a prosecution; and
- the offender admits the offence and is willing to accept the caution.
- the offenders previous history is good
- is the offender is willing or has taken steps to prevent a recurrence of the offence;

9.2 The views of any victim about the offence and the nature of any harm or loss and its will also be taken into account, alongside wider public interest factors, in considering whether a simple caution is appropriate. A caution with conditions to repair damage or pay compensation may be the most appropriate conclusion.

9.3 The decision to issue a simple caution/conditional caution will be made by a relevant manager in conjunction with the case officer using the guidance contained within Ministry of Justice– Simple Cautions for Adult Offenders (November 2013) requiring the offender to sign a document which contains: (a) details of the offence; (b) an admission by him that he committed the offence; (c) his consent to being given the conditional caution; and (d) the conditions attached to the caution. Defendants will be advised to seek legal advice and made aware that records of simple cautions are kept and will influence legal proceedings taken in the future.

9.4 A letter must be sent by Recorded Delivery post, or by hand, to the defendant inviting him/her to accept a simple caution by either attending the Council’s offices or completing a declaration and returning the Caution form(s) to the named manager within 14 days.

9.5 Receipt of the completed Simple Caution forms will be acknowledged in writing by the case officer.

9.6 Where a Simple Caution is not accepted within the time limit, the defendant should be sent a further letter to ensure they understand the implications.

9.7 A further 14 days to accept the caution may be offered where there is a problem preventing the defendant from dealing with the matter, or where they are seeking advice.

9.8 Where a simple caution has not been accepted within the time limit or has been refused, Legal Services will be instructed to commence criminal proceedings.

9.9 Victims shall be informed when a caution has been accepted as an alternative to prosecution.

## **10 OPTION - PROSECUTION**

10.1 The decision to prosecute is a serious step for the Council and for the defendant and will be made by a Section Manager in conjunction with the case officer applying the Code for Crown Prosecutors. There are two stages in the decision to prosecute. The first stage is the evidential test. There must be enough evidence to provide a realistic prospect of conviction. If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be. If the case does meet the evidential test, the public interest test is then applied. Legal Services will review the case before commencing proceedings.

10.2 The public interest factors that would influence the decision to recommend prosecution would include:

- The offence is of a serious nature.
- The offence, although not serious in itself, is widespread in the area where it was committed.
- A prosecution would have a significant positive impact on maintaining community confidence;
- A conviction is likely to result in a significant sentence.
- The offence was motivated by any form of discrimination against the victim's ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of those characteristics;
- There are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct or the conduct continuing.
- The offence was committed against a person serving the public.
- Evidence shows the defendant was the organiser of the offence.
- The offence was premeditated.
- The victim of the offence was vulnerable.
- The defendant's previous convictions, or cautions, are relevant to the present offence.

Factors against prosecution would include:

- The Court is likely to impose a small financial penalty, using the national sentencing guidelines, and may not award costs (however the Council is aware that persons claiming benefits frequently receive small fines compared to those who are in employment in accordance with the sentencing guidelines. It should not therefore be assumed that a prosecution would not proceed purely based on this factor alone).
- The consequences of the offending can be appropriately be dealt with by an out of court disposal, which the defendant accepts and will comply with.
- The defendant has already been made subject to a sentence and a further conviction is unlikely to result in an additional sentence.
- The offence was the result of genuine mistake or misunderstanding.
- There was a long delay between the offence taking place and the date of the trial (unless the offence is serious, the delay caused by defendant, the offence only recently came to light, or the complexity of the offence meant a long investigation).
- There is a concern about the vulnerability of the defendant (for reasons of the age, physical and mental health of the offender)

10.3 For each defendant Officers will try to select offences that:

- Reflect the seriousness of offending.
- Give the court adequate sentencing powers.
- Are made to the appropriate court.
- Enable the case to be presented in a clear and simple way.

10.4 The documentation and investigation should be completed as soon as possible. (Target: within 40 working days of (i) the initial inspection or (ii) receipt of results of any relevant samples taken/tests carried out, or (iii) expiry of Statutory Notice or Fixed Penalty Notice, or (iv) completion of PACE interviews.)

10.5 The relevant manager shall then consider the case file and recommendation of the case officer (Target: 5 working days for decision) and make the decision to request that Legal Services prosecute the offence(s).

10.6 The Assistant Director, Law and Governance, either personally or via delegation will be responsible for prosecuting the case.

10.7 The Council will seek to recover as much as possible of the total costs involved in its enforcement work whenever the legal opportunities exist to do so.

10.8 An Officer will use Forfeiture Proceedings with a prosecution where there is a need to dispose of goods to prevent them re-entering the marketplace. If it is unlikely the defendant will agree to sign over the goods to the service for correct disposal, then the Council will apply for forfeiture in court following a successful prosecution.

## **11 OPTION - WITHDRAWING PROSECUTIONS**

11.1 Generally prosecutions will not be withdrawn once the summons has been served to prevent a situation arising where proprietors refuse to act until court action is confirmed.

11.2 Where a defendant did not have a statutory defence (e.g. “due diligence” or “best practicable means”), but then introduced suitable systems after the offence occurred, Officers may consider whether a simple caution is more appropriate having regard to the other factors involved.

11.3 Similarly, where work has been carried out after the decision to prosecute has been made a simple caution may in exceptional circumstances be considered.

11.4 A recommendation to withdraw a prosecution must be confirmed by the relevant Manager and the decision with reason(s) recorded on the prosecution case file.

11.5 A Manager who is considering the withdrawal of a prosecution should seek to recover all costs from the defendant and/or a written agreement from the alleged offender not to seek to recover their costs from the Council.

## **12 OPTION - COURT INJUNCTION**

12.1 An Officer will consider the use of an injunction when:

- the law allows it; and
- there is immediate risk to environment, health or safety; or
- there is gross nuisance to a large section of the population and the event would finish before the Council could launch a normal prosecution; and/ or
- the person has made it clear he sees the benefits of continuing to offend as outweighing any penalty against him resulting from a normal prosecution.

***This Policy was agreed by the Councils Cabinet on 5 April 2016***