

CABINET

5TH APRIL 2001

REPORT BY THE DIRECTOR OF HOUSING & ENVIRONMENTAL PROTECTION

THE ENFORCEMENT CONCORDAT

1.0 EXECUTIVE SUMMARY

1.1 The purpose of this report is to seek agreement to the Council adopting the principles contained within the Enforcement Concordat which is promoted by the Better Regulation Unit of the Cabinet Office. The Concordat is intended to promote good enforcement practice in all regulatory services. Cabinet is also asked to approve recent amendments to policies dealing with enforcement work of Trading Standards and Environmental Health Services.

2.0 BACKGROUND

2.1 All Departments of the Council have assessed whether they have regulatory services to which the Concordat applies.

2.2 Arising from this exercise the Borough Solicitor and Secretary, the Directors of Social Services, Housing and Environmental Protection, Borough Engineer and Planning and Economic Development, who all have extensive regulatory services, have now also reviewed their procedures in respect of enforcement and where necessary reported any changes to their Service Committees.

2.3 Environmental Health and Trading Standards Services have produced detailed enforcement policies which will enable the Concordat's principles to be monitored. (The policies agreed by the Environmental Health and Consumer Protection Committee is attached to this report at Appendix 1). The policies have now been amended to take into account the provisions of the Human Rights Act. A similar policy is being developed for Building Control.

2.4 All Departments other than those mentioned in 2.2 above have affirmed that the Concordat does not apply to their work areas. Some Departments may need to subsequently formulate detailed prosecution policies if the Council signs up to the principles of the Concordat.

3.0 FINANCIAL AND STAFFING IMPLICATIONS

3.1 There are no direct financial implications arising out of this report. Staff will have to have a good working knowledge of Departmental Prosecution Policies and the principles of the Enforcement Concordat. It is likely that the Best Value Inspectorate will require that decisions regarding prosecution and other regulatory matters are taken by personnel having regard to the agreed policies and Concordat.

4.0 LOCAL AGENDA 21 IMPLICATIONS

4.1 Regulatory decisions are required by the Concordat to be transparent so that everyone involved can see that they have been taken in line with existing policy and best practice. This should ensure that they are proportionate to risk.

5.0 LOCAL MEMBER SUPPORT IMPLICATIONS

5.1 None

6.0 PLANNING IMPLICATIONS

6.1 None.

7.0 EQUAL OPPORTUNITY IMPLICATIONS

7.1 None.

8.0 HUMAN RIGHTS IMPLICATIONS

8.1 Prosecution policies must take into account the Human Rights aspect of proportionality where decisions are taken which may result in an infringement of one or more of the articles in the European Convention on Human Rights.

9.0 BACKGROUND PAPERS

9.1 None.

10.0 COMMUNITY SAFETY IMPLICATIONS

10.1 The Concordat and associated local prosecution policies and procedures provide a framework where offenders can clearly see the guide-lines that will be used to decide what action the Council will take. Transparent regulatory action provides for punishment of offenders and acts as a deterrent for possible offenders.

11.0 RECOMMENDATIONS

11.1 That the Council agrees to the adoption of the Enforcement Concordat and requires that all of its regulatory services develop and maintain prosecution policies that include the principles of good enforcement contained in the Concordat

11.2 That the Cabinet approve the revised enforcement policies for the Trading Standards and Environmental Health Services.

Alan Stennard
Director of Housing & Environmental Protection

This report has been prepared by Charles Allan who can be contacted on 666 5209

ENFORCEMENT CONCORDAT

ENVIRONMENTAL HEALTH AND TRADING STANDARDS ENFORCEMENT POLICIES

1.0 BACKGROUND

The Environmental Health and Trading Standards Divisions enforcement policies deal with relationships with traders and businesses from the promotion of advice through to the prosecution of offences.

The Environmental Health policy is applicable to food premises inspections, food complaints and for premises where this Department is the Enforcement Authority for Health and Safety, Pollution Control and general Public Health Legislation.

Included in the term “enforcement“ are advisory visits and assisting with compliance as well as licensing and formal enforcement action. By adopting the Concordat, we commit ourselves to the following policies and procedures, which contribute to Best Value, and will provide information to show that we are observing them.

The majority of enforcement action leads to problems being resolved before the institution of legal proceedings becomes necessary.

Carrying out enforcement functions in an equitable, practical and consistent manner helps to promote a thriving national and local economy. The Environmental Health and Trading Standards Divisions support the Council’s objectives through commitment to maintaining a fair and safe trading environment for consumers and responsible businesses.

The effectiveness of legislation in protecting our stakeholders depends crucially on the compliance of those regulated. It is recognised that most businesses want to comply with the law. The Environmental Health and Trading Standards Divisions take care to help business and others meet their legal obligations without unnecessary expense, while taking firm action, including prosecution where appropriate, against those who flout the law or act irresponsibly. All stakeholders will reap the benefits of this policy through better information, choice and safety.

The policies adopt a holistic approach by incorporating the principles of good enforcement contained in the Enforcement Concordat promoted by the Regulatory Impact Unit of the Cabinet Office and the prosecution criteria adopted by the Crown Prosecution Service.

The policies clearly indicate to stakeholders the rationale behind enforcement decisions ranging from advisory visits to assisting businesses with compliance and finally to formal action.

It must be remembered that in relation to the institution of legal proceedings, enforcement action is, in some cases, dictated by the need to comply with all the provisions of criminal justice process legislation such as the Police and Criminal Evidence Act, the Criminal Procedures and Investigations Act and the variously titled Criminal Justice Acts.

TRADING STANDARDS ENFORCEMENT POLICY

Principles of Good Enforcement: Policy

- **Standards**

In consultation with business and other relevant interested parties, including technical experts where appropriate, we will draw up clear standards setting out the level of service and performance the public and business people can expect to receive. We will publish these standards and our annual performance against them. The standards will be made available to businesses, the public and others who are regulated.

- **Openness**

We will provide information and advice in plain language on the rules that we apply and will disseminate this as widely as possible. We will be open about how we set about our work, including any charges that we set, consulting business, voluntary organisations, charities and consumers where appropriate. We will discuss general issues, specific compliance failures or problems with business based in Wirral.

- **Helpfulness**

We believe that prevention is better than cure and that our role therefore involves actively working with business, especially small and medium sized businesses, to advise on and assist with compliance. We will provide a courteous and efficient service and our staff will identify themselves by name. We will provide a contact point and telephone number for further dealings with us and we will encourage business to seek advice/information from us. Applications for licenses, equipment testing, etc. will be dealt with efficiently and promptly. We will ensure that wherever practicable, our enforcement services are effectively co-ordinated to minimise unnecessary overlaps and time delays.

- **Complaints about service**

We will provide well publicised, effective and timely complaints procedures easily accessible to business, the public, and consumer groups. In cases where disputes cannot be resolved, any right of complaint or appeal will be explained, with details of the process and the likely time-scales involved.

- **Proportionality**

We will minimise the costs of compliance for business by ensuring that any action we require is proportionate to the risks. We will take account of the circumstances of the case and the attitude of the trader when considering action, taking into account our prosecution criteria included in this document.

We will take particular care to work with small businesses and voluntary and community organisations so that they can meet their legal obligations without unnecessary expense where practicable.

Enforcement decisions affecting individuals and companies will be made with regard to their rights as governed by the European Convention on Human Rights and will be

made in proportion to the risks to them compared with the risks to society at large using the concept of proportionality.

- **Consistency**

We will carry out our duties in a fair, equitable and consistent manner. While officers are expected to exercise judgement in individual cases, we will have arrangements in place to promote consistency, including effective arrangements for liaison with other authorities and enforcement bodies through schemes such as those operated by the Local Authorities Co-ordinating Body on Food and Trading Standards (LACOTS) and the Local Authority National Type Approval Confederation (LANTAC), if appropriate to Trading Standards.

Principles of Good Enforcement: Procedures

Advice from an officer will be put clearly and simply and will be confirmed in writing, on request, explaining why any changes in business practices or procedures are necessary and over what time-scale, and making sure that legal requirements are clearly distinguished from best practice advice. If the recipient disagrees with the advice, the option to ask for a review by a senior officer will be given.

Before formal enforcement action is taken, officers will provide an opportunity to discuss the circumstances of the case and, if possible, resolve points of difference, unless immediate action is required (for example, in the interests of health and safety or environmental protection or to prevent evidence being destroyed) and bearing in mind the over riding principles contained in the Police and Criminal Evidence Act and other legislation governing the conduct of investigations.

Where immediate action is considered necessary, an explanation of why such action was required will be given at the time and confirmed in writing in most cases within 5 working days and, in all cases, within 10 working days, subject to the provisions of the Police and Criminal Evidence Act.

Where there are rights of appeal against formal action, advice on the appeal mechanism will be clearly set out in writing at the time the action is taken (whenever possible this advice will be issued with the enforcement notice).

Enforcement Action

Minor infringements can be dealt with by means of an informal warning by the officer. More serious matters will be dealt with as follows:

Written Warning

This will consist of a letter from a senior officer outlining the circumstances of the offence explaining the alleged contravention, possible measures to be taken to prevent re-occurrences and the potential consequence of further breaches.

Formal Cautions

Under certain circumstances, a formal caution may be an appropriate alternative to prosecution. This option will be considered before prosecution. A formal caution is a serious matter. It is recorded on the Central Register of Convictions and may be used to influence any decision whether or not to institute proceedings if the person should offend again. It may be referred to in an subsequent court proceedings. It

will not be referred to in respect of any conviction recorded more than 3 years earlier.

Formal cautions serve the following purposes:-

- a. to deal quickly and simply with less serious offenders;
- b. to avoid unnecessary appearance in criminal courts;
- c. to reduce the chance of offenders re-offending.

Before issuing a caution the following conditions must be satisfied:-

- i. there must be sufficient evidence to give a realistic prospect of conviction;
- ii. the suspected offender must admit the offence by signing a declaration
- iii. the suspected offender must understand the significance of a formal caution and give an informed consent to the caution.

Prosecution

The Council will use discretion in deciding whether to initiate a prosecution. Where the circumstances justify it, prosecution with prior warning may take place.

The Council will consider prosecution when:-

- it is appropriate in the circumstances, as a way to draw attention to the need for compliance with the law, especially where there would be a normal expectation of a prosecution, or where, through the conviction of offenders, others may be deterred from offending; or
- there is the potential for considerable harm arising from the breach; or
- the gravity of the offence, taken together with the general record and approach of the offender justifies it.

The decision to prosecute will always take account of the criteria set down in the Code for Crown Prosecutors and Attorney General's Guidelines and the Code of Practice on Legal Matters made under section 40 of the Food Safety Act 1990.

Before deciding to prosecute there must be sufficient evidence for a realistic prospect of conviction taking account of any defence that may be available, and it must be in the public interest.

The following public interest criteria will normally be taken into account when deciding on the relevance of legal proceedings, although this list is not exhaustive:-

- The prevalence of the type of offence.
- The need for a suitable deterrent.
- The risk of danger or injury to the public.
- The failure to comply with a statutory notice or respond to advice about legal requirements.
- The disregard of legal requirements for financial reward.
- Significant financial loss, potential or actual, to a third party.
- A history of similar offences.
- Persistent breaches of legislation.
- Where fraud, gross negligence or guilty knowledge is a factor.

- Minor breaches of a number of statutes

Where possible, an offender will be told as soon as sufficient evidence is obtained that a prosecution may follow.

All prosecutions will be brought without unnecessary delay.

Environmental Health Enforcement Policy

Principles of Good Enforcement : Policy

Standards In consultation with business and other relevant interested parties, including technical experts, where appropriate, we will draw up clear standards setting out the level of service and performance the public and business people can expect to receive. We will publish these standards and our annual performance against them. The standards will be made available to businesses and others who are regulated.

Openness We will provide information and advice in plain language on the rules that we apply and will disseminate this as widely as possible. We will be open about how we set about our work, including any charges that we set, consulting business, voluntary organisations, charities and consumers, where appropriate. We will discuss general issues, specific compliance failures or problems with business based in Wirral.

Helpfulness We believe that prevention is better than cure and that our role therefore involves actively working with business, especially small and medium sized businesses, to advise on and assist with compliance. We will provide a courteous and efficient service and our staff will identify themselves by name. We will provide a contact point and telephone number for further dealings with us and we will encourage business to seek advice/information from us. Applications for licences, equipment testing, etc. will be dealt with efficiently and promptly. We will ensure that wherever practicable, our enforcement services are effectively co-ordinated to minimise unnecessary overlaps and time delays.

Complaints About The Service

We will provide well publicised, effective and timely complaints procedures easily accessible to business, the public, and consumer groups. In cases where disputes cannot be resolved, any right of complaint or appeal will be explained, with details of the process and the likely timescales involved.

Proportionality We will minimise the costs of compliance for business by ensuring that any action we require is proportionate to the risks. We will take account of the circumstances of the case and the attitude of the trader or person when considering action, taking into account our prosecution criteria included in this document.

We will take particular care to work with small businesses and voluntary and community organisations so that they can meet their legal obligations without unnecessary expense, where practicable.

Enforcement decisions affecting individuals and companies will be made with regard to their rights as governed by the European Convention on Human Rights and will be made in proportion to the risks to them compared with the risks to society at large using the concept of proportionality.

Consistency We will carry out our duties in a fair, equitable and consistent manner. While officers are expected to exercise judgement in individual cases, we will have arrangements in place to promote consistency, including effective arrangements for liaison with other authorities and enforcement bodies through schemes such as those operated by the Local Authorities Co-

ordinating Body on Food and Trading Standards (LACOTS) and the Local Authority National Type Approval Confederation (LANTAC). Due regard will also be given to any guidance issued in statutory Codes of Practice, HELA documents, Home Office Circulars the Human Rights Act 1998 and the Food Standards Agency.

Principles of Good Enforcement : Procedures

Advice from an officer will be put clearly and simply and will if necessary be confirmed in writing, explaining why any remedial work is necessary and over what timescale, and making sure that legal requirements are clearly distinguished from best practice advice.

Before formal enforcement action is taken, officers will provide an opportunity to discuss the circumstances of the case and, if possible, resolve points of difference, unless immediate action is required (for example, in the interests of health and safety, food safety, environmental protection or to prevent evidence being destroyed).

Where immediate action is considered necessary, an explanation of why such action was required will be given at the time and confirmed in writing in most cases within five working days and, in all cases, within ten working days.

Where there are rights of appeal against formal action, advice on the appeal mechanism will be clearly set out in writing at the time the action is taken (whenever possible this advice will be issued with the enforcement notice).

The decision as to whether or not to prosecute an individual or company lies initially with the individual officer as he or she confronts a particular situation. However, the officer must discuss their decision with their Line Manager prior to any action being initiated.

Prosecution is only one of a number of enforcement options available to the officer and each option should be considered to determine whether other courses of action are more appropriate and effective.

ENFORCEMENT OPTIONS OPEN TO ENVIRONMENTAL HEALTH STAFF

The form of enforcement which an officer can follow falls into two main types:-

Informal Informal action typically consists of verbal and/or written advice/ guidance or warnings.

Education in the form of courses and documents which have been translated into various languages are made available for those who do not have English as a first language.

When informal action is taken, officers will clearly differentiate between legal requirements and good practice.

Formal Formal action may take the form of:-

- a) Notices of Intention to Serve an Improvement Notice (for food notices) - served prior to an Improvement Notice.
- b) Improvement Notices - served when there are contraventions of laws and regulations where

- i) formal action is proportionate to the risk to public health.
 - ii) there is a record of non-compliance with breaches of legislation.
 - iii) the authorised officer has reason to believe that an informal approach will not be successful.
- c) Prohibition Notices including:
 Emergency Prohibition Notice (EPN)]
 Emergency Prohibition Order (EPO)] for food
- EPN served by Senior or Divisional Environmental Health Officer (or EHO's under direct supervision of SEHO/DEHO) when there is an imminent risk of injury to health. (Statutory Code of Practice No. 6 should be followed). The SEHO/DEHO then applies to the Magistrates Court for an EPO.
- d) Formal Caution - used when the defendant admits the offence but the matter is not taken to Court. Home Office Circular 18/1994 should be used as a guide.
 - e) Prosecution - used when there is a blatant disregard for the law and when the public are put at serious risk. The result of prosecution is a fine and/or imprisonment on conviction.

Since it often takes several months to bring a case to Court, it may be necessary for the Officer to take a combination of actions to achieve the desired result. This may well be the case when immediate action needs to be taken to prevent the occurrence or re-occurrence of a particular hazard. In these instances, the officer may serve a Prohibition Notice and also institute legal proceedings.

CRITERIA FOR PROSECUTION

Prior to deciding whether to prosecute, the officer should consider the guidance provided in the Code for Crown Prosecutors and the factors listed below. The list is not considered exhaustive nor prescriptive since ultimately each case must be taken on its merits.

i) The Seriousness of the Offence

- a) A serious offence would include instances of blatant and reckless disregard of the law which may have led, or lead, to a serious accident or a case of ill health, which places employees and/or the public at risk.
- b) In the case of accidents at work, it should be the seriousness of the offence which should be taken into account, not the severity of the accident.
- c) A serious offence would also include the failure to comply with an Improvement or Prohibition Notice.

ii) The Public Benefit of a Prosecution

- a) Any prosecution must be able to demonstrate that it is only taken for the benefit of the general public. If there is no public benefit then the prosecution should not be pursued.
- b) A prosecution which attracts local publicity can have a salutary effect on the occupiers of similar premises.

- c) The prosecution might also establish a legal precedent applicable to other companies or other geographic areas.

iii) **The Likelihood of the Defendant being Convicted**

- a) Cases should not be instituted unless the officer considers he or she has adequate evidence to prove the matter beyond reasonable doubt.
- b) Consideration must also be given to whether the individual or company will be able to establish and maintain a “due diligence” defence.

iv) **The Previous History of the Party or Premises Concerned**

- a) This would include instances of persistent and repeated breaches of legal requirements leading to poor and deteriorating standards in individual establishments, or branches of multiple concerns, where it appears the individual, or management, is neither willing or structured to deal with these repeated breaches of the law.
- b) Had the individual or company ever received a formal caution?

v) **Witness Co-operation**

- a) The officer must also take into account the ability of any important witness to give evidence and their willingness to co-operate in the legal process.

vi) **Explanation/Confidence in Management**

- a) The officer should also take into account any explanation offered by the affected person or company and the willingness of the party to prevent a recurrence of the problem.

When gathering information as part of an investigation/interview or during an inspection when details are recorded in notebooks, officers will have regard to the Police and Criminal Evidence Act 1984 and collect evidence in the manner prescribed within the Home Office Code of Practice.

Where prosecution is determined to be the most appropriate course of action, the EHO/ SEHO is deemed to be both the Investigating Officer and the Officer in Charge whilst the Divisional Environmental Health Officer will assume the position of Disclosure Officer.