

Regulatory Services Partnership

Environmental Health Commercial  
Team

# Policy Statement on Enforcement

London Boroughs of Merton and  
Richmond upon Thames



November 2016

# The Regulatory Services Partnership Policy on Enforcement

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# The Regulatory Services Partnership Policy on Enforcement

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## 1. Introduction

1.1 This policy statement covers all the regulatory activity carried out by the Environmental Health Commercial Team which is part of the Regulatory Service Partnership (RSP) for the London Boroughs of Merton and Richmond and includes the following services:-

- (a) Environmental Health (Commercial )
- (b) Environmental Health (Pollution)
- (c) Trading Standards
- (d) Licensing

1.1 The aims of the (RSP) are:-

To provide a comprehensive and effective environmental health service, ensuring that, through monitoring regulation and enforcement that residents and businesses can enjoy an environment and services which are, so far as possible, safe and without risks to their health or welfare.

To create, develop and maintain a safe, fair and healthy environment and thereby protect the interests of consumers and businesses.

To regulate licensed activities in order to prevent crime and disorder, protect public safety, prevent public nuisance and protect children from harm.

1.2 The aim of this policy is to ensure that the RSP and its Officers apply enforcement guidelines in a consistent manner and is open and clear about the standards that it applies.

1.3 This Policy Statement on Enforcement conforms with the Regulators Compliance Code and the regulatory principles required under the Legislative and Regulatory Reform Act 2006. It sets out the general principles and approach which officers of the RSP are expected to follow.

1.4 The appropriate use of enforcement powers, including prosecution, is important, both to secure compliance with the law and to ensure that those who have duties under it may be held to account for failures to safeguard fair trading, health, safety and welfare.

1.5. In allocating resources, regulatory services should have regard to the principles set out below, the objectives published in the various service plans, and the need to maintain a balance between enforcement and other activities, including inspection sampling and test purchasing.

## 2 The purpose and method of enforcement

- 2.1. The ultimate purpose of the RSP is to ensure that those responsible for complying with food, health & safety, trading standards, licensing, animal health and environment legislation manage and control risks effectively, thus preventing harm. The term 'enforcement' has a wide meaning and applies to all dealings between the RSP and those on whom the law places duties.
- 2.2. The purpose of enforcement is to:
- a) ensure that businesses take action to deal immediately with serious risks;
  - b) promote and achieve sustained compliance with the law;
  - c) ensure that businesses or individuals who breach legislative requirements, and directors, employees or managers who fail in their responsibilities, may be held to account, which may include bringing alleged offenders before the courts, in the circumstances set out later in this policy.
- 2.3 Enforcement is distinct from civil claims for compensation and is not undertaken in all circumstances where civil claims may be pursued, nor is its purpose to assist such claims. It does however include civil sanctions as detailed later in this Policy.
- 2.4. The individual regulatory services within the RSP have a range of tools at their disposal in seeking to secure compliance with the law and to ensure a proportionate response to criminal offences and relevant civil breaches. Officers may offer businesses information, and advice, both face-to-face and in writing. This may include warning a business that in the opinion of the officer, they are failing to comply with the law. Where appropriate, officers may also issue Fixed Penalty Notices if available, serve enforcement notices, issue Simple Cautions<sup>1</sup> and they may recommend prosecution.
- 2.5 Giving information, advice and issuing enforcement notices are the main means which officers use to achieve the broad aim of preventing harm, dealing with serious risks and securing compliance with the relevant legislation. Information on certain types of enforcement notices<sup>2</sup> are required to be retained on a public register and reported to the relevant Government agency – e.g. the Health & Safety Executive.

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1. A Simple Caution is a statement by an Officer that is accepted in writing by the duty holder, that they have committed an offence for which there is a realistic prospect of a conviction. A simple caution may only be used where a prosecution could be properly brought. RSP Officers will take into account the current Home Office Guidelines when considering whether to offer a simple caution.

2. Environment and Safety Act 1988 requires that all notices served under the Health and Safety Act etc 1974 with any element that might affect the public, are required to be entered on a public register for a period of at least three years irrespective as to whether or not they have been complied with by the recipient.

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- 2.6. Prosecution and, if appropriate, simple cautions are important ways to bring businesses and individuals to account for alleged breaches of the law. Where it is appropriate to do so in accordance with this policy, the RSP will use one of these measures in addition to any enforcement notice(s) to deal with immediate issues.
- 2.7. Early consideration will need to be given during the initial investigation stages of the incident as to whether or not the matter is likely to end in formal action so that adequate resources can be allocated.
- 2.8. In deciding what resources to devote to these investigations, the RSP will have regard to the principles of enforcement set out in this statement and the objectives published in the individual service plans. In particular, in allocating resources, the RSP will strike a balance between reactive investigations and pro-active, preventative activity, including the provision of advice and education
- 2.9. The RSP will expect its regulatory service officers to use their discretion in deciding when to investigate incidents or complaints and as to what enforcement action may be appropriate and these judgements will always be made in accordance with the with the Regulators' Compliance Code <sup>3</sup>, The Enforcement Concordat and the regulatory principles required under the Legislative and Regulatory Reform Act 2006

### 3. The principles of enforcement

- 3.1. The RSP believes in the firm but fair enforcement of all law that it enforces. This enforcement should be informed by the principles of:-
  - a) **proportionality** in applying the law and securing compliance;
  - b) **targeted** towards activities that give rise to the most serious risks
  - c) **consistent** in our approach
  - d) **transparency** about how we as a regulator operate and what those whom we regulate can expect; and
  - e) **accountability** for our actions.

These principles apply both to enforcement in particular cases and to enforcement activities as a whole.

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<sup>3</sup> Regulators' Compliance Code published by Department for Business, Innovation and Skills

## Proportionality

- 3.2. Proportionality means relating enforcement action to the risks.<sup>4</sup> Those whom the law protects and those on whom it places duties, can expect that any action taken by the RSP to achieve compliance and/or bring people to account for non-compliance should be proportionate to the seriousness of any breach with respect to:-
- a) any risks to health, safety, environmental damage or economic advantage gained; and
  - b) the severity of any actual or potential harm arising from such; and
  - c) the likelihood of any such harm recurring.
- 3.3. In practice, applying the principle of proportionality means that the RSP will take particular account of how far those responsible have fallen short of what the law requires and the extent of the risk of harm or economic disadvantage to others arising from any such failings.
- 3.4. Some duties are specific and absolute whereas others require action 'so far as is reasonably practicable' and the RSP will apply the principle of proportionality in relation to both kinds of duty.
- 3.5. Deciding what is reasonably practicable to control risks involves the exercise of judgement. Where businesses must control risks so far as is reasonably practicable, the RSP, in considering protective measures taken by businesses, the officer(s) must take account of the degree of risk on the one hand, and on the other the sacrifice, whether in money, time or trouble, involved in the measures necessary to avert the risk. Unless it can be shown that there is gross disproportion between these factors and that the risk is insignificant in relation to the cost, the businesses is expected to such take measures and incur costs to reduce the risk.
- 3.6. The RSP expects relevant good practice to be promoted by its officers. Where relevant good practice in particular cases is not clearly established, the law effectively requires businesses to establish explicitly the significance of the risks to determine what action needs to be taken. Ultimately, the courts will determine what is reasonably practicable in each particular case.

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4. In this policy statement 'risk' (where the term is used alone) is defined broadly to include any source of possible risk.

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## Targeting

- 3.7. Targeting means making sure those contacts and interventions, particularly pro-active ones:-
- a) are targeted primarily on those whose activities giving rise to the most serious risks of non-compliance or where the hazards are least well controlled; and that
  - b) action is focused on those who are responsible for compliance and risk control and who are best placed to control it – be they employers, manufacturers, suppliers, or others.
- 3.8. The RSP has processes in place by which inspections, investigations or other regulatory contacts are prioritised according to the nature and extent of risks posed by each businesses operations and any other intelligence received regarding the levels of complaints about a business. Their management competence is important, because a relatively low hazard business poorly managed can entail greater risk to workers or the public than a higher hazard business where proper and adequate risk control measures are in place.
- 3.9. All enforcement action will be directed against those responsible for such breaches. This may be employers in relation to workers or others exposed to risks; companies, partnerships, sole traders and the self-employed; owners of premises; designers or clients of projects, directors and employees. Where there are several parties who each have responsibilities, the RSP may take action against more than one when it is appropriate to do so in accordance with this policy.
- 3.10. When officers issue enforcement notices, issue Simple Cautions, or recommend prosecution, the RSP will ensure that a senior officer at board level of any business concerned, is notified.

## Consistency

- 3.11. Consistency of approach does not mean uniformity. It means taking a similar approach in similar circumstances to achieve similar ends.
- 3.17. Businesses are entitled to expect a consistent approach from officers in the same regulatory service in the advice they tender, their issue of enforcement notices, decisions on whether to prosecute and in the response to incidents.
- 3.18. The RSP recognises, that in practice, consistency is not a simple matter and its officers are faced with many variables including the degree of risk, the attitude and competence of management, any history of incidents or contraventions involving the business, any previous enforcement action, and the seriousness of any breach, which includes any potential or actual harm arising from a breach of the law.

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- 3.19. Decisions on enforcement action are discretionary, involving judgment by the officer and the RSP has arrangements in place to promote consistency in the exercise of discretion, including effective arrangements for liaison and Continuous Professional Development (CPD) amongst professional peer groups across the range of regulatory services.

### Transparency

- 3.20. Transparency means helping businesses to understand what is expected of them and what they should expect from the RSP enforcement activities. It also means making clear to businesses not only what they have to do but, where this is relevant, what they don't. That means clearly distinguishing between statutory requirements and advice or guidance about what is desirable (best practice) but not compulsory.
- 3.21. Transparency also involves the RSP in having arrangements for keeping employees, their representatives, and victims of incidents or their families and complainants informed whenever possible as to the latest developments in their particular case. Notwithstanding, that these arrangements have regard to legal constraints and requirements of concerning the non-disclosure of evidence or matters prior to any court appearance or hearing.
- 3.22. This policy statement sets out the general policy framework within which the RSP's regulatory services operate. The public, businesses, employees, their representatives and others also need to know what to expect when an officer calls and what rights of complaint are open to them and for this our complaints procedures are set out in Merton and Richmond's websites.
- 3.23. When officers offer businesses or the public information, or advice, face-to-face or in writing, including any warning, they will tell the business or individual what to do to comply with the law, and explain why. Officers will write to confirm any advice, and to distinguish between legal requirements from best practice advice.
- 3.24. In the case of enforcement notices, the officers will discuss the notice and, if possible, resolve points of difference before serving it. The notice will say what needs to be done, why, and by when, and that in the officer's opinion a breach of the law has been committed. In the case of any prohibition type notice which have the effect of immediately stopping activity or operations, the notice will explain why the prohibition is necessary.
- 3.25. If regulatory compliance can be achieved by the procurement of services of which the London Borough's of Merton and Richmond currently provides, those being regulated will be directed to the appropriate Department or Service, whilst advising them that Merton and Richmond are not the only provider and that they have no obligation to procure any services provided by either Borough over any other provider.



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## Accountability

- 3.26. Regulators are accountable to the public for their actions. This means that RSP that provides a regulatory service to the London Boroughs of Merton and Richmond have policies and standards (such as the five enforcement principles above) against which they can be judged, and an effective and easily accessible mechanism for dealing with comments and handling complaints.
- 3.27. We will be accountable for the efficiency and effectiveness of our activities as outlined in the Regulators' Compliance Code.

## 4. Our enforcement actions

- 4.1. In deciding what enforcement action to take against an offender we will have regard to the following aims:
- a) to change the behaviour of the offender; and/or
  - b) to eliminate any financial gain or benefit from non-compliance; and/or
  - c) to be responsive and consider what is the most appropriate sanction for the particular offender and the regulatory issue concerned; and/or
  - d) for the action to be proportionate to the nature of the offence and the harm/potential harm cause; and/or
  - e) to restore the harm caused by regulatory non compliance, where appropriate; and/or
  - f) to deter future non-compliance.
- 4.2. The range of enforcement options available to the RSP includes the following:
- a) **No action** - in certain circumstances e.g. where the detrimental impact on the community is small, contravention of the law may not warrant any action.
  - (b) **Indirect action** - including referral to another authority or agency for information or action.
  - c) **Verbal/written advice or warning** - where an offence has been committed but is not thought appropriate to take any further action, in which case the suggested corrective action and a timescale will be given.
  - d) **Fixed Penalty Notices (FPN)** - certain offences are subject to FPNs and legislation permits an offence to be dealt with by way of a Fixed Penalty Notice, we may choose to administer a FPN on a first occasion, without issuing a warning. This avoids a criminal record for the defendant.
  - e) **Statutory Notice** - these are used as appropriate in accordance with relevant legislation (they usually require offenders to take specific action or to cease certain activities). Examples include improvement notices, prohibition notices and suspension notices.

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- f) **Seizure** - some legislation permits our Officers to seize goods and documents that may be required as evidence. When we seize goods, we will give an appropriate receipt to the person from who they are taken. On some occasions, we may ask the person to voluntarily surrender the goods.
- g) **Forfeiture** - some legislation allows us to apply to the court to seek forfeiture of goods, either in conjunction with a prosecution, or separately.
- h) **Review of License's**- where there is a requirement for a business to be licensed by a local authority e.g. Licensing Act, or other body e.g. Office of Fair Trading, then a review of the licence or permit may be sought where the activities or fitness of the license holder is in question.
- i) **Simple Caution** - in accordance with the current Home Office circular is used to deal quickly and simply with less serious offences and to avoid unnecessary appearances in criminal courts. A formal or 'Simple' caution is an admission of guilt but it is not a form of sentence, nor is it a criminal conviction - it may be cited in court in certain circumstances. A record of the caution will be sent to the Office of Fair Trading and to other bodies that are required to be notified. In these cases the following guidance should be complied with:

- Simple cautions may be used only where there is sufficient admissible evidence for a realistic prospect of conviction if a prosecution was taken;
- Simple caution can be given ONLY if the defendant admits their guilt;
- Simple cautions should not be given if the defendant is under 18 ( a reprimand or a final warning should be used instead);
- under normal circumstances Simple cautions should not be offered for serious offences, a simple caution should only be offered if it is likely to be effective;
- in general a Simple caution should not be given if the defendant has already recently received a Simple caution for a similar offence;
- the defendant must understand the significance of a caution and be able to
- consent to being cautioned;

The issuing and recording of Simple cautions will be carried out only by officers who are authorised to institute legal proceedings on behalf of the Council. If a Simple caution is not accepted by the defendant then a prosecution will follow (unless there are serious extenuating circumstances).

- j) **Prosecution** - will only be undertaken when the evidence passes the 'Evidential Test' and when it is in the public interest to do so – we will have regard to the Crown Prosecution Service Code of Practice.

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- k) **Proceeds of Crime Actions** - purpose is to recover the financial benefit that the offender has obtained from his criminal conduct. Applications may be made under the Proceeds of Crime Act for confiscation of assets in serious cases. Proceedings are conducted according to the civil standard of proof. Applications are made after a conviction has been secured. We will continually review our position regarding the use of enforcement options and additional sanctions under the Regulatory Enforcement and Sanctions Act 2008.

## 5. Investigations

- 5.1 The RSP services undertake investigations in order to determine:
- a) sources of complaint – e.g. statutory nuisance, unfair trading
  - b) causes of accidents;
  - c) whether action has been taken or needs to be taken to prevent a recurrence and to secure compliance with the law;
  - d) lessons to be learnt and to influence the law and guidance; and
  - e) what response is appropriate to a breach of the law.
- 5.2. To maintain a proportionate response, higher levels of resource will be made available for the investigation of incidents and complaints that are deemed to be serious.
- 5.4. Complaints or reports of environmental nuisance, unfair trading, work-related deaths, injuries or occupational ill-health are all investigated but in deciding the level of resources to be deployed, the regulatory service will take account of the following factors:
- a) the severity and scale of potential or actual harm;
  - b) the risk of any continuing breach of the law;
  - c) the business's past performance in complying with relevant legal responsibilities;
  - d) the current enforcement priorities of the service;
  - e) the practicality of achieving results including any evidential gap;
  - f) the wider relevance of the event, including serious public concern and interest.
- 5.5. Where it is necessary to carry out a full investigation, the case will be progressed without undue delay. All investigations into alleged breaches of legislation will be conducted in compliance with statutory powers and all other relevant legislation (and relevant Codes of Practice), including the requirements of:
- a) Police and Criminal Evidence Act (PACE)
  - b) Criminal Procedure and Investigations Act (CPIA)
  - c) Regulation of Investigatory Powers Act (RIPA)
  - d) Human Rights Act (HRA).

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- 5.6 As part of the investigation process, persons suspected of breaching legal requirements will, wherever possible:-
- a) be formally interviewed in accordance with PACE;
  - b) be given the opportunity to demonstrate that a statutory defence is available; and
  - c) have the opportunity to give an explanation or make any additional comments about the alleged breach.
- 5.7. Before a decision to prosecute is taken, the alleged offence(s) will be fully investigated in accordance with the latest version of the Prosecution Toolkit produced by the South London Legal Partnership. A report is to be compiled by the Investigating Officer and the file reviewed by a Manager or Lead Officer. We will take into account the views of any victim, injured party or relevant person to establish the nature and extent of any harm or loss, including potential harm and loss and its significance in making the decision.
- 6. Prosecution**
- 6.1. The final decision to proceed with prosecution rests with the [Head of the Regulatory Services Partnership](#) together with those named managers in the scheme of delegated authority acting upon the recommendation of the relevant Manager or Lead Officer.
- 6.2. The decision whether to prosecute should take account of the evidence obtained and the relevant public interest factors set down by the Crown Prosecution Service in their Code for Crown Prosecutors <sup>5</sup>. No prosecution may go ahead unless [Head of the Regulatory Services Partnership](#) acting on legal advice, believes there is sufficient evidence to provide a realistic prospect of conviction, and decides that prosecution would be in the public interest.
- 6.3. While the primary purpose of the regulatory services is to ensure that businesses manage and control their risks effectively and thus preventing harm, prosecution is an essential part of enforcement. Where in the course of an investigation, a regulatory service collects sufficient evidence to provide a realistic prospect of conviction and has decided, in accordance with this policy and taking account of the Code for Crown Prosecutors, that it is in the public interest to prosecute, then that prosecution should go ahead.
- 6.4. The Code for Crown Prosecutors requires the decision to prosecute to be kept under continuous review, so that any new facts or circumstances, in support of or conversely, undermining the prosecutions' case, are taken into account in the decision to continue or immediately terminate the proceedings. Where

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the circumstances warrant it and the evidence to support a case is available, regulatory services may prosecute without prior warning or recourse to alternative sanctions first.

- 6.5. The RSP expects that, in the public interest, its regulatory services should normally prosecute, or recommend prosecution, where, following an investigation or other regulatory contact, one or more of the following circumstances apply. Where:
- a) death was a result of a breach of the legislation;
  - b) the gravity of an alleged offence, taken together with the seriousness of any actual or potential harm, or the general record and approach of the offender warrants it;
  - c) there has been reckless disregard of legal requirements;
  - d) there have been repeated breaches which give rise to significant risk, or persistent and significant poor compliance;
  - e) activities or trade have been carried out without or in serious non compliance with an appropriate licence, permission or sanction;
  - f) a business's standard of operation is found to be far below what is required by law and/or is giving rise to significant risk;
  - g) there has been a failure to comply with an enforcement notice; or there has been a repetition of a breach that was subject to a Simple Caution;
  - h) false information has been wilfully supplied, and/or there has been an intent to deceive, in relation to a matter of non-compliance and/or one which gives rise to significant risk; and
  - i) officers have been intentionally obstructed in the lawful course of their duties.
- 6.6. Where officers are assaulted, regulatory services will always seek police assistance, with a view to seeking the prosecution of offenders.
- 6.7. The RSP also expects that, in the public interest, its regulatory services will consider recommending prosecution, where following an investigation or other regulatory contact, one or more of the following circumstances apply:
- a) it is appropriate in the circumstances as a way to draw general attention to the need for compliance with the law and the maintenance of standards required by law, and conviction may deter others from similar failures to

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comply with the law; and

b) a breach which gives rise to significant risk has continued despite relevant warnings.

## **7. Prosecution of individuals**

7.1. Subject to the above, the RSP will identify and recommend the prosecution of individuals if they consider that a prosecution is warranted.

7.2. In particular, we will consider the management chain and the role played by individual directors and managers, and will take action against them where an inspection or an investigation reveals that the offence was committed with their consent or connivance or to have been attributable to any neglect on their part and where it would be appropriate to do so in accordance with this policy.

7.3 Where appropriate, regulatory services should seek disqualification of directors under the Company Directors Disqualification Act 1986.

## **8. Summoning**

8.1 Where a prosecution is to be taken, officers will decide, in association with the Legal Department, which offences should appear in the summons. The summons issued should:

- reflect the seriousness of the offence;
- give the court adequate sentencing powers;
- enable the case to be presented in a clear and simple way.

8.2 Officers should never go ahead with more offences than are necessary just to encourage a defendant to plead guilty to a few. In the same way they should not change the summons simply because of the decision made by the Court/defendant about where the case will be heard. (ie Magistrates Court or Crown Court)

## **9. Accepting guilty pleas**

9.1 Defendants may want to plead guilty to some but not all of the charges. Alternatively they may want to plead guilty to a different, possibly less serious charge, because they are only admitting part of the crime. Prosecutors should only accept the defendants plea if they think the court is able to pass a sentence that matches the seriousness of the offending. A guilty plea must never be accepted just because it is convenient.

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## 10. Disseminating Information

- 10.1. The Crime and Disorder Act 19986 recognises that there are key stakeholder groups who have responsibility for the provision of a wide and varied range of services to and within the community. In carrying out these functions, the Act places a duty on them to do all it can do to reasonably prevent crime and disorder in their area.
- 10.2. Each section of the RSP will fulfil its responsibilities by sharing information regarding its regulatory investigations with other such services both within the London Boroughs of Merton & Richmond and with other external agencies including, though not exhaustively, the Metropolitan Police, the Health & Safety Executive, the Food Standards Agency, the Environment Agency, the Border Force and Revenue & Customs.
- 10.3. If there is a shared enforcement role with other agencies - e.g. the Office of Fair Trading (OFT), Animal Health, HM Revenue & Customs, other COL Services or the Police - we will consider co-ordinating with these agencies to minimise unnecessary overlaps or time delays and to maximise our overall effectiveness.

## 11. Publicity

- 11.1. The RSP will also consider in all cases drawing the media's attention to factual information about charges which have been laid before the courts, but great care must be taken to avoid any publicity which could prejudice a fair trial.
- 11.2. The RSP will also consider publicising any successful conviction which could serve to draw attention to the need to comply legislation requirements, or deter anyone tempted to disregard their duties under UK law.
- 11.3. The RSP will post all Food prosecutions on the Food Law Prosecution database. This database is managed by the Food Standards Agency (FSA) and is a public register of successful food standards, food hygiene and food safety related prosecutions obtained by the FSA and Local Authorities in England, Wales and Northern Ireland. The primary object of the database is to share information between enforcement authorities but it is also of benefit to the consumer.
- 11.4. The RSP will post all Health and Safety prosecutions on the Health and Safety Prosecution database. This database is managed by the Health and Safety Executive and is public register of successful Health and Safety related prosecutions.

Cases that may be subject to appeal are not published before the outcome of the appeal, by not adding the details of the conviction to the database until 28days after the date of conviction.

## **12. Action by the courts**

- 12.1. The RSP will continue to seek to raise the courts' awareness of the gravity of any offences and of the full extent of their sentencing powers and draw to the court's attention all the factors which are relevant to the court's decision as to what sentence is most appropriate whilst still recognising that it is ultimately for the courts to decide whether or not someone is guilty and what penalty if any to impose on conviction.
- 12.2 As of 1 February 2016 the RSP will advise the Court on sentencing for Health and Safety and Food Safety and Hygiene Offences to have reference to the Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences- Definitive Guidelines.

## **13. Representations to the courts**

- 13.1 In cases of sufficient seriousness, and when given the opportunity, the RSP will consider indicating to the magistrates that the offence is so serious that they may send it to be heard or sentenced in the higher court where higher penalties can be imposed. In considering what representations to make, regulatory services should have regard to current case law and guidance.



## Annex 1

### **SPECIFIC GUIDANCE ON ENFORCEMENT OF THE DUTIES OF ENVIRONMENTAL HEALTH COMMERCIAL WITH RESPECT TO FOOD SAFETY/STANDARDS LEGISLATION**

#### **1. Principal aims**

- 1.1 Enforcement action whether it is informal or formal will be primarily based upon an assessment of risk to public health and whether food businesses are negligent of their obligations or are intentionally infringing the law. In the context of this policy, this risk is the probability of harm to health occurring due to non-compliance with food safety law. Enforcement action will not generally be instigated as a punitive response to minor technical contraventions of legislation.
- 1.2 All officers authorised to carry out food safety duties will have regard to guidance on enforcement action contained in the Food Law Code of Practice issued by the FSA , any industry guides approved by the Secretary of State for the particular food sector in question and guidance and advice issued by the Chartered Institute of Environmental Health.
- 1.3 All authorised officers will abide by this policy when making enforcement decisions. Any departure from the policy must be exceptional, capable of justification, unless it is considered that there is significant risk to the public in delaying the decision.
- 1.4 All authorised officers will be fully acquainted with the requirements of this policy

#### **2. Informal action**

- 2.1 Informal action to secure compliance with legislation includes offering advice, verbal warnings and requests for action, the use of letters and the issue of food hygiene/standards inspection reports.
- 2.2 Inspection reports will be issued following all programmed inspections, where deficiencies are identified and/or advice on good practice is appropriate. The minimum content of such reports will be that specified in statutory code of practice.
- 2.2 When enforcing legislation, the RSP recognises the need to clearly differentiate between legal requirements and matters which are recommended as good hygiene practice, even if only giving verbal advice.

## **3. Statutory Notices**

### **3.1 Hygiene/Improvement Notices**

3.2 Hygiene/Improvement Notices will normally only be served where one or more of the criteria below apply:

- i) where formal action is proportionate to the risk to public health;
- ii) where there is a record of non-compliance with breaches of food hygiene/standards or food processing regulations;
- iii) where confidence in the responsible person is low;
- iv) where the authorised officer has sufficient evidence available to justify their issue and is satisfied that any subsequent legal proceedings are likely to succeed.

3.3 The use of Hygiene/Improvement Notices will, in general, be related to risk to health. It will not normally be appropriate to issue improvement notices for minor technical contraventions.

3.4 Hygiene/Improvement Notices will only be served by officers who have been authorized by the Head of Regulatory Services partnership.

3.5. An authorised officer will not sign Hygiene/Improvement Notices unless that officer has witnessed the contravention.

3.6. All authorised officers will follow the guidance in the relevant Food Law Code of Practice in the drafting of statutory notices. Officers will place realistic time limits on notices and where possible these time limits will be agreed in advance with the proprietor. Where practicable, Officers will discuss the works that will be specified with the proprietors and fully consider the availability of solutions.

3.7 Failure to comply with a Hygiene/Improvement Notice generally will result in prosecution for non-compliance with that notice.

3.8 In any enforcement notice the rights of appeal notes shall be enclosed and the operator shall be informed of these rights in an accompanying letter. In exercising their rights the operator shall be advised in the first instance to contact the officer issuing the notice or the lead officer or manager.

### **3.9 Remedial Action/ Detention Notices**

3.10 Remedial Action /Detention Notices can be used against establishments approved under Regulation 853/2004.

3.11 Remedial Action Notices (RANS) are to be served if any of the requirements of the hygiene regulations are being breached or an inspection is being hampered

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3.12 A RAN may have the affect of prohibiting the use of equipment, or any part of the establishment the imposition of conditions upon or prohibiting any process and also allows for the rate of the operation to be reduced or stopped completely.

3.13 Circumstances that may lead to the issue of a RAN may include

- the failure of any equipment or part of an establishment to comply with the requirements of the hygiene regulations.
- The need to impose conditions upon or the prohibition of the carrying on of any process breaching the requirements of the regulations or hampering adequate health inspection in accordance with the regulations.
- Where the rate of operation of the business is detrimental to its ability to comply with the regulations.

3.14 As soon as the RAN has been complied, the Notice must be withdrawn by means of a further Notice in writing.

3.15 If an authorized officer finds it necessary to serve a RAN owing to the conditions or practices found, than the officer must also consider whether food at the establishment must be detained for the purposes of examination by means of a detention notice under Regulation 10.

### **3.16 Emergency Hygiene Prohibition Notices**

3.17 An Emergency Hygiene Prohibition Notice will only be considered in the following circumstances:

- i) where there is an imminent risk of injury to health can be demonstrated - this may include officer evidence of the conditions / practices etc found and or evidence from relevant experts, including the public analyst, food examiner, or Consultant in Public Health Medicine,
- ii) where the guidance criteria, specified in the Food Law Code of Practice 3.3.2.2., concerning the conditions when prohibition may be appropriate, are fulfilled.

3.18 An Emergency Hygiene Prohibition Notice will only be issued by authorised Environmental Health Practitioners who have adequate experience and are currently involved in food safety enforcement.

3.19 Once an Emergency Hygiene Prohibition Notice has been issued an application for an Emergency Hygiene Prohibition Order will be made to a Magistrates Court within three days. The proprietor MUST be given 1 days notice of the intention to apply for the Order. Failure to do so will entitle the proprietor of a business to claim compensation.

3.20 If such an enforcement notice is served, the operator shall be informed of the procedure for determination by the Magistrates' Court and their rights in an

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accompanying letter. In exercising their rights the operator shall be advised in the first instance to contact the officer issuing the notice or their line manager

- 3.21 Voluntary Procedures to remove a health risk condition may be used, at the instigation of the food business operator, when the food business operator agrees that a health risk condition exists i.e. there is an imminent risk of injury to health. An officer may suggest this option to the food business operator, but only when they are able to use regulation 8. If in doubt, the food business operator should be advised to take legal advice.
- (a) Any voluntary closure agreement should be confirmed in writing by the food business operator or manager and the authorised officer, with an undertaking by the food business operator or manager not to re-open without the officer's prior approval.
  - (b) If the manager of a food business offers to close voluntarily, the officer should confirm that the manager has the authority of the food business operator to agree to such voluntary action.
  - (c) If the food business operator offers to close voluntarily, the officer should: consider whether there is a risk of the establishment being re-opened without the officer's knowledge and/or agreement (if this were to cause food poisoning, the RSP could be criticised for not having used statutory powers);
  - (d) it should be explain to the food business operator that, by making the offer to close, any right to compensation is lost.

## 4. Prosecutions

- 4.1 In addition to the general guidance given on prosecutions officers should also consider the following criteria.
- (a) whether the offence has national significance;
  - (b) the co operation of the defendant during investigations;
  - (c) whether or not there is due diligence system or other statutory defence in place;
  - (d) the view of the Primary/ home authority who should be notified and consulted in all case where formal action is being considered.
  - (e) If there has been blatant disregard of the law such that public health, safety or well being is or has been put at risk,
  - (f) If there has been a failure to comply with a statutory notice.

## 5. Prosecution of employees

- 5.1 This should be considered only in exceptional cases (e.g. where an employee has contradicted employers instructions or is being deliberately obstructive). In all such cases it must be borne in mind that an employee may be put at

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risk of losing his/ her employment.

## **6. Minor/technical breaches**

- 6.1 Prosecutions will normally be considered only in association with more serious offences or where there has been a consistent failure of the duty holder to rectify the problem following informal advice.

## **7. Food seizures**

- 7.1 Where food has been deemed to have failed the food safety requirement and has been either voluntarily forfeited or seized it will be usual for this to be disposed of by at least a letter of caution.

## **8. Statutory Notices**

- 8.1 Prosecution will be considered in all cases where a duty holder has failed to comply with a statutory notice.
- 8.2 In any case involving the service of a Hygiene Emergency Prohibition Notice/Order it will be usual for this matter to be disposed of by at least a Simple caution of prosecution.

## **9. Revisits**

- 9.1 Revisits will be carried out for enforcement purposes to underperforming premises which are those premises scoring 0,1,2 under the national food hygiene rating scheme.

Revisits will be carried following formal request for a rerating under the national food hygiene rating scheme.

Revisits will be carried out where contraventions of food hygiene/standards or food processing regulations are identified during an inspection or other visit, the premises will be revisited to confirm compliance if:

- i) the contraventions are serious i.e. where the consequences of non-compliance might pose a significant risk to public health;
- ii) there is a lack of confidence in the management of the business to address the contravention/s identified; and/or,
- iii) statutory notice has been served.

Further action will be considered following each revisit where satisfactory compliance has not been achieved.

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## **10. Conflicts of interest**

- 10.1 Where the local authority is either the duty holder or has an active interest in the duty holder they should be treated in the same way as a duty holder that is not connected with the duty holder.
- 10.2 All serious breaches must be brought to the attention to the relevant service manager and Director of the appropriate service area.

## ANNEX 2

### **SPECIFIC GUIDANCE ON ENFORCEMENT OF THE DUTIES OF ENVIRONMENTAL HEALTH COMMERCIAL WITH RESPECT TO HEALTH & SAFETY LEGISLATION**

#### **1. General**

- 1.1 All officers authorised to undertake duties with respect to the Health and Safety at Work etc Act 1974 (HASWA) shall be suitably qualified and possess relevant experience as determined by any relevant available guidance whether statutory or non statutory. Each authorised officer's competence will be continually assessed through regular managerial control involving their compliance with this policy, relevant guidance, and other performance indicators as determined by the Commercial manager/lead officer.
- 1.2 The responsibility for Health and Safety enforcement in workplace premises nationally is split between the Health and Safety Executive and the Local Authority. Premises enforced by Local Authorities are generally service based, with enforcement for manufacturing, construction, medicine and agriculture being allocated to the Health and Safety Executive.
- 1.3 The Local Authority is under a statutory duty to provide adequate arrangements for the enforcement of health and safety within its area and mandatory guidance is issued stipulating the minimum standards expected.

#### **2. Complaint and Incident investigation criteria**

- 2.1 Not every incident reported to LAs will require investigation after initial enquiries have been made. Incidents will be selected for investigation with consideration of HSE's Enforcement Policy Statement (EPS) and in particular Local Authority Circular 22/13 Rev1 (Incident selection criteria)
- 2.2. The RSP, will in accordance with their duty under Section 18, allocate sufficient time and resources to investigate accidents, dangerous occurrences and causes of occupational ill health. When deciding which incidents to investigate and the level of resource to be allocated to the investigation, account should be taken of the:
  - severity and scale of potential or actual harm;
  - seriousness of any potential breach of the law;
  - duty holder's known past health and safety performance;
  - enforcement priorities;
  - practicality of achieving results; and
  - wider relevance of the event, including serious public concern

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- national guidance on targeting interventions (LAC 67/2)

2.3 In certain cases the RSP may decide not to investigate an incident in the Mandatory, in which case the advice given in LAC22/13 will be followed.

### 3. The Enforcement Management Model

3.1 To aid officers in their decision making the HSE has issued the Enforcement Management Model Ver. 3.2 (Oct 2013) (EMM) to all Local Authorities. Under Section 18 of the Health and Safety at Work etc Act 1974, Local Authorities **MUST** have due regard to it. Accordingly, all officers involved in the enforcement decision making process have been trained in its application. In determining what action to take all officers **SHALL** pay due regard to the results of the EMM. Where the results of the EMM conflict with those of the officer, the matter shall be referred to the line manager or other senior officer for ratification. In all cases, the issue of a statutory notice, shall be referred to their line manager, unless, it is considered there would be significant risk to employees, self employed or the public by any delay. With regard to the issue of a formal caution or the instigation of legal proceedings the matter, including the results of the EMM will be referred to the Environmental Health Manager or the Head of the Regulatory Services Partnership.

3.2 Where the duty holder has a Primary/home authority, contact shall be made with that authority prior to service of any notice or other enforcement action, unless, it is considered there would be significant risk to employees, self employed or the public by any delay.

### 4. Statutory Notices

#### 4.1 Improvement Notices

4.2 Improvement notices may be served on responsible persons, which may also include limited companies, in circumstances as described in and in accordance with legislation and HELA guidance. In all cases the responsible person shall be informed that should the notice not be complied with or they contravene it they will be liable to prosecution.

4.3 The circumstances when it is appropriate to use Improvement Notices include:

- i) where there are significant contraventions of legislation
- ii) where there is a lack of confidence in the responsible person to respond to informal action owing to past history of non-compliance with informal action
- iii) where the consequences of non-compliance could pose a significant risk of injury to employees, self employed or the public
- iv) where the results of the EMM indicate that service of a notice is appropriate

4.4 The officer will discuss the Improvement Notice with the responsible person and, if possible, resolve matters in dispute, before serving it. The notice may



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say what needs to be done, it will state by when and why, with reference to which particular Act, Sections and or Regulations are being contravened, the reason the officer holding the opinion that the specified legislation is being contravened, and an indication of the potential consequences of failing to comply with the notice will also be included in the notice. Where applicable, the notice will also indicate that other means of achieving the same effect as detailed in the notice may also be chosen by the responsible person. The minimum time period specified on the notice, within which to take remedial action, will be 21 days.

- 4.5 Together with any Improvement Notice the rights of appeal notes shall be enclosed and the responsible person shall be informed of these rights of appeal in an accompanying letter.

### 4.6 Prohibition Notices

- 4.7 Prohibition notices shall be served on duty holders in circumstances as described in and in accordance with legislation and HELA guidance. In all cases the responsible person shall be informed that should the notice not be complied with or they contravene it they will be liable to prosecution.

- 4.8 The circumstances when it is appropriate to use Prohibition Notices include:

- i) where there are any activities being carried on, or likely to be carried on, which involve, or will involve, a risk of *serious personal injury* to employees, self employed or the public,
- ii) where there is a lack of confidence in the responsible person to respond to informal action owing to past history of non compliance with informal action,
- iii) where the consequences of not taking immediate and decisive action to eliminate or reduce the risk would be unacceptable
- iv) where the result of the EMM indicate this as appropriate

- 4.9 The notice will specify what activity is causing or is likely to cause the risk of injury and the reason for the officers' opinion that the activity is likely to cause injury. It may state what needs to be done; it will say by when, why, with reference to which particular Act, Sections and or Regulations are being contravened and indicate the potential consequences of failing to comply with the notice. Where applicable, the notice may also indicate that other means of achieving the same effect as detailed in the notice may also be chosen by the responsible person.

- 4.10 Together with any Prohibition Notice the rights of appeal notes shall be enclosed and the responsible person shall be informed of these rights of appeal in an accompanying letter.

## 5. Prosecutions

- 5.1 The decision to prosecute will, in general, be restricted to those occasions where:
- i) death was a result of a breach of the legislation;
  - ii) the gravity of the offence, taken together with the seriousness of any actual or potential harm, or the general record and approach of the offender warrants it;
  - iii) there has been a reckless disregard of health and safety requirements;
  - iv) there have been repeated breaches which give rise to significant risk, or persistent and significant poor compliance;
  - v) work has been carried out without, or in serious non compliance with, an appropriate licence or safety case;
  - vi) a duty holder's standard of managing health and safety is found to be far below what is required by health and safety law and to be giving rise to significant risk;
  - vii) there has been a failure to comply with an improvement or prohibition notice; or there has been a repetition of a breach that was subject to a formal caution;
  - viii) false information has been supplied wilfully, or there has been an intent to deceive, in relation to a matter which gives or gave rise to significant risk; this may include the situation where a reportable accident/ incident has not been reported with a view to dallying the effective investigation of the incident
  - ix) inspectors have been intentionally obstructed in the lawful course of their duties.

## 6. Prosecution of Individuals

- 6.1 In appropriate circumstances, prosecution will also be considered of individuals such as directors and managers. Such cases would be appropriate where an offence was committed with their consent or connivance or the matter was felt to have been attributable to neglect on their part. Where appropriate, the authority will also seek disqualification of directors under the Company Directors Disqualification Act 1986.

## 7. Revists

- 7.1 Where contraventions of health and safety legislation are identified during an inspection or other visit, the premises will be revisited to confirm compliance if:

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- i) the contraventions are serious i.e. where the consequences of non-compliance might pose a significant risk to employees or public health;
- ii) there is a lack of confidence in the management of the business to address the contravention/s identified; and/or,
- iii) a statutory notice has been served.

7.2 Further action will be considered following each revisit where satisfactory compliance has not been achieved.

## **8.0 Death at Work**

8.1 Where there has been a breach of law leading to a work related death the authority will consider whether the circumstances of the case might justify a charge of manslaughter. In such cases the applicable parts of the HSE / CPS / ACPO document *Work related deaths; A protocol for liaison*, shall be followed.

## **9. Conflicts of Interest**

9.1 A potential conflict of interest may arise in those premises for which the RSP is the Enforcing Authority but in which the London Boroughs of Merton and Richmond have an ownership or management interest. Examples of such premises include leisure centres, shopping malls, museums, golf courses etc which under the Enforcing Authority Regulations 1998 are the responsibility of the Local Authority unless solely operated by them. The nature of the relationship between the Council owning the premises and a contractor/client using the premises can potentially impact upon the RSP's role as enforcer and enforced. The purpose of the following paragraphs of this section is to set out the RSP's policy in accordance with HELA Circular 22/10 (8/3/12) so as to ensure openness and transparency.

9.2 In relation to premises in which the councils of Merton and Richmond may have an interest the RSP will:

- i) carry out its enforcement policy and practice in exactly the same way that it does in all other premises;
- ii) ensure that the attention received is in accordance with the criteria applied to other duty holders.

9.3 Where any potential conflict of interest may arise, public and employee safety will take precedence over political or economic considerations so far as is reasonably practicable. Where it is apparent following an investigation that the Council may have contributed to a Health and Safety contravention by one of its contractors/clients through a failure of its own duties this will be brought to the attention of the HSE. All information obtained from any such investigation will be passed to the HSE as soon as reasonably practicable.

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- 9.4 Officers employed by Merton and Richmond Councils and/or Elected Members with an interest in the premises concerned shall ensure that they cooperate fully with any investigation and that they shall not attempt to influence the findings of an investigation by applying pressure upon any officer employed by either Council in the course of the investigation.
- 9.5 In appropriate exceptional circumstances, which shall be determined by the Head of the Regulatory Services Partnership and the Regulatory Services Partnership Board, consideration shall be given to the employment of an external investigator. Legal advice shall be sought in order to ensure impartiality in serious cases.
- 9.6 In those premises where a genuine conflict of interest has been identified and cannot be resolved by this policy, consideration shall be given to request the HSE for a formal transfer of Enforcement Responsibility.

## ANNEX 4

### The Evidential Test

An officer recommending or deciding upon legal proceedings will be satisfied that there is enough evidence to provide a realistic prospect of conviction (i.e. a properly directed jury or Magistrates, is more likely than not to convict) against each defendant on each charge. They will also consider what the defence case may be and how this will affect the prosecution.

When deciding if there is enough evidence to prosecute, consideration will be given to the following questions:-

Can the evidence be used in Court?

- a is it likely the Court will exclude evidence (e.g. due to breaches of procedure or because it is hearsay);
- b Is the evidence reliable?
- c Is there any evidence which might support/detract from the reliability of a confession (e.g. defendants age, intelligence, lack of understanding etc.);
- d What explanation has the defendant given? Is a court likely to find it credible in the light of the rest of the evidence? Does it support an innocent explanation?
- e if the identity of the defendant is likely to be questioned, is the evidence about this strong enough
- f is a prosecution witness's background likely to weaken the prosecution case (e.g. dubious motive, previous convictions);
- g are there any concerns over the accuracy/credibility of a witness?

Officers should not ignore evidence because they are not sure that it can be used or is reliable but they should look closely at it when deciding if there is a realistic prospect of conviction.

## ANNEX 5

### The Public Interest Test

The public interest will be considered in each case where there is enough evidence to provide a realistic prospect of conviction.

A prosecution will usually take place unless there are public interest factors tending against a prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against a prosecution, often the prosecution should go ahead and those factors should be put to the Court for consideration when sentence is being passed.

Public interest factors include:

- a the seriousness of the offence
- b whether or not violence was used/threatened;
- c whether or not the offence was committed against a person serving the public (e.g. obstruction\assault of Council staff);
- d whether or not the defendant was in a position of authority/trust or was the ringleader/organiser of an offence
- e whether the defendant knew that the activity was illegal or had deliberately set out to commit the offence;
- f whether or not the offence was carried out by a group of people;
- g whether the victim was vulnerable, put in considerable fear, suffered personal attack, damage or disturbance;
- h whether the offence was motivated by any form of discrimination or the defendant demonstrated hostility towards the victim based on any of those characteristics.
- i whether there is a marked difference between actual/mental age of the defendant and victim or if there is any element of corruption;
- j the previous history of the defendant (e.g. relevant previous convictions/cautions, other recent history);
- k whether or not the offence was committed while the defendant was already under an order of the Court;
- l whether or not the offence is likely to be continued/repeated;
- m the offence, though not serious in itself, is widespread in the area;

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- n the likely penalty
- o whether or not the offence was due to a genuine mistake/misunderstanding;
- p whether or not the loss/harm was minor and arose from a single incident;
- q any long delay between the offence and the trial (unless the offence is serious; the delay was caused by the defendant; the offence has only recently come to light; or the complexity of the offence required a lengthy investigation).
- r a prosecution would have a very bad effect on the defendant's physical/mental health (always bearing in mind the seriousness of the offence);
- s the defendant's age and state of health (again always bearing in mind the seriousness of the offence and whether it is likely to be repeated);
- t whether or not the defendant has put right the loss/harm caused (NB defendants must not avoid prosecution SIMPLY because they pay compensation);
- u the views of the victim and the consequences of the decision to prosecute or not on the victim;

Extra consideration must be given if the prospective defendant is under 18. Normally a prosecution should only be considered if a previous warning has been given.

**Officers deciding upon enforcement action must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.**