

THE ROYAL BOROUGH OF WINDSOR AND MAIDENHEAD

ENFORCEMENT AND PROSECUTION POLICY

1.0 INTRODUCTION

- 1.1 One of the main functions of the Council is to act as a regulator and an enforcement agency across a large range of legal duties and powers required by Acts of Parliament and various Regulations and Orders made under them (including byelaws).
- 1.2 The Council's regulatory and enforcement activities are extensive and cover a wide range of functions within several service departments. These regulatory and enforcement activities cannot be listed here in full but they include: trading standards, health and safety, food safety, environmental protection, pollution and noise control, building control, planning and development control (including the protection of trees), highways, housing, licensing (for example taxi and liquor licensing), dog fouling, litter, waste management, council tax, business rates, education, electoral registration and social services.
- 1.3 This Policy sets out the general principles that the Council intends to follow in relation to enforcement action and prosecution. It will be used together with any detailed guidance that has been developed in respect of specific departmental duties and responsibilities. It applies to both members of the public (e.g. residents and visitors) and to businesses (e.g. proprietors, employers and employees). The Council will monitor the implementation and effectiveness of this Policy and review it from time to time to ensure that it continues to reflect current best enforcement practice.

2.0 THE COUNCIL'S AIMS

- 2.1 The Council has two main aims in relation to its regulatory functions. Firstly, it aims to protect the public and the environment, to promote health, safety and welfare, and to generally improve the quality of life for its residents and visitors to the Borough. Secondly, it aims to undertake its regulatory and enforcement functions in a fair, open and consistent manner. The Council has adopted the Government's Enforcement Concordat, which sets out what businesses and others being regulated can expect from enforcement officers. The Council has committed itself to implementing the principles of good enforcement outlined in the Enforcement Concordat, which include proportionality, consistency of approach, openness, helpfulness, targeting and accountability. Each of these principles are considered below:

Proportionality

- 2.2 Proportionality means that any proposed action must be proportionate to the risks involved and the severity of the breach. The concept of proportionality is judicially applied by the European Court of Human Rights (see paragraph 3 below) and is built in to most regulatory frameworks, which allows for some discretion by officers when considering whether to take enforcement action. However, some legal requirements are mandatory or prescriptive leaving no room for discretion or individual interpretation.

- 2.3 Some incidents or breaches of regulatory requirements cause or have the potential to cause serious injury to health or environmental damage. Others may interfere with people's enjoyment or rights, or the Council's ability to carry out its enforcement functions. Severe breaches of the law should be dealt with by firm action; however any enforcement action taken by the Council will be proportionate to the seriousness of the breach and the risks posed to people and/or the environment.

Consistency of approach

- 2.4 Consistency of approach means taking similar action or adopting a similar approach in similar circumstances. The Council aims to achieve consistency in relation to advice given, the response to incidents or breaches of legislation, the use of enforcement powers and decisions on whether to prosecute.
- 2.5 However, it should be recognised that consistency does not mean uniformity. In coming to a decision as to the way forward, officers will need to take into account many variable factors such as the seriousness of the offence, the impact on people or the environment, the behaviour and attitude of the offender, previous history of compliance or non-compliance, and the likely effectiveness of various enforcement options. Officers will be expected to exercise professional judgement and discretion when making enforcement decisions. They will also be expected to be impartial and objective and not to be influenced by race, gender, sexual orientation or religious beliefs of any alleged offender, victim or witness.
- 2.6 The Council will take steps to promote consistency, including the training of staff and where appropriate, liaison with other enforcing authorities and agencies, such as the Local Authorities Coordinators of Regulatory Services (LACORS).

Openness

- 2.7 Openness is important to maintain public confidence in the Council's ability to enforce and regulate. It means helping those who are being regulated, and other companies and individuals to understand what is expected of them, and what they should expect from the Council. The Council will continue to train its staff and develop procedures to ensure that:
- When action is required, it is clearly explained (in writing if requested) what action is required, why it is required, and when it is required to be done by. A distinction should be made between guidance or good practice, and legal requirements.
 - An opportunity should be provided to discuss what is required to comply with the law before formal enforcement action is taken, unless urgent action is required (e.g. to prevent serious harm or to safeguard evidence), or where non-compliance with the law has resulted in irreparable damage or injury to people and/or the environment.
 - Where urgent action is required, a written explanation of the action taken should be given as soon as practicable after the event.
 - Where a right of appeal exists against formal enforcement action, a written explanation of the appeal procedure will be given at the time the enforcement action is taken. This will include details of when the appeal must be made, to whom, and either the grounds of appeal will be listed or information given as to where they can be accessed.

Helpfulness

- 2.8 The Council believes that prevention is better than cure and that education is an intrinsic part of law enforcement. Advice and assistance will be given to both businesses and individuals to inform them of their rights and responsibilities and to help them comply with their statutory requirements. If leaflets or other published guidance are available they will be distributed on request or advice will be given on how to access them on the Council's web site or from any of its premises. Where appropriate the Council will ensure that its enforcement services are effectively co-ordinated so as to avoid duplication of effort or time delays. Officers will be professional and courteous in their conduct of regulatory or enforcement matters and will provide their name and a contact telephone number to those persons or businesses with whom they are in contact.

Targeting

- 2.9 Targeting means ensuring that regulatory resources are targeted to those areas or activities that are perceived to be causing the greatest harm. These could be the areas where more littering or dog fouling is occurring, or the workplaces or eating establishments that are generating the greatest number of complaints from employees or consumers. It could also mean targeting hazards that are less well controlled, or deliberate, organised or widespread criminal activities. Action will be targeted against those who break the law, and against those who are best placed to secure compliance with the law or to control the risk of the law being broken.
- 2.10 The Council's departments have systems in place to prioritise their regulatory and enforcement activities. These systems will continue to be developed and reviewed in order to maintain effective targeting.

Accountability

- 2.11 The Council recognises that it is accountable for its actions and decisions. There are many standards in place against which the Council can be judged and the Council will strive to meet these standards. Any dissatisfaction with the actions of a Council officer will be dealt with under the Council's Complaints Procedures, copies of which are available on the Council's web site, from the Council's offices or by contacting the Council by telephoning 01628 798888.

3.0 THE HUMAN RIGHTS ACT 1998

- 3.1 The Human Rights Act 1998 gives further effect in domestic law to the rights enshrined in the European Convention on Human Rights (ECHR). The Act makes it unlawful for public authorities (including the Council) to act in a way which is incompatible with any of the Convention rights. Council officers will therefore ensure that respect for human rights is at the core of their day-to-day work including decision making and interaction with the public.
- 3.2 Few of the rights protected by the ECHR are absolute rights (an example of an absolute right is the prohibition of torture). The majority of the Convention rights are subject to express limitations which means that the Council may interfere with the exercise of these rights, provided that the interference is prescribed by law and is necessary in the interests of matters specified in the Article concerned, such as public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others, including the community at large.

- 3.3 In practice there will usually be competing interests between one or more private rights or between private rights and the public interest. The duty placed upon Council officers is to strike a fair balance between these competing interests and to make a decision which is reasonable in all the circumstances, having regard to the principle of proportionality as applied by the ECHR. The Council has a 'margin of appreciation' which allows it a certain amount of discretion when taking legislative, judicial or administrative decisions. This is because the ECHR recognises that domestic authorities are better placed to make decisions about the merits of individual cases.

4.0 PURPOSE AND METHODS OF ENFORCEMENT

- 4.1 The purpose of enforcement is to secure compliance with regulatory systems and to ensure that preventative or remedial action is taken to protect both people and the environment. Although the Council expects full compliance with relevant legislative requirements and licence provisions, it will not hesitate to use its full range of enforcement powers where necessary. The method of enforcement used will depend on various factors such as the nature of the breach and the particular circumstances of each individual case. It should be recognised that where the law is prescriptive in laying down precisely what needs to be done, there will be limits to the discretion available to the Council. However, in all cases the Council will treat everyone fairly and with respect for his or her privacy and dignity.
- 4.2 There are many courses of action open to officers when seeking compliance with the law, ranging from informal advice, through formal action, to ultimately prosecution. In the first instance, officers will actively encourage and assist businesses and individuals to understand what the law requires and what needs to be done to comply. If the businesses and individuals heed the advice of officers and fulfil their obligations under the law, then no further action will be necessary.
- 4.3 Where advice is not heeded, resulting in continued or further breaches, then officers will need to consider taking more formal action. The exact powers available to officers will vary depending on the legislation they are enforcing, but they include: a verbal or written warning; variation of licence conditions, suspension or revocation of licences, enforcement notices, prohibition notices, fixed penalty notices, and carrying out works in default, administering a formal caution, prosecution and injunction.
- 4.4 In addition, officers can recommend that the offender receives a formal Caution in accordance with Home Office Guidance, although a formal Caution can only be administered if the offender admits the offence and accepts the Caution. Failure to accept a formal Caution would normally result in a prosecution, as would further similar breaches after a Caution had been issued. A formal Caution will be brought to the Court's attention if the offender is convicted of a subsequent offence.
- 4.5 Finally, offenders may be prosecuted. When deciding if prosecution is appropriate, the officers will consider all the circumstances surrounding the offence and the purpose of the legislation that has been contravened.

5.0 PROSECUTION

- 5.1 The purpose of prosecution is to punish the offender for wrong doing, prevent a recurrence and act as a deterrent to others who have similar duties. The Council recognises that the institution of a prosecution is a serious matter and should not be undertaken lightly. Discretion must be exercised when deciding if a prosecution is the most appropriate course of action, or whether another method of enforcement may be

more effective in securing the desired outcome. In some cases it may be appropriate to institute a prosecution and to take other enforcement action at the same time, e.g. prosecute and issue a formal notice. In other cases it will be appropriate to commence a prosecution without any prior warning or without recourse to any other methods of enforcement.

- 5.2 Although the institution of a prosecution is a serious matter, it remains an important part of enforcement and should be used where appropriate. When deciding whether to commence or continue with a prosecution, Council officers will have regard to this Policy, the Code for Crown Prosecutors, the Human Rights Act 1998 and any other guidance that is specific to the service department which is investigating the alleged offence(s).
- 5.3 In addition, a prosecution will only be commenced or continued where there is sufficient, admissible and reliable evidence that the alleged offence has been committed and that there is a realistic prospect of conviction. If the case does not pass this evidential test, it will not go ahead, no matter how important or serious it may be. In these circumstances a formal caution shall not be used as an alternative although it may be appropriate to pursue other methods of enforcement such as a formal notice or informal caution. However, cases should not be abandoned simply because they are difficult or conviction is not a complete certainty.
- 5.4 Where a case passes the evidential test as described above, Council officers will then have to satisfy themselves that the prosecution will be in the public interest. The Code for Crown Prosecutors includes a list of some common public interest factors both for and against prosecution. Deciding whether a prosecution is in the public interest is not simply a matter of adding up the number of factors on each side. Officers must balance factors for and against prosecution carefully and fairly and make an overall assessment. Some factors may increase the need to prosecute but others may suggest that another course of action would be better. The following public interest factors (which are not exhaustive) will be considered when deciding if prosecution is the appropriate course of action:-
- The seriousness of the breach and the potential harm that may result/has resulted from the breach;
 - Whether the breach and/or the events leading up to it were foreseeable;
 - Whether there is evidence that the offender intended to commit the offence;
 - The compliance history of the offender;
 - The attitude of the offender;
 - The personal circumstances of the offender;
 - Whether a prosecution will have a salutary effect on others and encourage compliance with the law.
- 5.5 The decision to prosecute will be taken having regard to the advice of the Council's legal officer to whom the matter has been allocated. In all cases, the legal officer must be satisfied that the prosecution passes both the evidential test and the public interest test. If it does, the legal officer will complete a prosecution decision making record prior to instituting proceedings on behalf of the Council.

Presumption to prosecute

5.6 Where there is sufficient evidence, the Council will normally prosecute in any of the following circumstances:-

- The incident or breach has significant or serious consequences for people and/or the environment, or has the potential for such consequences;
- There has been a blatant disregard of the law, which has placed the offender at an economic advantage over those who comply with the law, or which has benefited the offender in some other way;
- The incident or breach has caused particular public concern or alarm, e.g. an incident involving a member of the public;
- There is a history of persistent breaches of regulatory requirements, poor standards, or lack of co-operation with Council officers;
- There has been a reckless disregard for management or quality standards;
- There is a widespread disregard to the law and appropriate notice has been given to the public or businesses that a prosecution will be considered for future breaches (e.g. sale of alcohol to those under the age of 18);
- Failure to comply, or to comply adequately, with legal notices or warning letters requiring remedial action;
- Failure to pay fixed penalty notices;
- Failure to supply information without reasonable excuse, when lawfully requested to do so, or knowingly or recklessly supplying false or misleading information;
- Carrying out operations without a relevant licence, or persistently breaching the terms of a licence currently in force;
- Where prosecution has been identified as the only effective means of taking formal enforcement action, e.g. unauthorised works to protected trees or to listed buildings;
- Obstruction or assault on Council officers whilst acting in the course of their duties;
- Impersonation of a Council officer to gain unlawful access to business or domestic premises;
- Some other significant public purpose would be served by instituting a prosecution.

6.0 COMPANIES AND INDIVIDUALS

6.1 Prosecutions will be taken against those responsible for the breach. Where the offence is committed as a result of a Company's activities, action would normally be taken against the Company. However, the investigation will identify the part played by Directors, Officers and Managers of the Company in the commission of the offence. Action may also be taken against such officers (as well as the Company) where the evidence shows that the offence was committed with their consent, was due to their neglect, or they turned a blind eye to commission of the offence or the events leading up to it.

7.0 COURT PROCEEDINGS

7.1 Some offences are summary only and are dealt with in the Magistrates' Court. Other offences (caused either way offences) can be referred up to the Crown Court and heard on indictment. When deciding if an either way offence should be dealt with by the Magistrates' Court or the Crown Court, the Council's officers will consider the gravity of the offence, the consequences of the offence and the previous history of the offender.

- 7.2 The penalties available in the Crown Court are considerably greater than those available to Magistrates and therefore consideration will also be given to the ability of the Magistrates' Court to adequately punish the offender. However, even if a case is heard in the lower court, the Magistrates have the power to refer a case to the Crown Court for sentence if, having heard all the facts, they feel their sentencing powers are inadequate.
- 7.3 In cases of urgency, the Council will also consider seeking an Injunction in the County Court or High Court. An injunction is a judicial remedy by which a person is ordered to refrain from doing something, or ordered to do a particular act or thing. In appropriate cases an Injunction may be sought prior to, or simultaneously with, the commencement of a prosecution.
- 7.4 In all cases the Council will seek to recover the costs of investigating the offence and instituting Court proceedings from the offender, as it does not consider that such costs should be borne by the Borough's general taxpayers.

8.0 WORKING WITH OTHER REGULATORS

- 8.1 There may be occasions where officers of the Council and other enforcing authorities, such as the Health and Safety Executive, the Environment Agency and the Police, both have the power to prosecute. In such cases, the Council will liaise with the other enforcing authorities to ensure effective co-ordination and co-operation in gathering and sharing information. Every effort will be made to avoid duplication of work or inconsistencies, and to ensure that where proceedings are to be instituted, this is undertaken by the most appropriate enforcing authority and for the most appropriate offence(s).

9.0 AUTHORISATION AND COMPLIANCE WITH THE POLICY

- 9.1 Officers who carry out the enforcement of legislation on behalf of the Council will be authorised to do so in accordance with the Council's Scheme of Delegation.
- 9.2 The Council believes that this Policy reflects the principles of good enforcement as outlined in the Enforcement Concordat. It is therefore important that all authorised officers abide by this Policy, and any revisions made to it, when making enforcement decisions. Departures from this Policy will be permitted but only in exceptional cases where the departure can be fully justified after a detailed consideration of all the circumstances of the particular case.

10.0 REVOCATION

- 10.1 In order to avoid duplication, the Environmental Services Enforcement Policy (Revision date 5/3/02) will be revoked on the day that this Policy is adopted by the Council. However, for the avoidance of any doubt, this shall have no effect whatsoever on any decisions made in accordance with the Environmental Services Enforcement Policy prior to its revocation.