Somerset Authorities Environmental Health Enforcement Policy

Incorporating the Statutory Code of Practice for Regulators

FOREWORD

The Statutory Code of Practice for Regulators, sometimes referred to as the *Regulators' Compliance Code*, which forms a major section of this Policy, is a central part of the Government's better regulation agenda. Its aim is to embed a risk-based, proportionate and targeted approach to regulatory inspection and enforcement.

Effective and well-targeted regulation is essential in promoting fairness and protection from harm. However, in achieving these objectives, regulation and its enforcement should be proportionate and flexible enough to allow or even encourage economic progress.

The Code is based on the recommendations of the Hampton Report, which is referred to in paragraph 2.2 and described in more detail in Appendix 1. The purpose of the Code is to promote efficient and effective regulatory inspection and enforcement, to improve required outcomes without imposing unnecessary burdens on regulated persons and businesses.

The Environmental Health Services of Somerset Authorities will make every effort to comply with the Code. However, in certain instances it may be decided that a provision in the Code is either not relevant or is outweighed by other factors. Any decision that is taken to depart from the Code in a material way will be properly reasoned, based on relevant evidence, and documented.

In having regard to the Code we will, in particular, adopt a positive and proactive approach towards ensuring compliance by:

- helping and encouraging regulated persons to understand and meet regulatory requirements more easily; and

- responding proportionately to regulatory breaches.

To that end, this document has been produced, representing joint policy. As such, it is to be adhered to by all Officers when considering their regulatory functions.

It is important that this document is viewed as a whole and within the intended context. For this reason, care is required when using individual parts or isolated text.

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1.0 Introduction

1.1 It is the function of Environmental Health Services to regulate and ensure compliance with the law across broad subject areas, including:

a) Environmental Protection

b) Food Safety

c) Health and Safety

d) Licensing

e) Housing Standards

1.2 To enable these statutory functions to be carried out, Officers are appointed and are duly authorised to act under specified legislation.

In some cases, an individual's authority may be limited in scope and in others, proof of Competence, in terms of relevant qualifications and/or experience may be a pre-requisite to Authorisation.

1.3 This document describes the principles upon which our joint enforcement approach is based, rather than the detailed internal Procedures through which regulatory functions are delivered, which will be different in each of the signatory Authorities.

1.4 The importance of complying with this Policy cannot be overstated, as Case Law (*R v Adaway*) has established that prosecutions may not succeed in cases where regulating authorities have failed to follow their own Enforcement Policies. Further details on *R v Adaway*, a Trading Standards case, are at Appendix 2.

2.0 Principles of Enforcement

2.1 As a guiding principle, all of our enforcement activities will be in accordance with the five "Principles of Good Regulation". Identified by the Better Regulation Executive, the Principles are that regulation should be:

- transparent
- accountable
- proportionate
- consistent
- targeted – only at cases where action is needed

2.2 Our regulatory functions are also fundamentally influenced by the Hampton Principles, which have shaped our Policy and to which Officers will have continuing regard.

The background to the Hampton Report and details of its Principles are at Appendix 1.

2.3 Wherever possible, officers will seek to find solutions that are arrived at by agreement and co-operation and will keep in mind the maxim that prevention is better than cure.

Officers are required to regulate activities across a wide range of businesses and this brings them into contact with individuals having varying abilities.

Full regard will be paid to the different abilities that are encountered and to the importance of the education and help which Officers themselves are able to give to assist in achieving compliance.

2.4 However, the aim behind much of our efforts is the protection of persons at work, the general public and the environment from harm caused by failure to comply with the safeguards provided for in law.

This being the case, there will be circumstances in which enforcement is unavoidable and we do not shrink from using our full legal powers, including prosecution, where it is necessary to do so.

2.5 There are two distinct facets to enforcement, which may be taken to mean either of the following:

a) Enforcement for Compliance. This ensures that each of the signatory Councils have programmes in place for monitoring compliance by businesses and individuals with the various legislation affecting them.

Such programmes are *pro-active* in nature and will include, for example, routine inspections of food premises, workplaces, licensed premises, private sector rented housing, and Permitted Processes.

Because of the diversity of requirements under the different legislation and Guidance, no attempt is made in this document to be prescriptive about the ways in which pro-active programmes are organised and monitored.

However, each Team/Section has in place the means to arrange programmes or visits which will satisfy the needs of their particular legislation ***and*** the administrative mechanisms for monitoring progress against such programmes.

b) Enforcement for ***Non*** Compliance In this aspect of enforcement, the options available for taking action against businesses or individuals for ignoring or otherwise failing to comply with their legal obligations are outlined in paragraph 2.6, below.

The need for enforcement for non-compliance may result either from the pro-active programmes outlined in a), above, or alternatively from a *reactive* response, for example, to a complaint or an event such as a workplace accident.

2.6 Options include the following:

a) Prosecution

b) Injunction

c) ASBOs and CRASBOs

d) Simple Cautions

e) The service of Notices, including Fixed Penalty Notices

f) Works in Default, including seizure of equipment

g) Revocation, Suspension or Refusal to Renew (Permits or Licences)

h) Written warnings (sometimes known as informal Notices)

Enforcement action may be taken as a result of an incident, a complaint or an inspection.

2.7 Each level of enforcement action is subject to individual internal Procedures. This being the case, this Policy document does not intend to provide operational detail, but some of the more important points that are covered by Procedures include:

a) A decision to prosecute will be taken by a senior manager, in consultation with the Investigating Officer and, where appropriate, Legal Services.

During the decision making process, full consideration is given to lesser enforcement alternatives.

b) Any proposed prosecution must satisfy two specific Tests, these being:

i) Evidential Test: no case will be taken unless there is the realistic likelihood of conviction and,

ii) Public Interest Test, by which the circumstances leading to consideration of prosecution are deemed to affect the public interest.

A number of factors, listed at Appendix 3, will determine whether or not a particular prosecution is in the public interest and a balance in favour or against will be made, between those factors that are present.

c) Following a successful Prosecution, the Council will seek to recover the costs involved in the investigation and subsequent Court proceedings.

d) A Simple Caution will be offered only if the evidence of the case is sufficient for Prosecution to have been considered as a viable option.

e) Unless there is extreme urgency, Formal Notices will be subject to a Peer Review process before being served, and will be accompanied by any information regarding Appeal Provisions that may apply.

2.8 A raft of legislation bears upon the conduct of investigations and of legal proceedings and these include, for example, the Police and Criminal Evidence Act, the Criminal Procedure and Investigations Act, the Regulation of Investigatory Powers Act, and many more.

All of the provisions of the above will be complied with at all times when they are relevant to a particular investigation or enforcement task.

2.9 Whenever possible, we will work in partnership with other agencies to achieve common goals on matters of mutual concern.

These Agencies may include, for example, the Environment Agency or the Health and Safety Executive.

3.0 General Considerations

3.1 Where it is necessary, enforcement will be undertaken without fear or favour and without consideration of the race, ethnic background, age, faith, social status, colour, gender or sexual orientation of any persons involved.

3.2 If any person exerts undue or improper pressure in an attempt to influence a decision concerning enforcement, it will be reported through line management without delay.

3.3 As a general rule and where there may be options, the level of enforcement contemplated will be the minimum at which a satisfactory solution is thought to be achievable.

4.0 Team-Specific Considerations

4.1 In considering their regulatory functions and enforcement, our specialist Teams will have due regard to other *statutory or authoritative* guidance and internal Policies/Procedures detailing local use and interpretation of such guidance, that may affect only their particular areas of work.

Further details can be found through the websites given at Appendix 2 on page 14 and they will include the following, or the relevant Council policy document:

a) <u>Health and Safety Team:</u>

i) The HSC Enforcement Policy (2004)

ii) The HSE publication “The Enforcement Management Model” (2005)
iii) HSE Guidance on Section 18 HASAWA (Statutory)

b) Food Safety Team: The Food Standards Agency Code of Practice

c) Environmental Protection Team: "Environmental Permitting General Guidance Manual on Policy and Procedures for A2 and B Installations" (2008) A Defra document.

d) Licensing Team DCMS Guidance on the Licensing Act and the Gambling Act

e) Housing Standards Team

i) Housing Health and Safety Rating System: Operating Guidance (ODPM Feb 2006)

ii) Guidance on the Fire Safety Provisions for Certain Types of Existing Housing: LACORS Housing-Fire Safety

iii) Private Sector Housing Enforcement Procedures

5.0 Statutory Code of Practice for Regulators

5.1 This Code, sometimes referred to as the Regulators' Compliance Code, is a Statutory document and includes the legal duty for Regulators to *"……take into account the Code's provisions and give them due weight in developing policies, principles, or in setting standards or giving evidence".*

So far as our regulatory functions are concerned, the Code replaces the Enforcement Concordat.

6.0 Compliance with the Code

6.1 The Code imposes a number of specific Obligations on Regulators, each of which reflects one of the Hampton Principles.

The ways in which we will ensure compliance with each of the Obligations are shown in paragraphs 6.2 to 6.8.1, below.

6.2 Economic progress ~ Hampton Principle: ***"Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection".***

6.2.1 We will:

a) consider the impact of our interventions on economic progress, including costs, effectiveness and perceptions of fairness.

b) adopt a particular approach only if the benefits justify the costs and impose the minimum burden compatible with achieving the objectives.

c) review our regulatory activities and interventions to consider whether burdens could be removed or reduced.

d) consider the impact of our interventions on small businesses, and ensure that the burdens fall fairly and proportionately, by considering the size of the business and the nature of its activities.

e) when setting standards or giving guidance in relation to the exercise of our own or other regulatory functions, allow for reasonable variations to meet local government priorities.

6.3 Risk Assessment ~ Hampton Principle: ***"Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most".***

6.3.1 We will:

a) ensure that the allocation of our efforts and resources is targeted where they would be most effective, by assessing the risks to regulatory outcomes.

We will also ensure that risk assessment precedes and informs all aspects of our approaches to regulatory activity, including data collection and other information requirements, inspection programmes, advice and support, enforcement and sanctions.

b) base our risk assessments on available relevant and good-quality data.

Assessments will include explicit consideration of the combined effect of the potential impact of non-compliance on regulatory outcomes, and the likelihood of non-compliance.

c) in evaluating the likelihood of non-compliance, consider all relevant factors including, past compliance records and potential future risks, the existence of good systems for managing risks, evidence of recognised external accreditation, and management competence and willingness to comply.

d) consult and involve businesses in designing our own risk methodologies.

e) review and, where appropriate, improve our risk methodologies, taking proper account of feedback from businesses.

6.3.2 Where national schemes or authoritative guidance for risk assessment exist we will base our assessments upon them where it is appropriate to do so.

A list of sources for such guidance is at Appendix 2.

6.4 Advice and Guidance ~ Hampton Principle: ***"Regulators should provide authoritative, accessible advice easily and cheaply".***

6.4.1 We will:

a) promptly communicate legal requirements relating to our regulatory activities, as well as changes to those legal requirements, to businesses.

b) provide information, advice and guidance to make it easier for businesses and the public to understand and meet their regulatory obligations.
Such information will be provided in clear, concise and accessible language, using appropriate formats and media.

Where possible, advice will be given free of charge, but it may be appropriate to charge a reasonable fee for services beyond any basic advice and guidance necessary to help ensure compliance.

Note: Businesses and the public will appreciate that the level of help that our Officers are able to give is limited in terms of the amount of detail, and that they must always have regard to avoiding conflict between advice that they give and their enforcement role.

c) involve businesses and the public, where appropriate, in developing the content and style of guidance, and assess the effectiveness of information given by monitoring businesses' awareness and understanding of legal requirements, including the extent to which additional costs may be incurred for obtaining external advice to comply with legal requirements.

d) provide targeted and practical advice that meets the needs of businesses and the public.

Such advice may be through face-to-face interactions, telephone helpline or online guidance.

We will also seek to maximise the reach, accessibility and effectiveness of advice.

e) distinguish clearly between statutory requirements and advice or guidance aimed at improvements above minimum standards, and confirm such advice in writing, if requested.

f) ensure that businesses and the public can, within reason, access our advice without directly triggering an enforcement action.

In responding to such an approach, our primary aim will be to provide the advice needed to help ensure compliance.

6.5 Inspections and Other Visits ~ Hampton Principle: ***"No inspection should take place without a reason".***

6.5.1 We will:

a) ensure that inspections and other visits, such as compliance or advice visits, to regulated businesses, only occur in accordance with a risk assessment methodology, as set out in paragraph 6.3.1, above.

However, this will not apply where visits are requested by businesses, or when we are acting on relevant intelligence.

b) use only a small element of random inspection in our programme to test our risk methodologies or the effectiveness of interventions.

c) focus our greatest inspection effort on those businesses where risk assessment shows both:

i) a compliance breach or breaches would pose a serious risk to a required outcome; and

ii) there is high likelihood of non-compliance

d) give positive feedback to encourage and reinforce good practices, and we will share amongst regulated businesses, and with other regulators, information about good practice.

e) have arrangements for collaboration to minimise burdens on the regulated entity where two or more inspectors, whether from the same or different regulators, undertake planned inspections of the same business. Such arrangements may include joint or coordinated inspections, and data sharing.

6.6 Information Requirements ~ Hampton Principle: ***"Businesses should not have to give unnecessary information, nor give the same piece of information twice".***

6.6.1 We will:

a) undertake an analysis of the costs and benefits of data requests to regulated businesses, when determining which data we may require

b) explicitly consider reducing costs to regulated businesses by:

i) varying data requests according to risk

ii) limiting collection to specific regulated areas

iii) reducing the frequency of data collection

iv) obtaining data from other sources, allowing electronic submission, and requesting only data that is justified by risk assessment.

v) share data with other regulators to avoid duplication of collection where it is practicable, beneficial and cost effective to do so.

We will have regard to rulings made by the Information Commisioner in applying the Data Protection Act 1998, to avoid unnecessarily restricting the sharing of data. Further guidance can be found at Appendix 2.

vi) involve regulated businesses in vetting data requirements and form design for clarity and simplification.

We will seek to collect data in a way that is compatible with the processes of regulated businesses and those of other regulators who collect similar data.

6.7 Compliance and Enforcement Actions ~ Hampton Principle*: **"The few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions".***

6.7.1 We will:

a) seek to reward those businesses that consistently achieve good levels of compliance through positive incentives, such as lighter inspections and reporting requirements, in cases where risk assessment justifies this.

We will provide information to businesses in cases where their performance has resulted in a change to their risk rating.

We will also take account of the circumstances of small regulated businesses, including any difficulties they may have in complying.

b) where appropriate, discuss the circumstances with those suspected of a breach and take these discussions into account when deciding on the best approach.

This paragraph does not apply where immediate action is required to prevent or respond to a serious breach or where to do so is likely to defeat the purpose of the proposed enforcement action.

c) ensure that our sanctions and penalties policies are consistent with the principles set out in the Macrory Review. A summary of the relevant principles is at Appendix 4.

d) ensure that clear reasons for any formal enforcement action are given to the person or entity against whom any enforcement action is being taken, at the time the action is taken.

We will seek to confirm the reasons in writing at the earliest opportunity. Complaints and relevant appeals procedures for redress will be explained at the same time.

e) enable inspectors and enforcement officers to interpret and apply relevant legal requirements and enforcement policies fairly and consistently between similarly regulated businesses in comparable situations.

We will ensure that our inspectors and enforcement staff interpret and apply their legal requirements and enforcement policies consistently and fairly.

As an aid to consistency, enforcement staff will refer to Home Authority or Lead Authority schemes, where these exist.

6.8 Accountability ~ Hampton Principle: ***"Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take".***

6.8.1 We will:

a) create effective consultation and feedback opportunities to enable continuing cooperative relationships with regulated businesses and other interested parties.

In this regard, we will continue to monitor satisfaction levels notified by regulated businesses and we will comply in all respects with relevant National Performance Indicators.

b) ensure that our employees provide courteous and efficient services, and take due account of comments from regulated businesses and other interested parties regarding the behaviour and activity of inspectors and other enforcement staff.

c) provide effective and timely complaints procedures, including for matters in this Policy, that are easily accessible to businesses.

We will publish our complaints procedures, with details of the process and likely timescale for resolution.

d) Follow a complaints procedures that includes a final stage to an independent, external, person. Where there is a relevant Ombudsman or Tribunal with powers to decide on matters in this Policy, the final stage may allow referral to that body.

Where no such person exists, we may, in consultation with interested parties, provide for further complaint or appeal to another independent person, for example, an independent professional body.

APPENDIX 1

The Hampton Principles

Sir Philip Hampton, Chairman of Sainsburys, led the "Hampton Review" into regulatory inspection and enforcement commissioned by HM Treasury as part of the 2004 Budget. His Final Report, published in March 2005, "*Reducing Administrative Burdens: effective inspection and enforcement",* recommended a risk-based approach to enforcement and included the so-called Hampton Principles.

The Report can be found at: www.berr.gov.uk/files/file22988.pdf

The Report's findings were accepted in full by the Government and now form the basis of current enforcement protocols.

The Hampton Principles are:

- Regulators and the regulatory system as a whole should use comprehensive risk assessment to concentrate on the areas that need them most.

- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.

- All regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all interested parties should be consulted when they are being drafted.

- No inspection should take place without a reason.

- Businesses should not have to give unnecessary information, nor give the same piece of information twice.

- The few businesses that persistently break regulations should be identified quickly, and face proportionate and meaningful sanctions.

- Regulators should provide authoritative, accessible advice easily and cheaply.

- When new policies are being developed, explicit consideration should be given to how they can be enforced using existing systems and data to recognize the administrative burden imposed.

- Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work.

- Regulators should recognize that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.

APPENDIX 2

Additional Sources of Guidance

The following website addresses contain authoritative guidance relevant to the work areas noted. Where appropriate, the guidance contained in each is to be followed and enforcement staff should ensure that they check regularly for updated or new sources of guidance.

LACORS: (Local Authorities Coordinators of Regulatory Services) LACORS is an advisory body to Local Authorities, whose web homepage is at www.lacors.gov.uk Note that subscription is required to access some elements.

Environmental Protection:
www.defra.gov.uk/environment/ppc/localauth/pubs/guidance/pdf/ggmanual-2008-parta.pdf

Food Safety: www.food.gov.uk/multimedia/pdfs/codeofpractice.pdf

Health and Safety:

http://www.hse.gov.uk/pubns/hsc15.pdf (HSC Enforcement Policy Statement)

http://www.hse.gov.uk/lau/lacs/23-17.htm (Section 18 Guidance)

and the **Enforcement Management Model** at www.hse.gov.uk/enforce/emm.pdf

Licensing:

http://www.culture.gov.uk/images/publications/RevisedGuidanceJune2007.pdf

Gambling: LACORS is producing a note which sets out the need for Licensing Authorities to utilise Risk Assessments for premises licensed under the Gambling Act 2005 and the criteria upon which such assessments should be based. The Licensing Team is to have due regard to this document when it is published.

Data Protection The Information Commissioner's Statement of good practice on the use and disclosure of information about business people can be found at:

www.bre.berr.gov.uk/regulation/documents/data/pdf/letter.pdf

Case Law The case of *R v Adaway* emphasises the importance of adhering closely to Enforcement Policies. In the case, the Judge concluded that:

"If they (the prosecuting authority) *fail to* (consider with care the terms of their own Prosecution Policy) *or if they reach a conclusion which is wholly unsupported…… by material establishing the criteria for prosecution, it is unlikely that the Courts will be sympathetic."*

Further details of the case can be found at the LACORS website, given above.

APPENDIX 3

The Public Interest Test for Prosecution

Those factors that will tend to indicate the need for prosecution include the following, which may not be an exhaustive list:

a) the number of people affected by the offence

b) the degree to which people are/were affected (seriousness of the offence)

c) evidence that the offence was committed deliberately or maliciously

d) evidence that the defendant intimidated or harassed those affected

e) evidence of previous or on-going offences of a similar type

f) the likelihood of repeated offences

g) the defendant was in a position of authority

h) a lack of co-operation on the part of the defendant

i) the offence is widespread, at least in the general area in which it was committed

Factors that might argue against a prosecution will include:

a) the Court is likely to impose a very small penalty on conviction

b) the offence appears to have been the result of a genuine misunderstanding or mistake

c) harm done was minor and was the result of a single incident, particularly if it was caused by a misjudgement

d) willingness on the part of the defendant to co-operate and to ensure that no future offences of a similar nature are committed

e) a long delay between offence and trial, unless

i) the offence is serious
ii) the delay has been caused, at least in part, by the defendant
iii) the Offence has only recently come to light
iv) the complexity of the investigation results in unavoidable delays.

f) the defendant is elderly, in poor health or confused (unless there is a real possibility that the offence will be repeated).

g) the defendant has, so far as possible, put right the harm caused

h) a key witness has refused to testify or to provide a Witness Statement or, if they are the only victim, they have strongly indicated opposition to a prosecution

APPENDIX 4

Improving Compliance among Businesses (Macrory Review)

In 2006, Richard Macrory, a barrister and professor of economics, was asked to look at what could be done to improve compliance among UK businesses.

His Final Report was published in November 2006. The relevant principles from the McCrory Review are reproduced below. The full Report can be found through: http://bre.berr.gov.uk/

Sanctions and penalties policies should:

- aim to change the behaviour of the offender;
- aim to eliminate any financial gain or benefit from non-compliance;
- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- aim to deter future non-compliance.

Regulators should also:

- publish an enforcement policy;
- measure outcomes not just outputs;
- justify their choice of enforcement actions year on year to interested parties;
- follow-up enforcement actions where appropriate;
- enforce in a transparent manner;
- be transparent in the way in which they apply and determine penalties; and

• avoid perverse incentives that might influence the choice of sanctioning response.