

**BIRMINGHAM CITY COUNCIL**

**REPORT OF THE DIRECTOR OF ENVIRONMENTAL AND CONSUMER  
SERVICES TO THE PUBLIC PROTECTION COMMITTEE**

**FEBRUARY 2003  
ALL WARDS**

**PUBLIC HEALTH ENFORCEMENT POLICY - UPDATE**

1. Summary

- 1.1 The Enforcement Policy was endorsed by the Sustainability and Public Protection Advisory Team in September 2000.
- 1.2 In August 2002 the Public Health Service was assessed by District Audit against the Best Value Performance Indicator [BVPI 166] '*Score against a checklist of enforcement best practice for Environmental Health and Trading standards*', and scored a 100% compliance rating.
- 1.3 This report provides an update to the Policy based up on the actions that have been undertaken to underpin the BVPI 166 assessment rating.

2. Recommendation

- 2.1 That the Public Protection Committee approves the Enforcement Policy, as amended.

### 3. Background

- 3.1 The Department has a statutory duty to enforce a wide range of legislation. The Enforcement Policy is essential to ensure that consistency in enforcement is achieved. The Policy is an evolving document that reflects both changes in central Government guidance, new legislation, statutory codes of practice and service user feedback.
- 3.2 The Department in 1999-2000 adopted the six principles of 'good enforcement' set out in the Enforcement Concordat. These are:
- Performance will be measured against published *standards*
  - There will be *openness* in dealing with businesses and others
  - Enforcement officers will be *helpful*, courteous and efficient
  - *Complaint* procedures will be published
  - Enforcement decisions will be *proportionate* to the circumstances
  - Enforcement officers will strive for high standards of *consistency*

### 4. Responding to Central Government Guidance and Best Practice

- 4.1 The aspirational principles of the Enforcement Concordat have been substantially reinforced through the introduction of Best Value Performance Indicator (BVPI) 166, which sets out a framework to measure and score '*enforcement performance*'. The main provisions relate to:
- Written and published Enforcement Policy
  - Planning of enforcement activity
  - Reactive enforcement activity
  - Appropriate resources
  - Consultation and satisfaction levels
- 4.2 Compliance with the new BVPI is discretionary, but the scores are published and will be used for comparative scoring purposes between local authorities and local authorities will be expected to demonstrate continuous improvement. The 100% compliance score achieved by the Public Health Service in 2002, places it within the top quartile of all local authority environmental health service providers.

### 5. Enforcement Policy

- 5.1 The Enforcement Policy has now been amended to ensure continued compliance with BVPI 166 and *best practice* in enforcement and regulation.
- 5.2 The Enforcement Policy recognises that it is necessary to protect the consumer and the environment and that where businesses persistently and deliberately flout the law or put the safety of others at risk, there must be effective sanctions.

The proposed Enforcement Policy is shown in Appendix 1, and the main changes are to ensure:

- a) That the Policy takes into consideration the guidance issued to prosecutors by the Crown Prosecution Service in the 'Code for Crown Prosecutors'.
- b) That the Policy identifies the factors that will be considered before formal enforcement action is taken.
- c) That the service has procedures and protocols for liaising with other regulatory bodies/agencies in relation to wider enforcement issues, including joint enforcement arrangements where they exist.
- d) That the Enforcement Policy is published on the City Council's website.
- e) That the Policy is underpinned by detailed operational guidance procedures that are reviewed annually, for example to ensure that authorisation procedure for Prosecutions and Formal Cautions remains independent of the Investigating Officer.
- f) That the Policy and associated operational guidance procedures take full account of primary legislation relating to the protection of human rights, for example the Data Protection Act 1998 concerning disclosure of personal information and the Regulation of Investigatory Powers Act 2000 concerning covert surveillance.

5.2 Pending approval by Members, arrangements will be put into place to publish the Enforcement Policy on the Birmingham website.

## 6. Implications For Resources

6.1 No specific implications have been identified.

## 7. Implications For Policy Priorities

7.1 The issues addressed in this report reflect the Department's mission statement and the Chair's priorities of ensuring a safer, cleaner and greener city. The Policy ensures consistency and fairness throughout all communities in Birmingham.

D R BOWMAN  
DIRECTOR OF ENVIRONMENTAL AND CONSUMER SERVICES

Background Papers: NIL

# Environmental & Consumer Services Public Health Section

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## Enforcement Policy (2003)

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## **Introduction**

- 1.1 Fair and effective enforcement is essential to protect the economic interests and health and safety of the public and businesses, and the environment. Decision about enforcement action and in particular the decision to prosecute has serious implications for all involved. The Environmental and Consumer Service's Public Health Section applies this Policy to ensure that:
- Decisions about enforcement action are fair, proportionate and consistent;
  - Officers apply current Government guidance and codes of practice;
  - To ensure that everyone understands what principles are applied when enforcement action is considered.
- 1.2 This Policy is designed to make sure that everyone knows the principles that the Public Health Section applies when carrying out its work. By applying the same principles, everyone involved in the decision making process is helping to treat victims fairly and to prosecute fairly but effectively.

## **Legal status of the Enforcement Policy**

- 2.1 This Policy was approved the Public Protection Committee of Birmingham City Council on 14<sup>th</sup> February 2003 and all enforcement officers carry cards showing their identity and a list of legislation that they are authorised to enforce.

## **Scope and meaning of 'Enforcement'**

- 3.1 This Policy applies to all the legislation enforced by Officers from the Environmental and Consumer Service's Public Health Section.
- 3.2 'Enforcement' includes any action taken by Officers aimed at ensuring that individuals or businesses comply with the law. This is not limited to formal enforcement action such as prosecution; it also includes, for example, the inspection of premises for the purpose of checking compliance with acts of Parliament and regulations.

## **How to obtain a copy of the Policy or make comments**

- 4.1 This Policy is available on the City Council's web site:  
[www.birmingham.gov.uk/publichealth](http://www.birmingham.gov.uk/publichealth)

If you would like a paper copy of the Policy and/or you would like to comment on the Policy, please contact us by:

- telephoning 0121 303 6007;
- e-mailing [publichealth@birmingham.gov.uk](mailto:publichealth@birmingham.gov.uk)
- writing to the Head of Public Health, Environmental & Consumer Services, Ladbroke House, Bordesley Street, Birmingham, B5 5BL.

4.2 On request, this Policy will be made available on tape, in Braille, large type, or in a language other than English.

## General Principles

5.1 Each case is unique and must be considered on its own merits. However, there are general principles that apply to the way each case must be approached. These are set out in this Policy and in the Government's *Enforcement Concordat* to which Birmingham City Council is a signatory.

For more information about the Enforcement Concordat visit: <http://www.cabinet-office.gov.uk/regulation/publicsector/enforcement/enforcement.htm>

5.2 Enforcement officers must be fair, independent and objective and must not let any personal views about issues such as ethnic or national origin, sex, religious beliefs, political views or the sexual orientation of the suspect, victim, witness or offender influence their decisions. They must not be affected by improper or undue pressure from any source.

5.3 It is the duty of enforcement officers to make sure that enforcement action is taken against the right person. In doing so it must act in the interests of justice and not solely for the purpose of obtaining a conviction.

## Notifying alleged offenders

6.1 If we receive information [for example from a complainant] that may lead to enforcement action against a business or individual we will notify that business or individual as soon as is practicable of any intended enforcement action, except in the circumstances described in 6.3 below.

6.2 During the progression of enforcement investigations/actions, business proprietors or individuals or witnesses will be kept informed of progress. Confidentiality will be maintained and personal information about individuals will only be released to a Court when required and/or in accordance with the Data Protection Act 1998.

6.3 In certain circumstances, we may chose not to keep business proprietors or individuals or witnesses informed of progress if this could impede enforcement action and/or pose a safety risk to those concerned or the general public.

## Deciding what level of enforcement action is appropriate

- 7.1 A large number of factors are considered when determining what action to take. These factors are detailed in **Appendix 1 [*Factors we consider when taking enforcement action*]**. These factors are used to determine the level of enforcement action we may take:

### Levels of enforcement action:

There are a large number of potential enforcement options. The level of the action taken varies from no action through to proceedings in Court. Examples of the main types of action that can be considered are shown below:

- Prosecution
- Formal Caution
- Refusal/revocation of a licence
- Court Injunction
- Seizure
- Forfeiture Proceedings
- Formal Notice
- Written warning and/or advice
- Verbal warning and/or advice
- Revisit of premises
- No action

### Prosecution

- 7.2 A prosecution will normally ensue where the individual or organisation meets one or more of the following criteria :

- Deliberately or persistently breached legal obligations, which were likely to cause material loss or harm to others,
- Deliberately or persistently ignored written warnings or formal notices,
- Endangered, to a serious degree, the health, safety or well being of people, animals or the environment,
- Assaulted or obstructed an Officer in the course of their duties.

### Formal Caution

- 7.3 This procedure is used as a final warning. It derives from advice issued by the Home Office and has already been successfully used by this authority to deal with contraventions of Environmental Health and Trading Standards legislation. For a formal caution to be issued a number of criteria must be satisfied:

- sufficient evidence must be available to prove the case, and;

- the offender must admit the offence; must agree to be cautioned and must not have been committed by the offender before.

For details on the Home Office guidance [Circular 18/1994] visit:

<http://www.homeoffice.gov.uk/circulars/1994/hoc9418.htm>

- 7.4 A record of the Formal Caution will be sent to the Office of Fair Trading and the Local Authorities Coordinators of Regulatory Services (LACORS) if appropriate, and will be kept on file for 3 years. If the offender commits a further offence, the Formal Caution may influence our decision to take a prosecution. If during the time the Caution is in force the offender pleads guilty to, or is found guilty of, committing another offence anywhere in England and Wales, the caution may be cited in court, and this may influence the severity of the sentence that the court imposes.

### **Refusal / Revocation of a licence**

- 7.5 Certain types of premises/businesses require a licence to operate legally, for example butchers premises. In order to warrant refusal/revocation of a licence, the controlling individual or organisation must meet one or more of the following criteria:

- Deliberately or persistently breached legal obligations, which were likely to cause material loss or harm to others
- Deliberately or persistently ignored written warnings or formal notices
- Endangered, to a serious degree, the health, safety or well being of people, animals or the environment
- Obstructed an Officer during undertaking their duties

### **Court Injunction**

- 7.6 In certain circumstances, for example where offenders are repeatedly found guilty of similar offences or where the City Council's Solicitors agree that an injunction is a more appropriate course of enforcement action than any other, then injunctions may be used as an enforcement measure to deal with repeat offenders or dangerous circumstances.

### **Seizure**

- 7.7 Certain legislation enables authorized Officers to seize goods or equipment, for example food that is unsafe or sound equipment that is being used to cause a statutory noise nuisance. When we seize goods we will give the person from whom the goods are taken an appropriate receipt. Where the law requires, we will *produce* seized goods before the Magistrate Court.

## **Forfeiture Proceedings**

7.8 This procedure may be used in conjunction with seizure and/or prosecution where there is a need to dispose of goods in order to prevent them re-entering the market place or being used to cause a further problem. In appropriate circumstances, and where the law enables us to do so, we will make an application for forfeiture to the Magistrates Court following successful prosecution.

## **Formal Notice**

7.9 Notices are served to require offenders to cease contravening activities, or to give offenders reasonable time to rectify a contravention. Notices may require *contravening activities* to cease immediately where the circumstances relating to health, safety, environmental damage or nuisance demand. In other circumstances, the time allowed must be reasonable, but must also take into account the health, safety, environmental damage or nuisance implications of the contravention.

7.10 All notices issued will include details of any applicable *Appeals Procedures*.

7.11 Certain types of notice allow us to 'carry out work at default'. This means that if a notice is not complied with [a breach of the notice] we may carry out any necessary works to satisfy the requirements of the notice ourselves. Where the law allows, we may then charge the person/business served with the notice for any cost we incur in carrying out the work.

## **Written warning and advice**

7.12 For some contraventions we will send the offender a firm but polite letter clearly identifying the contraventions, giving advice on how to put them right and including a deadline by which this must be done. Failure to comply could result in a notice being served or more severe enforcement action being taken. The time allowed must be reasonable, but must also take into account the health, safety and nuisance implications of the contravention.

## **Verbal warning and advice**

7.13 For minor breaches of the law we verbally advise the offender. We will clearly identify the contraventions of the law and give advice on how to put them right and including a deadline by which this must be done. Sometimes we will advise offenders about 'good practice', but we will clearly distinguish between what they *must do* to comply with the law and what is advice only.

7.14 Failure to comply could result in more severe enforcement action being taken. The time allowed must be reasonable, but must also take into account the health, safety and nuisance implications of the contravention.

## Revisit of premises

- 7.15 Following a formal notice, written warning or verbal warning we may revisit the premises to check compliance has been achieved. For very minor contraventions we may advise that a revisit may be carried out after the agreed deadline. Officers will then decide whether to actually make a revisit depending upon the health, safety, environmental damage or nuisance implications of the contravention, and the perceived likely response of the offender to the warning/advice.

## No action

- 7.16 In exceptional circumstances, contraventions of the law may not warrant any action. This can be where the cost of compliance to the offender outweighs the detrimental impact of the contravention on the community, or the cost of the required enforcement action to the City Council outweighs the detrimental impact of the contravention on the community. A decision of *no action* may also be taken where formal enforcement is inappropriate in the circumstances, such as where a trader has ceased to trade, or the offender is elderly and frail and formal action would seriously damage their well being. A decision to take no action will be recorded in writing and must take into account the health, safety, environmental damage or nuisance implications of the contravention.

## Determining whether a *Prosecution or Formal Caution* is viable and appropriate

- 8.1 We apply two 'tests' to determine whether a Prosecution or Formal Caution is viable and appropriate. We follow guidance set by the Crown Prosecution Service when applying the tests:

- The **Evidential Test** –  
There must be enough evidence to provide a 'realistic prospect of conviction' against each defendant on charge.
- The **Public Interest Test** –  
There may be public interest factors which are in favour of, or are against prosecution. These have to be weighed-up before enforcement action is taken.

For more information about the 'Code For Crown Prosecutors' visit:

<http://www.cps.gov.uk/Home/CodeForCrownProsecutors/>

- 8.2 If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be. If the case does meet the evidential test, the Investigating Officer(s), along with senior managers from the Public Health

Section and City Council Solicitors must decide if formal enforcement action is needed in the public interest.

- 8.3 Formal Caution or Prosecution proceedings will only be progressed when the case has passed both tests. Paragraphs 8.4 to 8.8 below, detail how this Policy applies to the consideration of taking a prosecution. The principles outlined apply equally to the other types of formal enforcement action that are available.

### **The Evidential Test**

- 8.4 The Investigating Officer(s), along with senior managers from the Public Health Section and City Council's Solicitors must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge. A realistic prospect of conviction is an objective test that means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply. A jury or magistrates' court should only convict if satisfied so that it is sure of a defendant's guilt.
- 8.5 When deciding whether there is enough evidence to prosecute, the Investigating Officer(s), along with senior managers from the Public Health Section and City Council's Solicitors must consider whether the evidence can be used and is reliable.

### **The Public Interest Test**

- 8.6 The public interest must 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 prosecution, which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed.
- 8.7 The Investigating Officer(s), along with senior managers from the Public Health Section and City Council Solicitors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be better. The following lists include some common public interest factors, both for and against prosecution. These are not exhaustive and the factors that apply will depend on the facts in each case.

### **Some common public interest factors in favour of prosecution**

The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:

- a conviction is likely to result in a significant sentence;
- the evidence shows that the defendant was a ringleader or an organiser of the offence;
- there is evidence that the offence was premeditated;
- the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal, damage or disturbance;
- the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual orientation, or the suspect demonstrated hostility towards the victim based on any of those characteristics;
- there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
- the defendant's previous convictions or cautions are relevant to the present offence;
- there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct

### **Some common public interest factors against prosecution**

A prosecution is less likely to be needed if:

- the court is likely to impose a nominal penalty;
- the defendant has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order, unless the nature of the particular offence requires a prosecution;
- the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
- the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgment;
- there has been a long delay between the offence taking place and the date of the trial, unless:
  - the offence is serious;
  - the delay has been caused in part by the defendant;
  - the offence has only recently come to light; or
  - the complexity of the offence has meant that there has been a long investigation;
- a prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;
- the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated.

- 8.8 Deciding on the public interest is not simply a matter of adding up the number of factors on each side. The Investigating Officer(s), along with senior managers from the Public Health Section and City Council's Solicitors must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

## **Who decides what enforcement action is taken**

- 9.1 For less serious infringements of the law, decisions about the most appropriate course of action is usually determined by the Investigating Officer(s). Decisions are based upon professional judgment, legal guidelines, statutory codes of practice and priorities set by the City Council and/or Central Government.
- 9.2 For more serious offences [where the nature of the offence point towards prosecution, formal caution or seizure], decisions about enforcement, where appropriate, may be 'authorised' by a team, including the:
- Investigating Officer(s)
  - Senior managers from the Public Health Section
  - City Council Solicitors
  - Chair of the City Council's Public Protection Committee (or other relevant Committee)

Details of '*who decides what enforcement action is taken*' is shown in **Appendix 2**.

## **Liaison with other regulatory bodies and enforcement agencies**

- 10.1 Where appropriate, enforcement activities within the Public Health Section will be co-ordinated with other regulatory bodies and enforcement agencies to maximise the effectiveness of any enforcement.
- 10.2 Where appropriate, for example where there has been a work related death, we will inform and liaise directly with West Midlands Police. In certain circumstances joint investigations may be undertaken with the Police and or the Health and Safety Executive. These provisions along with other matters relating to workplace health, safety and welfare are detailed within our **Health & Safety Policy guidance** document (shown in **Appendix 3**).
- 10.3 Where an enforcement matter affects a wide geographical area beyond the City boundaries, or involves enforcement by one or more other local authorities or organisations; all relevant authorities and organisations will be informed of the matter as soon as possible and all enforcement activity co-ordinated with them.

- 10.4 The Public Health Section shares intelligence relating to wider regulatory matters with other regulatory bodies and enforcement agencies, and examples including:
- Government Agencies, such as the Food Standards Agency, Meat Hygiene Service, Health and Safety Executive and Environment Agency.
  - Police Forces, such as West Midlands Police
  - Fire Authorities, such as West Midlands Fire Service
  - Public Health Laboratory Service
  - Statutory undertakers, such as Severn Trent Water
  - Other Local Authorities
- 10.5 Where wider regulatory matters can be more effectively addressed through joint working we will, where appropriate, enter into formal 'Enforcement Liaison Policies'. To support the City Council's *Food Law Enforcement Plan* we are joint signatories, along with seven Local Authorities in the West Midlands Region, to the **West Midlands Food Liaison Group – Enforcement Policy**. This Policy is shown in **Appendix 4**.

## Offences

- 11.1 The Investigating Officer(s), along with senior managers from the Public Health Section and City Council's Solicitors should select the most appropriate legislation which:
- reflect the seriousness of the offence,
  - give the court adequate sentencing powers,
  - are made to the appropriate court,
  - enable the case to be presented in a clear and simple way.

## Considering the views of those affected by offences

- 12.1 The Public Health Section undertakes enforcement on behalf of the public at large and not just in the interests of any particular individual or group. However, when considering the public interest test (see section 8.6 above), the consequences for those affected by the offence, of the decision whether or not, and how to take enforcement action, and any views expressed by those affected will, where appropriate, be taken into account.
- 12.2 Those people affected by the offence will be told about any decision that makes a significant difference to the case in which they are involved.

## The interests of the City's stakeholders

- 13.1 Where particular local circumstances dictate, enforcement activity will, where practicable, take account of those circumstances that minimise any adverse effects of enforcement activity on legitimate businesses and individuals.

- 13.2 When practicable and beneficial to local businesses, standards of competitors will be reviewed/monitored, for example through liaison with other regulatory bodies and enforcing agencies, in order to support a consistent approach to enforcement (see section 10).

## **Re-starting a prosecution**

- 14.1 People should be able to rely on enforcement decisions taken by the Public Health Section managers. Normally, if a suspect or defendant is advised that there will not be a prosecution, or that the enforcement action has been stopped, that is the end of the matter and the case will not start again. But occasionally there are special reasons why enforcement action will re-start, particularly if the case is serious. These reasons include:
- Rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand
  - Cases which are stopped so that more evidence, which is likely to become available in the fairly near future, can be collected and prepared. In these cases, the defendant will be told that the enforcement action may well start again
  - Cases which are stopped because of a lack of evidence but where more significant evidence is discovered later

## **Protection of Human Rights**

- 15.1 This Policy and all associated enforcement decisions take account of the provisions of the Human Rights Act 1998. In particular, due regard is had to:
- Article 6 - Right to a fair trial
  - Article 8 - Right to respect for private and family life, home and correspondence
  - Article 14 - Prohibition of discrimination on any grounds
- 15.2 Officers within the Public Health Section operate to a range of internal guidance documents that support the principles of primary human rights legislation, for example guidance relating to the Data Protection Act 1998 and Regulation of Investigatory Powers Act 2000. These guidance documents will be monitored by scheduled internal quality audits.

## **Review of the Enforcement Policy**

- 16.1 This Policy will be reviewed annually.

Factors we consider when taking enforcement action ?

Officer(s) carry out **investigations/inspections**. This can be done in response to a complaint or request for assistance, as part of routine planned inspections of business premises or survey work.

Investigating Officer discovers evidence and is satisfied that a **criminal offence** may have been committed or is about to be committed. This is called *Prima facie* evidence.

Investigating Officer considers a range of factors including:

- Previous History - whether any similar situation has been found before.
- Seriousness of the alleged offence(s), including:
  - Risks to the public or the environment
  - Any intent or recklessness of the person(s) committing the offence
  - Any obstruction of the Investigating Officer
  - Whether the alleged offence(s) are considered a special area of priority by Central Government and/or Birmingham City Council
- Is their enough evidence to provide a realistic prospect of conviction
- Would any further action be in the public interest

For **LESS SERIOUS** infringements of the law and/or where there is no previous history of offences/non-compliance with legislation the following options are considered:

- **Informal Action** – verbal or written advice/warning
- **Statutory Notice** – service of a legal notice that will require certain specified action to be taken by the recipient

In all cases we will advise the alleged offender what he/she needs to do in order to comply with the law.

For **MORE SERIOUS** offences the following options will also be considered:

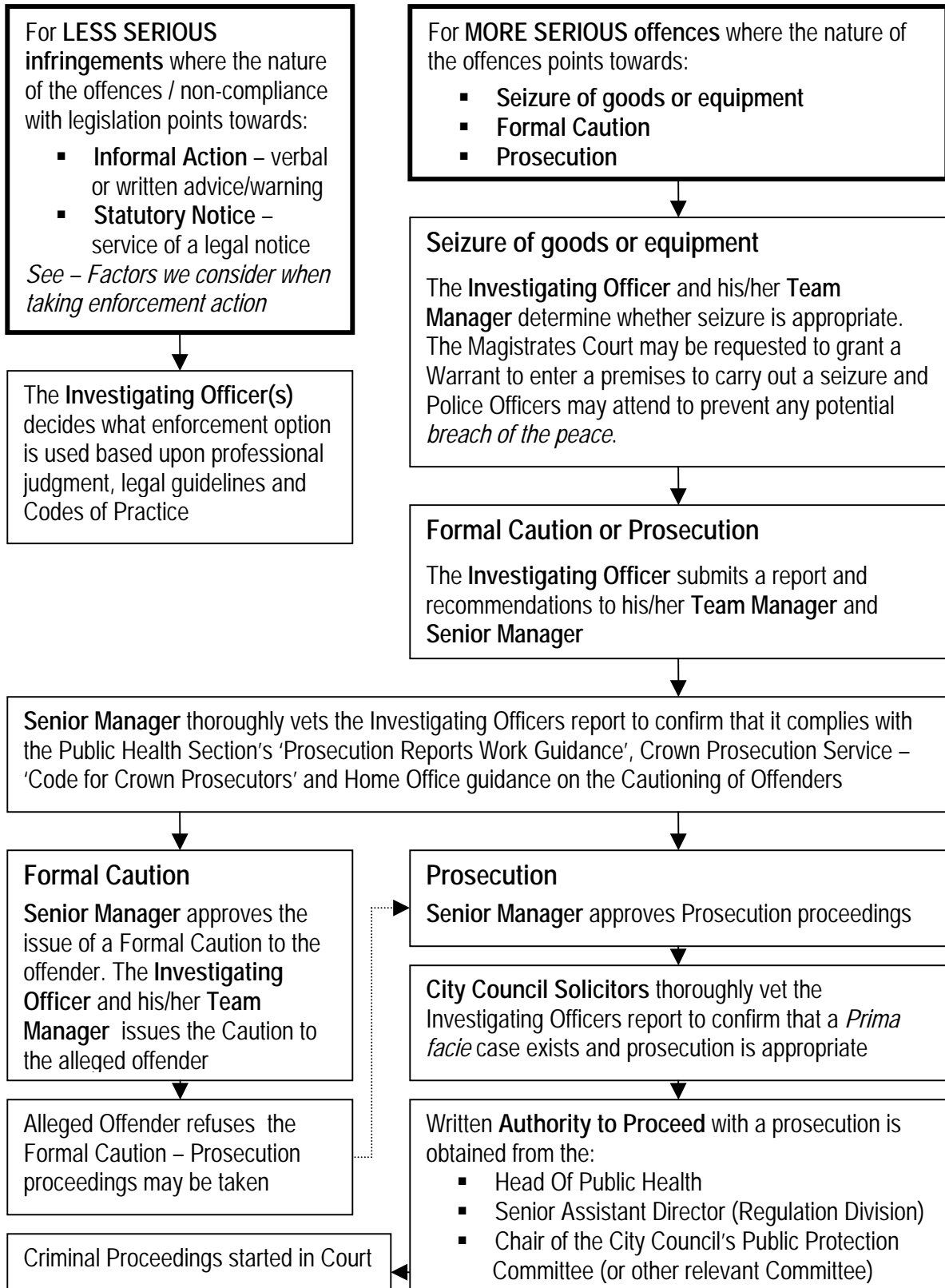
- **Seizure of goods or equipment** – In certain cases, goods or equipment may be seized to protect the public and/or employees, for example unsafe food or sound equipment being used to cause a nuisance.
- **Formal Caution** – a Formal Caution is an alternative to prosecution and can only be issued if strict criteria are met. The Home Office of Central Government sets these criteria. A Caution stays on public record for three years.
  - If a Formal Caution is offered to an offender, but he/she refuses to accept it then we may prosecute instead.
- **Prosecution** – legal proceedings are taken against the offender that results in the offender being summonsed to appear in Court. Any decision to prosecute is based upon guidelines set by the Crown Prosecution Service

In all cases the alleged offender will be informed of the matters under investigation and invited to attend a formal interview in accordance with the Police and Criminal Evidence Act 1984.

See – Who Decides What Action is taken [Appendix 2]

Appendix 2 - Public Health Enforcement Policy (2003)

Who decides what enforcement action is taken ?



**BIRMINGHAM CITY COUNCIL**  
**ENVIRONMENTAL AND CONSUMER SERVICES DEPARTMENT**

**HEALTH AND SAFETY ENFORCEMENT POLICY GUIDANCE**

**1. INTRODUCTION**

- 1.1 This document sets out the health and safety enforcement policy of Birmingham City Council's Environmental and Consumer Services Department. It will be applied by our officers when enforcing the provisions of the Health and Safety at Work etc Act 1974 (HSW Act).
- 1.2 The purpose of enforcement is to ensure that duty holders manage and control risks effectively, thus preventing harm. The term 'enforcement' has a wide meaning and applies to all dealings between Birmingham City Council (as the enforcing authority) and those on whom the law places duties (employers, the self-employed, employees and others). The appropriate use of enforcement powers 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 health, safety and welfare.
- 1.3 The means of achieving compliance are multifaceted. On the basis that prevention is better than cure much can be achieved through advice, education, training, encouragement and working with businesses, to help ensure compliance with current legislation. However, this approach will not always be successful or appropriate and in order to secure compliance, officers will use their enforcement powers, including prosecution, in accordance with this policy.

**2. POLICY STATEMENT**

- 2.1 Birmingham City Council's approach to health and safety enforcement reflects the duties placed upon it by the HSW Act. One of the main objectives of the Act is to secure the health, safety and welfare of persons at work and protect other persons against the risks arising from work activities.
- 2.2 The primary responsibility for ensuring health and safety in the workplace lies with those who are in overall control, in particular, employers who need to recognise their responsibility for managing health and safety.

### 3. **AIMS AND OBJECTIVES**

3.1 A key aim of this policy document is to ensure that a consistent approach is adopted to the enforcement of health and safety legislation by Birmingham City Council officers.

3.2 The policy aims to improve standards of health, safety and welfare within Birmingham by using appropriate measures to secure compliance with relevant statutory provisions.

3.3 It seeks to promote liaison and co-operation with the Health and Safety Executive and other relevant agencies, and to keep health and safety at work a high profile issue by means of press releases, articles, initiatives and promotions.

3.4 In endeavouring to carry out the above aims, Birmingham City Council will have regard to the following principles of enforcement contained in the Enforcement Concordat.

#### 3.5 **Human Rights**

Consideration will be given to the provisions of the Human Rights Act 1998 when considering action in respect of Health and Safety enforcement work. Particular attention will be given to:-

Article 6 Right to a fair trial

Article 8 Right to respect for private and family life, home and correspondence

Article 14 Prohibition of discrimination on any grounds.

### 4. **ENFORCEMENT STRATEGY**

#### 4.1 **Pro-active inspection**

Birmingham City Council will ensure that, through the action of competent officers, all premises for which we are the enforcing authority are inspected or contacted (as appropriate) at intervals based upon the appropriate risk rating allocated to them.

Whilst noting that regular surveillance needs to be exercised over all activities, resources will be primarily directed towards the identification and elimination of the more serious hazards and risks to health and safety.

Each premises visited will be allocated a “risk” score that will be used to determine the premises inspection priority rating. We will target out activities towards those premises with the highest scores, thus directing resources to premises posing greatest risk.

#### 4.2 **Investigation**

We will undertake investigations of accidents and complaints about work conditions/practices. This will prevent recurrences by securing improvements and putting serious breaches of health and safety law before the courts.

We will not investigate every reportable incident. To maintain a proportionate response, the majority of the resources available for the investigation of reportable incidents will be devoted to the more serious circumstances. This will be determined in accordance with the Environmental and Consumer Services Department’s Quality Procedure HS-2 ‘Accident Investigation’, which takes account of the following factors:

- The severity and scale of actual or potential harm
- The seriousness of any potential breach of health and safety law;
- The record of the duty holder/s;
- National enforcement priorities and initiatives;
- The wider relevance of the event, including the likelihood of it giving rise to serious public concern.

#### 4.3 **Enforcement Action**

Birmingham City Council’s officers will secure compliance with health and safety legislation through the use of:-

- Education
- Advice
- Letters informing duty holders of matters requiring attention
- Improvement and Prohibition Notices
- Formal Cautions
- Prosecution

##### 4.3.1 **Education**

We may hold seminars, issue guidance and organise courses to raise knowledge and awareness of health, safety and welfare issues.

##### 4.3.2 **Informal Action/Advice**

Our normal course of action will be to offer advice (either verbally or in writing) except where alternative courses of action are warranted.

#### 4.3.3 **Improvement and Prohibition Notices**

We will ensure that only authorised officers serve notices.

Notices will normally be served for the more serious issues or repeated contraventions. Notices may also be issued in conjunction with prosecutions.

#### 4.3.4 **Formal Cautions**

In appropriate circumstances a 'Home Office Formal Caution' will be offered as an alternative to prosecution. Such a Caution will be offered under the terms of the Home Office circular i.e.

- There must be evidence of the offender's guilt sufficient to give a realistic prospect of conviction.
- The offender must admit the offence(s).
- The offender must understand the significance and agree to accept the Caution. The Attorney General's Guidelines will be considered and if the Formal Caution is not accepted, legal proceedings will be instigated.
- The Caution should be in the public interest.

#### 4.3.5 **Prosecution**

Prosecution will only be undertaken when:

- We have collected sufficient evidence to provide a realistic prospect of conviction;
- It is in accordance with this policy and the Code for Crown Prosecutors; and
- It is in the public interest.

Subject to the above, we will normally prosecute where one or more of the following circumstances apply:

- Death was the result of a breach of the legislation;
- 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;
- There has been reckless disregard for health and safety requirements;
- There has been a failure to comply with an improvement or prohibition notice, or there has been a repetition of a breach that was previously subject to a notice or formal caution;
- There have been repeated breaches of legal requirements which give rise to significant risk or persistent or significant poor compliance;
- Work has been carried out without, or in serious non-compliance with, an appropriate licence or safety case;

- A duty holder's standard of managing health and safety is found to be far below that which is required by health and safety law and to be giving rise to significant risk;
- False information has been willfully supplied or there has been intent to deceive in relation to a matter which gives rise to a significant risk;
- Where officers have been intentionally obstructed in the lawful course of their duties;
- Where officers have been assaulted we will seek police assistance with a view to prosecution of offenders.

#### 4.3.6 **Prosecution of individuals**

Subject to the above criteria we will seek to prosecute individuals where appropriate. In particular, we will consider the management chain and the role played by individual directors or managers, and we will take action against them where an offence was found to have been committed with their consent or connivance or to have been attributable to neglect on their part. Where appropriate we will seek disqualification of directors under the Company Directors Disqualification Act 1986.

In all cases the alleged offender will be invited to give an explanation, which will be considered.

#### 4.3.7 **Death at Work**

Where there has been a breach of the law leading to a work-related death, West Midlands Police will be informed in accordance with the protocol 'Work-related deaths: A protocol for liaison'. This in certain circumstances may result in a joint investigation.

If in the case of a health and safety investigation, the Birmingham City Council officers find evidence suggesting manslaughter, that evidence will be brought to the attention of West Midlands Police.

If the Police or Crown Prosecution Service decide not to pursue a manslaughter case, we will consider bringing a health and safety prosecution in accordance with this policy.

#### 4.3.8 **Publicity**

We may actively inform the media of impending prosecutions, with the aim of drawing their attention to the court case. After the case we will publicise any conviction which could serve to draw attention to the need to comply with health and safety requirements or deter anyone tempted to disregard their duties under health and safety law.

## 5. **PERFORMANCE MEASURES**

### 5.1 **Monitoring Performance**

We will ensure that effective managerial control is exercised over all enforcement activities.

To ensure that enforcement activity is being carried out effectively, we will regularly monitor and review our performance in accordance with our documented systems.

We will participate in standardisation/evaluation exercises involving other West Midlands local authorities. Appropriate feedback and discussion will take place to ensure a common approach to inspection throughout the region.

### 5.2 **Quality**

We will endeavour through documented systems to create a consistent, quality approach to health and safety enforcement.

### 5.3 **Authorisation**

We will ensure that all officers are properly authorised to enforce relevant statutory provisions. Authorisation will only be granted to officers possessing the necessary competence through appropriate training, experience and/or qualifications.

Officers' level of competence will be established through managerial assessment.

## 6. **REVIEW**

This policy document will be reviewed at least every two years.

## **COMMENTS**

Organisations and individuals who may wish to comment on this policy are invited to do so, in writing, to the following address:

Team Manager (Health and Safety)  
21-22 Calthorpe Road  
Edgbaston  
Birmingham  
B15 1RP

Telephone: 0121 303 9910  
Email: [publichealth@birmingham.gov.uk](mailto:publichealth@birmingham.gov.uk)

**WEST MIDLANDS FOOD LIAISON GROUP  
FOOD SAFETY ENFORCEMENT POLICY  
[February 2001]**

**1. INTRODUCTION**

This policy has been prepared to detail the enforcement procedures to be applied by the seven Metropolitan Boroughs of the West Midlands Region.

It has been written and approved by representatives from the seven authorities of the West Midlands Food Liaison Group acting on behalf of the West Midlands Directors of Environmental Health and Trading Standards.

The original policy was prepared and approved in June 1996, this revision incorporates the principles of good enforcement contained in the Enforcement Concordat which was jointly issued by the Local Government Association and the Government in March 1998 and the provisions of The Human Rights Act 1998.

**2. PURPOSE OF THE POLICY**

It is the aim of the seven Authorities to strive to ensure that food and drink intended for sale for human consumption, which is produced, stored, distributed, or handled within the West Midlands region is safe, wholesome and without risk to health.

The major legal provision used by Food Enforcement Authorities to secure the safety of food and drink and the hygienic condition of food premises, is the Food Safety Act 1990 and the many regulations and provisions contained in consequential legislation.

Skilled, professional, fair and open enforcement of the legislation should be the aim of each enforcement authority and every enforcement officer.

**3. ENFORCEMENT CONCORDAT AND HUMAN RIGHTS ACT 1998**

In deciding to institute enforcement action, particularly prosecution or closure, authorities will need to consider the rights and freedoms given to individuals under the Human Rights Act 1998. This will be particularly relevant to Article 6, the right to a fair trial and Article 8, the right to respect for private and family life, home and correspondence.

Prior to instituting legal proceedings, an authority should be in a position to demonstrate that the proposed action is a proportionate response to the offence with a balanced view taken of the risk to food safety and/or the seriousness of the offence.

It will be necessary prior to prosecution to demonstrate that the proprietor of the business has been kept informed of the action taken and that full and

recorded discussion of the decision to prosecute has been undertaken.

#### **4. EQUAL OPPORTUNITIES**

Local Authorities should ensure that all recipients of the Food Safety Service, including inspections, investigations, requests for assistance and any actions taken to ensure food safety, receive fair and equitable treatment irrespective of their race, ethnicity, gender or disability.

#### **5. OBJECTIVES**

Authorities should endeavour to ensure that all enforcement action is proportionate to an assessment of risk to the public health and is implemented in a consistent and uniform manner.

Each Authority should commit support for both the Statutory Codes of Practice issued under Section 40 of the Food Safety Act 1990 and for the guidance issued by LACORS.

All food safety enforcement officers should be fully trained and authorised in those aspects of food safety relevant to their duties. Each authority should ensure that their officers are fully competent to carry out those duties and that the level of delegated authority for each officer has been approved by the head of the Environmental Health Service.

The minimum training and qualification for enforcement officers should be in accordance with Code of Practice 19.

Authorities should ensure that their enforcement officers are acquainted with the terms of this policy and that the officers abide by its terms when considering enforcement action.

All Authorities should endorse the principles laid down in the LACORS Home Authority Principle and should discuss proposed enforcement action with either the WMFLG or the relevant Home Authority where it believes such action may be inconsistent or contrary to existing advice. LACORS will be consulted in the following instances:-

- if a reasonable consensus group view cannot be reached.
- If the issue appears to be of national significance.
- If existing guidance has not taken account of the legal provisions, case law, relevant research or other evidence.

Each Authority should bring the contents of this policy to the attention of its relevant Service Committee with a view to obtaining its Members endorsement.

The WMFLG should endeavour to research and clarify certain food safety or food hygiene issues and provide relevant information to appropriate groups, organisations and individuals.

## **6. ENFORCEMENT STANDARDS**

All enforcement actions should be based on clear standards and delivered in plain language, with a clear distinction between advice items and remedies required by law.

All such enforcement decisions should be fair, balanced and should relate to areas that ensure adequate public protection.

The authorities should actively work with businesses, especially small and medium sized businesses to advise on and assist with compliance with the law.

So as to facilitate an open attitude to complaints about the service provided, Authorities should operate a well publicised, effective and timely complaints procedure easily accessible to business, the public, employees and consumer groups. In cases where disputes cannot be resolved, any right of complaint or appeal should be explained, with details of the process and the likely time-scales involved.

Authorities should minimise the costs of compliance for business by ensuring that any action required is proportionate to the risk. As far as the law allows, authorities should take account of the circumstances of the case and the attitude of the operator when considering action.

## **7. ENFORCEMENT ACTIONS**

Every time an officer visits a food premises that action has an impact on the business, even to the extent of leading in some cases to temporary or permanent closure.

It should be made clear to all enforcement officers that business proprietors can expect a basic level of politeness, good manners and a professional attitude to law enforcement.

Authorities should take all relevant information into account when reaching an enforcement decision, and, having considered the appropriate facts and evidence should decide on a course of action from the following options:-

- Informal action
- Use of statutory notices
- Use of formal cautions
- Prosecutions
- Prohibition of persons

Informal action includes verbal or written warnings and requests for action, food hygiene/standards written reports and may involve offering advice, information and assistance to the food business proprietor to ensure compliance.

Informal action should be taken when one or more of the following apply:-

- The act or omission is not serious enough to warrant formal action.
- The consequences of non-compliance will not pose a significant risk to public health.
- Confidence in the individual/enterprise's management is high.
- The past history of the food business shows that informal action is likely to achieve compliance.
- Other circumstances apply such as where a food business is associated with a voluntary organisation.

Food Inspection Reports, in accordance with Codes of Practice 8 and 9 must be issued following all programmed food inspections.

When an informal approach is used, any written documentation issued must:-

- Contain all information necessary to understand what work is required and the reasons.
- Indicate the specific legislation contravened.
- Indicate any recommendations of good practice to show that they are not a legal requirement.

Officers should always make clear, even when giving verbal advice, what are legal requirements as opposed to recommendations of good practice.

As far as is possible, advice should be given in plain language and be free from jargon.

## **8. USE OF STATUTORY NOTICES (Formal Action)**

### **Improvement Notices**

The circumstances in which improvement notices should be served on a food business are set out in Code of Practice No 5 (Revised).

- The Code states that the use of improvement notices may be appropriate in any of the following circumstances or combination, thereof:-
- Where formal action is proportionate to the risk to public health;
- Where there is a documented history of non-compliance with food safety legislation;
- Where an informal approach has been tried but has not been successful, or the authorised officer has reason to believe that such an approach would not succeed;
- In the case of new businesses or new requirements, where the authorised officer assesses that the proprietor is unwilling to comply

- or is unlikely to do so, for whatever reason;
- Where there is a breakdown in procedural controls, including hygiene practices falling within that category, which are critical for food safety or, where no such controls exist.

Improvement Notices should only be signed by authorised officers who have witnessed the contravention and should be served in accordance with Code of Practice No 5.

Realistic time limits should be given for compliance with Improvement Notices. These limits should, where possible, be agreed with the food proprietor as being attainable and appropriate.

Failure to comply with an Improvement Notice will normally result in legal proceedings, authorised officers must therefore have sufficient evidence available to justify their issue.

## 9. EMERGENCY PROHIBITION NOTICES

Emergency Prohibition Notices should be considered in one or more of the following circumstances:-

- Immediate and decisive action is needed to protect public health.
- An imminent risk of injury to health can be demonstrated.
- The guidance criteria specified in Code of Practice No 6 are fulfilled (see **Appendix A**).
- There is no confidence in the integrity of an unprompted offer made by a proprietor to voluntarily close the premises or cease the use of any equipment, process or treatment associated with the imminent risks. In cases where such offers are accepted the Authority should confirm the agreed criteria in writing as soon as is practicable after the visit resulting in the closure.
- A proprietor is unwilling to confirm in writing his/her unprompted offer of a voluntary prohibition.

Emergency Prohibition Notices may only be served by officers authorised to do so, who are competent, suitably qualified and experienced and have witnessed the contravention.

## 10. FORMAL CAUTIONS

Local Authorities may consider issuing a formal caution as an alternative to a prosecution and should have regard to the Home office Circular 59/1990. The purpose of a formal caution is to:-

- Deal quickly and simply with less serious offences.
- Divert less serious offences away from the Courts.
- Reduce the chances of repeat offences.

The following conditions should be fulfilled before a caution is administered:-

- There must be evidence of the alleged offender's guilt sufficient to give a realistic
- prospect of conviction.
- The alleged offender must admit the offence.
- The alleged offender must understand the significance of a formal caution and
- give an informed consent to being cautioned.

**If there is insufficient evidence to consider taking a prosecution, then a formal caution must not be considered.**

There is no legal obligation for a person to accept the offer of a formal caution and no pressure should be applied to the person to accept one. If the person refuses to accept a formal caution, a prosecution should normally be pursued.

Local Authorities must identify a specific officer or officers authorised to issue formal cautions. Such officers should hold a senior management position.

## **11. PROSECUTION**

Prosecution should, in general, be restricted to those persons or companies who blatantly disregard the law, refuse to achieve even the basic minimum legal requirements often following previous contact with the authority and who put the public at serious risk, or persistently and deliberately continue to contravene food safety law.

When considering prosecution, one or more of the following circumstances may apply:-

- The alleged offence involves a flagrant breach of the law such that public health, safety or well being is or has been put at risk.
- The alleged offence involves a failure to correct a serious potential risk to food safety after a reasonable opportunity to correct the matter.
- The offence involves a failure to comply in full or part with the requirements of a statutory notice.
- There is a history of similar offences related to risk to public health.

When circumstances have been identified which may warrant a prosecution, all relevant evidence and information must be considered to enable a consistent, fair and objective decision to be made.

There must be sufficient relevant, admissible, substantial and reliable evidence that an offence has been committed by an identifiable person or company. If there is insufficient evidence to prosecute, a formal caution is not an alternative.

The criteria laid down in **Appendix B** of this policy must be considered, as

well as guidance laid down by Code of Practice No 2 the Code for Crown Prosecutors, and any relevant LACORS guidance.

Local Authorities must have a system in place for ensuring that decisions to prosecute are taken by specified persons or committees and are made in a consistent manner. The decision to prosecute should not be taken until the alleged offender has been given the opportunity to offer any explanation.

Once a decision to instigate prosecution has been taken, the matter should be referred without undue delay to the Local Authority's solicitor or officer authorised to conduct legal proceedings.

## **12. PROHIBITING A PERSON FROM MANAGING A FOOD BUSINESS**

Where the proprietor of a food business is convicted of an offence under regulations relating to the Food Safety Act 1990, the Local Authority may apply to the Court for an order prohibiting the proprietor participating in the management of any food business.

Prohibition of persons should only be considered in serious cases, where there is a past history of non-compliance and the offence involves risk of injury to health.

## **13. MONITORING OF PERFORMANCE**

The WMFLG and its constituent Authorities recognise both the need for, and the benefits of the proper and efficient monitoring of individual officer's performance and the overall functional performance of the divisions / departments in which they work. Such monitoring is an essential means of improving consistency and sharing good practice.

To this end, the WMFLG and the seven Authorities concerned should commit support for the principles of monitoring, review and feedback when applied to the service of Food Safety enforcement.

## **14. INTERNAL MONITORING OF QUALITY AND PERFORMANCE BY INDIVIDUAL AUTHORITIES**

In accordance with Food Safety Act 1990 Code of Practice No 9 and the LACORS document "Monitoring Systems", each Authority in the region should maintain a documented management system designed to monitor the quality of the inspections undertaken by the officers and to ensure a consistent and uniform approach to enforcement.

The documented system employed by each Authority should reflect the particular structures, organisation and personnel employed in the food safety service at that particular Authority. The types of monitoring system chosen may include any or all of the following:-

- Checklists, i.e. paper systems or hand held electronic systems.
- Monitoring of correspondence, reports, notices etc.

- Questionnaires – issued to either food businesses, other service recipients or officers.
- Validation Inspections
  - Follow up inspections
  - Accompanied Inspections
  - Team or Mock Inspections
- Professional Development Interviews.
- Team meetings/workshops etc.

## **15. INTER AUTHORITY AUDITS OF QUALITY AND PERFORMANCE**

The WMFLG may carry out a regular audit of the Food Safety Management Systems of all its constituent Authorities.

The criteria applied during the audits together with their aims and objectives, will follow the guidance contained in the relevant LACORS document.

Following each audit the WMFLG shall review the effectiveness of the process with a view to modifying the procedures and/or expanding the objectives for further audits.

The detailed information obtained from the audit process should remain confidential to the Authority concerned, however, any common areas of deficiency should be raised at an appropriate meeting of the WMFLG when the particular issues may be discussed and resolved.

## **16. STANDARDISATION INSPECTIONS OR ACTIVITIES**

The WMFLG may arrange an annual mock inspection or other standardisation exercise in which all seven West Midlands Authorities should participate.

The responsibility for organising the exercises should rest with each Authority on a rota basis.

The aims of such exercises are to:-

- identify areas of consistency and inconsistency between Authorities;
- provide discussion points for the WMFLG with a view to the development of identified training needs;
- identify other areas of good practice and promote their widespread endorsement.

Results of standardisation activities should be reported back to the WMFLG as soon as practicable. Each Authority shall arrange for its participating officers to be appropriately briefed and for the results of the exercise and all matters arising and policy issues to be disseminated and implemented.

## **CONDITIONS WHERE PROHIBITION MAY BE APPROPRIATE**

### **Prohibition of Premises**

- Serious infestation by rats, mice, cockroaches or other vermin (including birds) or a combination of these infestations resulting in actual food contamination or a real risk of food contamination.
- Very poor structural condition and poor equipment and/or poor maintenance of routine cleaning and/or serious accumulations of refuse, filth or other extraneous matter resulting in a real risk of food contamination.
- Serious drainage defects or flooding of the premises leading to actual contamination or a real risk of food contamination.
- Premises or practices which seriously contravene the Food Safety (General Food Hygiene) Regulations 1995 and have been or are involved with an outbreak of food poisoning.
- Any combination of these criteria or the cumulative effect of contraventions which together represent an imminent risk of injury to health.

### **Prohibition of Equipment**

- In addition to the above criteria, the following circumstances may exist:-
- Use of defective equipment, for example, a pasteuriser incapable of achieving the required pasteurising temperature.
- Use of equipment involving high risk foods which has been inadequately cleaned or disinfected or which is obviously grossly contaminated and can no longer be properly cleaned.

### **Prohibition of a Process**

In addition to the above criteria, the following circumstances may exist:-

- Serious risk of cross contamination.
- Inadequate temperature control, for example, failure to achieve sufficiently high cooking temperatures.
- Operation outside critical control criteria, for example, incorrect pH of a product which might allow *Clostridium botulinum* to multiply.
- The inappropriate use of a process for a particular product.

**Criteria to be used in cases where prosecution is considered**

Before deciding to prosecute, the following factors should be considered:-

- The seriousness of the alleged offence;
- The previous history of the party concerned;
- The likelihood of the defendant being able to establish a due diligence defence;
- The ability of any important witnesses and their willingness to co-operate.
- The willingness of the party to prevent a recurrence of the problem.
- The probable public benefit of a prosecution and the importance of the case e.g. whether it might establish a legal precedent.
- Whether other action, such as the issue of a formal caution or notice would be more appropriate or effective;
- Any explanation offered by the alleged defendant;
- The advice contained in the Code for Crown Prosecutors.