

**SWALE BOROUGH COUNCIL
HEALTH AND SAFETY
ENFORCEMENT AND
PROSECUTION POLICY**

**Drawn up by the Kent & Medway Partnership of
Enforcing Authorities and endorsed and
supported by the Kent Environmental Health
Managers Group – Sept 2010**

OBJECTIVE

The aim of the enforcing authorities forming the Kent and Medway Partnership is to protect the health, safety and welfare of people at work and to safeguard others, principally the public, who may be exposed to risks from work activity.

AIM OF POLICY

- ◆ To ensure a consistent approach to health and safety enforcement within the relevant districts.
- ◆ To provide officers with guidelines to enable them to make decisions consistent with current nationally accepted standards/guidance from the Health and Safety Executive (HSE). This document has been produced taking into account new guidance on section 18 of the Health & Safety at Work etc Act 1974.
- ◆ To inform the public and proprietors of businesses of the principles by which enforcement action is taken.

GENERAL BACKGROUND

- ◆ The primary responsibility for ensuring health and safety in the workplace lies with those who create the risks, and in particular employers and the self-employed have a need to recognise their responsibility for managing health and safety.
- ◆ The purpose of enforcement is to:
 - Ensure that all duty holders (employers, self employed, employees and others) take action immediately to deal with serious risks:

- Promote and achieve sustained compliance with the law;
- Ensure that duty holders who breach health and safety requirements, and directors or managers who fail in their responsibilities, are aware they may be held to account, which may include bringing alleged offenders before the courts in the circumstances set out later in this policy.
- ◆ Enforcement is distinct from civil claims for compensation and not undertaken in all circumstances where civil claims may be pursued, nor to assist such claims.
- ◆ Swale Borough Council has a duty to undertake health and safety enforcement in various types of premises under the Health and Safety at Work etc Act 1974. These premises and the activities concerned are determined by the Health and Safety [Enforcing Authority] Regulations 1998.
- ◆ Swale Borough Council has, under the same Act, a range of powers to enable them to fulfil the duties for which they are responsible.
- ◆ The range of actions available are those below and those laid out in section 20 of the Health and Safety at Work etc Act 1974:
 - Informal – oral or written guidance, information and warnings;
 - Improvement Notices – which require remedial works to be carried out within a specified time scale;
 - Prohibition Notices – which require the cessation of a work activity immediately or within a specified time scale;
 - Prosecution and
 - Simple Cautions (previously known as Formal Cautions).

PRINCIPLES OF ENFORCEMENT

Enforcement needs to be fair but firm and effective. The following principles ensure this approach and are also in keeping with the Regulators' Code of Compliance:

- Proportionality
- Consistency
- Targeting
- Transparency

- Accountability - Complaint Procedure, Agreed Standards and Procedures, Helpfulness, Openness

◆ **Proportionality**

Proportionality means relating enforcement action to the risks. Enforcement action will be proportional to the degree of harm / risk, the seriousness of any breach and to the particular circumstances of the case.

Some health and safety duties are specific and absolute. Others require action so far as is reasonably practicable. Swale Borough Council should apply the principle of proportionality in relation to both kinds of duty. Deciding what is reasonably practicable to control risks involves the exercise of professional judgement.

In taking enforcement action, Swale Borough Council will attempt to minimise compliance costs, and recognises that small businesses and voluntary and community groups frequently have to achieve compliance at minimal cost.

Swale Borough Council will expect relevant good practice to be followed. Where in particular cases this has not been clearly established the law requires duty holders to establish explicitly the significance of the risks to determine what action needs to be taken. Ultimately the courts will determine what is reasonably practicable.

◆ **Consistency**

Swale Borough Council will carry out enforcement in a fair, equitable, and consistent manner in accordance with its policies and procedures. Similar approaches will be taken in similar circumstances to achieve similar ends. However, Swale Borough Council recognises that consistency does not mean uniformity and Inspectors are required to take professional decisions that take account of a wide variety of situations and circumstances. Inspectors are also expected to take account of local and national standards and guidance, and be aware of this policy. The willingness and co-operation of the person or organisation subject to enforcement action will also be considered in deciding how enforcement action should proceed.

◆ **Targeting**

Targeting means making sure that enforcement activity is targeted primarily on those whose activities that give rise to the most serious risks or hazards; and that action is focused on duty holders who are responsible for the risk and who are best placed to control it.

Swale Borough Council has systems in place for deciding which inspections, investigations or other issues should take priority according to the nature and extent of risks posed by a duty holders operation.

Any enforcement action will be targeted against the duty holder responsible for a breach. This may be employers in relation to workers or others exposed to risks; the self-employed; owners of premises; suppliers of equipment; designers of clients of projects; or employees themselves. Where several duty holders have responsibilities, Swale Borough Council may take action against more than one when it is appropriate to do so in accordance with this policy.

◆ **Transparency**

Transparency is important in maintaining public confidence in Swale Borough Council's regulatory capability. Swale Borough Council will help those being regulated and others to understand what they need to do and how it may be achieved. We will also make our own role in the matter clear.

Swale Borough Council will explain carefully (and, if necessary, in writing) why the action is necessary, who must carry it out, and by what date it must be carried out. A clear distinction will be made between legal requirements, recommendations, and best practice.

Swale Borough Council will give every reasonable opportunity for discussion before formal enforcement action is taken, unless urgent action is necessary to protect health and/or the environment, or to prevent the destruction of evidence that would compromise the authority's case. In such circumstances, Swale Borough Council will give a written explanation of its reasons for taking immediate action and this will be done as soon as practicable after the event.

Swale Borough Council will give written notice of any rights of appeal against enforcement action at the time that the action is taken.

All inspectors are advised to issue the HSE leaflet *What to expect when a health and safety inspector calls*, to those businesses they visit. This explains what employers and employees and their representatives can expect when an inspector calls at a workplace.

◆ **Accountability**

Swale Borough Council is accountable to the public for its actions. This means we must have policies and standards against which we can be judged, and an effective and easily accessible mechanism for dealing with comments and handling complaints.

Swale Borough Council has their own internal procedures for dealing with complaints against the service etc. Details are available from the council. In addition to Swale Borough Council's own complaints procedures, the Local Government Ombudsman hears complaints regarding local government mal-administration, and details of this service are also available from the council.

In the case of all statutory notices the right of appeal is to an Employment Tribunal irrespective of whether it is issued by a local authority or an HSE Inspector.

◆ **Helpfulness**

Swale Borough Council will deal courteously and efficiently with all individuals, organisations and businesses that they come into contact with. Staff will identify themselves by name, and contact numbers will be made available. Electronic means of communication (for example, by E-mail) will be facilitated wherever practicable.

◆ **Openness**

Information and advice will be provided in plain language. Translation services will be made available where reasonably practicable to assist customers who do not have English as their first language.

ENFORCING HEALTH AND SAFETY LAW

- ◆ Swale Borough Council's primary concern is the prevention of accidents and ill-health. This is best achieved by encouraging effective management of health and safety issues by those who create the risks.
- ◆ As signatories to the Government's Enforcement Concordat⁽¹⁾, and in compliance with the Statutory Code of Practice for Regulators, the Kent and Medway Partnership of Enforcing Authorities⁽²⁾ have adopted a graduated approach to enforcement, commencing with an educative approach.
- ◆ Enforcement Officers will seek to help businesses improve their management of health and safety by giving guidance. They will be aware that they are an important source of help on the maintenance of good standards in conformity with the law and will therefore provide education and guidance wherever reasonably practicable.
- ◆ Officers have to exercise considerable discretion when approaching individual cases and will initiate the type of enforcement action warranted by the nature and severity of the risk, hazard or contravention that has been identified. A combination of types of action may well be appropriate.
- ◆ In determining the course of action, an Officer will have regard to the current willingness and intentions of the responsible person to comply, their knowledge of management and health and safety and their previous record of compliance.

- ◆ The enforcing authorities forming the Kent and Medway Partnership of Enforcing Authorities have regard to the Primary Authority principle⁽⁶⁾ and will consider whether a Primary Authority should be consulted before giving detailed advice or taking enforcement action.
- ◆ When dealing with small organisations or those operated by volunteers, officers will expand their guidance and explanation of enforcement action and how compliance with the law can be achieved.
- ◆ If an officer identifies any risk, hazard or contravention, this will be drawn to the attention of the person responsible for the work activity at that time or as soon as that person can be identified and contacted.
- ◆ Whatever the type or nature of action chosen, it will be because it achieves the Officers primary concern as described above, and will be proportionate to the level of risk identified and the seriousness of any breach.
- ◆ To ensure consistent enforcement action is taken by Swale Borough Council reference should be made to the Enforcement Management Model (EMM) and an assessment completed for each individual case where enforcement action is being considered.
- ◆ Decisions should be made following any other relevant guidance and direction (e.g. LGR⁽³⁾, LAPS⁽⁴⁾ or PAP⁽⁶⁾)
- ◆ Before taking action that Swale Borough Council believes may be inconsistent with that taken by any other enforcing authority, or with HSE advice, it will first discuss the area of difficulty with those bodies through the Kent and Medway Health and Safety Group.
- ◆ Departures from the Enforcement and Prosecution policy must be exceptional and the reasons will be documented.

INFORMAL ENFORCEMENT

- ◆ Many are anxious to comply with the law and a growing number realise the economic benefits of good health and safety management. In such cases an enforcement officer's role will often be to guide and support.
- ◆ The Officer will supply guidance on legislation and standards either orally or in the form of leaflets or by providing details of where suitable guidance may easily be obtained.
- ◆ All requirements, observations or advice will be confirmed in writing, when necessary, as soon as practicable. The officer will endeavour to clearly identify and describe any fault and necessary remedial works in a manner that is readily understandable. In identifying faults, etc., the Officer will have regard to nationally recognised standards and "good practice".

- ◆ Any requirement made orally or in writing will clearly identify whether it is mandatory or advisory in nature.
- ◆ All mandatory requirements will be given a reasonable time for completion and these will be discussed with the person responsible for complying. Due regard will be had to the observations of that person when the Officer specifies the time allowed.

FORMAL ENFORCEMENT – STATUTORY NOTICES

- ◆ Statutory Notices can be effective and quick in that they require employers to put dangerous situations right without hopefully the delay and uncertainty of going to Court. Where a Notice is served there is an appeal procedure to an Employment Tribunal to permit independent review

IMPROVEMENT NOTICES

These will be served where:

- a contravention of the current health & safety law has been identified,
- and
- the Officer has reason to believe that an informal approach would not be successful or has already failed, and
- that the cessation of the contravention would be likely to achieve the Officer's primary concern to prevent accidents or ill health.

PROHIBITION NOTICES

These will be served where, as a result of or in conjunction with a work activity:-

there is or there will be a risk of serious personal injury, and the Officer has reason to believe that, due to the severity of the risk/hazard, any other action:

- would not be sufficient for Swale Borough Council to satisfy its duty,
- or
- would not be successful or
- it has already failed.

In most circumstances statutory provisions would be breached and can also be cited in the notice.

- ◆ As soon as the officer has decided to serve a notice he/she will endeavour verbally to advise the persons responsible or their recognised representative of the contravention and reason for service, and discuss with them the ramifications, the compliance requirements and the proposed timescale together with the procedure for appeal.

FORMAL ENFORCEMENT – PROSECUTIONS

- ◆ In keeping with the preventative role, a duly Authorised Officer of a Council may recommend prosecution as a way to draw attention to the need for compliance with and maintenance of good standards.
- ◆ Prosecutions will only be initiated for the more serious offences which either resulted in or could have resulted in serious injury or ill-health or which represented a blatant disregard by employers or others of their legal responsibilities, whilst having regard to the EMM.
- ◆ Officers investigating breaches of the law will consider their potential to cause harm as well as any harm actually caused. Therefore, if a breach has significant potential for harm, even if it causes no actual injury, a prosecution may be authorised.
- ◆ In deciding whether to prosecute, the Authorised Officer will also consider:
 - gravity of an alleged offence , taken with the seriousness of any actual or potential harm, or the record and approach of the offender warrants it
 - whether it is in the public's best interest to ensure remedial action or to deter others from similar failures to comply with the law.
 - whether the evidence available provides a realistic prospect of conviction including application of the Evidential Test and Public Interest Test as described in the Crown Prosecution Service Code for Crown Prosecutors.
 - death was a result of a breach of the legislation
 - there has been reckless disregard of health and safety requirements
 - there have been repeated breaches which give rise to significant risk, or persistent and significant poor compliance
 - work has been carried out without or in serious non-compliance with an appropriate licence or safety case

- a duty holders standard of managing health and safety is found to be far below what is required by health and safety law and to be giving rise to significant risk
 - there has been a failure to comply with an improvement or prohibition notice; or there has been a repetition of a breach that was subject to a formal caution
 - false information has been supplied wilfully, or there has been an intent to deceive, in relation to a matter which gives rise to a significant risk;
 - Officers have been intentionally obstructed in the lawful course of their duties.
- ◆ If warranted by the circumstance, prosecution will be initiated by Swale Borough Council without any prior warnings and without any recourse to alternative sanctions, subject always, to correct procedures being followed under the Police and Criminal Evidence Act 1984, and the related Codes of Practice, along with any internal policies and procedures.

FORMAL ENFORCEMENT – VARIOUS OTHER POWERS

- ◆ In carrying out their functions, duly Authorised Officers have a range of far reaching powers including:-
- the right of entry without prior warning;
 - examination of articles, substances and documents, and
 - seizure of articles or substances.
- ◆ Prior to using such powers, an Authorised Officer will have decided that informal action, in that particular instance:-
- would not be appropriate or
 - would be inadequate for Swale Borough Council to satisfy its duty,
 - would not be successful or
 - has already failed.

SIMPLE CAUTIONS (previously known as Formal Cautions)

(Home Office Circular 16/2008)

There may be circumstances where evidence exists for a successful prosecution, but where mitigating circumstances are such that nothing is likely to be gained from such action. In such circumstances the authorised officer will consider the offer of a Simple Caution as an alternative to prosecution. Circumstances where a Simple Caution may be considered are:

- ◆ The contravention is minor and a first offence
- ◆ The contravention, although serious, has been speedily dealt with and steps taken to prevent a recurrence;
- ◆ The business has since closed or the employer/employee/self employed person has ceased that occupation;
- ◆ The defendant would be unable to pay a fine, costs or compensation.

A Simple Caution will only be considered where there is sufficient evidence to give a realistic expectation of success if the case went to the courts. It will not be used as an alternative to prosecution where it is felt the prosecution case is weak.

A caution can only be administered where the suspected offender is prepared to admit the offence. Care will be taken to ensure that the suspected offender understands the significance of the caution and is able to give an informed consent to being cautioned.

The decision to offer a Simple Caution will be taken by the duly authorised officer after consideration of a report from the inspecting officer. (It should be noted that Simple Cautions are not generally used by HSE Inspectors.)

If the offer of a Simple Caution is declined, further enforcement action will be considered which would usually be prosecution.

Lead Authorities⁽⁵⁾ will be notified of Simple Cautions⁽⁵⁾ issued by Swale Borough Council where appropriate.

DETERMINING WHETHER FORMAL ENFORCEMENT ACTION IS VIABLE AND APPROPRIATE

There are two stages in the decision to take formal enforcement action. The first stage is the evidential test. If the case does not pass the evidential test, it must not go ahead, no matter how serious or important it may be. If the case does meet the evidential test senior managers and Legal Services for Swale Borough Council must decide the second stage – if formal action is needed in the public interest. Swale Borough Council will only proceed with formal enforcement action when the case has passed both tests.

THE EVIDENTIAL TEST

Swale Borough Council must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge. It 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 alleged charge. This is a separate test to that applied by the criminal courts. A jury or magistrates court will only convict if they are satisfied that a defendant is guilty beyond reasonable doubt.

Senior managers in conjunction with their legal advisors will need to consider whether there is enough evidence to prosecute, whether all the evidence can be used, and its reliability.

THE PUBLIC INTEREST TEST

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 in favour. Senior managers and legal advisors must therefore balance factors for and against prosecution carefully and fairly.

TRAINING AND QUALIFICATION OF ENFORCEMENT OFFICERS

- ◆ No officer will carry out health and safety enforcement duties unless (s)he meets the Standards of Competencies as outlined in current guidance issued by the Health and Safety Commission under S18 of the Health and Safety at Work etc Act 1974. The officer must be specifically appointed by one of the Enforcing Authorities making up the Kent and Medway Partnership to exercise these powers for which (s)he is judged to be competent.
- ◆ Improvement and Prohibition notices will only be signed and served by an authorised officer.
- ◆ Notification of the service of a Prohibition Notice to the relevant enforcing authority will be in accordance with the Inspectors Handbook.
- ◆ Prosecution will only be instigated following review of the matter by the relevant Head of Service and in consultation with their legal advisors.
- ◆ Training will be provided for all enforcement officers as required to maintain their competence.

REVIEW OF POLICY

- ◆ The implications and effectiveness of this policy will be constantly monitored.
- ◆ This Policy will be reviewed every twelve months to reflect changes indicated by internal monitoring, by legislation or by guidance from the Health and Safety Executive.

April 2010

Footnotes

- (1) Government's Enforcement Concordat - A guidance document drawn up in collaboration with businesses, local and national regulators which sets out principals of good enforcement. Department of Trade and Industry 1998
- (2) Kent and Medway Partnership of Enforcing Authorities – A partnership between all the local authorities in Kent and Medway which have a health and safety enforcement responsibility.
- (3) LGR - Local Government Regulation; is a liaison body for all local government organisations involved in regulatory enforcement; it was formally known as LACORS.
- (4) LAPS - Lead Authority Partnership Scheme – a voluntary scheme whereby a single local authority takes the lead on advising a partner business on compliance of management and policy issues on health and safety matters. The scheme, originally operated by the HSE is currently run by the LRG.
- (5) PAP - Primary Authority Partnership - The governments Department for Business Enterprise Regulatory Reform set up this scheme as a replacement for the LAP scheme. The idea is to place the partnership status on a legal footing and to require local authorities to restrict interference with any policy agreed by the Primary Authority.