

WEST DUNBARTONSHIRE LICENSING BOARD

Report by the Clerk to the Licensing Board

Licensing Board : 3 February 2010

Subject: Enforcement Policy for Regulatory Services

1. Purpose

- 1.1 To advise the Board that a single enforcement policy for Regulatory Services was approved by the Corporate and Efficient Governance Committee on 27 January 2010 and to seek the approval of the Board to this policy for licensing activities.

2. Background

- 2.1 Board members will recall an enforcement strategy outlining the approach by the Licensing Standards Officers (LSOs) to fulfil their statutory obligations was approved on 07 October 2009.
- 2.2 The LSOs continue to undertake their duties to ensure compliance with the requirements of the Licensing (Scotland) Act 2005.
- 2.3 LARS has responsibility for delivering Environmental Health, Trading Standards and Licensing services which are grouped together within the Regulatory Services Unit. The sections have, however, historically applied different enforcement policies. The single enforcement policy for Regulatory Services will result in more consistent decision making and greater understanding of enforcement policy by those we protect and those whose activities we regulate.
- 2.4 In 2005 HM Treasury published a report containing eight principles for better regulation which came to be known as the Hampton Principles after its author, Sir Philip Hampton. The report was published in response to concerns about overzealous enforcement by some regulators.
- 2.5 Since 2007 local authorities in England have been under a statutory duty to act in a way which is transparent, accountable, proportionate, consistent and targeted and also to have regard to a Regulators' Compliance Code. In November 2009 these requirements were extended to apply to local authorities in Scotland. The requirements only apply to legislation which is reserved to Westminster (e.g. fair trading and health and safety at work) and not to devolved legislation (e.g. food safety).

3. Main Issues

- 3.1 The appendix contains the enforcement policy which replaces all existing enforcement policies in use by Regulatory Services. The approach to enforcement is based on the Hampton Principles, the five principles of good

regulation and the Regulators' Compliance Code referred to above. For simplicity, the policy is designed to apply to both matters which are reserved and devolved.

4. Personnel Issues

4.1 None.

5. Financial Implications

5.1 None

6. Risk Analysis

6.1 No risk assessment required.

7. Conclusions and Officers Recommendations

7.1 Adoption of the Regulatory Services Enforcement Policy will further aid consistency and increase understanding of the policy by those we regulate.

7.2 The Board is asked to approve the Regulatory Services Enforcement Policy.

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Clerk to the Licensing Board

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Appendices: Enforcement Policy

Background Papers: Reducing administrative burdens: effective inspection and enforcement (HM Treasury, Sir Philip Hampton, March 2005)
Legislative and Regulatory Reform (Regulatory Functions) (Amendment) Order 2009
Regulators' Compliance Code (Department for Business, Innovation & Skills)
Equality Impact Assessment

Wards Affected: All

Enforcement Policy

Introduction

Regulatory Services is responsible for ensuring that those persons who must comply with the laws that we enforce do so. This includes compliance with any conditions attached to a licence granted by us. Regulatory Services includes the Council's Environmental Health, Trading Standards and Licensing functions.

This document sets out our enforcement policy and explains what regulated persons can expect from us. We have based our approach to enforcement on the Legislative and Regulatory Reform Act 2006¹ and the Hampton Principles².

This document also satisfies our legal obligation to have enforcement policies which apply to food safety and health & safety law.

In this policy...

- *regulated person* means anyone who must comply with the laws we enforce. Regulated persons will mainly be businesses and their employees but may also include non-business organisations, private individuals and West Dunbartonshire Council. We will not give the Council more favourable treatment compared to other regulated persons.
- *enforcement* includes all action taken by us following discovery of a breach of the law with the ultimate aim of ensuring that someone complies with the law. This may involve enforcement action, which can include advice, and the use of our investigatory powers (as defined in the Appendix).
- *formal action* includes formal enforcement action and the use of formal investigatory powers (as defined in the Appendix) but does not include advice.

Our aims

We aim to...

- ensure that regulated persons take action immediately to deal with serious risks,
- promote and achieve sustained compliance by regulated persons,
- treat all regulated persons fairly,
- be helpful to regulated persons who wish to comply,
- support those who comply by targeting those who don't, in particular by taking firm action against those who flout the law or act irresponsibly, and
- protect the public in a way which does not stifle enterprise, hinder economic progress or place unnecessary burdens on businesses.
- communicate this policy effectively to those people who are affected by it.

¹Section 21 of the Act sets out five general principles. Section 22 implements a Regulators' Compliance Code to which all regulators must have regard.

²Published in March 2005 by HM Treasury in a report by Sir Philip Hampton entitled *Reducing administrative burdens: effective inspection and enforcement*.

We will strive to achieve our aims by carrying out our work in the following ways:

1 Helpfulness

- 1.1 We firmly believe that prevention is better than cure and therefore we place a strong emphasis on the provision of **advice** to regulated persons. We will actively encourage them to seek advice from us at an early stage, especially new businesses or those expanding into a new area of activity.
- 1.2 Where possible, we will work with regulated persons to encourage compliance in a helpful manner in preference to taking formal action. However, where they abuse this goodwill we may need to adopt a more formal approach. We will be less likely to take formal action against anyone who regularly seeks advice from us and complies with any advice we give.
- 1.3 We will give information and advice in clear, concise and accessible language. We will provide general information and advice to regulated persons in a range of appropriate formats and media. We will confirm specific advice in writing on request.
- 1.4 Before we take any **formal action** we will provide an opportunity to discuss the matter and if possible resolve points of difference. However this will not apply when immediate action is required (for example, to prevent or respond to a serious breach, or where there is an imminent risk to health & safety, or where an opportunity for discussion is likely to defeat the purpose of the proposed enforcement action, or to prevent evidence being destroyed).
- 1.5 Our officers will explain in writing the reasons why they took a particular course of formal action. Where there are rights of appeal against formal action, advice on the appeal mechanism will be clearly set out in writing at the time the action is taken.
- 1.6 Where we have discretion we will ensure that our **forms** are simple, normally no more than two pages. We aim to minimise the amount and frequency of data collection.
- 1.7 We will try to be considerate in the **timing of our visits** but we would ask regulated persons to understand that it would be neither practical nor effective to give advance notice of our visits except in limited circumstances.

2 Openness

- 2.1 Occasionally, in order to find out how a regulated person would deal with an ordinary member of the public, visits may need to be conducted covertly with the officers posing as private individuals. However with the exception of these covert visits our officers will always produce their **written credentials** (including their name and photographic identification) and will explain the purpose of their visit.

- 2.2 We will **consult** regulated persons generally about the way we go about our work and we will carry out regular satisfaction surveys of those which have been inspected and those which have been investigated in response to a complaint from the public. We will publish the results of any surveys and explain what we will do in response.
- 2.3 This policy explains what regulated persons can expect from us. If you feel we have not complied with it, or if you are dissatisfied with any action we have taken, you can use the Council's **complaints procedure** to request that we carry out a formal review of that action. The procedure is described on our website; alternatively, please ask us for details. Complaints should include an explanation of why the regulated person is dissatisfied. The request should be made in writing unless the regulated person believes there is a need for an urgent review. The action will be reviewed by a senior officer who was not involved in the original decision-making process. We will fully explain the reasons for our decision and, if we decide to vary the action, we will describe how that variation will impact on you. If you remain dissatisfied we will tell you how to take your complaint further.
- 2.4 We will measure our **performance** against our standards and we will publish an annual performance report on our website and in our offices. We will aim to measure important outcomes (such as the percentage of businesses which are compliant), and not just numerical outputs (for example, the number of inspections carried out).

3 Proportionality

- 3.1 Where we have discretion, when deciding what action to take we will act proportionately by balancing the risks to the public with the costs to the regulated person (in time and money) of implementing changes.
- 3.2 When deciding what action to take we will pay particular attention to our impact on smaller organisations. We will take reasonable steps to ensure that any action we take is proportionate to the size of the organisation unless that comes into conflict with the need for consistency (see below).
- 3.3 We will seek to impose the minimum burden compatible with ensuring compliance. Whilst we will encourage the adoption of good practice, we will always clearly distinguish between legal requirements and recommendations.
- 3.4 We will determine the most appropriate course of action to take by making a careful assessment of *all* of the following criteria with no one factor likely to be decisive on its own:
- (i) The seriousness of the breach and in particular its impact on the safety, health and well-being of all those affected by it
 - (ii) The impact on people who are especially vulnerable, for example by reason of age, disability or any other impaired ability to protect themselves, and in particular whether such people were specifically targeted by the regulated person

- (iii) The steps which the regulated person took, or the reasonable steps which they failed to take to prevent the offence
- (iv) The extent to which the regulated person has been proactive in seeking advice from us, and whether they have complied with any advice we have given
- (v) The history of compliance and in particular whether any previous warnings went unheeded
- (vi) Evidence of fraudulent, deliberate, irresponsible, reckless or negligent behaviour, and evidence of aggression or harassment
- (vii) The likelihood of the contravention happening again
- (viii) The extent to which the regulated person accepts its responsibilities and is willing to heed advice
- (ix) Whether the breach is rectified promptly
- (x) The need to deter future breaches
- (xi) The nature of the evidence available to us

4 Consistency

- 4.1 We will ensure that anyone who is regulated by us is treated consistently on each occasion, and consistently with other regulated persons. Consistency is not the same as uniformity; it means taking a similar approach in similar circumstances to achieve similar ends. We will do this by monitoring the enforcement action taken by our officers, and by training our officers.
- 4.2 We fully support the 'home authority' and 'primary authority' principles as the means by which regulated persons trading across local authority boundaries are able to rely on one local authority as their main source of advice on compliance.
- 4.3 We will work with other local authorities in the west of Scotland and throughout the UK to ensure consistent interpretation and application of the law. We will do this by playing an active part in cross-border working groups as well as by having regard to guidance from bodies such as the Food Standards Agency and the Health & Safety Executive.

5 Fairness and Equality

- 5.1 We will be fair in our dealings with regulated persons. Where we can exercise discretion, we will take into account the unique circumstances of each person and balance this fairly with the need for consistency.
- 5.2 When investigating complaints we will carry out all investigations in an independent, fair and even-handed manner by listening with an open mind to what everyone connected to the dispute has to say. Although we may give

advice to the complainer, we will not act on their behalf. We will only form an opinion after examining the facts.

- 5.3 We will not measure ourselves by the quantity of enforcement action we take and we will not set targets. We will not take enforcement action specifically to assist with someone's civil claim and we will ensure that breaches with both criminal and civil elements are investigated by different officers.
- 5.4 We will comply with the council's guidance on 'Communicating Effectively' when providing information and advice, for example by providing it in an alternative format to suit the needs of the user. We will provide a language interpreting service during interviews where required.
- 5.5 We will gather data to monitor our impact on people with different needs and we will use it to improve the way we carry out our work. We will also monitor our enforcement actions to ensure that no person or group is unfairly treated.
- 5.6 We will take account of cultural issues and seek ways of developing our employees' capacity to deal with these effectively. We will take account of equalities needs during consultations.

6 Targeted action

- 6.1 We will use the principles of risk assessment by taking into consideration the *likelihood* of non-compliance and the *impact* of non-compliance. We will use these principles to determine the frequency of inspection, and we will consider those principles when arranging other visits, for example to take samples and carry out projects. We will normally investigate all complaints from the public.
- 6.2 We will use standard widely-used risk assessment schemes such as those produced by Lacors, CoSLA, Food Standards Agency and Health & Safety Executive. Regulated persons will generally be assessed as being high, medium or low risk. The assessment is usually based on the risk which the activity presents to the public or employees, the complexity of the legislation, the size and type of organisation, and the confidence which we have in the ability of the regulated person to comply based on our knowledge of their control systems and previous compliance levels. On request, we will explain to any regulated person why we have assigned them a particular risk rating.
- 6.3 Our data shows that lower risk entities do still occasionally fail to comply with the law. We will therefore carry out a small element of random inspection but only where the burdens have been minimised.
- 6.4 We will conduct follow up visits generally within 30 days after the issue of a written warning or formal warning to check whether appropriate action has been taken.

Appendix

The definition of 'enforcement'

Enforcement action *Informal* enforcement action may include verbal and written advice, and written warnings (issued by an investigating officer) and formal warnings (issued by a senior officer) which warn that further contraventions could result in formal enforcement action.

Formal enforcement action includes statutory notices (which require the recipient to do something specific such as prohibiting the use of a premises or process where there is a risk to health & safety), fixed penalty notices, applications to a civil court for an enforcement order, and reports to the Procurator Fiscal recommending prosecution in a criminal court. It also includes any report by us to the licensing committee or the licensing board recommending that they suspend or revoke a licence.

Investigatory Powers The statutory powers which officers can use to help them to check whether the law is being complied with and to investigate any breach of the law.

Routine investigatory powers usually include the power to:

- inspect premises at any reasonable time
- inspect goods
- inspect documents where there is reason to suspect a breach has been committed
- purchase goods to test whether the law is being complied with (called a 'test purchase')
- take samples for analysis

Formal investigatory powers usually include the power to:

- seize and detain goods and documents where there is reason to believe they are required as evidence
- apply to a Sheriff for a warrant to enter premises by force if necessary or to take a constable to apprehend any serious obstruction in the execution of our duties
- prohibit access to unsafe premises or equipment pending an investigation

Contact details

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Our opening hours are 9am to 4pm, Monday to Friday.

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