

Subject: Smokefree Enforcement Protocol **Status:** For Publication

Report to: Cabinet **Date:** 6th June 2007

Report of: Head of Street Scene and Liveability

Portfolio

Holder: Clean & Green Rossendale

Key Decision: No

Forward Plan General Exception Special Urgency

1. PURPOSE OF REPORT

1.1 This report outlines the enforcement protocol in relation to requirements under the Health Act 2006 relating to smokefree indoor environments.

2. CORPORATE PRIORITIES

2.1 The matters discussed in this report are linked to and support the following corporate priorities:

- Delivery of quality services – by undertaking consistent application and monitoring of enforcement decisions, customers will have a clear indication of the way legislation will be enforced.
- Improving Health & Wellbeing Across the Borough – by implementing and enforcing this legislation, considerable health gain will be achieved with a much improved indoor air environment in public places and places of work. The outcome of effective implementation is saved lives, improved health and reduced prevalence of smoking.

3. RISK ASSESSMENT IMPLICATIONS

3.1 There are no specific risk issues for members to consider arising from this report.

4. BACKGROUND AND OPTIONS

4.1 Introduction

The Health Act 2006 introduces a requirement for premises, places and vehicles to be smokefree. These provisions take effect from 1st July 2007 and apply to enclosed and substantially enclosed premises which are open to the public and to shared workplaces. The premises to which these requirements apply are defined by regulations made under the Act.

The aim of this protocol is to assist individuals and organisations within the region to understand their responsibilities under this legislation and to ensure that a consistent approach is taken in cases of non-compliance.

4.2 The Protocol

This protocol outlines the approach to the enforcement of Smokefree legislation and lays down the principles which will be followed in deciding upon, and taking action.

Rossendale Borough Council will take all reasonable steps to assist businesses and individuals to comply with the law. However they will be prepared to ensure compliance by exercising the formal powers available to them under the provisions of the Health Act 2006 and the Regulations made thereunder.

In exercising the powers, enforcement staff will have regard to the Council's enforcement policy and this protocol which is also based on enforcement concordat principles: standards, openness, helpfulness, proportionality and consistency.

4.3 Procedures

There will be a prompt response to flagrant breaches of the law, but where requirements allow it, a more measured and discriminating approach will be taken. It is, however, recognised that where the law is prescriptive in laying down precisely what needs to be done there will be limits to the discretion available. This policy is consistent with that developed and adopted by Greater Manchester and other Lancashire Authorities.

4.4 Implementation

Enforcement will be carried out by authorised officers who are trained and competent to carry out the functions contained within the legislation. Compliance with the legislative requirements will be achieved through a combination of reactive and proactive approaches. These approaches are outlined in detail below.

Proactive interventions

- Advice and information – Where practicable, advice and information will be provided in a common format across the region.

- Risk based inspections- the following priorities are considered appropriate for risk based inspection, based on health risk:
Business premises
Vehicles
Residential Premises (common areas)

Where contraventions of smokefree legislation are identified appropriate enforcement action will be taken. This is outlined below under the heading of “enforcement options”. Where a contravention is identified, in addition to taking enforcement action in accordance with this policy, the authorised officer will offer assistance to aid compliance in future. Primarily this will focus on directing the offender to the web based information and advice.

Reactive interventions

- Complaint investigation – Rossendale B.C. will respond to complaints about contraventions of smokefree legislation with a view to securing compliance with the legislation. Where contraventions of smokefree legislation are identified appropriate enforcement action will be taken. This is outlined below under the heading of “enforcement options”.

The source of such complaints may be the Council’s own complaints process, other enforcers e.g. HSE, or the Department of Health helpline. All complaints will be responded to within 3 working days of receipt.

4.5 Offences

The Health Act 2006 and associated regulations create the following main offence types:

Failure to display no-smoking signage
Smoking in a smokefree place
Failure to prevent smoking in a smokefree place

4.6 Enforcement options

In accordance with Enforcement Concordat principles, a graduated approach to enforcement will be taken and the provision of advice and information is regarded as the first stage of the enforcement process.

Where a formal approach is considered appropriate, we will use following enforcement options, using a graduated approach¹:

Fixed Penalty Notices for the offences of:

- Smoking in a smokefree place
- Failure to display no-smoking signage

¹ Please note that there will however be a “presumption to prosecute” in the circumstances outlined later in this policy and where there is a blatant disregard for the law

Simple Caution for the offences of:

- Failure to prevent smoking in a smokefree place

Prosecution for the offences of:

- Failure to prevent smoking in a smokefree place
- Smoking in a smokefree place
- Failure to display no-smoking signage
- Intentional obstruction of an authorised officer of an enforcement authority
- Failure to give a Council authorised officer any facilities, assistance or information reasonably required, including making false or misleading statements

4.7 **Fixed Penalty Notice procedures**

The Fixed Penalty Notice will be in the form prescribed by the appropriate regulations. A person may request to be tried for the offence in Court instead of paying a fixed penalty.

For the offence of smoking in a smokefree place a fixed penalty of (£50) is prescribed by the regulations. If this penalty is paid, he will not be liable for conviction for the offence. A discounted amount of (£30) is payable if the fixed penalty is settled within 15 days.

For the offence of failing to display no-smoking signage a fixed penalty of £200 is payable. If this penalty is paid, he will not be liable for conviction for the offence. A discounted amount of (£150) is payable if the fixed penalty is settled within 15 days.

Fixed Penalty Notices are only issued where there is adequate evidence to support a prosecution if a notice is not paid, and unpaid notices are followed up. Failure to pursue unpaid notices through the courts would discredit the use of fixed penalties in the locality, and would lead to declining rates of payment.

4.8 **Prosecution procedures**

Prosecution will not be undertaken lightly and discretion must be exercised when deciding if this is the appropriate course of action. Other enforcement approaches may be more effective in securing the desired outcome, however, prosecution remains a cornerstone of enforcement and will be used where appropriate.

Prosecution without prior warning and recourse to other alternative sanction, will be pursued where appropriate, for example, where there has been a blatant disregard for the law.

The purpose of prosecution is to punish the offender for wrong doing, prevent a recurrence, and act as a deterrent to others who have similar legal obligations.

4.9 **Evidential Matters**

When deciding whether to initiate proceedings, officers will have regard to the Crown Prosecution Service's guidance in their Code for Crown Prosecutors, in terms of the tests of evidence and public interest. All evidence will be collected in accordance with the Police and Criminal Evidence Act and associated codes. Only when there is sufficient admissible and reliable evidence of the offence, and therefore a realistic prospect of conviction, will a case go forward. Cases which fail the evidential test, will not proceed. Cases will not, however, be abandoned because they are difficult, or conviction is not a complete certainty.

4.10 **Offences by young persons**

All offences involving persons under 18 years of age will receive special consideration. Arrangements will be made for an appropriate adult to be present during any PACE interview involving a child or young person and the requirements of PACE Code C will be followed. Social services and the probation service will be notified, as appropriate, before legal proceedings are commenced. Sanctions available to enforcement officers for offences involving children and young people may differ from those available for adult offenders.

4.11 **Public Interest Factors**

Enforcement officers will also have to satisfy themselves that a prosecution is in the public interest. Issues relating to the seriousness of the breach and the circumstances of the offender fall into this category.

The following factors will be considered when deciding whether to prosecute:

- (i) The seriousness of the breach and the potential harm which may result.
- (ii) Was the breach and the events leading up to it foreseeable?
- (iii) Did the offender intend to commit the offence?
- (iv) What is the compliance history of the offender?
- (v) What is the attitude of the offender?
- (vi) Will the prosecution have a salutary effect on others and encourage compliance with the law?
- (vii) What are the personal circumstances of the offender?

These factors are not exhaustive and reflect the range of issues which will be considered when deciding if prosecution is the appropriate course of action.

4.12 **Companies and individuals**

The Health Act 2006 and associated regulations clarify who can be charged with the range of offences. They are:

<i>Offence</i>	<i>Person responsible</i>
Failure to display no – smoking signs in premises	any person who occupies or is concerned in the management of smokefree premises
Failure to prevent smoking in a smokefree place	any person who controls, or is concerned in, the management of smokefree premises
Smoking in a smokefree place	a person who smokes in a smokefree place
Intentional obstruction of an authorised officer of an enforcement authority	any person
Failure to give an authorised officer of an enforcement authority any facilities , assistance or information reasonably required , including making false or misleading statements	any person

4.13 **Presumption to Prosecute**

The decision to prosecute will be taken having regard to the advice of the Council's solicitor. There is a presumption to prosecute in the following circumstances:

- (i) Where there has been a reckless disregard of the law, which has a potentially serious outcome.
- (ii) Where there has been a blatant disregard of the law, which has placed the offender at economic advantage over those who comply.
- (iii) Where there is a history of repeated breaches, either at the same site or at multiple sites, or a particular type of offence is prevalent at the site indicating significant management failings.
- (iv) Failure to comply with legal notices requiring remedial action.
- (v) Where the contravention has caused particular public concern, e.g. an incident which involves a member of the public or young person.
- (vi) Obstruction or assault on officers of the Council in the course of their duties.
- (vii) Impersonation of an officer to gain unlawful access to business or domestic premises.

4.14 **Shared regulatory functions**

Rossendale Borough Council is designated under the Health Act 2006 as an "enforcement authority" as it falls within the category of district councils.

Each enforcement authority has enforcement functions in relation to the premises and vehicles that are within the area for which it is a local authority. However where one or more enforcing authority is investigating the same person for offences created by section 6(5) (no smoking signs), 7(2) (smoking in a smokefree place), 8(4) (failing to prevent smoking in a smokefree place) or

11(1) (obstruction etc of officers), the Smoke-free (Premises and Enforcement) Regulations 2006 permit authorities to transfer and receive enforcement functions from one or more enforcement authority.

Enforcement authorities agree to the transfer and receipt of enforcement functions to ensure the most effective and efficient use of resources throughout the Greater Manchester and Lancashire areas. When such situations arise, officers will liaise with their counterparts throughout the investigation to ensure effective co-ordination and co-operation in gathering and sharing information. Inconsistencies of approach should be avoided, and where proceedings are to be instituted, this should be undertaken by the most appropriate enforcing authority and the most appropriate officers.

It is recognised that enforcement powers may be delegated to differing services and departments within local authorities dependant on individual circumstances. The Lancashire Health & Safety Officers Group and the Greater Manchester Public Protection Managers will ensure effective communication of smokefree enforcement arrangements within their local authorities to ensure good co-ordination of investigations and subsequent actions.

Enforcing authorities will share information with other regulators (such as the Health and Safety Executive, Passenger Transport Executive, Police) and transport companies and the public transport providers to assist in achieving high levels of compliance with the legislative requirements.

4.15 Consultation

All Greater Manchester authorities and the Unitary authorities of Blackpool, Blackburn with Darwen and Warrington have participated in the development of this protocol and this has been adopted by Lancashire Local Authorities. The involvement of external regulatory bodies has been achieved as well as feedback from other professionals outside the scope of environmental health and trading standards services. The intention is to build upon this existing dialogue and use it, where appropriate, to inform further development of this protocol in future.

4.16 Monitoring and review

Service managers will ensure that all enforcement officers are familiar with the protocol document. They will also monitor the activity of enforcement officers to ensure that the protocol is being followed in day to day regulatory work.

4.17 Complaints about the operation of the protocol

Where a business, or member of the public, makes a complaint or expresses dissatisfaction in the way the protocol is being applied, this will be dealt with under the Council's complaints procedure. Complaints and expressions of dissatisfaction will be seen as opportunities to identify possible weaknesses in the protocol and as an opportunity for improvement. This information therefore will be used to examine possible action to improve service provision within the local authority receiving the complaint and across the other authorities signed up to the protocol, where appropriate.

4.18 **Review**

The Greater Manchester Public Protection Managers Group and Lancashire Health & Safety Officers Group are committed to ensuring that local enforcement practice reflects current best practice and government policy. To this end, this protocol will be reviewed in line with the review of the Health Act and its Regulations and further revisions will occur where the existing protocol is shown not to reflect best enforcement practice. Any revision will ensure that the protocol reflects current best practice to ensure that those regulated are treated fairly and in line with national policy.

5. COMMENTS OF THE HEAD OF FINANCIAL SERVICES

5.1 There are no material financial implications from this report.

6. COMMENTS OF THE HEAD OF LEGAL AND DEMOCRATIC SERVICES

6.1 It is important that enforcement procedures are adopted which agree with those adopted by other Authorities to ensure there is consistency across the Region.

7. COMMENTS OF THE HEAD OF HUMAN RESOURCES

7.1 There are no human resources implications relating to this report. Enforcement training for enforcement staff is provided by the Department of Health.

8. CONCLUSION

8.1 Enforcement of the smokefree legislation needs to be implemented consistently across local authorities in order to ensure that businesses and their employees and the public in general can be confident of equal access to a clean indoor environment. The adoption of this protocol will help to ensure this equality and provide a clear interpretation of enforcement to those who have responsibilities under the legislation.

9. RECOMMENDATION(S)

9.1 That Cabinet adopts the Enforcement Protocol as shown as the means by which smokefree legislation will be enforced in Rossendale.

10. CONSULTATION CARRIED OUT

10.1 This matter has been discussed by the Council representatives within Lancashire's Health and Safety Officer Group, a sub-group of the Lancashire Association of Chief Environmental Health Officers. The protocol was developed by the Greater Manchester Authorities and the Lancashire Authorities agreed to recommend to member Authorities that the protocol be adopted to ensure equality of implementation.

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Background Papers	
Document	Place of Inspection
<p style="text-align: center;">Health Act 2006 The Smoke-free (Premises and Enforcement) Regulations 2006 The Smoke-free (Signs) Regulations 2007</p>	<p>Environmental Health service Stubbylee Hall, Stubbylee Lane, Bacup, OL13 0DE.</p>