

SMOKEFREE ENFORCEMENT PROTOCOL FOR THE

GREATER MANCHESTER AUTHORITIES

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.

This protocol applies across the Greater Manchester authorities of Bolton, Bury, Rochdale, Oldham, Salford, Stockport, Tameside, Trafford, Manchester and Wigan and the Unitary authorities of Blackburn with Darwen, Blackpool and Warrington. The protocol was drafted prior to any national guidance being issued. The protocol however recognises and accepts the subsequent LACORS Guidance for Local Council Regulatory Officers. This joint protocol aims to supplement the national guidance and assist individuals and organisations within the region to understand their responsibilities under this legislation and to ensure that regulatory authorities take a consistent approach in cases of non-compliance.

The Protocol

This protocol outlines the common approach to the enforcement of Smokefree legislation agreed by all of the local authorities and lays down the principles which will be followed in deciding upon, and taking action. The protocol is available to businesses and consumers on all of the participating authorities' web sites and available in paper format on request.

Regulators 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 their powers, regulators will have regard to their individual authority's enforcement policy and this protocol which is also based on enforcement concordat principles: standards, openness, helpfulness, proportionality and consistency.

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 to regulators. Through developing this policy jointly, the Greater Manchester (AGMA) authorities are confident that consistency will be achieved in deciding upon appropriate action.

Implementation

Implementation 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.

Successful implementation of the smokefree legislation will be measured by the number of premises that are meeting the requirements of the law and are smokefree and /or where smoking no longer takes place rather than by the number of enforcement actions taken by any individual authority.

Proactive Interventions

Advice and information – Where practicable, advice and information will be provided in a common format across the region. Locally targeted advice will be left to the discretion of the authority concerned as the individual authorities may have priorities to address which are specific to their area.

Risk based inspections- The AGMA authorities consider that the following priorities for risk based inspection are appropriate, based on health risk:

- Where it has previously been customary for people to assume they can smoke
- Where the managers may not realise the law applies to them
- Where the legislative proposals have been altered during the parliamentary process (eg in relation to private members clubs)
- Where it is anticipated that the management of the premises may have difficulty in securing compliance
- Which are open to significant numbers of people
- Where there is an absence of pre-existing voluntary adopted controls on smoking
- Where it is likely that the management will wish to make use of the exemption provisions for designated bedrooms and designated smoking rooms or
- Where regulatory officers do not usually visit as part of their routine inspections under other legislation

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 - Local authorities 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 local authority’s own complaints process, other enforcers eg HSE, or the Department of Health helpline. All complaints will be investigated within a timeframe that meets the individual authority’s standards for response times.

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

Enforcement Options

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

Where a formal approach is considered appropriate, Regulators will use following enforcement options available to them, using a graduated approach¹:

Fixed Penalty Notices for the offences of:

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

Prosecution for the offences of:

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

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

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.

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.

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.

Offences By Young Persons

All offences involving persons under 16 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. Childrens 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.

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:

1. The seriousness of the breach and the potential harm which may result.
2. Was the breach and the events leading up to it foreseeable?
3. Did the offender intend to commit the offence?
4. What is the compliance history of the offender?
5. What is the attitude of the offender?
6. Will the prosecution have a salutary effect on others and encourage compliance with the law?
7. 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.

Companies and individuals

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

Offence	Person responsible
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

Presumption to Prosecute

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

1. Where there has been a reckless disregard of the law, which has a potentially serious outcome.
2. Where there has been a blatant disregard of the law, which has placed the offender at economic advantage over those who comply.
3. 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.
4. Failure to comply with legal notices requiring remedial action.
5. Where the contravention has caused particular public concern, eg an incident, which involves a member of the public or young person.
6. Obstruction or assault on officers of the Department in the course of their duties.
7. Impersonation of an officer to gain unlawful access to business or domestic premises.

Shared regulatory functions

The AGMA Authorities are designated under the Health Act 2006 as "enforcement authorities" as they fall within the category of unitary authorities which are the sole principal councils for their areas.

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 area. 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 Greater Manchester Public Protection Partnership 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.

Consultation

All Greater Manchester authorities and the Unitary authorities of Blackpool, Blackburn with Darwen and Warrington have participated in the development of this protocol. 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.

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.

Complaints about the Operation of the Protocol

Where a business, or member of the public, makes a complaint or expresses dissatisfaction the way the protocol is being applied, this will be dealt with under the complaints procedure for that local authority. 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.

Review

The Greater Manchester Public Protection Partnership is 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.

**Smoke Free Enforcement Protocol
Agreed -10 May 2007**