



**ORKNEY**  
ISLANDS COUNCIL

# General Enforcement Policy

Covering Environmental Health, Trading Standards and Licensing

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**Scope and aims of this policy**

Orkney Islands Council is a regulator, meaning the Council can, as necessary, use a range of legal powers to help secure compliance with the relevant law. This may range from giving advice (verbal or written), the service of legal notices, or submitting reports to the Procurator Fiscal. The Council is also responsible for granting consent for certain activities, for example through the issuing of licences, approvals or permits or seeking registrations for particular business activities; therefore the suspension or revocation of a licence are also valid enforcement options, should the need arise.

The Council scheme of administration and scheme of delegation sets out the enforcement remit and responsibilities for services, officers and committees.

The council’s preferred method to secure compliance with any legal requirement which we are responsible for regulating is to use the so called 4 E’s approach as shown below. Ideally this is a linear process, but in serious cases where there is a genuine risk or flagrant disregard of the law, it may be appropriate to move straight to formal enforcement in order to secure compliance/minimise risk.

<b>Engage</b>	➔	<b>Explain</b>	➔	<b>Educate</b>	➔	<b>Enforce</b>
To create interest in something, make people aware, trigger interest and discussion		To make something clear and easy to understand by giving information about it		To teach, show, offer guidance demonstrate, signpost to expert resources or skills		To make people comply with a law by requiring things, prohibiting things, applying for a Court order or making reports to the Fiscal
<b>Example</b> The council issues a press release about allergens in food		<b>Example</b> The council’s website carries general information about how to comply with a particular law		<b>Example</b> An officer visits a premises and provides guidance to the duty holder on compliance		<b>Example</b> An officer issues a “prohibition notice” to require a dangerous activity to stop

This policy sets out, in general terms, the Council’s approach to enforcement and is applicable to the following activities undertaken by the Council, its officers or contractors:

- Animal health and welfare
- Animal feed
- Anti-social behaviour
- Civic licensing standards (including short term let licences)
- Dog Control
- Food safety, standards and hygiene
- Health and safety at work
- Infectious disease control
- Licensing standards (alcohol)
- Other public health and environmental health activities carried out by the Council

- Pollution control
- Port health
- Private sector housing
- Trading Standards

This policy is applicable to all Council employees working within the above areas and those from other service areas who support them. It is also applicable to agency/contract staff working on behalf of the Council. Separate policies/ protocols apply to planning enforcement and tenancy enforcement.

This policy provides guidance to Authorised Officers<sup>1</sup> and information to Elected Members, regulated persons, other regulatory organisations the Council works with, and the public.

Where this policy refers to legislation, codes of practice, guidance or similar, that reference includes any subsequent amendments/update to such documents.

This is a general statement of approaches to be taken regarding enforcement and will assist in making decisions. However, individual service areas may have their own operational procedures and guidance which set out in practical terms how the various enforcement tools available to the Council may be used.

This document is the Council's food and feed law enforcement policy and the Council's health and safety enforcement policy.

Through this policy, the Council aims to:

- Upon discovery, ensure that regulated persons take action to deal with serious risks.
- Promote and achieve sustained compliance with legal requirements by regulated persons through inspection, advice, guidance and formal enforcement action.
- 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 seek economic advantage by flouting the law or act irresponsibly, especially where employees or the public are put at risk.
- Protect the public in a way which does not stifle enterprise, hinder economic progress, or place unnecessary burdens on businesses.
- Take formal action in accordance with this policy when it is the most appropriate way of dealing with the matter.
- Communicate this policy effectively to those people who are affected by it.

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<sup>1</sup> In this document the term "Authorised Officer" is used to mean an Officer of the Council authorised in writing to carry out enforcement activities on behalf of the Council. It includes other designations such as "Inspector", "appointed Officer", "designated person" and similar terms, as well as a Committee of the Council acting under delegated powers to enforce a particular provision on behalf of the Council.

## Background

A number of Council services are able to carry out enforcement action on behalf of the Council to help ensure 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 the Council. This policy sets out the steps we will use to secure compliance with the law, while minimising the burden on individuals, businesses and the Council. This document also sets out and explains what regulated persons can expect from us. We have based our approach to enforcement on the Legislative and Regulatory Reform Act 2006, the Hampton Principles and the Scottish Regulators' Strategic Code of Practice, along with guidance from Food Standards Scotland, the Health and Safety Executive and the Scottish Government.

This policy is based on the statutory principles of good regulation<sup>2</sup>, namely:

**Proportionality:** to ensure that action taken relates directly to the actual or potential risk (for example to health, safety or the environment).

**Accountability:** to a number of interested parties. This may include Orkney Islands Council elected members, local and national businesses, members of the public and national regulatory bodies.

**Consistency:** to ensure that similar issues are dealt with in the same way, having regard to and making full use of guidance produced by the Government and other national agencies.

**Transparency:** to ensure enforcement action to be taken by the Council is easily understood. Clear distinctions will be made between legal requirements and recommendations about good practice which are not compulsory.

**Targeted:** regulation will only take place in cases where action is needed. In carrying out its function as a regulator, the Council will try to avoid imposing unnecessary regulatory burdens. Before undertaking enforcement action, the Council will generally assess whether similar social, environmental or economic outcomes could be achieved by means other than formal enforcement.

In this policy:

“Regulated person” means anyone (including a business) who must comply with the laws we enforce. Regulated persons will mainly be businesses and their employees, but may also include charity or commercial organisations, private individuals and the Council. We will not give the Council more or less favourable treatment compared to other regulated persons.

“Enforcement” includes all action taken by us following discovery of a (potential) breach of the law, with the ultimate aim of ensuring that risks are managed and someone complies with the law. This can include advice and the use of our investigatory powers.

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<sup>2</sup> These are provided in the Legislative and Regulatory Reform Act 2006, s21

“Formal action” includes formal enforcement action and the use of formal enforcement tools as specified in the relevant legislation, but does not include advice.

This policy cannot be considered in isolation and needs to be read in conjunction with other relevant documents, such as the food safety service plan, the health and safety intervention plan, Licensing policies, HSE enforcement policy statement, Food Standards Scotland codes of practice and relevant guidance.

## **Enforcement Principles**

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

### **Helpfulness**

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.

Where possible, we will work with regulated persons to encourage compliance in what we consider to be 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.

We will give information and advice in clear, concise and accessible language, taking account of the Equality Act 2000, as necessary. 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.

Before we take any formal action, we will try to provide an opportunity to discuss the matter and, if possible, resolve points of difference. However, this will not apply when immediate action is required, such as:

- where there is an imminent risk to health and/or safety
- to prevent or respond to a serious breach of the law
- where an opportunity for discussion is likely to defeat the purpose of the proposed enforcement action
- to prevent evidence being destroyed

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.

We will try to be considerate in the timing of our visits, but we ask regulated persons to understand that it would be neither practical nor effective to give advance notice of our visits, except in limited circumstances. Visits may also be made out of normal office hours.

In undertaking enforcement activities enforcement officers will clearly differentiate between what is required and what is recommended. This means that when providing advice and guidance, legal requirements will be distinguished from suggested good practice and the impact of the advice or guidance will be considered so that it does not impose unnecessary burdens. Regulated persons are welcome to discuss and seek clarity on what is required if it is not clear.

## **Openness**

Authorised Officers have been provided with Council Employee Identification Cards and copies of their official authorisation documents (the so called “instrument of appointment”) summarising the powers they are able to exercise. These all contain a picture of the officer. Upon request, or where statute demands, Authorised Officers will produce appropriate and necessary identification. The original copies of all such documents will be kept securely for use in any legal proceedings and will therefore not routinely be carried by officers.

Where appropriate, officers will attempt to make an appointment before attending domestic premises, unless this would hinder or prejudice the progress of the investigation. Verification of an officer’s name and status may be obtained by telephoning the number on the officer’s identification card.

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, or by accompanying other persons acting under the direction of an officer. This will be undertaken in accordance with the Council’s surveillance policy and the Regulation of Investigatory Powers (Scotland) Act 2000. However, with the exception of covert surveillance, our officers will always identify themselves and, as requested, produce their written credentials (including their name and photographic identification) and will explain the purpose of their visit.

We will consult regulated persons generally about the way we go about our work and the range of enforcement matters dealt with by the Council is such that there may well be occasions when there is a need to work across departments and agencies to maximise effective enforcement. For example, the work-related death protocol facilitates joint working in case of work related fatalities; other examples include working with the Police, Fire Service, Health and Safety Executive, Scottish Environmental Protection Agency, Food Standards Scotland, Animal and Plant Health Agency, UK Border Agency, UK Health Security Agency, Public Health Scotland and NHS Orkney. Where necessary, appropriate information sharing agreements will be put in place to share data in a timely and appropriate way, having due regard to the requirements of the Data Protection Act 2018.

The Council is at risk if it undertakes enforcement action outside of an agreed policy framework. A further risk arises from inconsistency if various services within the Council are enforcing against the same organisation/individual and are applying different standards. Implementing this agreed common enforcement policy will help mitigate these risks.

The Council also holds duties to comply with the law and, on some occasions, it may be that the Council itself or its contractors are the subject of investigation and enforcement activity. This policy recognises that in such circumstances, the Council as a duty holder should be treated no differently to other regulated persons, and will therefore put in place measures to actively minimise any potential or actual conflict of interest, for example as set out in LAC 22-10 which deals with health and safety enforcement at Council-owned premises, which may be occupied by third parties.

## **Proportionality**

Sometimes the law sets clear expectations as to what enforcement action is appropriate. However, where we have discretion, in deciding what action to take, we will act proportionately by balancing the risks to employees, the public or environment with the costs to the regulated person (in time and money) of implementing changes.

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.

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.

We will determine the most appropriate course of action, including formal action which may include matters being reported to the Procurator Fiscal, by making a careful assessment of all of the following criteria with no one factor likely to be decisive on its own:

- Death as a result of a breach of legislation.
- The seriousness of the breach and, in particular, its impact or potential impact on safety, health, the environment or well-being.
- 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.
- The steps which the regulated person took, or the reasonable steps which they failed to take, to prevent the offence.
- 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.
- The history of compliance and, in particular, whether there is a failure to comply with notices or any previous warnings which went unheeded.

- Evidence of fraudulent, deliberate, irresponsible, reckless or negligent behaviour, or of officers having been intentionally obstructed in their duties and evidence of aggression or harassment.
- The likelihood of the contravention happening again.
- The extent to which the regulated person accepts their responsibilities and is willing to heed advice.
- Whether the breach is rectified promptly.
- The need to deter future breaches.
- The nature of the evidence available to us.

## **Consistency**

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.

We operate within 'Home Authority principle'. This seeks to promote consistency of enforcement across the UK by local Regulatory Services. Therefore, if a business is based in Orkney, but its activities extend outwith the islands, we will adopt formal or informal arrangements to provide it with relevant advice. We will also act as a single point of contact for other local authorities that wish to contact any trader based in Orkney on a regulatory issue.

In addition, the Council may operate as a "Primary Authority" for a local business. A Primary Authority has responsibility for providing the regulatory advice that a business requires in relation to specified areas of regulation. A Primary Authority may issue statutory advice to other local authorities and produce an inspection plan to which other enforcing authorities must have regard. In Scotland, however, a local authority can only presently agree to act as a Primary Authority for functions that remain the responsibility of the UK Government.

We will work with other local authorities in 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 Food Standards Scotland and the Health and Safety Executive.

## **Fairness and Equality**

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.

We will investigate service requests and incidents in an independent, fair and even-handed manner and listen with an open mind to what everyone connected to the dispute has to say. Although we may give advice to the complainer/reporter, we will not act on their behalf. We will only form an opinion after examining the facts.

We will not measure ourselves by the quantity of enforcement action we take and we will not set enforcement targets (for example, the number of notices served). We will not take enforcement action specifically to assist with someone's civil claim.

We will aim to communicate effectively when providing information and advice, for example by providing an alternative format to suit the needs of the user. We will provide a language interpreting service during interviews, where required.

We will ensure that enforcement decisions are not influenced by a person's age, disability, race (including nationality), religion or belief, sex, sexual orientation, gender re-assignment, marriage and civil partnership, pregnancy or maternity status. The Council will consider equality and diversity when determining what enforcement action we are considering and how we communicate the message. We believe in the dignity of all people and their right to respect and equality of opportunity. We value the strength that comes with difference and the positive contribution that diversity brings to Orkney.

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.

The Council will consider the appropriateness of using formal enforcement in the case of a person who is elderly or is, or was at the relevant time, suffering from significant mental or physical ill health. It will balance this with the need to safeguard others, taking into account the public interest. The Council will consider its safeguarding policies when determining what enforcement action we are considering. We are committed to safeguarding and promoting the welfare of children, young people and vulnerable adults.

It is incumbent on an Authorised Officer to identify and report to their manager, and in accordance with relevant council procedures any actual or perceived conflict of interest that may occur as a result of their regulatory or enforcement work. Steps will then be taken to minimise that conflict of interest, and this may include allocating the work to another Authorised Officer or enhanced supervisory oversight.

### **Targeted action**

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, along with national and local priorities/guidance, to determine the frequency of inspections, and we will consider those principles when arranging other visits, for example to take samples and carry out projects. However, in respect of any anonymous complaints, any investigation will be based on the potential seriousness of any regulatory breach and in particular its impact or potential impact on the safety, health or well-being of all those affected by it.

We will use standard widely-used risk assessment schemes such as those produced by Local Government Regulation, Convention of Scottish Local Authorities, Food Standards Scotland and Health and 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.

In undertaking enforcement activities, officers will clearly differentiate between what is required and what is recommended. This means that when providing advice and guidance, legal requirements will be distinguished from suggested good practice and the impact of the advice or guidance will be considered so that it does not impose unnecessary burdens in itself. Regulated entities are welcome to discuss and seek clarity on what is required if it is not clear.

The Council will comply with the Human Rights Act 1998 wherever it applies. Authorised Officers will ensure that all enforcement action is justified, auditable, proportionate, authorised, and necessary, having regard to the circumstances of the individual case.

## Enforcement options

As a regulator, the Council recognises that there are a range of enforcement, sanctioning and penalty powers available. These range from informal approaches through to formal action, such as notices, prosecutions, suspensions and revocations. Where there is particular guidance on enforcement options, for example the Health and Safety Executive Enforcement management model, these will be used to guide decision making.

The pyramid of enforcement options set out in Appendix A can be a helpful way to generally show the relative severity of enforcement options. At the top of the pyramid are those sanctions which potentially affect a person's liberty or ability to earn a living, so the application of these enforcement options is reserved for the most serious of cases.

The exact enforcement tools available will vary with the offence under consideration and the Council's Authorised Officers will usually choose which level to start at depending on the offence, the seriousness of the situation and the level of intent of the offender. They will seek compliance with legislation by use of the powers provided by the relevant legislation, having carefully considered legislation, circumstances of the case, risks, tools available and the outcome intended.

In general, this means that enforcement will start at the bottom of the pyramid and move towards the top, although this may not be appropriate in serious cases, especially those where deliberate economic advantage is being sought by non-compliance with the law, or employees or the public are put at risk.

In very rare circumstances, it may be appropriate to enter in voluntary undertakings with regulated persons to achieve compliance; failure to comply with such an undertaking will usually result in formal action being taken.

## Investigation of serious workplace incidents

The investigation of certain workplace incidents can be a complex issue and the primacy (taking the lead role) for such will vary depending on the premises where the incident took place and circumstances found at the time of the incident. It is the intention that there will be a single point of contact for the victim's family. This person will be different to the lead investigating officer.

People react to grief in different ways and this policy recognises that it is essential that the victim's family are kept informed throughout such a traumatic time. A liaison bridge between the investigation team and the victim's family will be established for every fatality investigated by the Council, who will investigate the matter along with the Police and the Procurator Fiscal in accordance with the national work-related deaths protocol for liaison.

The family of any victim of a workplace fatality investigated by the Council will be kept appropriately informed, particularly with regard to:

- Roles and names of key officers
- The progress of the investigation
- Enforcement options available and actions taken
- Consequences of enforcement actions
- Penalties/other legal remedies available

### **Investigation of offences**

The law provides Council Authorised Officers with a wide variety of investigatory powers to assist them in their work. Officers will at all times have regard to the guiding principles of this policy and other relevant guidance when exercising their investigatory powers.

It is the right of regulated persons to seek legal advice and have legal representation in their dealings with the Council, if they so wish.

The work of the Council as a regulator, including investigations, will be subject to prioritisation on the basis of risk. Once started, investigations will be conducted in a timely manner, in accordance with the requirements of relevant legislation. Regard will be made to the requirements of associated codes of practice and guidance. Investigations will be brought to a timely conclusion.

The Council will not generally act on anonymous complaints/requests for service and will require all people contacting the Council to provide basic minimum information to assist the investigation. Failure of an individual who requests our services to co-operate with the investigation team may limit the ability of the Council to resolve a particular case, particularly if a person is unwilling to provide statements or other evidence or attend court as a witness on behalf of the Council.

The Council does not assist in the negotiation for compensation from third parties on behalf of an individual or organisation.

### **Liaison with Primary, Home or Lead authorities**

Where it has been established that the subject of potential enforcement action has entered into a Primary Authority (including Home or Lead Authority Partnership or scheme) with another local authority, unless the matter is one of extreme urgency, the Council will notify the Primary Authority of the proposed enforcement action.

Where an inspection plan has been produced by the Primary Authority in connection with a regulated entity, then officers are required to exercise their inspection function in accordance with any Primary Authority inspection plan.

The Council will share information with other statutory enforcement agencies, subject to the relevant legal provisions. Before information is shared with an external third party, unless the Council is specifically able to do so by statute, the consent of the person providing the information will be obtained. Where the Council requests information to be provided by another organisation, it may do so via service of data protection request notice (example in Appendix B).

## **Freedom of Information and access to information**

The Council will comply with the Freedom of Information (Scotland) Act 2002 and Environmental Information (Scotland) Regulations 2004. Requests for access to information will be dealt with in a timely manner and with reference to appropriate guidance and the Council Legal Services. Documents will be held on file for the required retention periods and then will be disposed of appropriately.

Subject to the provisions of the Freedom of Information (Scotland) Act 2002, the Data Protection Act 2018 and the Environmental Information (Scotland) Regulations 2004, the Council can make no guarantees regarding confidentiality of information obtained; for example, ongoing investigations may be subject to exemptions regarding disclosure but closed cases may be subject to partial or full disclosure. If a case proceeds to Court, then full disclosure, including to the defence, will need to take place in accordance with the rules of the Court.

## **Record keeping**

All Authorised Officers and support officers are responsible for keeping accurate and appropriate notes relating to their investigations and enforcement activities. This includes computer logs and paper/written notes. The Council will provide appropriate notebooks and software for this purpose. In particular, Authorised Officers should ensure that both actions and key decisions affecting the direction of the investigation are recorded.

## **Collection of Evidence**

Where physical evidence is collected as part of an investigation, the officers involved in the case will ensure the evidence is stored and handled in an appropriate way whilst it is in the Council's possession. This policy recognises that an investigation may be compromised by the inappropriate handling of evidence or the lack of evidential continuity as regards a particular piece of evidence. Once evidence is in the possession of the Council, it will not generally be released to third parties (including the press), except for the purposes of laboratory or other technical examination.

## **Photographs, digital images and videos**

Sometimes it may be necessary or helpful to make digital images or take photographs or video to assist an investigation. The Council will provide training and equipment for this purpose and procedures are in place to ensure the evidential continuity of any images made.

## **Measurements and recordings**

Sometimes it may be necessary or helpful to make measurements or recordings to assist with an investigation. The Council will provide appropriate training and equipment for such purposes and will ensure any equipment receives necessary periodic maintenance and calibration.

## **Enforcement Decision Records**

All formal enforcement decisions made by Officers will be peer reviewed. Each service area is responsible for producing a suitable document (paper or electronic) for their own needs, having regard to the legislation that they enforce and their own operational procedures. An example is provided at Appendix C. This policy accepts that in exceptional circumstances, such as an emergency, out of hours or in response to an immediate matter of evident concern, it may be impractical to complete a peer review.

## **Statutory (legal) Notices**

Some legislation provides for the service of statutory notices which require a regulated person to comply with specific requirements. Some notices may require works to be undertaken, others may impose a prohibition which prevents actions from starting or continuing. In some circumstances, the use of a notice is a power available to the authority or Authorised Officer; other times it is a statutory duty. Where the service of a notice is a power, that decision will usually be taken by an appropriate Authorised Officer. Except in exceptional or emergency situations, all notices will be peer reviewed prior to service.

Prior to the service of the notice, the Authorised Officer concerned must ensure that the situation to which the notice relates has not been remedied.

Generally, the notice will explain:

- what is wrong
- what is required to put things right
- the timescale in which to put things right
- what will happen if the notice is not complied with

In some circumstances where a formal notice has been served, there may be a right of appeal against the Council's decision. Aside from the general appeal procedures in respect of Human Rights issues, there are certain notices which allow a more specific and direct route of appeal through the local Courts or other Tribunal. In such cases, an explanation of the method of appeal will be provided at the time the notice is issued. It is anticipated that regulated persons who do not comply with a properly written and served statutory notice will be considered for referral to the Procurator Fiscal for prosecution.

## **Work in default**

Sometimes a further possible action after the service of a notice is the carrying out of "work in default". Where appropriate, this will be considered. The decision to carry out work in default will be governed by the urgency of the situation and the risk benefit which is to be achieved. Every effort will be made to ensure that work is carried out competently and that recharges are not unnecessarily high. Recharges may include costs to cover staff time expended after the service of a statutory notice. Outstanding debts will be passed to the Council's legal services for recovery.

It may be necessary for the Council to take steps to remove unauthorised campers from land either in the ownership of the Council or at the request of another landowner. The Council's internal procedures will be followed in this regard. Where a request is received from the owner of a third-party land, the Council will not always act on their

behalf, but may request the landowner to take their own action to secure possession of the land.

### **Fixed penalty notices**

There are specific offences where these notices may be considered as an enforcement option. Fixed Penalty Notices are an alternative to prosecution. They allow the offender to prevent the prosecution process taking place by paying a financial penalty. Fixed Penalty Notices will not generally be used for repeat offenders or where there is previous record of a Fixed Penalty Notice being served for that offence.

If the penalty is unpaid, then the offender will be referred for prosecution for the original offence. A Fixed Penalty Notice will therefore only be issued where there is enough evidence to support a prosecution. Generally, unpaid notices will be followed up with a report for prosecution to ensure their use is not discredited.

### **Interdict**

In some cases, an interdict may provide a more appropriate remedy. The advice of the Council's legal service will be taken in this regard.

### **Prosecution**

The Council is a Specialist Reporting Agency to the Procurator Fiscal and this policy, appropriate legal advice and discretion will be used in deciding whether to make a report Procurator Fiscal to seeking to initiate a prosecution. The scheme of administration and delegation sets out the delegated arrangements for making a report to recommend a prosecution. This may be to the solicitor to the council, a senior officer, a committee or, in certain cases, the Authorised Officer.

The decision to report for prosecution will always take into account the criteria laid down in the Guide for Specialist Reporting Agencies issued by the Crown Office.

### **Permissioning, registration and consent regimes**

Sometimes the Council is responsible for granting consent for activities, examples may include issuing licences under the housing, licensing and Civic Government Acts, registering food premises or cooling towers or granting consent for the removal of asbestos. In these circumstances, proactive use of necessary and proportionate conditions can help regulate activities. However, this policy recognises that in order to minimise burdens on regulated persons, conditions should not merely restate or replicate other requirements in legislation.

### **Endorsement, suspension and revocation of Licences**

Following a conviction for certain offences, it may be appropriate to endorse a licence issued by the Council.

In some cases, the suspension or revocation of a licence is an enforcement option (which may or may not require the holder to have been convicted of an offence).

This policy recognises that endorsement, suspension and revocation of licences can have a serious impact on an individual's livelihood and such decisions will only be taken having full regard to the human rights issues regarding the removal of such a licence drawing upon appropriate legal advice. This is generally an enforcement matter reserved to the Council's Licensing Committee.

### **Recovery of enforcement costs**

The Health and Safety Executive "fee for intervention" process does not extend to local authority enforcement activities. However, where statute or regulation allows for the recovery of costs in connection with an investigation or enforcement activity, then these will be levied on a cost recovery basis of the officer(s) time involved. This includes costs associated with work in default and voluntary closure/surrender activities.

### **Indemnity of Inspectors**

The council provides general indemnity to its officers under section 64 of the Local Government (Scotland) Act 1973. Section 26 of the Health and Safety at Work etc. Act 1974 allows local authorities to indemnify Inspectors appointed under that Act under specified circumstances. It is the policy of the Council to indemnify Inspectors appointed under that Act against the whole of any damages and costs or expenses which may be involved, if the Council is satisfied that the Inspector honestly believed that the act complained of was within their powers and that their duty as an Inspector entitled them to do it, providing the Inspector was not wilfully acting against instructions.

Section 44 of the Food Safety Act 1990 provides protection for council officers acting in good faith and accordingly it is the policy of the Council to indemnify officers appointed under the Food Safety Act 1990 against the whole of any damages and costs or costs incurred if the Council is satisfied that the officer honestly believed the act complained of was within the scope of his<sup>3</sup> employment.

### **Training**

The Council will put in place and resource/fund a scheme of relevant training and continuous professional development for all staff engaged in regulatory activities. This may include training in general enforcement, technical and service specific matters.

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<sup>3</sup> The Interpretation Act 1978 (as amended) applies throughout this policy

## Monitoring and Review

This policy will be periodically reviewed and will be updated in response to new legislation, guidance or other relevant information. The reviewed policy will be approved by the relevant Council committee and if significant changes are required to the policy, then it will undergo a consultation process involving the public, partner organisations and business community.

Customer feedback can be made direct to council officers, via the council website, email, or using the corporate complaints, compliments and comments system.

## Contact details

### By post or in person to:

Environmental Health, Planning and Community Protection Services, Orkney Islands Council, Council Offices, School Place, Kirkwall, Orkney KW15 1NY.

Email: [env.health@orkney.gov.uk](mailto:env.health@orkney.gov.uk).

Or:

Trading Standards, Planning and Community Protection Services, Orkney Islands Council, Council Offices, School Place, Kirkwall, Orkney KW15 1NY.

Email: [trading.standards@orkney.gov.uk](mailto:trading.standards@orkney.gov.uk).

Or:

Licensing, Orkney Islands Council, Council Offices, School Place, Kirkwall, Orkney KW15 1NY.

Email: [Licensing@orkney.gov.uk](mailto:Licensing@orkney.gov.uk)

**By telephone:** 01856 873535.

### Opening hours:

09:00 – 17:00, Monday to Friday.

**Website:** [www.orkney.gov.uk](http://www.orkney.gov.uk).

## Complaints

Complaints or observations regarding the content or application of this enforcement policy should be made using the Council complaint procedure. This is explained on the Council website at <https://www.orkney.gov.uk/Council/C/complaints-procedure.htm>

Complaints are different to statutory rights of appeal (which are explained in the section below) which often have strict timescales which must be followed by the appellant.

### **Right to review of a regulatory decision**

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 regulatory action. You should include an explanation of why the regulated person is dissatisfied in writing, unless the regulated person believes there is a need for an urgent review. The matter 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. This is separate to any statutory right of appeal that may exist.

### **Complaints regarding health and safety enforcement**

Complaints regarding the enforcement of health and safety at work legislation may be made to the Independent Regulatory Challenge Panel. The Independent Regulatory Challenge Panel provides an independent means for any person (whether companies or individuals) to complain about the actions of Health and Safety Executive (HSE) or Local Authority (LA) health and safety regulators. Complaints may only be referred to the Panel if they have first been raised locally (ie through the Council complaint procedure) and it has not been possible to resolve the matter.

The Panel will consider complaints from companies or individuals who have been visited by HSE or LA health and safety inspector and who believe that the visit was not justified as being in accordance with a risk-based approach to targeting proactive inspections; or where the advice given by the HSE or LA health and safety regulator is incorrect or not proportionate to the risks.

The Panel will not consider complaints from companies or individuals subject to statutory notices or prosecution by HSE or LA health and safety regulators, as they have recourse to Employment Tribunals or the Courts respectively, which provide such an established and proper mechanism of appeal. Equally, it will not deal with determinations on enforcement action subject to Primary Authority arrangements as there is an existing process to follow.

Details of the Panel are available at [The Independent Regulatory Challenge Panel \(hse.gov.uk\)](https://www.hse.gov.uk/contact/challenge-panel.htm)

<https://www.hse.gov.uk/contact/challenge-panel.htm>

## **Complaints regarding technical food safety issues**

Complaints and disputes regarding technical food safety matters arising from the Council's work as a food law enforcement authority may be made to Food Standards Scotland Independent Business Appeals Panel. This route can only be used when the Council complaints procedure has been exhausted, but has not resulted in agreement. The panel will not consider food hygiene information scheme ratings, food law inspection results or formal enforcement actions, as these are already covered by existing appeal routes. The panel can be contacted online at [www.food.gov.uk/business-appeal](http://www.food.gov.uk/business-appeal)

## **Statutory right(s) of appeal**

In some cases, there may be a formal right of appeal against enforcement action taken by the Council, for example to a Sheriff, Court or other Tribunal. This right will be explained as part of the enforcement action and may be governed by strict rules or timescales. Such appeals are separate to complaints made to the Council or other bodies. It is the responsibility of the regulated entity to seek their own legal advice and assistance in making any such appeals in the timescales allowed.

## Appendix A: Levels of enforcement action

### 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 and/or 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 an Authorised Officer to the Licensing sub-committee or the Licensing Board recommending that they review, suspend or revoke a licence.

The law sets out the particular enforcement options available in a particular circumstance and not every enforcement option is available in each case. The pyramid of enforcement actions shows the general range of enforcement options, with the most severe sanctions at the top.



## Appendix B. Example information request form

### NEIGHBOURHOOD SERVICES AND INFRASTRUCTURE

Corporate Director: Hayley Green, MBA (Public Service)  
Council Offices, Kirkwall, Orkney, KW15 1NY

Tel: (01856) 873535

Website: [www.orkney.gov.uk](http://www.orkney.gov.uk)  
Email: [env.health@orkney.gov.uk](mailto:env.health@orkney.gov.uk)



To: .....

For the attention of: .....

Position: .....

#### DATA PROTECTION ACT 2018 SCHEDULE 2 PART 1, SECTION 2(1) (A) AND SECTION 2(1) (B)

I am making enquiries which are concerned with:

- a) The prevention or detection of crime
- b) The apprehension or prosecution of offenders

The processing will adhere to the data protection principles of the Data Protection Act 2018, including Section 35 (2)(b), (5)(a),(b) and (c) alongside Schedule 8(6)(a),(b) or (c).

I confirm that by reference to paragraph 1 of Schedule 7, Orkney Islands Council is a 'competent authority' for the purpose of Part 3 of Data Protection Act 2018.

I can confirm that the personal data requested are needed for the above purposes and failure to provide the information will, in my view, be likely to prejudice those matters.

This information will be used only for the stated purpose, and in accordance with data protection legislation. The information will be treated in confidence.

#### DETAILS OF PERSON

Name: ..... Date of Birth: .....

Address: .....

Information required:

.....  
.....  
.....  
.....  
.....

#### TO BE COMPLETED BY PERSON REQUESTING THE INFORMATION

Signed:  
Name:  
Tel:

Date:  
Position:  
Email:

## Appendix C. Example content of enforcement decision peer review sheet

1. Preliminaries	
Enforcement action under consideration	
Name of case officer	
Name of reviewing officer	
Case reference	
Date of review	

2. Details of recipient
Who is this recipient of enforcement action? What steps have been taken to confirm the recipient of the enforcement action is the correct person/body for this action? [specify what checks have been made]

3. General		
	Case officer (answer yes, no or N/A)	Reviewing officer comments
Has the relevant legal provision been clearly identified?		
Is the proposed action in accordance with the enforcement policy?		
Have key actions AND decisions leading to this action been recorded?		
In the case of health and safety, has an EMM assessment been undertaken?		
Is the proposed enforcement action taken on the basis of risk?		
Has pre-enforcement dialogue taken place with the recipient of the enforcement action?		
Has discussion taken place with the legal advisor to the case?		
Has liaison with Primary Authority taken place?		
Is the proposed action proportionate having regard to the business size and activity?		
Is the Officer authorised to take this action?		

<b>4. Human rights considerations</b>		
	Case officer (answer yes, no or N/A)	Reviewing officer comments
Is the proposed action justified?		
Is the proposed action authorised?		
Is the proposed action proportionate?		
Is the proposed action necessary?		

<b>5. Notice details</b>		
	Case officer (answer yes, no or N/A)	Reviewing officer comments
Do the details on the notice and any covering letter match the info in 2 above?		
Notice has a unique reference number?		
Has the notice been signed by the officer witnessing the contravention?		
Is the officer signing the notice authorised to sign that specific notice?		
Are the details relating to the regulation/act contravened correct?		
Reason is specified for the contravention?		
Wording of the notice is clear and easily understood?		
Wording of any schedule is clear and easily understood?		
Wording reflects any ACoP or guidance?		
Acceptable and clear time limits are given for any works?		
Indication of works of equivalent effect/alternative routes to compliance have been explained?		
Details of appeal procedure have been provided?		
Details of local Court or tribunal have been provided?		
Details of any "options" on the notice clearly stated (eg inclusion in register, effect of appeal etc)?		

<b>6. Sign off</b>	
Signed (case officer)	
Signed (officer reviewing notice)	