

North Yorkshire County Council**Executive****17 December 2019****Trading Standards Enforcement Policy****Report of the Corporate Director – Business and Environmental Services****1.0 Purpose of the report**

- 1.1 To seek authorisation for a revised Trading Standards Service Enforcement Policy (produced as appendix 1).

2.0 Background

- 2.1 The Trading Standards Service (the Service) has a number of statutory duties and powers to enforce consumer protection and associated legislation in North Yorkshire, and may take enforcement action and prosecute in accordance with the Officers' Delegation Scheme within the Constitution. The Service has delegated authority under the Constitution in relation to the Council's statutory duty of enforcement for safety safety of sports ground legislation, and also enforces traffic regulation orders relating to weight restricted roads and bridges in the County.
- 2.2 The National Trading Standards e-Crime Team (NTSeCT) is hosted jointly by NYCC and City of York Council (CYC). North Yorkshire leads on digital forensics and CYC leads on investigations and prosecutions. In the interests of clarity and transparency, the policy states explicitly that it applies to any enforcement work undertaken by NTSeCT under the authorisation of NYCC.
- 2.3 The Regulators' Code (2014) is a statutory code of practice made under the Legislative and Regulatory Reform Act 2006. Paragraph 6.2(d) states that a regulator should publish its enforcement policy, explaining how it will respond to non-compliances. The current enforcement policy is published on the County Council's website in accordance with paragraph 6.3 of the code but it is several years since it was reviewed and considered by elected Members. That policy is produced as appendix 2.
- 2.4 In making a decision to prosecute a business or trader, the Service has regard to the Code for Crown Prosecutors. This is the code used by the Crown Prosecution Service when deciding whether to prosecute individuals investigated by the police. It sets out a two stage test: the evidential stage and the public interest stage. The evidential stage requires the evidence to be sufficient to provide a realistic prospect of conviction against each suspect on each charge. This is based on an objective examination of the evidence and means that an impartial judge or jury, properly directed and acting in accordance with the law, would be more likely than not to convict the defendant of the offence(s) alleged.
- 2.5 A case only progresses to the public interest stage if the evidential stage is met. It has never been the case that all cases meeting the evidential stage must be prosecuted. Consideration must be given to the public interest in prosecuting by reference to factors including the seriousness of the offending, the level of culpability of the defendant, the vulnerability of the victim(s) and harm caused, the suspect's

age and maturity, the impact on the local community and whether prosecution is proportionate.

- 2.6 In addition to the Code for Crown Prosecutors, the Service has regard to other relevant codes and official guidance, including the statutory Food Law and Feed Law Codes of Practice issued by the Food Standards Agency, and the Enforcement Management Model issued by the Health and Safety Executive.

3.0 The Revised Policy

- 3.1 Paragraph 1 of the policy now sets out how the Service's aims in undertaking enforcement work link to the Council's key ambitions for 2023.
- 3.2 Paragraph 5 sets out the criteria by which the Service decides whether to investigate a consumer complaint or other report of non-compliance. Consistent application of these criteria is managed by the use of a filter and matrix which has been approved, and is reviewed annually, by the Business and Environmental Services Corporate Director and Executive Members.
- 3.3 Paragraph 6 provides more information about the statutory codes and official guidance that are taken into account in undertaking enforcement or making enforcement decisions. Hyperlinks are included to assist readers of the policy in finding documents once the policy is published on the County Council website. Hyperlinks will be checked and updated regularly as part of routine web page checks.
- 3.4 Paragraph 7 (statutory notices) does not list all the statutory notices that are available to the Service as these are numerous and subject to change with the introduction or amendment of legislation. Separate regularly updated guidance will be published on the website alongside the policy.
- 3.5 Paragraph 7 (fixed penalty/monetary penalty) does not list all the legislation for which these penalties apply as they are subject to change with the introduction or amendment of legislation. Separate regularly updated guidance will be published on the website alongside the policy.
- 3.6 Paragraph 7 (prosecution) includes more examples of the sorts of cases in which prosecution would be considered to provide greater transparency and clarity for both businesses and consumers.
- 3.7 Paragraph 7 (post-conviction orders) now includes information about the orders that may be sought or issued by a court following conviction in order to secure future compliance or forfeit goods or materials or confiscate the proceeds of crime.

4.0 Legal Implications

- 4.1 The policy ensures that we continue to comply with the statutory Regulators' Code. As long as the policy is followed, it also ensures that a legal challenge to the validity of an enforcement decision is unlikely to succeed.

5.0 Financial Implications

- 5.1 There are no additional financial implications. Enforcement costs are already included within the service's budget.

6.0 Equalities Implications

- 6.1 An impact assessment is not considered necessary. The main purpose of the policy is to ensure transparency and consistency in enforcement decisions and it has a structured processes by which account can be taken of the age or vulnerable characteristics of the complainant(s) or suspect(s).

7.0 Recommendations

- 7.1 It is recommended that:
- a. Members approve this policy for immediate use by the Service and for publication on the County Council's website.
 - b. the policy be reviewed in three years' time in order to ensure it is still current and fit for purpose.

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Author of report: Jo Boutflower

Background Documents to this Report: None

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TRADING STANDARDS ENFORCEMENT POLICY

Introduction

1. North Yorkshire County Council Trading Standards Service (the Service) is responsible for enforcing a wide range of trading standards, consumer protection and safety legislation across North Yorkshire. Our aims are to safeguard consumers, so that every adult has a longer, healthier and independent life and every child has the best possible start in life; and to support legitimate traders to ensure that North Yorkshire is a place with a strong economy and a commitment to sustainable growth.
2. North Yorkshire County Council (NYCC) hosts the National Trading Standards e-Crime Team jointly with City of York Council. This policy applies to any enforcement work undertaken by the team under the authorisation of NYCC. The City of York Council (CYC) has its own enforcement policy which will apply in relation to enforcement work undertaken under the authorisation of CYC.
3. This enforcement policy is made in accordance with the Legislative and Regulatory Reform Act 2006 and the [Regulators' Code](#). The Service is committed to good enforcement practice and carries out its enforcement activities in accordance with the [principles](#) set out in the Act. This means that the Service will act in a manner that is transparent, accountable, proportionate and consistent, and that enforcement activities will be targeted only at cases in which action is needed.
4. The Service uses a variety of methods to encourage and support fair and safe trading. This policy sets out the different sanctions we can use when non-compliances put consumers at risk of injury or other detriment, and mean that other businesses cannot compete on a level playing field.

Investigation

5. The Service uses discretion when deciding whether to investigate consumer complaints and other reports or findings of non-compliance. It is recognised that it is neither necessary nor possible for the purposes of the execution of our statutory duties to investigate all issues of non-compliance with the law. When making such decisions, including the level of resources to be allocated, we take the following factors (as applicable) into account:
 - the risk of physical harm or injury;
 - the vulnerability of consumers using a product or service;
 - the use of aggressive practices by a business;
 - the level of financial detriment to consumers and the wider economic impact;
 - the environmental impact;
 - the risk to farmed animal welfare;

- the risk of farmed animal disease;
- the wider impact, including public interest/concern;
- the size and trading reach of the business;
- the compliance history of the business.

Methods of Enforcement

6. The Service has regard to applicable Government and other official enforcement guidance. This includes but is not limited to the [Health and Safety Executive Enforcement Management Model](#), the [Food Law Code of Practice](#), the [Feed Law Code of Practice, Age Restricted Products and Services: A Code of Practice for Regulatory Delivery](#) and [Guidance for the Enforcement of the Energy Performance of Buildings \(England and Wales\) Regulations 2012](#).
7. Depending on the legislation being enforced, the Service has a number of sanctions available to it:

Written advice or informal warning

We recognise that most businesses want to comply with the law and minor non-compliances will be dealt with by advice and guidance unless previous advice has been ignored or there is other evidence that a business had deliberately broken the law.

Statutory notices

Some legislation, such as that covering product safety, food or the storage of petroleum, allows the Service to issue a notice requiring action to be taken, or preventing specified actions. Such notices will clearly set out what is required and the timescale in which it must be done. Notices include details of how to appeal against them. In most cases statutory notices may be issued in addition to the investigation and prosecution of criminal offences.

Fixed penalty/monetary penalty

Financial penalties may be issued by the Service in respect of breaches of legislation which set out a monetary penalty framework. Guidance is published separately about the enforcement of these penalties, when they are used and how they can be appealed. Financial penalties are not a criminal conviction and civil enforcement action will be taken if a financial penalty is not paid by the date specified.

In most cases, the penalty is set by law. In some cases, a maximum amount is set in legislation. In setting the penalties in those cases, the Service will have regard to national or other relevant guidance or codes, and will publish the criteria by which fees are set.

[Guidance for Enforcement of Sales and Letting Businesses](#) has been issued by the National Trading Standards Estate and Letting Agency Team, and the Service follows the [Tenants' Fees Financial Penalty Policy](#) associated with that guidance.

Undertaking or enforcement order

Fair trading legislation may be enforced in the civil courts under the regime set out in [part 8 of the Enterprise Act 2002](#). In these circumstances, breaches which harm the collective interests of consumers will be dealt with by seeking an undertaking from a business that it will not engage in specified trading practices or that it will do certain things. Where an undertaking is breached or refused, or where the matter is serious or urgent, an order may be sought from the court. Breach of a court order can result in a term of imprisonment.

Simple caution

When there is sufficient evidence to warrant a prosecution and a business or sole trader admits that an offence has been committed, a simple caution may be offered if it is considered no in the public interest to prosecute. A simple caution may be referred to in court in any subsequent proceedings should a similar offence be committed in the future. The Service follows the [Code for Crown Prosecutors](#) in determining whether there is sufficient evidence ('the evidential test') to warrant prosecution.

Prosecution

Prosecution is a serious, but sometimes necessary and proportionate, response to breaches of the law. The decision to prosecute is made under the Officers' Scheme of Delegation within the [Constitution of North Yorkshire County Council](#) (see paragraphs 4.4 (e), (m) and (n)), and in accordance with the [Code for Crown Prosecutors](#). The Service will not prosecute an individual or a company if the evidential test in the Code is not met nor if the evidential test is met but the public interest test is not met.

Where the nature of the offending is sufficiently serious or persistent, a prosecution will be taken without the prior use of alternative sanctions. Prosecution will generally be considered in, but is not limited to, the following circumstances:

- Offences contrary to regulation 12 of the Consumer Protection from Unfair Trading Regulations 2008 involving the use of [schedule 1](#) commercial practices which are in all circumstances considered unfair.
- Use of [unfair practices](#) within the meaning of [regulation 3 of the Consumer Protection from Unfair Trading Regulations 2008](#) resulting in, or likely to result in, significant consumer detriment. Such detriment may be significant if it is a large sum lost by one or more consumers or a small sum lost by many consumers.
- Offences contrary to the [Trade Marks Act 1994](#) or part I, chapter VI or part III, chapter VII of the [Copyright, Designs and Patents Act 1988](#) involving the manufacture of infringing items, the sale or supply of such items to consumers who were misled about their authenticity, or the sale or possession for sale of such items in significant quantity.

- Frauds contrary to the [Fraud Act 2006](#) or conspiracy to defraud contrary to common law.
- Money laundering offences contrary to [part 7 of the Proceeds of Crime Act 2002](#).
- Offences relating to unsafe products involving risk of a serious or significant injury or health effect, as defined in the [Health and Safety Executive Enforcement Management Model](#), to any person.
- Food safety offences concerning allergens.
- Offences, not already covered above, involving the exploitation by the trader of a vulnerability of the complainant(s).
- Offences involving the sale, including the proxy sale, of age restricted products to minors.
- Failure to treat or otherwise causing unnecessary suffering to livestock, or transporting or causing unfit livestock to be transported.
- Significant or persistent breaches of disease control measures relating to livestock.
- Breach of a traffic regulation order imposing a weight restriction on a road or bridge in North Yorkshire.
- Offending for which a simple caution has been offered but refused.
- Obstruction of authorised officers of the Service in the lawful execution of their duties.

Where an offence has been committed by a body corporate and there is evidence that the offending has taken place with the consent or connivance or due to the neglect of a director or directors, those directors may also be liable to prosecution.

Post-conviction orders

Following conviction the following orders may be used to secure future compliance with the law, compensate victims or forfeit goods and other items.

Forfeiture

Following conviction, a court may order the [forfeiture](#) of goods associated with the offending under section 143 of the Powers of the Criminal Courts (Sentencing) Act 2000. For goods and materials bearing infringing trademarks or items used to make infringing trademarks, a [forfeiture order](#) is sought under section 97 of the Trade Marks Act 1994.

Director disqualification

Where a director has been convicted of an indictable offence (that is one which may be tried either in the magistrates' court or the crown court), on his own account or as a result of his consent, connivance or neglect, [disqualification](#) from acting as a company director under section 2 of the Company Directors Disqualification Act 1986 may be sought.

Confiscation order

Following conviction in appropriate cases, the Service will seek a [confiscation order](#) under [part 2 of the Proceeds of Crime Act 2002](#). In deciding whether to pursue confiscation, regard will be had to the Crown Prosecution Service's [Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings](#).

Compensation order

In cases where compensation is not dealt with as part of confiscation proceedings, the court will be made aware of any compensation claim a victim wants to put forward. The court may make a [compensation order](#) under the Powers of the Criminal Courts (Sentencing) Act 2000.

Criminal behaviour order

Following conviction for offending which has caused harassment, alarm or distress, a [criminal behaviour order](#) might be sought under part 2 of the Anti-social Behaviour, Crime and Policing Act 2014.

Animal welfare orders

On conviction for a relevant offence contrary to the Animal Welfare Act 2006, an order might be made by the court preventing a person from owning or otherwise controlling livestock. A [deprivation order](#) under section 33 of the Act deprives a person of their ownership of livestock. A [disqualification order](#) under section 34 of the Act disqualifies a person from keeping, owning or controlling livestock.

Restriction of sales

On conviction for 2 or more offences involving the sale of tobacco products to minors within a two year period, a [restricted sale order](#) or a [restricted premises order](#) under section 12 of the Children and Young Persons Act 1933 may be sought preventing an individual from selling or managing the sale of tobacco products or preventing the sale of tobacco products from particular premises.

Following a conviction for the sale of alcohol to minors, an application will generally be made to the relevant district council under section 51 of the Licensing Act 2003, seeking a [review of the premises licence](#).

PENALTY GUIDANCE & ENFORCEMENT POLICY

PUBLISHED PURSUANT TO SS. 63 & 64 OF THE REGULATORY ENFORCEMENT & SANCTIONS ACT 2008

1.0 BACKGROUND

- 1.1 It is the aim of North Yorkshire County Council Trading Standards & Regulatory Services (the service) to impact positively on the fair trading environment of North Yorkshire. This is achieved by education and advice, and by regulating the activities of businesses and other trading entities. Securing compliance with statutory regulatory requirements using enforcement powers and sanctions is a necessary means to achieving this aim.
- 1.2 This guidance is issued by the service pursuant to sections 63 and 64 of the Regulatory Enforcement and Sanctions Act 2008 (the act). It sets out the ways and situations in which criminal and civil sanctions will be used by the service in the course of its relevant regulatory functions. Relevant regulatory functions are those set out in the schedules to the act.

2.0 ENFORCEMENT

- 2.1 The service will have regard to the act and the Regulators' Code (the code) at all times when establishing and reviewing enforcement policies and procedures. In particular, such policies and procedures will ensure that regulatory activities are carried out in accordance with the 'Principles of Good Regulation' as set out in section 21(2) of the Legislative & Regulatory Reform Act 2006 and the code. This means that the service will act in a manner which is transparent, accountable, proportionate and consistent, and that enforcement activities will be targeted only to cases where action is necessary.
- 2.2 The service will carry out risk assessment based inspections and provide targeted, meaningful and consistent advice to businesses and other regulated entities in line with the 'Hampton Principles' set out in the code. Those traders who persistently breach regulations or whose one-off offending is serious in terms of its detriment, or potential detriment, to consumers or other businesses will be identified quickly and appropriate action taken so that they are subject to proportionate and meaningful sanctions.

3.0 AVAILABLE SANCTIONS

3.1 The following sanctions are available to the service:

- a. informal caution/advice;
- b. fixed monetary penalty/fixed penalty notice;
- c. discretionary requirement (including variable monetary penalty);
- d. stop notice;
- e. enforcement undertaking;
- f. enforcement order;
- g. simple (formerly 'Home Office') caution;
- h. prosecution.

3.2 In deciding which sanction is appropriate, the service will have particular regard to the following criteria:

- i. Whether the breach was committed deliberately or recklessly, or without due diligence.
- ii. Any complaints, previous complaints or other information relevant to the trader's history including any previous advice given.
- iii. The trader's attitude and, in particular, whether he/she was obstructive or co-operative.
- iv. The prevalence of the class of breach and whether a particular sanction could act as a deterrent and encourage compliance generally.
- v. Inadequate mitigation or explanation given by the trader (or the lack of such information).
- vi. The effect of the breach on the victim, in particular where the victim is in some way vulnerable.

4.0 INFORMAL CAUTION/ADVICE

4.1 A written informal caution or note of advice may be given for a minor infringement of any legislation when the service is confident that the business or other regulated entity will immediately take steps to correct the breach. In cases where there is a presumption of prosecution (see below) such action will be taken only where there is an evidential difficulty, such as a key witness who is not prepared to attend court.

5.0 FIXED MONETARY PENALTY/FIXED PENALTY NOTICE

5.1 Fixed penalty notices (FPN) are issued in relation to offences contrary to part 5 of the Housing Act 2004 (home information packs). An FPN imposes a penalty of £200 which is payable within 29 days of its date of issue. There is a right of appeal in the first instance to the service. Following this, unpaid penalties will be pursued in the county court as a civil debt and this venue will allow a further challenge to the notice's validity if the defendant wishes.

5.2 The service will use FPNs only in relation to persistent offenders who have

committed at least two breaches. In all other cases compliance will be encouraged by advice and guidance.

- 5.3 Otherwise, this sanction is only available to the service in circumstances where the relevant Minister of the Crown has created provision for it within secondary legislation in accordance with section 60 of the act. No such provisions exist at present.

6.0 DISCRETIONARY REQUIREMENT

- 6.1 This sanction is only available to the service in circumstances where the relevant Minister of the Crown has created provision for it within secondary legislation in accordance with section 62 of the act. No such provisions exist at present.

7.0 STOP NOTICE

- 7.1 This sanction is only available to the service in circumstances where the relevant Minister of the Crown has created provision for it within secondary legislation in accordance with section 62 of the act. No such provisions exist at present.

8.0 ENFORCEMENT UNDERTAKING

- 8.1 Undertakings may be sought from businesses who breach legislative requirements specified for the purposes of part 8 of the Enterprise Act 2002. This includes most fair trading legislation but does not include animal health, food and agriculture or product safety legislation. Such a sanction will require a business to refrain from certain agreed activities and will be drafted in consultation with the business. Compliance with the undertaking will be monitored, and it may be a condition of the undertaking that its terms be published to allow monitoring to be effective. Undertakings may be used where there is a high level of confidence in the business's willingness and ability (through management control) to correct breaches and where the breach is not so serious as to attract the presumption of prosecution.

9.0 ENFORCEMENT ORDER

- 9.1 Injunctive orders (subject to penal notices for breach) may be sought in the county court in relation to businesses who breach legislative requirements specified for the purposes of part 8 of the Enterprise Act 2002. In most cases an order will be sought from the court in circumstances where a business has given an undertaking which it has subsequently breached. In exceptional circumstances an interim order may be sought without consulting with the business to obtain undertakings in the first instance. This action would only be taken in cases involving civil breaches of legislation leading to significant financial detriment to one or more consumers and where there is risk of continued breaches if the business is not subject to an immediate interim injunction. The precise terms of any order, including the length of imprisonment in the event of breach, will be set by the court after hearing evidence and representations from both sides.

10.0 SIMPLE CAUTION

10.1 A simple caution, where a business admits an offence but receives no penalty, may be administered for minor criminal breaches where there is sufficient evidence to prosecute but it would not be in the public interest to do so. A record of the caution is kept on file and may be cited in a court if further offending occurs. If a trader refuses the offer of a caution the decision on what action to take will be reviewed and it likely that prosecution will follow.

11.0 PROSECUTION

11.1 Prosecution is a serious, but sometimes necessary and proportionate, response to breaches of legislative requirements. The decision to prosecute will be taken in accordance with the Code for Crown Prosecutors. The service will not prosecute when there is insufficient evidence to make a conviction more likely than not and when it is not in the public interest to do so.

11.2 Where offending is of a sufficiently serious or persistent nature a prosecution will be taken without warning and without the use of alternative sanctions. There will be a presumption of prosecution in the following circumstances:

- a. Deceptions or frauds contrary to the Theft Act 1968 or the Fraud Act 2006.
- b. Use of practices specified in schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).
- c. Use of other unfair practices within the meaning of regulation 3 of CPRs which materially distort, or are likely to, the economic behaviour of the average consumer to the significant financial detriment of consumers. Such detriment may be significant if it is a large sum lost by one or more consumers or a smaller sum lost by many consumers.
- d. Other situations where it is evident that the trader has exploited a vulnerable characteristic of the victim.
- e. Failing to treat or otherwise causing unnecessary suffering to livestock, or transporting or causing unfit livestock to be transported.
- f. Offences committed under the Trade Marks Act 1994 or the Copyright, Designs & Patents Act 1988 involving the manufacture of counterfeit items, the sale of such items to consumers who were misled, or the sale or possession for sale of significant quantities of such items.
- g. Breach of a weight restriction order in relation to a bridge or road situated in North Yorkshire.
- h. Obstruction of authorised officers of the service in the lawful execution of their duties.

11.3 On very infrequent occasions prosecutions may be taken on points of law where

the evidential test is not necessarily met but the public interest in settling the point of law is such that the action is warranted.

Initial equality impact assessment screening form (As of October 2015 this form replaces 'Record of decision not to carry out an EIA')			
This form records an equality screening process to determine the relevance of equality to a proposal, and a decision whether or not a full EIA would be appropriate or proportionate.			
Directorate	BES		
Service area	Trading Standards		
Proposal being screened	Trading Standards Enforcement Policy		
Officer(s) carrying out screening	Jo Bouflower		
What are you proposing to do?	Revise the existing policy to ensure that it is current, clear and transparent.		
Why are you proposing this? What are the desired outcomes?	It is some years since the policy was last revised and there are now additional sanctions and enforcement methods available to trading standards services. There are also additional or revised statutory codes of practice and guidance which should be taken into account in reaching enforcement decisions.		
Does the proposal involve a significant commitment or removal of resources? Please give details.	No, the trading standards budget includes resources for enforcement work and this will remain the same.		
Impact on people with any of the following protected characteristics as defined by the Equality Act 2010, or NYCC's additional agreed characteristic As part of this assessment, please consider the following questions:			
<ul style="list-style-type: none"> To what extent is this service used by particular groups of people with protected characteristics? Does the proposal relate to functions that previous consultation has identified as important? Do different groups have different needs or experiences in the area the proposal relates to? 			
If for any characteristic it is considered that there is likely to be a significant adverse impact or you have ticked 'Don't know/no info available', then a full EIA should be carried out where this is proportionate. You are advised to speak to your Equality rep for advice if you are in any doubt.			
Protected characteristic	Yes	No	Don't know/No info available
Age		X	
Disability		X	
Sex (Gender)		X	
Race		X	
Sexual orientation		X	
Gender reassignment		X	
Religion or belief		X	
Pregnancy or maternity		X	
Marriage or civil partnership		X	
NYCC additional characteristic			
People in rural areas		X	
People on a low income		X	
Carer (unpaid family or friend)		X	
Does the proposal relate to an area where there are known inequalities/probable impacts (e.g. disabled people's access to public transport)? Please give details.	No		
Will the proposal have a significant effect on how other organisations operate? (e.g.	No		

<p>partners, funding criteria, etc.). Do any of these organisations support people with protected characteristics? Please explain why you have reached this conclusion.</p>				
<p>Decision (Please tick one option)</p>	<p>EIA not relevant or proportionate:</p>	<p>X</p>	<p>Continue to full EIA:</p>	
<p>Reason for decision</p>	<p>There is no reason to believe that the change brought about by this policy will impact on any user groups negatively.</p>			
<p>Signed (Assistant Director or equivalent)</p>	<p><i>Matt O'Neill</i></p>			
<p>Date</p>	<p><i>19 November 2019</i></p>			