

LAND AND ENVIRONMENT SERVICES

ENVIRONMENTAL HEALTH

ENFORCEMENT POLICY: PROHIBITION OF SMOKING

- **The Smoking, Health and Social Care (Scotland) Act 2005 (as amended)**
- **The Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006**
- **The Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016**
- **The Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016 (Fixed Penalty Notices) Regulations 2016**

1. Introduction

Glasgow City Council aims to ensure compliance with the prohibition of smoking in areas designated by the Smoking, Health and Social Care (Scotland) Act 2005 [the 2005 Act] (as amended by Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016) and the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 and by the Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016 [the 2016 Act]. The prohibition of smoking legislation is enforced by Land and Environment Services, Environmental Health.

The Service seeks to adopt a fair and balanced approach to the enforcement of this legislation and to apply the principles of better regulation. Where possible, an informal, advisory approach will be used to ensure that businesses and members of the public are aware of their legal responsibilities and comply as required. However, formal means of enforcement such as fixed penalty notices and prosecution will be used where necessary to ensure that the principal objective of compliance with the above legislation is achieved. In the enforcement of this legislation Land and Environment Services aims to actively promote the joint Glasgow City Council and NHS Greater Glasgow & Clyde 'Tobacco Strategy and Action Plan'.

The approach to enforcement reflects the guidance currently issued by the Scottish Government and the range of powers made available by the Acts and associated Regulations and the Glasgow Tobacco Strategy. The premises and vehicles to be regulated will be as determined in the Schedule to the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006, Section 108 of National Health Service (Scotland) Act 1978 and Section 4 of the Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016 respectively.

Enclosed, or substantially enclosed, premises are those with a roof or ceiling where permanent openings in the premises have an aggregate area of less than 50% of the total area of the walls. It should be noted that Glasgow City Council consider a wall or structure that is within 2m of the roof or ceiling as serving the purpose of a wall when calculating permanent openings.

A Private Motor Vehicle is a car or any other motor vehicle used primarily for the private purposes of the person who owns it or has the right to use it (i.e. not a commercial vehicle).

Various means are used to ensure that persons having the management or control of no-smoking premises (the duty holders) meet their responsibilities and persons who smoke in no-smoking premises are dealt with appropriately. This includes education, advice, guidance, warning letters, fixed penalty notices and prosecution. Enforcement procedures for this legislation are governed by the principles of proportionality in applying the law and securing compliance, consistency of approach, targeting of enforcement action, transparency about its enforcement and accountability for all enforcement action. Such principles are nationally recognised by all governmental enforcement agencies.

In addition, the principles contained within the Cabinet Office enforcement concordat, to which this Local Authority is a signatory, will be adhered to.

2. Purpose

This document aims to establish the enforcement options available to the Service in relation to the prohibition of smoking and to define the courses of action appropriate in specific instances.

3. Policy Contents

This document covers enforcement in the following areas:

- Proportionality – Enforcement Options (Section 4.1)
- Targeting of Enforcement (Section 4.2)
- Consistency in Application of Enforcement Options (Section 4.3)
- Transparency (Section 4.4)
- Accountability (Section 4.5)
- Verification of the Enforcement Policy (Section 5)

4. Prohibition of Smoking Enforcement Policy

This Service believes in firm but fair enforcement of the law which should follow the principles of proportionality in applying the law and securing compliance; consistency of approach; targeting of enforcement action; transparency about how a regulator operates and what those regulated may expect; and accountability for regulatory actions.

When determining the type of enforcement action to take, Authorised Officers of the Service shall have regard to the nature of the breach and the history of compliance of the business operator. Additionally, consideration shall be given to the said operator's willingness to undertake necessary works.

4.1 Proportionality (Enforcement Options)

The first enforcement option that shall be considered is an informal approach. Where formal action is considered appropriate, other than in the most flagrant breaches of the legislation, this Service shall take a phased, escalating approach: a formal written warning will be issued for the first noted offence; the person(s) permitting smoking will be issued with a fixed penalty notice for a second incident of non-compliance; the person(s) permitting smoking and individual smokers will be issued with fixed penalty notices should subsequent non-compliance be noted with a report to the Crown Office and Procurator Fiscal Service for any noted non-compliance thereafter.

4.1.1 Informal Approach

4.1.1.1 An informal approach shall be considered as the primary option in the following circumstances:

- Where formal action is not proportionate to the risk to public health; and/or,
- Where it appears that an informal approach will successfully achieve compliance.

Informal action shall consist of verbal or written advice and shall be taken when the following circumstances are found:

- The breach of law is relatively minor, e.g. signage is too small or incorrectly positioned, etc.; and/or,
- The past record of the premises suggests that informal action will achieve compliance; and/or,
- Confidence in management is at an acceptable level; and/or, and/or,
- There is an appropriate written Smokefree Policy and implementation procedure.

Such advice when written shall be separate from, and in addition to, any correspondence detailing breaches of food safety and health and safety legislation.

4.1.1.2 An informal approach shall not be considered as appropriate in the following circumstances:

- Where formal action is proportionate to the risk to public health; and/or,
- Where it appears that an informal approach will not successfully achieve compliance.

4.1.2 Formal Written Warning

4.1.2.1 A formal written warning will be considered as the primary option in the following circumstances:

- Where formal action is proportionate to the risk to public health; and/or,
- Where it appears that an informal approach will not successfully achieve compliance.

A formal written warning may be issued to a duty holder where there is a contravention of Sections 1, 2, 3, 4A, 4B or 4C of the 2005 Act. Where a formal written warning has been issued in respect of licensed premises to a person other than the licensee, a copy must also be sent to the licensee.

After the issue of the formal Written Warning the officer should make arrangements to revisit the premises in the near future.

4.1.2 Fixed Penalty Notices (FPN)

4.1.2.1 A FPN will be considered as the primary option in the following circumstances:

- Where formal action is proportionate to the risk to public health; and/or,
- Where it appears that an informal approach will not successfully achieve compliance; and/or,
- Where it is determined that a written warning is not proportionate to the offense.

A fixed penalty notice shall be issued where there is a flagrant disregard for the law, in particular Sections 1 or 4a of the Act. (At the present time we will not be issuing FPNs to individual smokers in the first instance but only as part of a phased escalation of enforcement.) Such notices do not require the prior issue of a written warning.

In such instances, the FPN shall be served on the duty holder. To ensure the safety of the officer concerned, an FPN need not be served at the time of the offence but shall be served or issued no later than the next working day. Where a FPN has been issued in respect of licensed premises to a person other than the licensee, a copy must also be sent to the licensee.

An FPN may be served by two officers on the Duty Holder in person or issued by a combination of recorded delivery and first class post.

It is also appropriate to issue a Fixed Penalty Notice with regard to premises where a Formal Written Warning has previously been issued in respect of evidence of smoking or lack of or defective signage.

4.1.2 Report to Crown Office and Procurator Fiscal Service (COPFS)

4.1.2.1 A report to the Procurator Fiscal will be considered as the primary option in the following circumstances:

- Where formal action is proportionate to the risk to public health; and/or,
- Where there is a pattern of repeated non-compliance (i.e. where there is blatant non-compliance following the issue of a FPN); and/or,
- Where false information has been wilfully supplied, where there has been intent to intentionally obstruct or deceive authorised officers lawful course of their duties; and/or,
- Where it is determined that the person in control of the premises has demonstrated such a serious or persistent disregard for the law that the offense merits report to COPFS.

4.1.2.2 Failure to pay a FPN shall not be referred to the Procurator Fiscal but instead shall be addressed by means of the decree arbitral process (as recommended in Scottish Government Guidance).

4.2 Targeting of Enforcement

The relative inspection programmes are comprised of the following elements:

Smoking, Health and Social Care (Scotland) Act 2005 (as amended)

- Planned general inspections
- Planned targeted surveys or enforcement initiatives
- Investigations of complaints and requests for service
- Provision of advice
- Visits to new premises
- Revisits to check.

Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016

- Roadside inspections
- Investigations of complaints and requests for service
- Provision of advice

4.2.1 Proactive Interventions

The Service shall ensure that interventions are targeted on premises whose activities give rise to the most serious risk of non-compliance; inspections shall focus on premises that are open to substantive numbers of people, premises in which people may remain for a considerable period of time and where there is perceived to be an absence of controls. In addition, officers will carry out 'smokefree' inspections during their normal day to day duties over a wide range of new and existing premises.

It is **not** the policy of this Service to give prior notice of visits.

Actions shall be focused on duty holders who are responsible for implementation of the prohibition of smoking within premises and enforcement action will be directed against the duty holder responsible for the breach.

4.2.1.1 Planned Inspection

Compliance with the 2016 Act will be incorporated into existing Roadside Testing. This will yield in excess of 3,500 inspections per annum.

Compliance with the 2005 Act will continue to be included as part of routine inspection of commercial premises. This includes new premises and currently yields in excess of 4,000 inspections per annum.

4.2.1.2 Enforcement Initiatives

Premises shall be selected based on their activities or where intelligence from the Scottish Government, Police Scotland, NHS Greater Glasgow and Clyde health board or other local authorities suggests further action is necessary. Alternatively, areas of the city substantially populated by commercial premises to which the public have access may be targeted.

4.2.2 Request for Service

4.2.2.1 Allegations of non-compliance received from members of the public will, wherever possible, be investigated within 5 working days.

4.2.2.2 Requests for advice received from proprietors (or prospective proprietors) of commercial premises will be responded to within 5 working days; in the first instance, contact will be made by telephone or email with visits to premises conducted if deemed necessary.

4.3 Consistency in Application of Enforcement Options

Duty holders managing similar premises can expect a consistent approach in terms of advice given and action taken. The Service endeavours to take a similar approach in similar circumstances to achieve similar ends; this does not mean uniformity.

When contacting duty holders, officers of the Service shall consider the seriousness of any non-compliance, the attitude of the duty holder and their ability to comply in addition to the previous enforcement history of the duty holder when determining the appropriate Enforcement Option. To achieve consistency, each authorised officer involved in the enforcement of this legislation is aware of and has access to the appropriate policy documents which are available electronically. These documents detail the appropriate practices and procedures to be adopted by all authorised officers.

The amendment to the 2005 Act (which creates the offences of permitting others to smoke outside hospital buildings; smoking outside hospital buildings; and, failure to conspicuously display warning notices in hospital buildings and on grounds) will be enforced in a consistent manner to the existing offences in the 2005 Act.

4.4 Transparency

The Service shall assist duty holders (i.e. persons having the management or control of no-smoking premises or operators of motor vehicles where a child or children are passengers) to understand what is expected of them and what they should expect from this Service. This includes making clear to such persons not only what they have to do but, where relevant, what they don't. This means distinguishing between statutory requirements and advice or guidance about what is desirable but not compulsory.

In pursuance of this policy the following arrangements are in place:-

- All correspondence clearly differentiates between statutory requirements and recommendations and includes the inspecting officer's name and contact details;
- All verbal communications clearly differentiate between statutory requirements and recommendations;
- How to pay and appeal procedure are printed on every fixed penalty notice.

4.5 Accountability

The Service shall be publically accountable for any action taken or not taken.

To this end, procedures have been developed and are implemented to ensure that:

- Recipients of correspondence are advised who to contact in the event that they are dissatisfied with the actions of the Service;
- Any complaint arising from such dissatisfaction is suitably investigated and a response issued.

5 Review

This enforcement policy will be updated and reviewed after one year or earlier if thought necessary or if directed by the Scottish Government.