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<b>Health &amp; Safety Enforcement Policy</b>  FOH H0	<b>Revision No:</b> 1 <b>Date:</b> June 2009 <b>Authorised Signature:</b>  .....

**1. Purpose**

This document establishes the Health and Safety Enforcement Policy and Procedures of Allerdale Borough Council.

**2. Application**

This policy and procedure will be implemented by the Environmental Health Unit Manager (EHUM) with the support and co-operation of the Food and Occupational Health Team.

**3. References**

HSE Enforcement Policy Statement  
HSE Enforcement Management Model  
HSE Section 18 Guidance  
Legislative and Regulatory Reform Act 2006

**4. Policy**

It is the Council's policy to ensure its approach to enforcement is consistent with HSE Statement on Enforcement Policy. This statement sets out the general principles and approach which the Executive expects enforcing authorities to follow.

**5. Procedures**

In relation to health and safety it is the Council's aim to protect the health, safety and welfare of people at work, and to safeguard others, mainly members of the public who may be exposed to risk from the way work is carried out. It will achieve this by education, providing advice and by regulating the activities of duty holders to manage and control risks effectively. An important part of this is to use enforcement powers to secure compliance with legal requirements.

Enforcement applies to all dealings between enforcing authorities and those on whom the law places duties.

The purpose of enforcement is to:-

- ensure that duty holders take action to deal immediately with serious risks
- promote and achieve sustained compliance with the law

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- ensure that duty holders who breach health and safety requirements, and directors or managers who fail in their responsibilities may be held to account, which may include bringing alleged offenders before the courts

**Intervene** – to assess, promote and ensure compliance with the law, to deal immediately with serious risk and to prevent accidents and ill health from occurring.

**Investigate** – after an incident to identify underlying causes and the lessons to be learned, prevent recurrence, detect breaches and take appropriate action.

**Permission** – to ensure that appropriate licenses are in place where the law requires close control of those activities where the potential for significant health impairment is high.

**Taking action** – to ensure that action is taken that is proportionate to the risk.

Enforcement of criminal law is distinct from civil claims for compensation. Although enforcement action may not be taken civil claims may be appropriate. Enforcement is not intended to assist claims for compensation.

The term enforcement has a wide meaning and applies to all dealings between the Council and those on whom health and safety law places duties, employers, the self employed, employees and others.

Authorised inspectors seek to secure compliance with the law and to ensure a proportionate response to criminal offences. Inspectors may offer duty holders advice and support, both face to face and in writing. This may include warning a duty holder that in the opinion of the inspector, they are failing to comply with the law. Where appropriate inspectors may also serve improvement and prohibition notices, issue simple cautions and they may prosecute.

The appropriate use of enforcement powers is important, both to secure compliance with the law and to ensure that those who have duties under it may be held to account for failure to safeguard health, safety and welfare.

Authorised inspectors when judging compliance with the law take into account relevant codes and guidance, use sensible judgement about the extent of the risks and the effort that has been applied to counter them. The Council has a published Enforcement Policy

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## The Principles of Enforcement

The Council believes in firm but fair enforcement of health and safety law. We shall follow the principle of **proportionality** in applying the law, securing compliance, and will be **consistent** in approach and **targeting** of enforcement action.

We operate in a **transparent** manner and are **accountable** for our actions.

### Proportionality

Proportionality means relating enforcement action to the risks. Those whom the law protects and those on whom it places duties (duty holders) expect that action taken by enforcing authorities to achieve compliance or bring duty holders to account for non-compliance should be proportionate to any risks to health and safety, or to the seriousness of any breach, which includes any actual or potential harm arising from a breach of the law.

We will take particular account of how far the duty holder has fallen short of what the law requires and the extent of the risks to people arising from the breach.

Some health and safety duties are specific and absolute. Others require action so far as is reasonably practicable. We will apply the principle of proportionality in relation to both kinds of duty.

Deciding what is reasonably practicable to control risks involves the exercise of judgement. Where duty holders must control risks so far as is reasonably practicable, we will when considering protective measures taken by duty holders take account of the degree of risk and the sacrifice needed whether in money, time or trouble on the measures necessary to avert the risk. Unless it can be shown that there is gross disproportion between these factors and that the risk is insignificant in relation to the cost, the duty holder must take measures and incur costs to reduce the risk.

We will expect relevant good practice to be followed. Where relevant good practice in particular cases is not clearly established, health and safety law effectively requires duty holders to establish explicitly the significance of the risks to determine what action needs to be taken. Ultimately, the courts determine what is reasonably practicable in particular cases.

Some irreducible risks may be so serious that they cannot be permitted irrespective of the consequences.

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As far as the law allows, we will take account of the circumstances of the case and the attitude of the operator when considering action, in effect how far the duty holder has fallen short of what the law requires and the extent of the risks to people arising from the breach.

**Consistency**

Consistency of approach does not mean uniformity. It means taking a similar approach in similar circumstances to achieve similar ends.

Duty holders managing similar risks expect a consistent approach from enforcing authorities in the advice tendered, the use of enforcement notices, approvals etc, decisions on whether to prosecute and in the response to incidents.

We recognise that in practice consistency is not a simple matter. Inspectors are faced with many variables including the degree of risk, the attitude and competence of management, any history of incidents or breaches involving the duty holder, previous enforcement action, and the seriousness of any breach, which includes any potential or actual harm arising from a breach of the law. Decisions on enforcement action are discretionary, involving judgement by the enforcer. We have arrangements in place to promote consistency in the exercise of discretion, including arrangements for liaison with other enforcing authorities.

The Council has arrangements in place to promote consistency in the exercise of discretion, including effective arrangements for liaison with other enforcing authorities.

**Transparency**

Transparency means helping duty holders to understand what is expected of them and what they should expect from enforcing authorities. It also means making clear to duty holders not only what they have to do but, where this is relevant, what they don't. That means distinguishing between statutory requirements and advice or guidance about what is desirable but not compulsory.

Transparency also involves the enforcing authorities in having arrangements for keeping employees, their representatives,, and victims or their families informed. These arrangements must have regard to legal constraints and requirements.

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**Targeting**

Targeting means making sure that contacts are targeted primarily on those whose activities give rise to the most serious risks or where the hazards are least well controlled; and that action is focused on the duty holders who are responsible for the risk and who are best placed to control it.

We will have systems for deciding which inspections, investigations or other regulatory contacts should take priority according to the nature and extent of risks posed by a duty holder’s operations.

The duty holder’s management competence is important, because a relatively low hazard site poorly managed can entail greater risk to workers or the public than a higher hazard site where proper and adequate risk control measures are in place.

Any enforcement action will be directed against duty holders responsible for a breach. This may be employers in relation to workers or others exposed to risks, the self employed, owners of premises, suppliers of equipment, designers or clients of projects, or employees themselves. Where several duty holders have responsibilities, enforcing authorities may take action against more than one when it is appropriate to do so in accordance with this policy.

When inspectors issue improvement or prohibition notices, issue simple cautions or prosecute, we will ensure that a senior officer of the duty holder concerned, at board level, is also notified.

We will ensure resources are targeted primarily on those whose activities give rise to the most serious risks or where the hazards are least well controlled. Action will be focused on the duty holders who are responsible for the risk and who are best placed to control it – whether employers, manufacturers, suppliers or others.

The Council follows a national priority rating system for inspections. Separate procedures are available for accident and complaint investigations.

**Accountability**

Authorised Inspectors are accountable to members, the public and Parliament for their actions. We have policies and procedures against which we can be judged, and an effective accessible mechanism for dealing with comments and complaints.

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## **Investigation**

The Council authorises inspectors to carry out the duties it has decided they are trained and competent to do. Current legislation, approved codes of practice and technical guidance will be available for reference.

The council will use its discretion in deciding whether incidents, cases of ill health or complaints should be investigated. This is detailed in our service plan and accident and incident policy.

We investigate to determine:

- Causes
- Whether action has been taken or needs to be taken to prevent recurrence and to secure compliance with the law
- Lessons to be learnt and to influence the law and guidance
- What response is appropriate to a breach of the law.

To maintain a proportionate response it is neither possible nor necessary for the purposes of the HSW Act to investigate all issues of non-compliance with the law which are uncovered in the course of preventative inspection, or in the investigation of reported events.

We will carry out a site investigation of a reportable work related death, unless there are specific reasons for not doing so, in this instance the reasons for the decision will be recorded.

## **Prosecution**

While the primary purpose of the enforcing authorities is to ensure that duty holders manage and control risks effectively, thus preventing harm, prosecution is an essential part of enforcement.

Enforcing authorities must use discretion in deciding whether to bring a prosecution. Where the circumstances warrant it and evidence to support a case is available, enforcement authorities may prosecute without prior warning and recourse to alternative sanctions.

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The decision to prosecute should have regard to the evidential and public interest tests set down in England and Wales by the Director of Public Prosecutions in the Code for Crown Prosecutors.

Prosecutions will only be considered when there is sufficient evidence to provide a realistic prospect of conviction and that prosecution would be in the public interest.

Subject to these two tests the Council will normally prosecute where one or more of the following apply:-

- Death was a result of a breach of the legislation.
- The alleged offence was extremely serious. This will take into account the seriousness of any actual or potential harm, and the general record and approach of the offender.
- There has been reckless disregard of health and safety requirements.
- There have been repeated breaches which give rise to significant risk or persistent and significant poor compliance.
- A duty holder's standard of managing health and safety is found to be far below what is required by health and safety law and to be giving rise to significant risk.
- Work has been carried out without or in serious compliance with an appropriate licence or safety case.
- There has been a failure to comply with an Improvement or Prohibition Notice or there has been a repetition of a breach that was subject to a simple caution.
- Inspectors have been intentionally obstructed in the lawful course of their duties.
- False information has been wilfully supplied, or there has been an intent to deceive, in relation to a matter which gives rise to significant risk.

Furthermore the council will consider prosecution where, following an investigation or other regulatory contact, the following apply:

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- The prosecution is a way to draw general attention to the need for compliance with the law and the maintenance of standards required by law, and conviction may deter others from similar failures to comply with the law.
- A breach which gives rise to significant risk has continued despite relevant warnings from employees, or their representatives, or from others affected by a work activity.

If resources are limited the above have been placed in order of priority for action.

Where Authorised Inspectors are assaulted police assistance will be required, with a view to the prosecution of offender.

### **Prosecution of an Individual**

Subject to the above the Council will identify and prosecute individuals if they consider that a conviction is warranted and can be secured. We will consider the management chain and the role played by individual directors and managers and will take action against them where it can be shown that the offence was committed with their consent or connivance or to have been attributable to neglect on their part. Where appropriate, disqualification of directors will be sought under the Company Directors Disqualification Act 1986.

### **Simple Caution**

A simple caution may be used in cases involving first time low level offences where the public interest can be met by a caution.

We will consider whether a caution is appropriate to the offence and the offender, and whether a caution is likely to be effective in the circumstances.

### **Death at Work**

Where there has been a breach of the law leading to a work related death, we will consider whether the circumstances of the case might justify a charge of manslaughter or corporate manslaughter.

Our decisions on investigation and prosecution will follow the 'Work Related Deaths: A Protocol for Liaison' document.

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This protocol has been agreed between the Health and Safety Executive (HSE) the Association of Chief Police Officers (ACPO) and the Crown Prosecution Service (CPS). It sets out the principles for effective liaison between the British Transport Police, the Local Government Association and the Office of Rail Regulation in relation to work related deaths.

The police are responsible for deciding whether to pursue a manslaughter or corporate manslaughter investigation and whether to refer a case to the CPS to consider possible manslaughter charges.

We are responsible for investigating possible health and safety offences. If in the course of our investigation we find evidence to suggest manslaughter or corporate manslaughter it will be forwarded to the police. If the police or CPS decide not to pursue a manslaughter or corporate manslaughter case, we will normally bring a health and safety prosecution in accordance with this policy.

**Publicity**

Arrangements are in place on the HSE website for the publication annually of the names of all the companies and individuals who have been convicted in the previous 12 months of breaking health and safety law. The Council will normally issue a press statement following conviction and inform the HSE.

We will keep a register of all Improvement and Prohibition notices which have been issued.

**Action by the Courts**

Health and safety law gives the courts considerable scope to punish offenders and to deter others, including imprisonment for some offences.

The Council when appropriate during a prosecution will draw the court’s attention to the Court of Appeals guidance on the factors which should inform sentencing in health and safety cases, that is fines must be large enough to reflect the seriousness of the offence (R v F Howe and Son (Engineers) Ltd [1999] 2 ALL ER).

Where the case is of sufficient seriousness, the Council will indicate to the magistrates that the offence is so serious that they may refer it to be heard or sentenced in the higher court where higher penalties can be imposed. We will have regard to the Court of Appeal guidance before asking for a referral.

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In our judgement magistrates should always think carefully before accepting jurisdiction in health and safety work cases, where it is arguable that the fine may exceed the limit of their jurisdiction or where death or serious injury has resulted from the offence.

### **Section 3 of the Health and Safety at Work etc Act 1974**

Section 3 of the HSW Act places general duties on employers and the self employed towards people other than their employees. We will:

- enforce section 3 in the key areas identified in our service plans and incident selection criteria
- take account of HSE's priorities and, generally, give less priority to the enforcement of section 3 in areas outside these priorities.

### **Working with other regulators**

There are many situations where work activities that may give rise to risks to health and safety are regulated by other authorities using legislation that may address circumstances which are also relevant to health and safety at work issues.

- We will, in accordance with the Regulators Compliance Code and the regulatory principles required under the Legislative and Regulatory Reform Act (2006), try to ensure that, wherever practicable, enforcement action by the health and safety enforcing authorities is effectively co-ordinated with that of other, relevant enforcing authorities to minimize unnecessary overlaps and time delays.

However, initial enquiries or information from other sources, may indicate that a breach of section 3 was or is the probable cause of, or a significant contributory factor to, the injury or risk complained of. In such circumstances, we and other enforcing authorities will consider investigating if:

- there was or is a high level of risk; or
- enforcing authorities need to act/investigate in the interests of justice.

### **Deciding which authority will lead an investigation**

There may be, however, a relevant health and safety interest in some aspects of a work activity covered by specific legislation, would seek to agree with other authorities who should take the lead on an investigation (to avoid unnecessary overlaps and time delays) and where there may be a need to act alongside each other, which activities are most appropriately dealt with by each authority.

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The following principles will be considered on who is best to lead on an investigation:

- Effectiveness: Which authority is best equipped, including appropriate powers to investigate the alleged risks?
- Capability: Is the other body capable of ensuring public safety? Does it have the enforcement powers necessary to do so?
- Health and safety expertise: Which body knows most about the risks concerned and the effective control measures?
- Economy: Is either body already inspecting/visiting the premises or activity in question? Can duplicate visits be avoided?
- Efficiency: Is health and safety enforcing authority involvement a good use of resources when considered against the scale of risk or level of public concern?

### **Scope and Application of Section 3 HSWA**

For section 3 to apply:

- there must be a duty holder, either an employee or a self employed person; and
- there must be a risk to the health or safety of a person who is not the employee of the duty holder or the self employed duty holder themselves; and
- that risk must arise from the conduct of the duty holder's undertaking. An 'undertaking' means 'enterprise' or 'business'. NB: Whether a particular activity is part of the conduct of the undertaking is determined by the facts of each case [R v Associated Octel Co Ltd (1996) 4 ALL ER 846]. Although not decisive in every case, whether the duty holder can exercise control over both the conditions of work and where the activity takes place is very important.

HSWA section 3 does not apply to:

- welfare issues (such as the provision of toilets or washing facilities)

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- nuisance or amenity issues that have no health or safety implications (such as unpleasant smells arising from work activities)
- poor workmanship, where trading standards or contractual remedies may exist, unless it has demonstrably compromised health and safety.

Generally we will not get involved in what may be essentially contractual or civil disputes except in cases where death or serious injury has occurred and initial enquiries, or information from other sources, indicate that a breach of section 3 HSWA was the probable cause or significant contributory factor. In such cases:

- our established complaint or incident selection criteria should be used to determine if an investigation is required
- inspectors should take into account the length of time since the work activity took place. Though it should not of itself deter inspectors from investigating, in practice the longer the time lapse, the more difficult it can be to collect evidence and the public interest arguments for action, weaken.

### **Enforcement in premises which the council own but do not occupy**

The council can not take action against itself nor should it be called upon to do so. In respect of premises in which we own but do not occupy:

- Carry out our enforcement policy and practice in exactly the same way we do in all our premises
- Ensure that the attention received is in accordance with the criteria applied to other duty holders.
- Where there is a potential conflict of interest we will discuss the matter with the HSE to determine the appropriate course of action.

### **Working with Others**

We will liaise with and bring areas of concern to the most appropriate body for advice and/or enforcement. Such bodies would include HSE, primary authorities, fire service, adventure activities, licensing service, OFSTED, quality care, children's services.

When there is a lead authority we will contact and if necessary, liaise with them when:

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- we will liaise before taking formal enforcement action, i.e issuing notices, such as an improvement notice, or considering prosecution against a participating organisation, except -
- in the case of immediate danger
- after serving a prohibition notice - consultation will be as soon as is practicable after service
- when significant shortcomings are identified in a participating organisation's agreed policies or procedures which the EA believe ought to be challenged at a national level
- following any on-site investigation of any death, major injury, case of work related ill health or dangerous occurrence reportable under RIDDOR 1995.

Contact with primary authorities is set out in appendix ?

### **Penalties For Health And Safety Offences\***

**The Health and Safety at Work etc Act 1974 (the HSW Act), Section 33** (as amended) sets out the offences and maximum penalties under health and safety legislation.

**Failing to comply with an Improvement or Prohibition Notice, or a Court Remedy Order** (issued under HSW Act, Sections 21, 22 and 42 respectively):

**Lower Court Maximum** £20,000 and/or 12 months imprisonment\*

**Higher Court Maximum** Unlimited fine and/or 2 years imprisonment

\*The sentencing option of 12 months applies in Scotland but will only apply in England and Wales when section 154(1) of the Criminal Justice Act 2003 is enacted.

**Breach of Sections 2-6 and 8 of the HSW Act**, which set out the general duties of employers, self employed persons, persons who have control of premises, or manufacturers and suppliers to safeguard the health and safety of workers and members of the public who may be affected by work activities:

**Lower Court Maximum** £20,000 and/or 12 Months imprisonment\*

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**Higher Court Maximum** Unlimited fine and/or 2 years imprisonment

Breach of section 7 of the HSW Act covers duties of employees:

**Lower Court Maximum** Fine not exceeding statutory maximum and/or 12 months imprisonment

**Higher Court Maximum** Unlimited fine and/or 2 years imprisonment

Most other breaches of the HSW Act , contravening licence requirements and breaches of all health and safety regulations under the Act. Regulations impose both general and more specific duties, such as requirements to carry out a suitable and sufficient risk assessment or to provide suitable personal protective equipment:

**Lower Court Maximum** £20,000 and/or 12 months imprisonment\*

**Higher Court Maximum** Unlimited fine and/or 2 years imprisonment

**On conviction of directors for indictable offences in connection with the management of a company** (all of the above, by virtue of HSWA Sections 36 and 37), the Courts may also make a disqualification order (Company Directors Disqualification Act 1986, Sections 1 & 2). The Courts have exercised this power following health and safety convictions. Health and safety inspectors draw this power to the Court’s attention whenever appropriate.

**Lower Court Maximum** 5 years disqualification

**Higher Court Maximum** 15 years disqualification

For a complete list of penalties refer to Health and Safety (Offences) Act 2008.

### **Health And Safety Enforcement**

At a visit an inspector will leave a copy of ‘What to Expect when a Health and Safety Inspector Calls’ to those they visit.

An Officer will consider the most appropriate course of action during routine inspections or following incidents/accidents or complaints.

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In line with the policy and having regard to the Enforcement Management Model the officer will use his judgement on what action to take that is namely:

- No action
- To give verbal and written warnings
- Serve improvement or prohibition notices
- Serve a simple caution
- To prosecute
- To seize an article or substance
- Any combination of the above

An officer, when using his judgement, will have regard to the legal requirement.

Sometimes the law is prescriptive – spelling out in detail what must be done. However, much of modern health and safety law is goal setting – setting out what must be achieved, but not how it must be done. Advice on how to achieve the goals is often set out in Approved Codes of Practice (ACOPs).

These give practical advice on compliance and have a special legal status. If someone is prosecuted for a breach of health and safety law and did not follow the relevant provisions of an ACOP, then the onus is on them to show that they complied with the law in another way. Advice is also contained in other HSE and LACORS guidance material describing good practice. Following this guidance is not compulsory, but doing so is normally enough to comply with the law. Neither ACOPs nor guidance material are in terms which necessarily fit every case. In considering whether the law has been complied with, inspectors will need to take relevant ACOPs and guidance into account, using sensible judgement about the extent of the risks and the effort that has been applied to counter them.

### **Information Given to Employees**

The officer will consult and notify employees on matters that affect their health and safety and welfare. This information shall be factual and detail the action taken by the officer, it will not divulge confidential matters or trade secrets.

### **Verbal Advice and Letters**

The circumstances when it is appropriate to use verbal advice and written warnings are:-

- The risk gap is minor
- The act or omission is not serious enough to warrant formal action

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- From the individuals/business compliance it can be reasonably expected that the warning will achieve compliance
- There is no deliberate economic advantage being sought
- Confidence in the management is high
- The consequence of non-compliance will not pose a significant risk to health and safety
- Even where some of the above criteria are not met, there may be circumstances in which a warning will be more effective than a formal approach

A record will be made on file of verbal warnings or on the report of visit form.

The inspector will tell the duty holder what to do to comply with the law, explain why and distinguish legal requirements from best practice. Inspectors will, on request, confirm any advice or legal requirements in writing detailing the above.

An inspector will not specify a lower standard than that prescribed by legislation.

The inspector will agree a timescale for compliance at the visit or will put a timescale for compliance in the letter.

### **Improvement Notice**

Served when an authorised inspector is of the opinion that there is a contravention of the law at the time of the visit or that there had been a contravention and that it is likely that the contravention will continue or be repeated.

An inspector will consider:-

- The risk gap assessment.
- The seriousness of the legal contravention.
- Whether the employer appears deliberately unwilling to recognise their responsibilities and those who may be affected by their actions.
- Whether the duty holder has a history of non-compliance with verbal and written warnings.

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- Whether deliberate economic advantage has been sought.

The inspector will discuss the notice and if possible, resolve points of difference before serving it. The notice will say what needs to be done, why and by when. Timescales will be realistic.

Improvement notices will be served by authorised officers based on their opinion.

Failure to comply with the notice will generally result in court proceedings.

### **Prohibition Notices**

These can only be issued when the Authorised Inspector is of the opinion that there is or will be a risk of serious personal injury, which includes risk to health. They can be issued to have immediate or deferred effect.

There does not have to be a breach of a statutory requirement before a prohibition notice can be issued but an inspector who thinks there has been should specify it in the notice. In circumstances when a Prohibition Notice would be necessary but the person in control of the activity has assured the inspector that he will remove the risk, this will be sought in writing.

The inspector will, where practicable, discuss why he is serving the notice and take the employer's views into account. The legal implications of non-compliance will be explained. Where the notice is issued the inspector will provide a written explanation of the reasons for the action.

### **Appeals**

Every notice will have written information on how to appeal, explaining how, where and within what period an appeal may be brought. An improvement notice is suspended while an appeal is pending, and that businesses can apply to an Employment Tribunal for a prohibition notice to be suspended pending the outcome of an appeal.

### **Public Register**

A public register will be kept and maintained by the Council of notices served which affect the public who are not employees of that workplace in accordance with the Environment and Safety Information Act 1988.

Entries will be made 14 days after the time limit for appeal of the notice has passed providing no appeals have been made or 14 days after an appeal that has determined that

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the notice should not be cancelled. The register is kept with the Team Leader in the Food and Occupational Health Department.

**Serving Notices and Prosecutions**

Both taking a prosecution and serving a notice may be appropriate when:

- (a) a situation may be so hazardous that even with a prohibition notice, prosecution may result.
- (b) prosecution is taken owing to the circumstance of an accident, a notice may be used to enforce the remedy.

Information will not be laid until after the appeal period for a notice has passed and any appeal has been heard.

**Power to Deal with any Article or Substance which is a Cause of Imminent Danger**

Articles or substances may be seized and rendered harmless if an Authorised Officer is of the opinion that it was the cause, or there is likely to be an immediate danger of serious personal injury.

**Reviewing the Policy**

The Health and Safety Enforcement Policy will be reviewed in 2 years time or sooner if there is a change made by the Health and Safety Executive to their enforcement policy.

**Complaints**

If you have a complaint that this policy has not been followed you can contact the Environmental Health Unit Manager to discuss. If you are still not satisfied you can use the local authority's formal complaint procedure.