

Smokefree Enforcement Policy



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Smokefree Enforcement Policy for Cumbrian Local Authorities

1. Introduction and Aims

- 1.1 The Health Act 2006 introduces a requirement for premises, places and vehicles to be smoke free. These provisions take effect from 6am on 1 July 2007 and apply to enclosed and substantially enclosed workplaces, public places, work vehicles and public transport. The premises to which these requirements apply are defined by regulations made under the Act.
- 1.2 The aim of the law is to protect people working in or visiting enclosed and substantially enclosed workplaces and public places from exposure to second hand smoke.
- 1.3 This policy applies across the Cumbrian authorities of South Lakeland, Eden, Barrow, Allerdale, Copeland and Carlisle. The aim of this policy is to assist individuals and organisations within the region to understand their responsibilities under smokefree legislation and to ensure that regulatory authorities take a consistent, fair and proportionate approach to enforcement.

1.4 The Policy

- 1.5 This policy outlines a common approach to the enforcement of smokefree legislation which has been agreed by all the local authorities during a period of consultation. It lays down the principles which will be followed when deciding upon and taking enforcement action. The policy is available to businesses and consumers on all of the participating authorities' web sites and is available in paper format on request.
- 1.6 Regulators will take all reasonable steps to assist businesses and individuals to comply with the law. However they will be prepared to ensure compliance by exercising the formal powers available to them under the provisions of the Health Act 2006 and the Regulations made under it.
- 1.7 In exercising their powers, regulators will also have regard to their individual authority's enforcement policy which is based on the Enforcement Concordat principles comprising standard setting; openness; helpfulness; well publicised, effective and timely complaints procedures; proportionality and consistency.
- 1.8 The policy also follows the principles of the Hampton and Macrory reports, taking into account the obligations of the draft code of practice for regulators:
 - supporting economic progress
 - using risk assessment to focus regulatory activities
 - provision of information and advice
 - risk-based inspections
 - application of appropriate compliance and enforcement actions
 - accountability

2. Overall Approach to Enforcement

- 2.1 Initially an educational, advisory and non- confrontational approach will be taken, both before and for a period of time after the legislation comes into force. Subsequently it will become apparent which businesses are making efforts to comply and which are not.
- 2.2 Where non-compliance is due to misunderstandings or a lack of diligence, then further information, advice and guidance will be provided. However, where it is clear that serious efforts are not being made to comply, or the attitude is un-cooperative or antagonistic, then a decision to take enforcement action will be considered.
- 2.3 It is likely that enforcement actions will attract publicity and public attention and therefore it is important that each decision on enforcement action is properly considered and clearly justified. Where a person is determined to flout the law a robust response will be appropriate.
- 2.4 Enforcement work will be carried out by authorised officers who are trained and competent to carry out duties to secure compliance with the smokefree legislation.

3. Inspections

- 3.1 Inspections carried out by enforcement officers to achieve compliance will either be proactive or reactive:

3.2 Proactive Inspections

- 3.3 The aim of proactive inspections is to advise businesses and to confirm compliance with the legislation. Where practicable, advice and information will be provided in a common format across the region. Proactive inspections will be risk-based using a comprehensive premises database which allows programmed visits to focus on premises including:

- Those where it has previously been customary for people to assume they can smoke
- Those where the occupiers may not realise the law applies to them
- Those where the legislative proposals were altered during the parliamentary process eg private members' clubs
- Those where it is likely that management will wish to make use of the exemption provisions for designated bedrooms and designated smoking rooms
- Those not usually visited as part of a local authority inspection programme ie HSE enforced premises
- Those where it can be anticipated that management may have difficulty in securing compliance or have shown hostility to the introduction of smokefree legislation

3.4 Reactive Inspections

- 3.5 These inspections will be in response to complaints and other intelligence which is received about alleged contraventions of smokefree legislation.
- 3.6 The source of such complaints may be the local authority's own complaints process, other enforcers eg the Health and Safety Executive (HSE), or the National Smokefree Compliance Line. All complaints will be investigated within a timeframe that meets the individual authority's standards for response times.
- 3.7 The frequency of visits will be determined by factors including:
- Complaints received
 - History of compliance
 - Confidence in management
- 3.8 In many cases it will be appropriate and cost effective to incorporate both proactive and reactive inspections into other enforcement work, eg health and safety visits and food hygiene inspections.

4. Enforcement Actions

- 4.1 In accordance with Enforcement Concordat principles, all action taken should be fair, proportional and consistent.
- 4.2 Regulatory officers have the following enforcement options available to them:
- Verbal warning
 - Written warning
 - Fixed Penalty Notice or legal proceedings against an owner, occupier, manager or any other person in charge of no-smoking premises for failing to display no-smoking signs (section 6(5) offence)
 - Fixed Penalty Notice or legal proceedings against an individual smoking in no-smoking premises (section 7(2) offence)
 - Legal proceedings against an owner, occupier, manager or any other person in charge of a no-smoking premises for failing to prevent smoking in a smokefree place (section 8(4) offence) - no fixed penalty for this offence.
- 4.3 Managers of any premises or vehicles that this law applies to, have a legal responsibility to ensure they become and remain smokefree and display all the required no-smoking signs.
- 4.4 Where there is no evidence of smoking in a smokefree place, failure to display correct no-smoking signage will be considered a technical infringement. It is therefore suggested that the educational approach be continued for longer than is normally the case before taking enforcement action. It should also be borne in mind that many businesses are already smokefree and may have been so for a considerable period of time and may not realise the need to display signs.
- 4.5 Simple Cautions (previously known as formal cautions) may be used for the offence of failing to stop a person from smoking in a smokefree place. However

they should not normally be considered for the other offences where Fixed Penalty Notices should always be the preferred first option.

- 4.6 The enforcement flowcharts from the LACORS guidance document 'Implementation of Smokefree Legislation in England' will serve as a useful guide to regulatory officers. These charts are attached in Appendix 2.

5. Enforcement Procedures

- 5.1 Where initial efforts to achieve compliance, using education and advice combined with verbal and written warnings, fail then a more formal enforcement approach is appropriate.

5.2 Fixed Penalty Notices

- 5.3 A Fixed Penalty Notice is a notice which offers a person the opportunity to discharge any liability to conviction for the offence by payment of a fixed penalty.

- 5.4 The Fixed Penalty Notice will be in the form prescribed by the Smokefree (Vehicle Operators and Penalty Notices) Regulations 2007.

- 5.5 Officers will need to ensure that a notice has been properly served. This may require serving immediately on the spot, however if justified, this can be delayed and served at a later date, for example if officer safety is compromised. However to avoid allegations of abuse of process, notices must be served within a reasonable time period and any delay will need to be justified. FPN's will be served within ten working days of the date of the offence. The statutory six months limitation period still applies for undertaking summary proceedings and this period begins from when the offence occurred not from when the notice is served.

- 5.6 A person may request, by giving notice in writing to the council, to be tried for the offence in court instead of paying a fixed penalty. Legal proceedings may then be brought against them before the end of the penalty payment period. If the person changes their mind and then pays the discounted or penalty amount, then the proceedings may not be continued.

- 5.7 There is no right of appeal against the service of a notice but the person on whom the notice is served may ask questions or put forward information that they feel, relevant to the issue of the notice. The Council will appoint a person to whom these questions should be directed. Should such information suggest that for example a notice has been incorrectly issued then the Council may give notice in writing to the person and withdraw the FPN. If any monies have already been paid, these must be repaid.

5.8 Penalties

- 5.9 For the offence of smoking in a smokefree place a fixed penalty of (£50) is prescribed by the regulations. If this penalty is paid, he/she will not be liable for conviction for the offence. A discounted amount of (£30) is payable if the fixed penalty is settled within 15 days.

- 5.10 For the offence of failing to display no smoking signage a fixed penalty of £200 is payable. If this penalty is paid, he/she will not be liable for conviction for the offence. A discounted amount of (£150) is payable if the fixed penalty is settled within 15 days.
- 5.11 Fixed Penalty Notices are only issued where there is adequate evidence to support a prosecution if a notice is not paid and unpaid notices are followed up. Failure to pursue unpaid notices through the courts would discredit the use of fixed penalties in the locality and would lead to declining rates of payment.
- 5.12 Appendix 4 - Fixed Penalty Notice flowchart. Applicable to offences relating to failure to display correct no-smoking signage and smoking in a smokefree place.

5.13 Prosecutions

- 5.14 Prosecution will not be undertaken lightly and discretion must be exercised when deciding if this is the appropriate course of action. Other enforcement approaches may be more effective in securing the desired outcome, however, prosecution remains a cornerstone of enforcement and will be used where appropriate.
- 5.15 Prosecution without prior warning and recourse to other alternative sanctions will only be pursued in exceptional circumstances - for example, where there has been a blatant disregard for the law.
- 5.16 The decision to prosecute will be taken having regard to the advice of the local authority's solicitor. There is a presumption to prosecute in the following circumstances:
- (i) Where there has been a reckless disregard of the law, which has a potentially serious outcome.
 - (ii) Where there has been a blatant disregard of the law, which has placed the offender at economic advantage over those who comply.
 - (iii) Where there is a history of repeated breaches, either at the same site or at multiple sites, or a particular type of offence is prevalent at the site indicating significant management failings.
 - (iv) Failure to comply with legal notices requiring remedial action.
 - (v) Where the contravention has caused particular public concern, eg an incident, which involves a member of the public or young person.
 - (vi) Obstruction or assault on officers of the department in the course of their duties.
 - (vii) Impersonation of an officer to gain unlawful access to business or domestic premises.

5.17 Evidential Matters

- 5.18 When deciding whether to initiate legal proceedings, officers will have regard to the Crown Prosecution Service's guidance in their Code for Crown Prosecutors, in terms of the tests of evidence and public interest.
- 5.19 All evidence will be collected in accordance with the Police and Criminal Evidence Act 1994 and associated codes. Only when there is sufficient admissible and reliable evidence of the offence, and therefore a realistic prospect of conviction, will a case go forward. Cases which fail the evidential test will not proceed. Cases will not, however, be abandoned because they are difficult or conviction is not a complete certainty.

5.20 Public Interest Factors

- 5.21 Enforcement officers will also have to satisfy themselves that a prosecution is in the public interest. Issues relating to the seriousness of the breach and the circumstances of the offender fall into this category.
- 5.22 The following factors will be considered when deciding whether to prosecute:
- (i) The seriousness of the breach and the potential harm which may result.
 - (ii) Was the breach and the events leading up to it foreseeable?
 - (iii) Did the offender intend to commit the offence?
 - (iv) What is the compliance history of the offender?
 - (v) What is the attitude of the offender?
 - (vi) Will the prosecution have a salutary effect on others and encourage compliance with the law?
 - (vii) What are the personal circumstances of the offender?
- 5.23 These factors are not exhaustive and reflect the range of issues which will be considered when deciding if prosecution is the appropriate course of action.

5.24 Offences by Young Persons

- 5.25 Offences involving persons under 18 years of age will receive special consideration. The issuing of FPN's to under 18's is generally regarded as controversial and problematic and it is a widely held belief that any enforcement action against children under the age of 16 cannot be justified.
- 5.26 Because of the difficulties in enforcing against those under 18, it may be wise to look at alternative strategies such as those used in environmental crime:
- Schools based education
 - Warning fixed penalty notices - issued, but without penalty, to those witnessed committing an offence
 - Letters to parents or guardians

(This guidance is based on advice from the recently issued by DEFRA on FPN's)

6. Partnership Working

- 6.1 Enforcement authorities will share information amongst themselves, with other agencies and act upon information received to help achieve high levels of compliance with the legislative requirements.

7. Complaints about the Operation of the Policy

- 7.1 Where a business, or member of the public, makes a complaint or expresses dissatisfaction about the way the policy is being applied, this will be dealt with under the complaints procedure for that local authority. Complaints and expressions of dissatisfaction will be seen as opportunities to identify possible weaknesses in the policy and as an opportunity for improvement. This information, therefore, will be used to examine possible action to improve service provision within the local authority receiving the complaint and across the other authorities in Cumbria, where appropriate.

8. Monitoring and Review

- 8.1 Service managers will ensure that all enforcement officers are familiar with this policy. They will also monitor the activities of their enforcement staff to make sure that the principles of the policy are being followed in day to day regulatory work.
- 8.2 This policy will be reviewed in line with the review of the Health Act 2006 and its Regulations and further revisions will occur where it is shown not to reflect best enforcement practice. Any revision will ensure that the policy reflects current best practice to ensure that those regulated are treated fairly and in line with national policy.

9. Appendices

APPENDIX 1

Guidance used in this Policy

- **Implementation of smokefree legislation in England** - issued by Local Authorities Coordinators of Regulatory Services (LACORS) (2007)
- **Department of Health** Guidance
- **Local environmental enforcement - Guidance on the use of fixed penalty notices** - issued by Department for Environment Food and Rural Affairs (DEFRA) (2007)
- **Draft Regulators' Compliance Code** - 2007
- **Concordat on Good Enforcement** - Cabinet Office (2003)
- **The Code for Crown Prosecutors** - OPSI

APPENDIX 2: Enforcement flowcharts

Figure 1 - Failure to Display Correct No-Smoking Signage

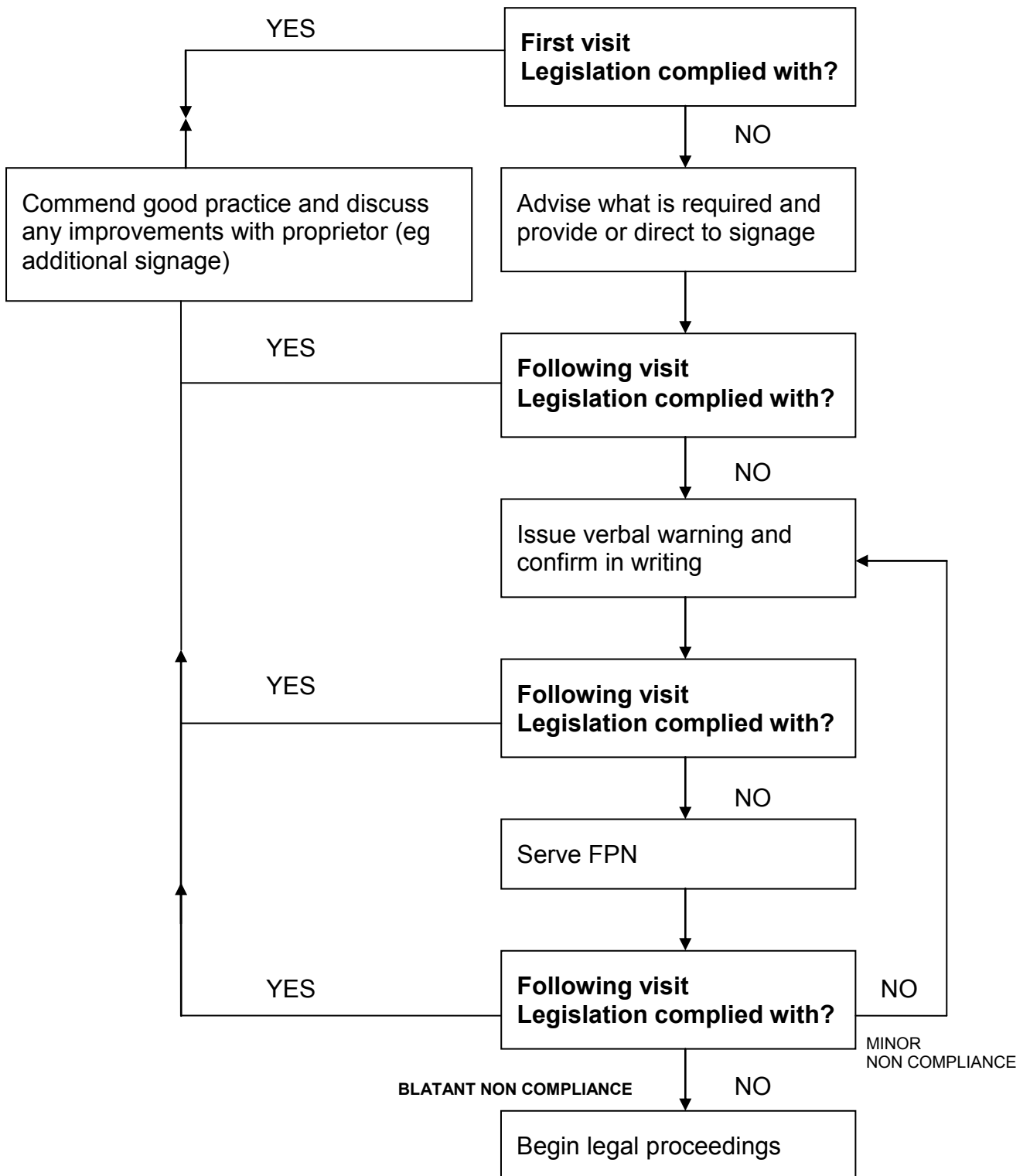
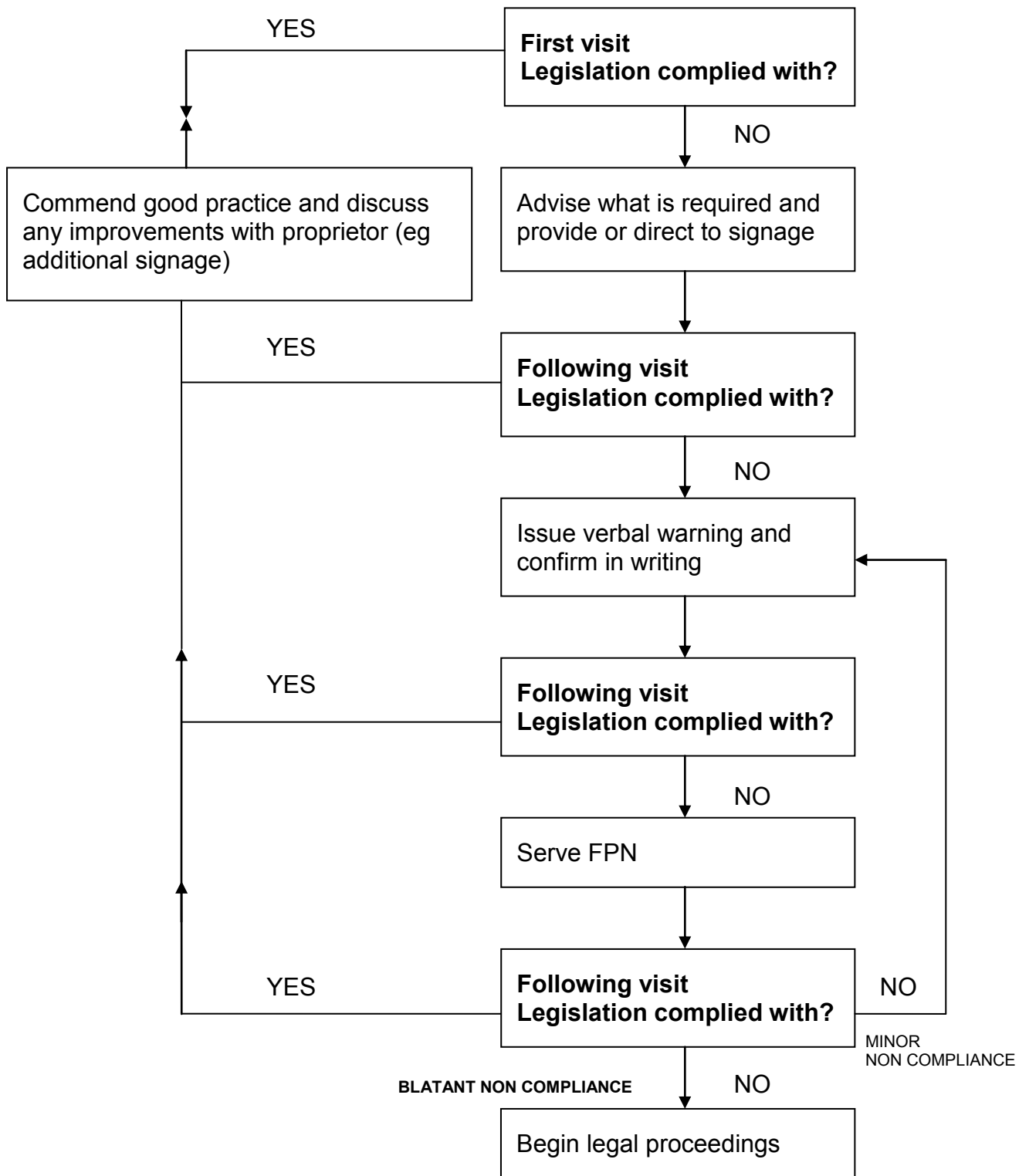


Figure 2 Enforcement Flowchart - Smoking in a Smoke Free Place



APPENDIX 3: Enforcement flowcharts

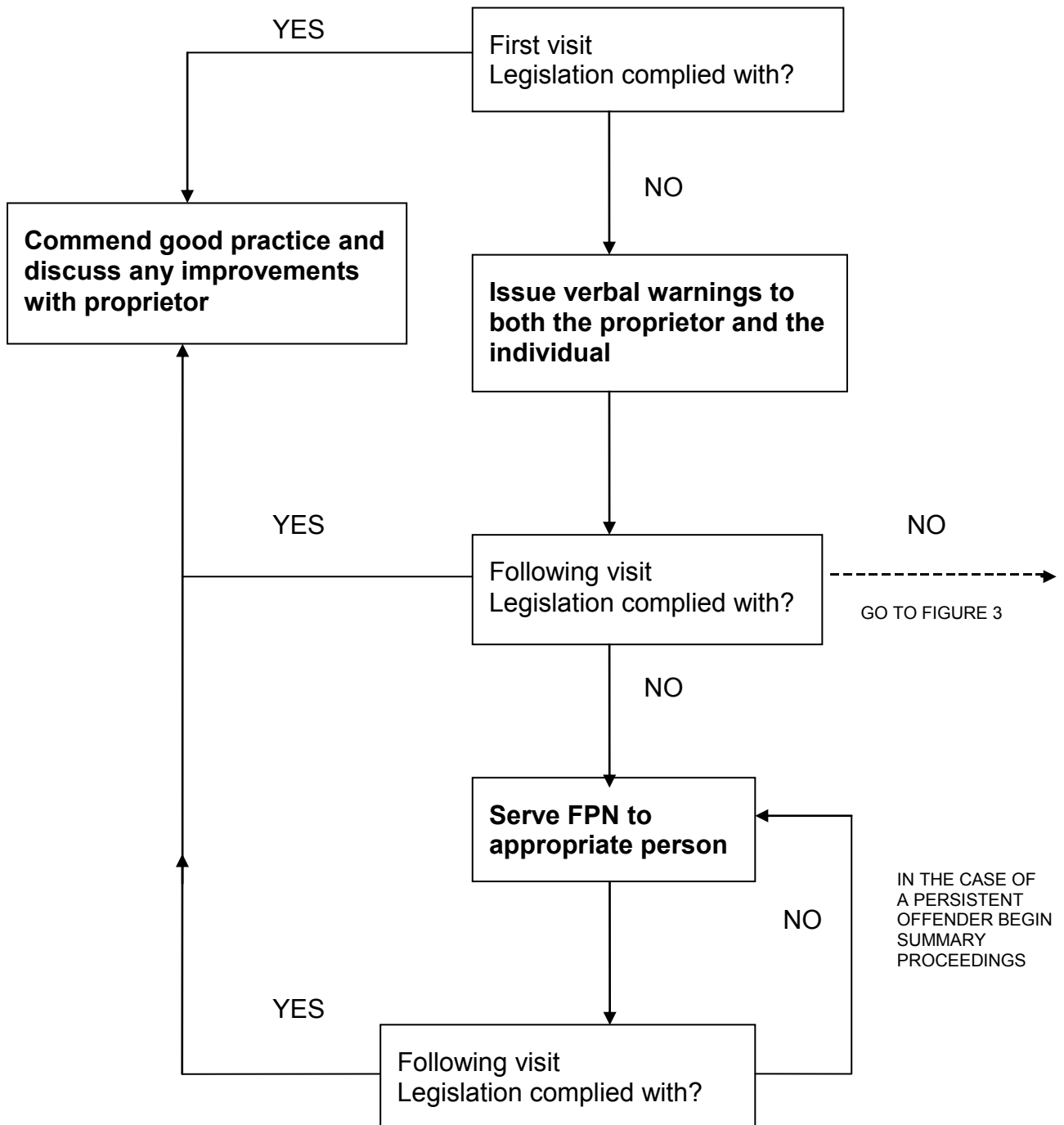
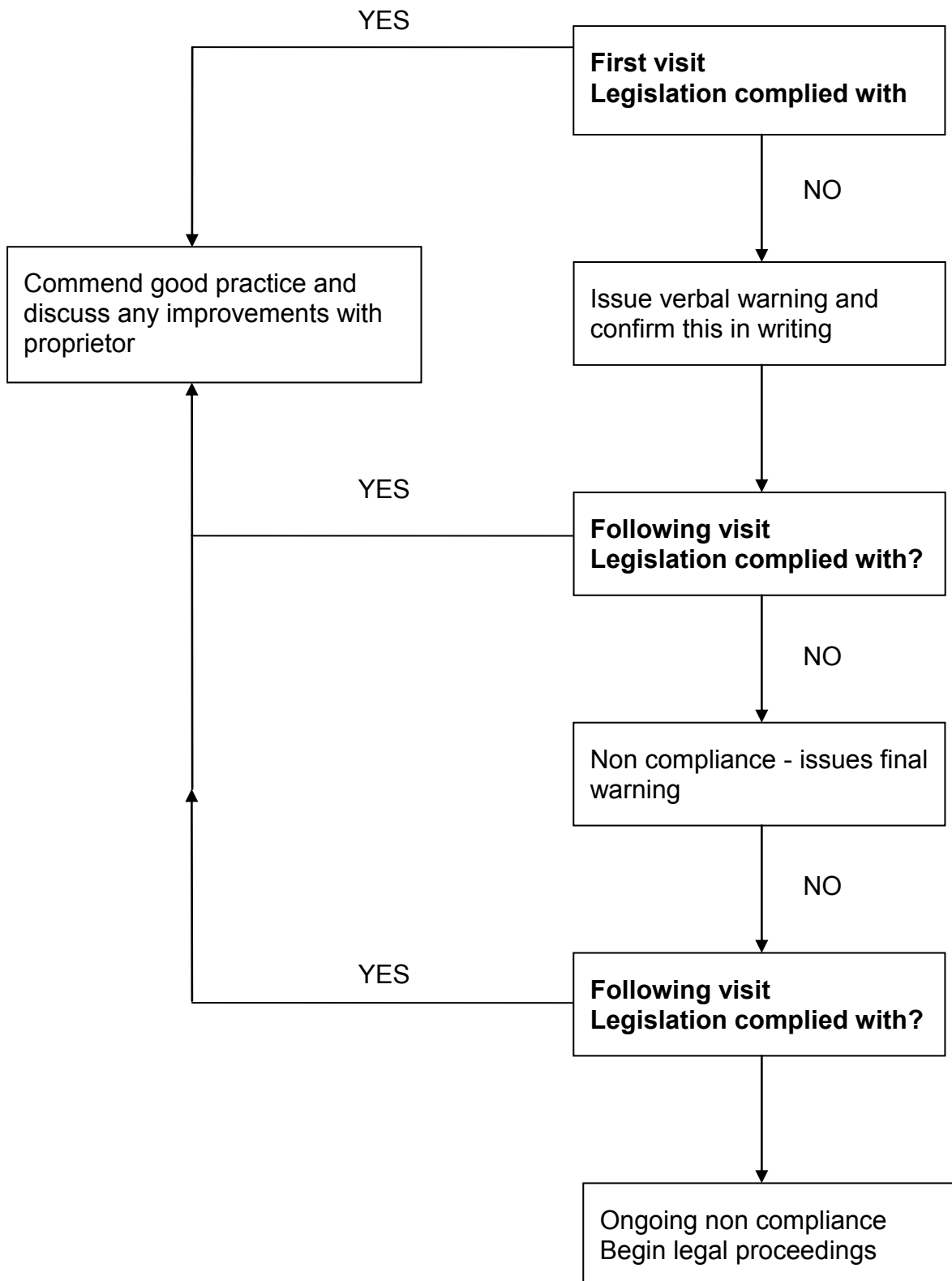


Figure 3 Enforcement Flowchart - Failure to Prevent Smoking in a Smoke Free Place



Shelters

There is no legal requirement for owners of premises, managers of staff, or anyone else to provide an outdoor shelter for their employees, customers or residents to smoke in. It is likely that some businesses will want to build shelters and any shelter that is erected for such a purpose should not be constructed so as to be substantially enclosed as defined later in this section.

Shelters may require planning permission and building control consent; their siting and use may affect the licensing conditions of a bar/restaurant if customers are drinking outside; they may increase noise levels in the open air and they may also adversely affect street cleanliness.

Anyone intending to erect such a shelter will be advised to discuss their proposal with the appropriate council officer at the earliest opportunity.

Definition of 'substantially' enclosed premises

Premises are **substantially enclosed** if they have a roof, but there are permanent openings in the walls which are **less than half** of the total areas of walls, including other structures which serve the purpose of walls and constitute the perimeter of the premises. When determining the area of an opening, no account can be taken of openings in which doors, windows or other fittings that can open or shut. This is known as the 50 per cent rule.

Key issues in relation to smoking shelters

The smokefree legislation does not deal with how smoking shelters should be constructed or sited and there is no national planning guidance regarding shelters.

LACORS suggests that the approval of shelters is a matter for local determination by regulatory officers liaising with planning officers and others to make sure that any shelter used for smoking is not substantially enclosed and can be used by smokers without offences being committed.

However, the following general factors should be considered where businesses want to erect shelters:

- Local planning requirements
- Building control requirements
- Licensing requirements in terms of outside hours/use of the street
- Noise issues, especially at night and adjacent to residential areas
- Provision of suitable litter receptacles
- The use of any temporary covers that may cause the structure to be classed as substantially enclosed

The siting of the shelter is also an important factor and it is therefore recommended that:

- It should not be sited too close to sheltering walls or other structures which may prevent proper air flow through the shelter and effectively make the structure substantially enclosed
- It should be sited so as to ensure as far as possible that secondhand smoke will not be likely to drift into smokefree areas of premises eg not under or near openable windows / air intake fans of the same or adjoining property
- It should not be located directly at or in front of the entry and/or exit doors to any premises

APPENDIX 4

Fixed Penalty Notice Flow Chart - Applicable to offences relating to failure to display correct no-smoking signage and smoking in a smokefree place

