



DEPARTMENT OF THE ENVIRONMENT

SHAPING THE JERSEY PLANNING AND BUILDING ENFORCEMENT SYSTEM FOR THE FUTURE

A REVIEW

FEBRUARY 2014

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February 2014

“..the entire planning process of statutory plans and planning permission is seriously devalued without a credible and effective enforcement regime.”

The Planning Officers Society

Introduction

In October 2013 an internal review was requested by the Chief Officer of the Department for the Environment to examine how the planning and building enforcement service operates.

This was prompted by a recent increase in Freedom of Information requests, requests under data protection processes, and individual cases and Court cases highlighting the need to ask whether the administration of complaints through to investigation and possible formal enforcement action needs to be reviewed.

The Deputy Chief Officer, assisted by the Department’s Planning Performance Manager was asked to draft a report to include recommendations and an outline implementation plan on any changes that may be required. The review was intended to underpin the way the service develops into the future.

Background

The Planning and Building Services section of the Department of the Environment has altered significantly since the introduction of Ministerial government in 2005 and the enactment of the Planning and Building (Jersey) Law 2002. Its functions have become far more open and the public are engaged in shaping the decisions and strategies it makes. The section is now far more comfortable in justifying its position in relation to the services it delivers and is willing to listen to those it works with to try and continuously improve what it does. However its role can be controversial when balancing the competing elements of the development process and this is no better illustrated when breaches of the Law result in enforcement action.

The enforcement process is a valuable, visible, and often maligned part of the planning and building system. It is important that it functions in a consistent manner to provide assurance and confidence to all parties. The Chief Officer and the Department’s Management Board are agreed that modern regulation requires that processes for undertaking enforcement work are proportionate but effective, professional and firm, clear and consistent. It is also important that the officers working within the system know what is expected of them so that they are provided with the best chance of success. The department has a duty of care not only to enforcement officers working within the system, but also to any complainants and other parties who are stakeholders in the process.

Reviews of the planning service in the last few years have looked at the enforcement function and there have been changes and improvements in reaction to recommendations made. What needs to be considered now is the direction the service should take and how it can build on the changes from the last few years.

This review will be informed by recent cases and access to information requests, and will learn from other enforcement functions within the Department of the Environment. It is envisaged that recommendations made in this review, when acted upon, will build upon improvements already made by the enforcement service in recent years.

Methodology

There were four principle methods used to gather information for this review that took place over the course of approximately seven weeks.

Firstly, discussions were held with stakeholders involved in the functioning of the Enforcement team and with the team itself. These meetings were based around the Terms of Reference of the review and asked questions about the specific role of the respective stakeholders in the enforcement process. These stakeholders are as follows:

- The current Enforcement Team (ET) with whom discussions took place at the beginning of the review and at the end.
- The ET manager.
- The Director of Development Control (DDC).
- The Director of Building Control (DBC).
- Representatives of the Building Control Team (BC).
- Representatives of the Development Control Team (DC).
- The Law Officers Department – Criminal and Civil Divisions (LOD, LOD(Cr), LOD(Ci)).
- The Business Operations Team (BOT).
- The Historic Environment Team (HET).
- Environmental Protection (EP) – to gain a comparison of a similar function within the department.

A second means of generating evidence for this review was by examining investigation cases. This included some which were prominent and others selected at random from 2013. This examination involved reviewing records held by the department which provided a picture of practices and processes which drive the enforcement service.

Thirdly, a review was undertaken of available appropriate documentation, both published and internal. This included previous reports into the planning service along with guidance from the UK and the published information available from other comparable functions in UK planning authorities. It also looked at comparable information from other enforcement functions.

Fourthly, each stakeholder was invited to provide any information that they might consider useful in informing the review.

Terms of Reference

The Terms of Reference for this review asked that seven areas be considered:

1. Policy and Process.
2. Systems and Administration.
3. Records Management.
4. Enforcement Culture and Officer Behaviour.
5. Consistency of Planning and Building Services Enforcement with broader DoE Enforcement.
6. Management, Location and Officer Support.
7. Performance Management and Reporting.

Each of the first 7 areas will be addressed by first introducing the question posed in the Terms of Reference, then discussing findings elicited from the four methods of evidence collection and proposing recommendations.

An 8th section has been added to consider other issues that do not readily fall within the Terms of Reference.

1 – Policy and Process

Question: Are there clear documented policies and procedures in place, detailing the process from the receipt and acknowledgement of complaints, the investigation of those complaints and action if required, to the closing of the complaint?

Discussions with stakeholders have shown that there are processes in place that have developed through custom and practice and it is on this basis that the team operates. Many of these processes are suitable for the tasks the team undertake but the fact they are not formally captured in writing can lead to inconsistencies which may go on to create problems. There are some processes which may not be suitable and should be reviewed. Formal capture of all policies will allow this review to take place.

Following comments made in the Reg's Skips Committee of Inquiry, the document "Practice Note 4 – Enforcement Procedures", was drawn up in December 2010. This document goes some way to capturing the role of the enforcement team but it is not comprehensive and does not adequately deliver some important messages about the role of enforcement. The document will benefit from being redrafted in light of the recommendations that follow in this report.

The Planning Improvement Programme (PIP) report of 2010 recommended formulating policies and procedures and suggested that Rushmoor and Wycombe Council enforcement policies, protocols, and charters could be examined as providing good practice in this regard.

Another document which would be of particular value is the UK government document "Enforcement Concordat: Good Practice Guide for England and Wales" (1998). It sets out a voluntary non-statutory code of practice, aimed at the relationship between all enforcers in the public sector and businesses. The

principles are equally applicable to all customers, being the establishing of standards, openness, helpfulness, proportionality and consistency along with accountability. It appears that the Concordat has informed all the local planning authority documents that were examined in conducting this review.

The ET themselves drafted policies and procedures, in Sept 2008 and then again in 2010/11 followed by supplementary paragraphs in March 2012. This work echoed the good practice suggested by PIP and recognised the usefulness of following the Concordat and other examples.

Recommendation 1.1: Policies and procedures should be captured and documented and made into operational reference document which can be published. Significant work was put into the drafting of policies and procedures documents by the team and these would be a useful starting point for this task.

Recommendation 1.2: Practice Note 4 should be re-published to reflect the policies and procedures.

There are already in existence some standard operational documents and templates including letters and notices to parties involved in complaints and notifications of suspected breaches.

Recommendation 1.3: A suite of standard documents should be established that clearly refer to the policies and procedures as appropriate and should be a reflection of the different stages of the enforcement process.

The majority of complaints investigated by the Enforcement Team are resolved without the need for formal enforcement action. It may be that there has not been a breach of control, the breach may stop, or the breach is regularised by the approval of an appropriate permission. Some complaints do however result in formal action – usually in the form of a notice being served – and a small proportion of those cases then result in court action in order to try to remedy the breach.

On the receipt of a complaint there is no reliable way of assessing what the outcome might be. There may be a quick resolution or there may be a protracted process ending in court. As such it is important that the same level of rigour is applied to every investigation as would be expected for a case that will be considered by the court. This should be readily achieved by acting on Recommendations in this report.

From discussions with many parties it is apparent that pursuing court action requires significant resources particularly in terms of officer time. This is not just limited to the ET, as professional colleagues, LOD, and independent witnesses are required to feed into the process.

It has been suggested that because some cases fail in court, the opportunity to emphasise the worth of the enforcement process is lost. Failure with prosecutions has resulted in two significant issues, firstly that there has been major resource expended with no satisfactory conclusion and secondly that the credibility of bringing such prosecutions is undermined in the eyes of the court. On the back of

these issues from an operational perspective morale and confidence of the department itself is dented.

Pursuing any legal action is a serious matter that should only be undertaken after proper consideration of the whole context of the situation, and that pursuit should be proportionate and reasonable as well as in the public interest.

Whilst the court action is a last resort the LOD were clear that court cases would be more quickly expedited and ultimately successful if all the technical planning and building issues had been fully rehearsed and documented prior to bringing the issues before the court. A proportionate approach must be demonstrated, a willingness to negotiate and/or compromise should be evident and a clear message that anyone being pursued through the court has been given every opportunity to comply.

The EP team of the Department of the Environment have a formal protocol set out for investigating incidents and if necessary pursuing prosecutions. This has been agreed by the Attorney General. It included challenges to actions prior to serving a notice or prosecuting and it forces officers to fully consider their options and actions prior to engaging legal processes. Whilst there is some generic guidance used by the ET, an agreed protocol, the creation of which has been commenced by the ET, would be of far more value.

Recommendation 1.4: A protocol for the investigation of complaints should be established that applies to all complaints and generates a “story of investigation”. Part of that process should include that everyone involved in the process is kept informed of the investigation at appropriate points and any actions or decisions made in connection with a complaint would be recorded and explained.

The protocol should require that a case file seeks to create a record that could be used as compelling, reasonable and considered evidence in court. It should also be able to minimise the risk of pursuing legal action where it is not appropriate. It will generate a comprehensive standardised record of how complaints are investigated, considered and brought to a conclusion. The protocol should also set out at what point a case is closed as there were examples found of cases being noted as closed only later seen to be re-opened. For example in challenging an unauthorised development, cases were closed on the receipt of an application for regularisation. The complaint should have remained open until either the appropriate permission was granted or the breach was otherwise addressed.

One of the reasons for failure of cases has been that it has not been adequately demonstrated to the court what harm the breach of control is causing. This should be clear from the development of the case and should be a clear factor in the assessment of whether to serve a notice in the first instance. In fact it was agreed by all parties that a notice should not be served unless there is a willingness to pursue to prosecution, and a clarity that the harm caused by the breach is such that it would be evident to a court. It would be of value to have any enforcement notice reviewed prior to it being served to ensure legitimacy in policy and legal terms.

Recommendation 1.5: Prior to a notice being served, a review of the case by the LOD should first ensure that the notice is an appropriate way of pursuing the breach and that the steps up to the point of serving the notice, would be considered reasonable in court. The LOD could also assess the notice itself. They have indicated that they have the appropriate skills to provide such a service but that there may be resource implications which need to be resolved.

Recommendation 1.6: On a further point the LOD suggested that they should be tasked with ensuring that any Notice is served on appropriate persons by first agreeing who those parties are.

Discussions with LOD brought to light that some documents used in connection with potential prosecutions include some based along States of Jersey Police lines and containing States of Jersey Police logos. This matter, when discussed with LOD, gave cause for concern as Magistrates may take a dim view of confused or misrepresented titling on official Department documents. It is necessary to ensure that the public are aware that ET officers are an enforcement team of a non-uniformed regulatory authority rather than Police Officers.

Recommendation 1.7 Appropriately branded Department specific letters / forms and communications including witness statement forms should be drafted and agreed upon by ET and management and used instead of those currently being used. All standard forms and templates should be reviewed not only by the management team but by a third party with a sound understanding of enforcement and planning issues. The documents should be bespoke and appropriate for use in investigations and for presentation to court.

Some complaints need to be acted upon more quickly than others. Planning and building enforcement complaints can vary from critical, such as serious harm to a listed building or dangerous highway conditions being created, to less critical but nonetheless important issues such as the erection of a fence. The least pressing in the context of time and damage may be, for example, non-compliance with a landscaping condition. It would be useful for the team to establish a sense of priorities of how quickly particular circumstances will be investigated and it would also help complainants understand how long an investigation might take and when to expect an outcome.

Recommendation 1.8: The policies should include a scale of prioritisation. Other jurisdictions set these priorities and it should not be too difficult to apply them to the context of Jersey.

2 – Systems and Admin

Question: Is the service making best use of the technology and administrative support available to ensure cases and information is recorded appropriately and we are able to adequately respond to internal or external requests for information?

There is no formal administrative support for the enforcement team and informal support is also limited, not least because the location of the team away from the

planning and building administrative support staff means that obtaining casual help is not always practical.

Recommendation 2.1:

Administrative support should be provided to the team out of current resources. From discussions, this need not be overly onerous a requirement and should not prejudice other workloads.

The team use the Northgate iLAP planning and building software locally known as Merlin. This is a package that is purpose built to assist planning and building enforcement investigations. It can be used to generate documents and record key actions and dates in relation to investigations. It has two distinct sections in the package, one relates to complaints (prefix CMP) the other to Enforcement (prefix ENF). The package allows the recording of who takes key actions, whether a priority has been attached to a complaint, target dates and parties who might be interested in a case. It also has numerous notes sections where details about cases, beyond dates and actions, can be recorded. Information can be extracted from Merlin on key data e.g. numbers of cases, type of action, dates of actions, in a form that might allow assessment of performance along with a lists of cases at different stages of investigation or in relation to defined dates.

In May 2012 the Planning and Building Applications Teams started to use an electronic document management system, Information at Work (I@W), which integrated with Merlin to store all documentation in connection with case files. With the development control function the use of I@W allowed the publication of information to the internet. This involved changing working practices and processes and has contributed to a more efficient service.

It is widely considered that the full extent of how useful the Merlin system could be has not been examined. The two ET officers use different methods of recording and managing their caseload and there are no process notes for the handling of information. This inconsistency means that reporting out of the system will not generate sufficiently accurate or useful information and it confuses others who need to access the information.

Recommendation 2.2: A proper understanding of the capabilities of the Merlin system should be explored, discussed, and the findings used to support the creation of the process notes discussed above.

Recommendation 2.3: Along with understanding Merlin, I@W should be integrated into the operation of the team in order to capture and manage all documentation generated in an investigation.

Recommendation 2.4: A set of process notes should be drafted with simple instructions on handling and recording information consistently. This should be based on methods agreed by enforcement officers and their management in conjunction with a Merlin expert.

The ET were recognised as being easy to approach to discuss issues with but their location and availability has meant that there is poor formal communication between

the team and the rest of the department. For example there is sometimes a breakdown in communication over whether a planning application requested in connection with an investigation has been submitted and then what the subsequent decision is. Added to this, progress on cases is not regularly reported back to officers who may be involved and in turn officers may not inform the team of information they receive.

Recommendation 2.5: A system for formally notifying applications / decisions would be a big step forward in opening communication. Weekly publication and decision lists should be actively shared with the team and acknowledgement recorded that they have been looked at.

As enforcement is such a critical tool in supporting the planning and building system, there should be an improved awareness of ongoing cases and issues at Director level. In addition to managing the risk to the department, it demonstrates direct support for the ET themselves and will help in the prioritisation of workloads.

Recommendation 2.6: A system should be instigated whereby the ET regularly (suggest monthly) report back to the planning and building Directors on workload and cases.

3 – Records Management

Question: Are there clear rules for data security and storage which respects the balance now required for Freedom of Information and Data Protection requests?

The department is working, as a whole, to ensure that processes are put in place to securely store data but there are currently no workable recorded processes for managing enforcement information.

Recommendation 3.1: The management of the ET should work with the officers, and the department officer who has been given the mandate to deal with data protection issues to generate a robust system which works for all parties.

The Law requires that a register of all Notices served is kept and made publicly available. Currently this appears to consist of placing a paper copy of any Notice on a file at reception at South Hill. Whilst operationally this may suit the needs of the department it may be considered insufficient if challenged especially in light of increasing use of websites. There have also been instances where the process has not been comprehensive.

Recommendation 3.2: There should be included in the process of issuing a Notice a definitive step of including the Notice on the register. There should then be a means to indicate where a Notice has subsequently been withdrawn on that Register. The Register should be made available online.

The ET tends to use a single notes document kept in Merlin against a case reference. This does not suit the task of investigating complaints as it does not constitute a reliable comprehensive record, it does not include vital details such as

correspondence dates and fails to provide a timeline of documents that reflect how a complaint is investigated.

E-mail communication is used extensively by the ET as a preferred method but this may not always be appropriate. In the regulatory context it is considered that E-mails have their place but are better suited to casual exchanges rather than setting out the official position of the department. Key stages of an investigation and the associated correspondence should therefore be recorded in a formal manner contained within a letter headed document that stands alone. That way there can be less room for confusion and the sender can be seen to have set a particular position at a particular time. This also reflects advice from LoD about the progressive narrative of a case file.

Recommendation 3.3: Letters must be generated to identify key stages of an investigation and to set out the formal position of the department and e-mail should only be used for informal correspondence. In conjunction with the implementation of Recommendation 2.2. – the use of I@W – the ET will ensure the proper storage and retrieval of all documentation in connection with investigations.

4 – Enforcement Culture and Officer Behaviour

Question: Are the expectations on staff, referencing the culture of the department, made sufficiently clear in staff manuals and guidance and do the behaviours of enforcement officers provide the department with an ambassadorial service within the bounds of departmental acceptability?

Whilst processes and procedures within the Department have in general become more prescriptive with the adoption of written policies, those associated with the ET are, so far, less well developed. Implementation of the recommendations in section 1 will go some significant way to clarify culture.

Notwithstanding the appointment of a manager for the ET, significant operational changes over the past two Ministerial terms have been resource hungry and this appears to have resulted in a lower priority in management focus on ET than on other parts of the department. This review seeks to instigate a redressing of this issue. Implementation of recommendation 2.5 will address this issue.

The team has significant and valuable experience in law enforcement gained in the context of a uniformed organisation but there is a difference between that experience and the role of a planning and building enforcement officer. The capturing of policies and procedures should include and highlight the approach taken in the DoE. This would clarify the expected acceptable behaviours for enforcement officers and would also allow formal training to be developed not just for ET but for enforcement officers throughout the States of Jersey.

Recommendation 4.1: An agreed plan of ongoing training for enforcement officers and those involved in their supervision should be put in place and this should be updated as required. This should reinforce behaviours required in a non-uniformed regulatory enforcement role and should be recorded as evidence that a framework is in place which provides advice on modern and good practice.

The enforcement role is difficult. ET officers are often dealing with individuals who are upset, angry or bewildered with the situation they are in. The process is often unavoidably confrontational and individuals are often in the position of receiving information with which they are unhappy. Close inspection of investigation cases and discussions with stakeholders indicate that there have been instances where language used may have exacerbated an already sensitive situation. Great care needs to be taken to ensure that ET officers adopt and maintain an objective position and they should be given every assistance in this.

Recommendation 4.2: It is recommended that appropriate training be sought by the DoE to give the ET as many tools as are required in order to carry out their function in the manner discussed.

The ET made a suggestion that the team could be re-branded to better reflect their role. The team only actually enforces in a limited number of cases. Most of the time the team investigates whether there has been compliance with either the law or with decisions previously made. Given the profile of the finance industry in Jersey and the understanding of the term “compliance”, the team felt that becoming the Planning and Building Compliance Team would be a better reflection of their role and could communicate that role more effectively to the public. In turn the officers would become “Compliance Officers” and the manager the “Compliance Manager”. There is significant merit in this suggestion, offering not just window dressing but rather a way to better describe and communicate their role to all of their customers.

Recommendation 4.3: The team should be renamed as the *Planning and Building Compliance Team* and the respective post descriptions should be amended accordingly

5 – Consistency of P&B Services Enforcement with broader DoE Enforcement

Question: Are the processes adopted by the team consistent with enforcement practices in other parts of the Department and with the expectations of the Law Officers Department?

Discussions with the LOD (Cr) highlighted that comparison with other teams from States departments such as EP and the Health and Safety Inspectorate demonstrated some weaknesses in the approach taken to the enforcement process. The LOD have concerns over the quality of case files and the evidence within them. This included references to opinion and speculation as well as documents being inappropriately presented. A common criticism was the lack of progressive narrative in case files along with an explanation of the specific contravention and the harm it caused. The result was that the LOD were less enthusiastic in pursuing such cases as, if the weaknesses in the case were exposed in court, the prosecution would likely be fruitless.

Recommendation 5.1: The LOD suggested that ET officers among other SoJ Enforcement teams should liaise, with a view to adopting more common processes as good practice.

The LOD was uncomfortable with prosecutions proceeding without their input. They recognised how this had occurred due to historical circumstances but now require that the practice changes.

An action for the Director of Criminal Law following the meeting between the reviewing party and the LOD was to contact relevant bodies eg Chef de Police to advise as such. The DoE would be copied in to this correspondence.

Recommendation 5.2: Cases for prosecution must only proceed with the authorisation of the LOD (Cr).

6 – Management, Location and Officer Support

Question: Are the enforcement officers sufficiently supervised and able to elevate issues if required? In addition, does effective caseload management exist, and are they appropriately located?

There has been an ET manager since April 2012 and this has had nothing but a positive effect on the team and its work. However there is no defined role or formalised job description for that manager. It is also unclear as to the impact of the current post holder's accumulated responsibilities on the enforcement role. This is no criticism of the post holder who has clearly made a difference to the team but the other responsibilities elsewhere in the department have not been shown to harmonise with the managerial role.

There is no clear direct line of reporting and responsibility above the team manager. Given the split in role between DC and BC functions, this is understandable but clarity is essential for operational and organisational purposes. Establishing revised processes and procedures for the team will need to be overseen from a senior management level to ensure support and accountability in seeing the process through.

Recommendation 6.1 The management line from the team to the CEO should be clearly defined and roles and responsibilities established and communicated internally.

There does not appear to be a consistent and formal process of caseload review, discussion and reporting. This would assist not only the ET in appropriately managing day to day tasks, but would also allow the updating of the internal customers of the Team such as BC and DC officers who may be involved in an investigation. This appears to have developed historically, certainly back to well before the current officers were in post, where the team were left largely to their own devices in conducting investigations. The inconsistent use of Merlin and the lack of reporting out of Merlin has meant that a consistent and reliable caseload list would be difficult to formulate and this does not encourage or support the review of investigations.

Recommendation 6.2: Active caseload management should be introduced. The production of reliable weekly caseload lists of outstanding investigations should

commence and then the lists used to hold regular caseload discussions with individual officers, within the team and with internal customers of the team.

The geographical separation of the ET from the DC & BC teams means that there is very limited informal communication or oversight of behaviour, if the effort is not made to meet. This is difficult with a role that involves being out of the office and that is carried out by people who, though highly experienced and skilled from past enforcement roles, are not formally qualified in enforcement matters pertaining specifically to planning law or building bye laws.

Recommendation 6.3: It is recommended that an office facility be found for the ET within the main operating body of Planning and Building Control officers at South Hill and that consideration should also be given to their need for a secure and soundproof room for the carrying out of recorded interviews under caution.

7 – Performance Management and Reporting

Question: How is the performance of enforcement measured and reported?

The lack of a standardised method of inputting information into the Merlin system makes gathering performance information difficult and there do not appear to be any management reports generated by the Merlin system.

Recommendation 7.1: A better understanding and use of the merlin system (as previously recommended) will enable performance information to be extracted. This ability will enable targets to be set and performance against these targets should be published and proactively made available to customers of the department.

8 – Other Issues

Whilst the terms of reference were broadly drawn there were some issues that did not readily fit into any single category but nevertheless need to be included in this report.

Resources:

There was a suggestion from one party questioned, that any changes to the current process and practices will require additional resource; however it was widely felt by other parties to the review that the extra capacity that will be created by standardising the investigation process, active case management and prioritisation of cases should generate rather than prejudice resources.

An improvement in prioritisation and management of existing resources through a steady, programmed and realistic process, clearly timetabled and with milestones should be achievable. This approach would reflect the ongoing organisational improvements throughout the States and should be readily achieved.

Prima Facie Law Breaches:

Article 7 of the Planning and Building (Jersey) Law 2002 makes the undertaking of development without the necessary permissions an offence. However the Law then goes on to set out actions that can be taken to address breaches of control such as

notices and then further offences for non-compliance with the notices as appropriate. It would be useful to establish how useful the Article 7 offence has been in addressing breaches of control. It may be that the courts could consider it a heavy handed approach to quickly escalate an issue to a prosecution when other parts of the Law may provide a more balanced approach. Alternatively there may be circumstances where Article 7 has provided the most appropriate way to address a breach of control. The scope and timescale of this study did not allow for full consideration of this matter but reflection by stakeholders would be useful in parallel with the other recommendations.

Recommendation 8.1: The suitability of Article 7 of the Planning and Building (Jersey) Law 2002 should be examined. It could prove to be crucial in protecting matters of acknowledged interest and providing a deterrent to unauthorised development but only if it is demonstrated as a successful tool will it carry any credibility.

NEXT STEPS

In the first instance a Director should be identified who will take management responsibility for the ET. This is recommended in section 6. That Director should be tasked with producing a detailed implementation plan for the recommendations with timescales and milestones clearly identified and agreed with the CEO.

There should then follow, a monthly review by the CEO with the Director to ensure that the agreed plan is being applied and milestones achieved. Upon the Chief Officer's satisfaction that progress is being made this responsibility should belong to the Director.

Recognising that many of the recommendations are immediately actionable whilst some will involve interaction with stakeholders involved in this review and hence may take longer, a preliminary timetable over 6 months is recommended.

All agreed actions should be reviewed between the Director responsible for enforcement and the CEO in order to ensure that timescales are met.

Timescales against actions are submitted in a separate document.