

# Guidelines

Enforcement guidelines for councils

**December 2015**

---

## **CONTACT US**

**NSW Ombudsman**

**Level 24, 580 George Street**

**Sydney NSW 2000**

**General inquiries: 02 9286 1000**

**Toll free (outside Sydney metro area): 1800 451 524**

**Facsimile: 02 9283 2911**

**Telephone typewriter: 02 9264 8050**

**Website: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)**

**Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)**

**ISBN: 978-1-925061-72-7**

© Crown Copyright, NSW Ombudsman, December 2015

*This work is copyright, however material from this publication may be copied and published by State or Federal Government Agencies without permission of the Ombudsman on the condition that the meaning of the material is not altered and the NSW Ombudsman is acknowledged as the source of the material. Any other persons or bodies wishing to use material must seek permission.*

---

---

# Foreword

I am pleased to present this updated and expanded second edition of the NSW Ombudsman, *Enforcement Guidelines for Councils*. The guidelines are accompanied by a comprehensive model enforcement policy that has been compiled from best practice examples from a number of councils and other relevant agencies.

The first edition of the guidelines was prompted by common complaints we receive about the enforcement process. These include poor record keeping, lack of consistency, delays in investigating allegations, failure to take action despite evidence of unlawful activity and failure to inform parties about outcomes and reasons for decisions.

The expanded guidelines can assist councils to develop better processes for compliance officers and managers to engage with individuals and businesses who may be breaking the law.

The guidelines urge councils to adopt a responsive and proportionate approach to enforcement.

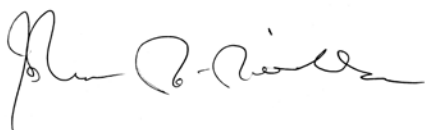
This requires an appropriate response that takes account of the nature of the offence, the harm caused and the particular offender.

The guidelines recognise that choosing the most appropriate regulatory option in a particular circumstance is often not easy. It can require a complex decision-making process that balances competing public interests and priorities.

The guidelines assist councils to follow an enforcement process that is robust and complies with principles of good administrative practice and decision making in relation to:

- preliminary assessment of allegations and information
- conducting investigations and collecting evidence
- choosing options after an investigation
- discretionary decision making and relevant consideration in the enforcement context
- deciding on prosecution action
- following fair procedures and keeping accurate records.

The NSW Ombudsman is interested to receive your comments on how well these guidelines achieve their objectives and any features that you think could be improved or included in future editions. Please email us any feedback at [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)



Professor John McMillan AO  
**Acting Ombudsman**

---

# Contents

Foreword.....	iii
<b>Section 1. Introduction .....</b>	<b>3</b>
1.1 General principles.....	3
1.2 Structure of these guidelines .....	4
<b>Section 2. Councils as regulators.....</b>	<b>5</b>
2.1 What is regulation?.....	5
2.2 What is enforcement? .....	5
2.3 What do councils regulate? .....	5
2.4 Why is regulation important? .....	6
2.5 Regulatory principles .....	6
2.6 What are the regulatory options?.....	7
2.7 What is the best regulatory model? .....	8
2.8 What is risk-based regulation?.....	8
2.9 Setting up risk-based compliance and enforcement programs .....	9
2.10 Proactive compliance monitoring .....	9
2.11 Reactive compliance enforcement .....	10
2.12 The role of education and promoting compliance .....	11
2.13 Imposing sensible and enforceable conditions .....	12
<b>Section 3. Responding to allegations of unlawful activity.....</b>	<b>13</b>
3.1 What is 'unlawful activity'? .....	13
3.2 Recording allegations of unlawful activity .....	13
3.3 Assessing the information – is an investigation needed? .....	14
3.4 Risk categorisation in initial assessments .....	15
3.5 Deciding if more information is needed.....	16
3.6 Does the council have jurisdiction/power to enforce compliance?.....	16
<b>Section 4. Investigating allegations of unlawful activity.....</b>	<b>19</b>
4.1 The role of the investigator.....	19
4.2 Recognising and avoiding conflicts of interests and bias.....	19
4.3 Establishing a framework for the investigation .....	21
4.4 Complying with secrecy, confidentiality and/or privacy requirements.....	23
4.5 Providing procedural fairness .....	24
4.6 Gathering evidence.....	25
4.7 Understanding the rules of evidence.....	26

---

4.8	Doing site inspections.....	27
4.9	Obtaining oral evidence.....	29
4.10	Documentary evidence.....	35
4.11	Expert evidence.....	35
4.12	Recording and storing information obtained during an investigation.....	35
4.13	Does the person being investigated have the right to inspect documents related to the investigation?.....	36
<b>Section 5. Discretion.....</b>		<b>37</b>
5.1	How should discretionary powers be exercised?.....	37
5.2	Wrongful exercise of discretion.....	38
5.3	Lawful exercise of discretion.....	39
5.4	Adopting policies and practices to guide the exercise of discretionary powers.....	39
5.5	What is the public interest?.....	40
5.6	Public interest considerations in enforcement.....	40
5.7	Considerations about the alleged offence.....	41
5.8	Considerations about the knowledge, motive and circumstances of the alleged offender.....	42
5.9	Considerations about the impact of the offence.....	43
5.10	Considerations about the impact of the enforcement action.....	44
5.11	Considerations about the potential for remedy.....	45
<b>Section 6. Deciding on prosecution action.....</b>		<b>47</b>
6.1	The decision to prosecute.....	47
6.2	Time within which to commence proceedings.....	49
6.3	Alternatives to prosecution.....	49
6.4	Selecting the appropriate defendant.....	50
6.5	Choosing preferable charges.....	51
<b>Section 7. Fair procedures.....</b>		<b>52</b>
7.1	Procedures to ensure the actual and perceived fairness of enforcement-related decisions.....	52
7.2	Record keeping.....	54
<b>Section 8. Appendices.....</b>		<b>57</b>
8.1	Examples in determining significance of unauthorised activity.....	57
8.2	Council powers to enter and inspect premises.....	59
8.3	Application of information protection principles to council enforcement action.....	64
8.4	Guidance on records management.....	68

This page is intentionally blank.

# 1. Introduction

The guidelines aim to assist councils to engage more effectively with individuals and businesses who may be breaking the law.

The term 'enforcement' is used in these guidelines to mean both action taken against parties in response to evidence of unlawful activity, and also to the processes preceding such action: responding to allegations of breaches, inspecting, assessing and investigating potential unlawful activity. Enforcement also includes processes prior to making a decision not to enforce the law in particular circumstances, despite evidence or allegations of non-compliance.

## 1.1 General principles

Choosing the most appropriate regulatory option in a particular circumstance is often not easy, and can involve a complex decision-making process and weighing up of competing public interests and priorities. In order to achieve consistency in enforcement and apply discretion fairly, both councils and individual compliance officers have an important role to play.

Overall, regulatory actions should be:

- **responsive** and consider what is **appropriate** for the particular offender and the particular regulatory issue. Regulators need flexibility and discretion in determining the best method to achieve the desired regulatory outcome.
- **proportionate** to the nature of the offence and the harm caused.<sup>1</sup>

Councils should:

- analyse the objectives of each piece of legislation under which they have enforcement powers or obligations
- develop and publish a compliance strategy that includes:
  - the outcomes council aims to achieve in each of the major areas it regulates (the 'what' and the 'why')
  - the activities and tools it will use to achieve the stated outcomes (the 'how')
  - the allocation of its limited resources to compliance activities
- develop and publish policies and procedures to appropriately guide the exercise of discretion by its compliance and enforcement officers
- provide ongoing training in all the skills required for compliance and enforcement officers, including:
  - changes in relevant legislation
  - conducting investigations and preparing briefs of evidence
  - good decision making
  - complaint handling and communication skills.

Compliance and enforcement officers are increasingly expected to have many varied skills to carry out their jobs. Officers must have working knowledge of multiple pieces of legislation, be able to investigate breaches, collect evidence, prepare briefs of evidence, communicate with alleged offenders in situations that can be challenging and even dangerous and make complex decisions about what enforcement action to take. The expectations of the public about service provision, quality of information and timeliness have also been increasing over time.

Compliance and enforcement officers should:

- attend all relevant training provided by council
- familiarise themselves with all relevant council policies and council expectations of their role
- abide by council's Code of Conduct
- apply the principles of good administrative conduct and decision-making discussed in these guidelines
- apply principles of good communication, customer service and complaint handling
- make accurate records of their investigations, inspections and decisions.

1. See: Regulatory Justice: Making Sanctions Effective, Final Report November 2006, Professor Richard Macrory pp. 29-30.

## 1.2 Structure of these guidelines

Section 2 gives a brief overview of regulatory principles and current best practice. It points councils to available resources to develop risk-based compliance strategies. It is important there is increased collaboration between councils in sharing best practice and achieving consistency in regulation.

Sections 3 to 7 focus on what is needed to ensure the enforcement process is robust and complies with principles of good administrative practice and decision-making in relation to:

- preliminary assessment of allegations and information
- conducting investigations and collecting evidence
- choosing options after an investigation
- discretionary decision making and relevant consideration in the enforcement context
- deciding on prosecution action
- the importance of fair procedures and record keeping.

These guidelines do not go into detail about available enforcement options under the various regulatory schemes that councils administer. They do not discuss legislative requirements other than to illustrate a point. Councils are encouraged to develop and keep updated guidelines for their staff engaged in specific enforcement roles.



## 2. Councils as regulators

### 2.1 What is regulation?

A local government regulatory function is any function under an Act, Regulation or other statutory instrument which empowers local government to create, impose, enforce or administer rules that control the actions of others.<sup>2</sup>

### 2.2 What is enforcement?

Enforcement can be seen simply as the pointy end of regulation aimed at and reserved for serious or deliberate contraventions of laws.

Broadly speaking enforcement can be seen as any punitive measure taken against an individual or a business for breaching a law. Measures range from lower level options such as cautions to imprisonment at the top end of the scale. It is now widely accepted that enforcement should focus not just on punishment, but equally on changing the non-compliant behaviour, remedying and addressing the problems caused by non-compliance and acting as a deterrent to future and general non-compliance.<sup>3</sup> Therefore enforcement is one among many options that can be chosen to achieve the overall objectives of a regulatory scheme. Often it is the last option used when others have failed or the conduct is particularly serious as pointed out by Freiberg:

*In modern compliance theory, enforcement is seen as an action to be used when persuasion fails or when advice about compliance is not taken.<sup>4</sup>*

Seeing enforcement and compliance in a broader context of councils' regulatory responsibilities enables councils to have an overarching objective and be deliberate about what compliance outcomes they want to achieve rather than just react to reported instances of non-compliance. If the goal is to change behaviours to achieve beneficial outcomes in the interests of the community and to address harm caused by non-compliance then the options available to councils are many and can be tailored to individual circumstances.

### 2.3 What do councils regulate?

Councils have many and varied regulatory functions. The main ones include:

- **Planning** – eg, development controls, development consents, certification of complying developments, and change of use approvals.
- **Building and construction** – eg, certification and compliance with building standards, and fire safety requirements.
- **Environmental protection** – eg, native vegetation, noxious weeds, waste management, noise control, coastal protection, underground petroleum storage systems, stormwater drainage, sewage and grey water systems, contaminated land, and solid fuel heaters.
  - **Public health and safety** – eg, food safety, mobile food vendors, skin penetration businesses, cooling towers, warm water system, and swimming pools.
  - **Parking and transport** – eg, road openings and closures, structures in or over roadways or footways, traffic management plans and controls, public car parks, and road access.
  - **Companion animals management** – eg, registration of dogs and cats, dangerous dogs, and surrendered animals.
  - **Liquor and restaurants** – eg, controls on licensed premises, and restaurants on footpaths.
  - **Public areas and issues** – eg, graffiti, hoardings, signs, waste bins, protection of public places, busking, street theatre, parks and playgrounds, public events, trees, and filming.
  - **Other activities** – eg, hairdressers, beauty salons, mortuaries, backpacker accommodation, boarding houses, camping grounds, and caravan parks.<sup>5</sup>

2. IPART 2013 review of Local Government Compliance and Enforcement, Regulation Review - Draft Report October 2013, Independent Pricing and Regulatory Tribunal.

3. *Regulators' Code of Conduct*, United Kingdom (BERR 2007:16).

4. Freiberg, A., *The Tools of Regulation*, The Federation Press, 2010, p. 204.

5. Stenning & Associates, *Register of regulatory functions undertaken by Local Government in NSW*, Final Report, Oct 2012, Version 3.0, available at [www.ipart.nsw.gov.au](http://www.ipart.nsw.gov.au)

## 2.4 Why is regulation important?

A significant amount of government regulation is directed to the prevention or minimisation of harm, whether it is harm to health, welfare, safety, property or to the environment.<sup>6</sup>

In western democracies it is often said that governments govern by consent. In this context councils can be considered to be an arm of government which regulates by consent and on behalf of ratepayers:

- for the collective good, the welfare of the community or the public interest
- to prevent or to minimise harm
- to promote social policies (eg to preserve or protect the environment)
- to manage risks
- to uphold social order.<sup>7</sup>

Councils can be seen as guardians of public trust. For example, the community can trust that the food they buy at food outlets inspected by their local council will not poison them, they will not encounter stray dogs that will bite them, there will be enough parking spaces, etc.

The objects section of an Act will often list the specific nature of the harm that is being addressed and explicitly state the regulatory purposes of the legislation. Councils should ascertain the regulatory outcomes to be achieved from the object clauses of the legislation wherever available and incorporate the objectives of the various regulatory schemes they administer in any compliance policy or plan.

## 2.5 Regulatory principles

The following guiding principles, which are now widely accepted by regulators, should underpin any compliance and enforcement program:

### Accountability and transparency

Councils need to be accountable for the efficiency and effectiveness of their compliance and enforcement activities as well as any unreasonable failures to take appropriate action. This means that activities need to be open to scrutiny. Councils are answerable for their decisions on why they took action or decided not to act. This should be transparent to the general public, people who report alleged unlawful activity, alleged offenders and other stakeholders.

To achieve accountability and transparency councils should:

- publish compliance/enforcement policies
- document and make publicly available their compliance priorities and strategies
- explain decisions made in particular circumstances by the giving of comprehensive and meaningful reasons, particularly when there has been a departure from adopted policy or standard practice
- have a mechanism for consultation and feedback from industry and other stakeholders on their compliance activities
- identify and explain the principal risks against which they are acting in all the major regulated areas
- develop and publish clear standards for performance
- measure and publish performance results against the standards
- have a complaint resolution mechanism to deal with any concerns about the conduct of compliance officers and decisions made
- have a publicly available complaint policy
- have clear procedures for internal and external review of decisions where applicable.

Providing information about the approach, priorities and reasons for decisions improves understanding and certainty and promotes trust by the community.

---

6. Freiberg, A., *The Tools of Regulation*, The Federation Press, 2010, p. 10.

7. See Freiberg, A., *The Tools of Regulation*, The Federation Press, 2010.

## Fairness and consistency

Publicly available procedures need to be fair, appear to be fair, and be consistently implemented.

Consistency in decision making can be achieved by defining outcomes, identifying risks and describing the type of response that is likely to be chosen for different levels of non-compliance. However, this must not lead to a one-size-fits-all approach and must be balanced with the need to consider the circumstances and facts of each individual matter. The blanket application of policy or law without regard to individual circumstances discourages the community from approaching council, as they may feel the council will not act reasonably.

## Proportionality

The level of enforcement action should be proportionate to the level of risk and seriousness of the breach, with more serious breaches attracting a more severe response. Seriousness could be measured by:

- impact/harm caused
- whether or not the conduct is intentional
- whether or not a precedent would be set if the council were to respond in a particular way (or not respond at all).

However, councils should be flexible and take individual circumstances into account when determining the enforcement response, and avoid applying policies too rigidly. For more guidance on applying discretion see Section 5.

More generally, enforcement should:

- aim to change the behaviour
- aim to eliminate financial gain or benefit from non-compliance
- be responsive and consider what is appropriate for the particular offender and issue
- be proportionate to the nature of offence and level of harm caused
- aim to rectify the harm where appropriate
- aim to deter future non-compliance.<sup>8</sup>

## Timeliness

Delays in responding to allegations of unlawful activity can result in difficulties for the council. For example, the passage of time may result in unauthorised works being further advanced, making them more difficult to remedy or rectify. Similarly, if a council has been aware of an issue for a considerable period of time but takes no action (so creating an expectation that no action would be taken), it becomes more problematic to justify enforcement action.

Councils should encourage their staff (from all areas of the council's administration) to report suspicions or concerns. This will help the council respond to unlawful activity at the earliest opportunity.

To ensure timely responses to allegations of unlawful activity, councils should have performance standards and ways to monitor progress.

## 2.6 What are the regulatory options?

Regulation aims to change behaviour so as to avoid or address problems, minimise harm and ensure the common good of the community. There are many options available to councils for achieving specific outcomes, depending on the particular circumstances. These include:

- education campaigns
- provision of information/advice on how to be compliant
- incentive programs to reward good compliance
- negotiating with the person to obtain voluntary undertakings or an agreement to address the issues of concern
- issuing a warning or a formal caution
- issuing a letter requiring work to be done or activity to cease in lieu of more formal action

8. Macrory Review of *Regulatory Justice: Making Sanctions Effective*, First report Professor R.B. Macrory, November 2006.

- issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate
- carrying out the works specified in an order at the cost of the person served with the order
- issuing a penalty infringement notice
- issuing a summons in the local court
- seeking an injunction through the courts to prevent future or continuing unlawful or criminal activity
- taking prosecution action.

## 2.7 What is the best regulatory model?

There is no single most appropriate regulatory action. The appropriateness of any given action will depend on many factors, including council's compliance priorities, available resources, the nature of the unlawful activity and also matters which may be difficult to determine, such as the reasons for the particular non-compliance.

To balance the need for consistency against appropriate application of significant individual discretion vested in decision-makers, and also the need to tailor a compliance response to particular circumstances of the case, councils should consider the outcomes they want to achieve.

There are two basic questions that all regulators grapple with:

- where to best allocate limited resources to achieve the most impact (eg who or what to target), and
- how compliance officers should apply the tools available to them, eg should a punitive measure be applied straight off or should the compliance officer try to negotiate an outcome through education and persuasion first and then escalate the approach depending on the response.<sup>9</sup>

There are many different approaches and models of regulation that attempt to answer these two questions.

There is now broad agreement among practitioners and academics that the best way to allocate limited resources available is through risk-based regulation.<sup>10</sup>

## 2.8 What is risk-based regulation?

Risk-based regulatory programs work on the basis that the type of compliance action chosen will be dependent on an evaluation of the degree of risk, and the impact of the non-compliance on the regulatory agency's ability to achieve its objectives.<sup>11</sup>

The risk-based approach works well for the allocation of limited resources which can be targeted and focused on areas of greatest risk as evaluated by the agency. It is a way to target resources where they are most needed and where they will produce the greatest impact.

A risk-based assessment model can be applied to proactive compliance activities and also in response to reports alleging that unlawful activity has occurred. See sections 2.10 and 2.11 below.

Closely related to a risk-based approach is the principle of proportionality. This requires that enforcement action is proportionate to both the risks and to the seriousness of the breach. This means that compliance and enforcement strategies are based on an escalating model of enforcement, ie the response escalates as the risk and seriousness of the breach increase. This is sometimes referred to as responsive regulation and is often combined with risk-based approaches.

Commentators caution that risk-based approaches to compliance and enforcement, while helpful in prioritising and targeting resources, do not help answer the question about what enforcement tool or strategy is the best option to achieve compliance in any given circumstance. The best strategy will often depend on the reasons for non-compliance and the urgency with which a problem/harm needs to be addressed. This requires a careful analysis of the facts and knowledge of the offender's circumstances. For this reason it is important that councils develop sophisticated assessment procedures on the one hand and criteria to guide individual discretion on the other.

---

9. See Gunnigham, Neil, 'Enforcing Environmental Regulation', *Journal of Environmental Law* 23:2 (2011), pp. 169-201.

10. *Ibid*, p. 170.

11. *Ibid*, p. 174.

## 2.9 Setting up risk-based compliance and enforcement programs

Detailed guidance on how to set up a risk-based compliance and enforcement program is beyond the scope of these guidelines. Councils are referred to the resource list below for further information.

The NSW Government requires all NSW state regulators to implement an outcomes and risk-based approach to regulation under the Quality Regulatory Services (QRS) initiative.

The Department of Premier and Cabinet has developed Guidance for regulators to implement outcomes and risk-based regulation (July 2014), which can be found at [www.dpc.nsw.gov.au](http://www.dpc.nsw.gov.au)

While developing risk-based compliance and enforcement programs is currently not a requirement for local government, we recommend councils consider developing and including in their policies proactive and reactive strategies. Because councils regulate many different and disparate pieces of legislation and the outcomes for each will differ, they may need to develop more than one program and may wish to develop programs over time depending on local priorities.

### Further resources

- Quality Regulatory Services Initiative at [www.dpc.nsw.gov.au](http://www.dpc.nsw.gov.au)
- Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS) *Guideline Compliance Inspection and Monitoring (2012)* [www.hccrems.com.au](http://www.hccrems.com.au)

## 2.10 Proactive compliance monitoring

Compliance inspection can be defined as a systemic process used to determine if the conditions or requirement of a licence, approval or legislative instrument are being met, and to what extent.<sup>12</sup>

Many councils do routine inspections of premises such as food outlets, public pools, private swimming pools, mortuaries, hairdressers, beauty parlours and tattoo/piercing businesses. Inspections of commercial and industrial premises are less common.

Often very little is done to monitor compliance with, for example, conditions of development consents. This means that councils sometimes seem to act as little more than gatekeepers and only respond to direct allegations of unlawful conduct. Despite resource constraints, councils need to try to do more to monitor compliance. Active monitoring of and enforcement of conditions is important to ensure they are achieving the desired outcomes. Councils should use a risk assessment approach and intelligence to identify which premises should be included in a program of compliance inspections. This should include a careful assessment of the key risk factors arising from the nature of activities and works carried out in the council area.

Councils should schedule regular inspections of premises with a high potential for pollution, noise and similar nuisances as a means of early detection and prevention of potential problems.

A proactive compliance inspection program assists councils to meet their statutory requirements, respond to common complaints, and maintain a positive monitoring presence with operations that pose significant environmental risk. A proactive program also provides the opportunity for councils to actively work with particular industries to improve compliance levels and environmental outcomes.<sup>13</sup>

Developing an effective proactive compliance program may reduce the amount of reactive incidents councils need to respond to.

12. Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS) *Guideline Compliance Inspection and Monitoring (2012)*.

13. *Ibid*, p. 5.

### Practical tip

The following tips may assist with developing an appropriate program to monitor conditions:

- scheduled checks
- a compliance code added to the register of standard conditions to allow for sending out scheduled reminder letters to comply with conditions.
- current required checks by DA planners and building inspectors could be expanded to consider other issues, such as environmental management.
- random monitoring schedules could be drawn from a database of consents issued in a certain timeframe.
- utilise intelligence from reports about alleged unlawful activity to identify areas that need monitoring.
- impose conditions that require the submission of audit reports.<sup>14</sup>

We recommend the inclusion of the following points in any policies that deal with proactive compliance strategies:

- identify the areas of focus for proactive work
- identify and record the reasons for focusing on these areas
- if risk ranking is used to identify and prioritise areas, ensure:
  - the indicators for each risk ranking are sufficiently detailed
  - the level of officer authorised to set and/or change the risk ranking is specified; and
  - the reasons for setting or altering the risk ranking are recorded
- the various levels of proactive work are adequately described
- the circumstances in which each level of work will be undertaken are described; and
- supervisors monitor the performance of proactive work to check if it is being carried out in accordance with the policies.<sup>15</sup>

### Further resources

- Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS) *Guideline Compliance Inspection and Monitoring* (2012), [www.hccrems.com.au](http://www.hccrems.com.au)

## 2.11 Reactive compliance enforcement

A risk-based approach can be easily applied to reactive compliance activities.

A risk assessment can be as simple as triaging incoming reports alleging unlawful activity into low, medium and high risk categories and having a matrix to guide the compliance response to those risk categories. For example:

- low risk cases may be assessed, reviewed against internal holdings and noted on the document management system for intelligence purposes but no action is taken unless further information becomes available
- medium and high risk cases may be subject to varying degrees of investigation, inspection or audit, implementation of the appropriate enforcement tool and follow up action.

A process for assessing each report of alleged unlawful activity against a number of clear and specific criteria should underpin a triaging system for it to be effective. Both the system and the associated risk assessment criteria should be documented and approved by the council or general manager under delegation. Assessments of individual cases, any risk rating and decisions about what action to take or why no action will be taken should be documented by the case officer.

14. Based on *Guideline Developing Quality Conditions of Consent*, Hunter Central Coast Regional Environmental Management Strategy (HCCREMS) (2012), p. 9.

15. Based on *Tips and Traps for Regulators*, Report of the Queensland Ombudsman, November 2007, p. 22.

It is important that risk categorisations are used flexibly, as a guide only, and that every individual report alleging unlawful activity is assessed on its merits having regard to its particular circumstances. When responding to reports alleging non-compliance it is also important to explain to the person reporting why a particular case has been categorised in a certain way, and why a particular action or no action was chosen. It is not enough to say that no action will be taken simply because a common incident falls within a low-risk category.

Care should also be taken that appropriate action is taken in relation to reports that are categorised as low risk. This may include periodic review to ensure individual cases are appropriately categorised. It may also include analysis of all low-risk cases as a group to ascertain whether systemic or more serious patterns are emerging.

The following case study is given as an example of ensuring low priority matters are responded to appropriately.<sup>16</sup>

### Case study

A regulator implemented the following procedure for responding to notifications assessed as being of low priority:

- initially, the notifier and the potential offender are posted an information kit, which may include fact sheets, and are urged to resolve their differences;
- the fact sheet for the potential offender might outline the relevant law, which the potential offender might not be aware of;
- where the problem is of a continuing nature, the fact sheet for the notifier might urge them to keep a diary of the details of the problem for 21 days; and
- if the notifier remains dissatisfied after that period, he/she can ask the regulator to proceed to investigate the notification.

See Appendix 1 for an example of a risk categorisation and matching enforcement options.

## 2.12 The role of education and promoting compliance

Education can be a cost effective way to ensure compliance.

A proactive approach to preventing breaches of the law should include providing information to the public about the range of matters councils regulate. This may include planning and building obligations, the restrictions which apply to the development of land, when consent is required, what requirements apply to the keeping of animals, and so on.

Most councils provide this information on their websites through downloadable fact sheets, maps, instruments and brochures. Many also publish advice and guidelines on common issues. A number of councils use recorded voice messages to give information on a range of issues to callers while they are on hold.

HCCREMS *Guideline Promoting Compliance* (2012) provides the following additional tips on promoting compliance:

- site visits and inspections to directly communicate requirements
- media releases on behaviours of concern, illegal activities and consequences
- workshops with target groups on how and why to comply
- the giving of financial incentives (eg rebates for pollution control devices, the use of bonds to ensure compliance).<sup>17</sup>

### Practical tip

Some councils have programs of audits of industrial and commercial sites to assess compliance with environmental protection standards.

The focus of the program is to educate property owners and occupiers about the relevant standards and to work cooperatively with them to rectify any non-compliance.

## Resources and further reading

- For more guidance on developing a Compliance Education Program councils are referred to the HCCREMS *Guideline Promoting Compliance* [www.hccrems.com.au](http://www.hccrems.com.au)

16. Adapted from *Tips and Traps for Regulators*, Report of the Queensland Ombudsman, November 2007.

17. Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS) *Guideline Promoting Compliance* (2012), p. 3

## 2.13 Imposing sensible and enforceable conditions

Unlawful activity can often be traced back to the imposition of unenforceable, ineffective, unclear or ambiguous conditions on consents, approvals, permits or licences.

Councils can avoid this if proper care and consideration is given to the development and imposition of conditions. All too often problems are caused by conditions being drafted with some overall objective in mind, but with little thought being given to whether the conditions are enforceable or effective. Poorly conceived conditions prove unworkable in practice and are most likely to be the subject of ongoing complaints.

To properly regulate work or activity, councils need to be clear about what sorts of objectives they are trying to achieve, what aspects of the work or activity must be subject to conditions to meet those objectives, and how the attainment of those objectives can be measured. Applicants are more likely to comply with conditions that are clear, reasonable, sensible and workable.

When drafting conditions of consent, it should always be assumed that at some stage the council or an accredited certifier will be called on to enforce them. This could be as part of a program of inspections or compliance audits or in response to reports from members of the public.

The conditions imposed on a consent, approval, permit or licence should be enforceable, effective and timely.

### Enforceable

- **legal** (in accordance with the provisions of the relevant Act or Regulation)
- **for the proper purpose** (for the purpose for which the power to impose the condition was conferred)
- **certain** (free from ambiguity or other uncertainty)
- **measurable** (in a manner which makes it possible, and preferably easy, to find out whether the requirements of the condition have or are being met or breached).

### Effective

- **necessary** (the condition serves a good and proper purpose to achieve a reasonable objective)
- **applicable** (the condition has been drafted to apply to the particular circumstances of the activity or work in question)
- **workable** (the requirements of the condition are practical and can be readily implemented)
- **reasonable** (compliance with the condition should not impose unreasonable burdens)
- **clear and simple** (easily understandable by members of the public).

### Timely

- the conditions should set time limits for compliance, where appropriate.

Many councils have publicly available registers of standard conditions. While this is good practice, it is vitally important for the credibility of the council that they are not used automatically, but only after an assessment as to whether they need to be modified to address the particular circumstances of the case.

### Further resources

- Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS), *Guideline Developing Quality Conditions of Consent* (2012), [www.hccrems.com.au](http://www.hccrems.com.au)
- Planning and Environment NSW, sets of standard and model conditions, [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au)
- City of Canada Bay, Standard conditions, [www.canadabay.nsw.gov.au](http://www.canadabay.nsw.gov.au)
- Leichhardt Municipal Council, Standard conditions, [www.leichhardt.nsw.gov.au](http://www.leichhardt.nsw.gov.au)



## 3. Responding to allegations of unlawful activity

### 3.1 What is 'unlawful activity'?

For the purposes of these guidelines, 'unlawful activity' is any activity or work that has been or is being carried out contrary to the terms and conditions of consents, construction certificates, approvals, licences, planning instruments or applicable legislation, or illegally (whether in the sense of being prohibited or merely unauthorised). This may include activities or work carried out:

- without a required development consent, approval, permission or licence
- contrary to the terms or conditions of a development consent, approval, permission or licence
- contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land
- contrary to a legislative provision regulating a particular activity or work.

Unlawful activity encompasses an omission or a failure to comply with conditions of consents, approvals, licences, and undertakings, and not just an active contravention of a law or regulation.

### 3.2 Recording allegations of unlawful activity

When councils receive a report or a service request about unlawful activity, they need to make a full and proper record of it.

Councils should have procedures on how allegations of unlawful activity should be received, registered and processed. Procedures should cover:

- what is to be recorded (eg details about the person making the report such as name, address and telephone number, and the details and location of the activity or work on a central register);
- where reports are recorded
- responsibilities of those recording reports
- how reports should be allocated to specific staff members
- reasonable response time requirements or targets in which to have investigated certain parts
- what information should be provided to the reporter (eg, information about council's rights and obligations regarding confidentiality, and checking whether they would be willing to be a witness)
- what internal holdings should be examined to assess the report.<sup>18</sup>

Councils should ensure that persons receiving reports of alleged unlawful activity are appropriately trained in how to advise the person making the report if the issue is outside of council's jurisdiction. When an allegation has been reported to the council, the person who reported it should be advised in writing of the process that council will follow in dealing with the matter.

To ensure reports about unlawful activity are responded to appropriately councils should ensure their procedures are:

- easily accessible and visible to both members of the public and people subject to enforcement or regulation
- simple
- fair, and likely to be perceived to be so by a reasonable observer
- objective (the assessment criteria enable the objective assessment of the facts and circumstances).

18. Also see Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS) *Guideline Managing Reports of Non Compliance* (2012), p. 3.

### Practical tip

Problems can arise when there is no central or coordinated method for recording and monitoring the investigation and resolution of reports about unlawful activity. Different branches may be responsible for different aspects of the council's regulatory responsibilities and use different procedures and records.

## 3.3 Assessing the information – is an investigation needed?

When deciding whether a report alleging unlawful activity requires investigation a range of factors need to be considered:

- Is the matter within the jurisdiction of the council?
- Is the report premature, eg does it relate to some unfinished aspect of works that are still in progress?
- Is the activity or work permissible without consent?
- If the work is permissible with consent, is there a consent in place and is it possible to determine from the information available to council whether all conditions of consent are being complied with?
- Has too much time elapsed since the events the subject of the report took place?
- Is there a more appropriate agency to investigate or deal with the matter?
- Is the activity having a significant detrimental effect on the environment?
- Does the activity constitute a risk to health and safety?
- Does the report indicate the existence of a bigger problem (eg if a report is one of a series, could there be a pattern of conduct or a more widespread problem)?
- Has the person/organisation or work/activity been the subject of previous reports or enforcement action?
- Does the reported non-compliance have special significance in terms of the council's existing priorities?
- Are there significant resource implications in relation to any investigation into the matters alleged or any subsequent enforcement action?
- Are there any other public interest considerations that should be taken into account?

Correctly identifying or categorising the nature of the allegation will help a decision to be made as to how it should be dealt with. In doing a preliminary assessment council may need to:

- examine internal information relevant to the allegation (eg if the allegation is about a development confirm the zoning of the site, consent history, etc)
- inspect the site and try to interview the owner/operator if there is evidence of unlawful activity or works.

Not every report will require an investigation. Many concerns can be resolved informally by providing prompt and accurate advice. This could be, for example, by confirming that consent is in place for an activity or work or that it is permissible without consent.

Any perception of delay in responding to a report can impact on council's reputation. An initial assessment of the report should therefore be made by the relevant officer as soon as practicable to determine whether investigation is required.

Any decision not to investigate an allegation of unlawful activity needs to be recorded and the reasons for that decision clearly explained to the person who reported the activity.

It is not open to councils to decide not to conduct an investigation solely on the basis that they can rely on the results of an investigation conducted by some other body unless they have satisfied themselves about the facts of the case and independently assessed the need for action. There may also be procedural fairness implications if decisions impacting on the rights or interests of individuals are based only on the findings of an inquiry by another investigative agency or a tribunal.

In other cases after the initial assessment council may have enough information to enable it to:

- recommend appropriate enforcement action if there is evidence of unlawful activity or works
- initiate informal enforcement action, usually starting with letters directing that the activity cease or the work be rectified
- review the effectiveness of the initial enforcement action and proceed, if appropriate, with formal enforcement action by issuing a relevant notice
- if the unlawful activity ceases or the work has been rectified, resubmit the matter in two or three months for follow up action, such as a repeat site inspection.

It is very important that councils inform the persons who report allegations of the outcome of their reports.

## Malicious reports

Reports that seem to involve ill will, vengeance or vindictiveness should not be immediately dismissed. Although a person's motive may cloud their judgement and flavour the report, it may still be well founded. Councils have a responsibility to deal fairly with the substance of any report, regardless of the real or imagined motives of the reporter.

## Anonymous reports

If the council receives an anonymous report the allegations should still be assessed if the subject matter of the complaint is sufficiently serious and there are other avenues of inquiry reasonably available. However, evidence will not be available from the person who reported the matter.

### 3.4 Risk categorisation in initial assessments

Answering the set of initial assessment questions will also assist councils to assign appropriate risk categories to individual matters. A triage or rating system for common non-compliance incidents, such as, critical, high, medium and low can be developed to help with prioritising action. This will assist councils with managing people's expectations and allocating resources.<sup>19</sup>

The following table of risk categories and examples is reproduced from HCCREMS' *Guideline Managing Reports of Non-compliance* (2012).

**Table 1. Example risk categories**

RISK CATEGORY			
CRITICAL	HIGH	MEDIUM	LOW
<b>FEATURES OF CATEGORY</b>			
Permanent, long-term or reoccurring and serious damage to health, property or environment likely or very likely Large scale impacts Very serious offences Very high priority issue for council and community	Moderate, major or severe consequences likely or very likely Medium-large scale impacts Serious offences Very high priority issue for council and community	Moderate consequences are likely, serious impacts are very unlikely Small-medium scale impacts Moderate offence severity Very high priority issue for council and community	Consequences are minor or moderate and are unlikely or very unlikely to occur Small scale, isolated impacts Low level offence severity Very high priority issue for council and community
<b>INDICATIVE TIMEFRAME OF INITIAL RESPONSE</b>			
Immediate and urgent response	Response within 24 hours	Response within 5 working days	Response within 10 working days
<b>EXAMPLE REPORT TYPES/ISSUES</b>			
Significant pollution incidents Large scale clearing of vegetation containing threatened species Food poisoning incidents Abandoned vehicles in an unsafe location Collapsed or unsafe building works in public areas Dog attacks	Roaming dogs Unsafe buildings and building works Rubbish dumped in an unsafe location/hazardous Pollution incidents Breaches of tree preservation order Dangerous/restricted dog complaints Straying stock on roads	Abandoned vehicles Stormwater or drainage issues Dumped rubbish (not hazardous) Breach of consent conditions (eg waste management) Poor sediment control on building sites Noise complaints affecting several people	Noxious weeds Minor consent breaches (eg no signage) Unauthorised signage Unauthorised land use Overgrown Aesthetic issues Neighbour disputes Nuisance complaints (eg domestic noise, barking dogs)

19. See Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS) *Guideline Managing Reports of Non-compliance* (2012) p. 7.

### 3.5 Deciding if more information is needed

Before deciding how a report of unlawful activity should be dealt with relevant staff may need to question the reporter more closely about their allegations and any evidence they have or can point to which supports their allegations.

It is important to remember that the person reporting may be under considerable strain. They may react badly to a line of questioning that gives the impression that the questioner is sceptical about their report.

### 3.6 Does the council have jurisdiction/power to enforce compliance?

#### Neighbourhood disputes

Councils sometimes become involved in protracted disputes between neighbours that end in entrenched conflict. These can be very difficult to resolve. Such disputes can lead to the expenditure of a large amount of resources even when the council has no role in resolving the matter, simply in order to respond to repeated allegations. Prolonged disputes can also lead to staff fatigue and inability to recognise when a new genuine issue arises that council needs to act on.

While reports alleging unlawful conduct that have a neighbour dispute at their heart are unavoidable, it is important that councils are clear about their regulatory roles in various scenarios and be up front about when they cannot assist. It is equally important not to let neighbour disputes cloud the issues and lead council to indecision about unlawful practices.

There are three common scenarios that can lead a council into unnecessary difficulties when it comes to neighbour disputes:

- **Unwittingly creating unrealistic expectations**

Council officers generally want to be helpful and assist people with solving their difficulties. However, this can sometimes lead to creating a false expectation about council's authority to resolve a matter. It is important to adequately manage the expectations of the parties at all times in the process.

When the subject matter of a dispute between neighbours is a civil matter and council has no role in resolving it, if council decides to facilitate the resolution of the matter it needs to clearly explain it has no power to enforce the resolution. This will avoid creating an unrealistic expectation that leads to repeated complaints because the expectation cannot be fulfilled. Councils should also be aware of the risk of creating expectations by initially taking legitimate action, and of the impact of subsequent decisions to discontinue such action.

---

#### Case study

A council decided to issue a notice of intention to declare dogs a nuisance in response to several complaints. After receiving submissions from the dog owner, council decided not to proceed with an order but did not explain its decision to the person who reported the nuisance. Instead council required the parties to take part in a mediation before it would consider further action.

From the perspective of the person reporting the nuisance, the council's decision to take no further action and require mediation was sudden and not within what they had been led to believe council would do. Initial information they received was that their allegations were substantiated and council appeared to be taking enforcement action. They unsurprisingly concluded council was biased towards the dog owner.

---

- **Incorrectly categorising the dispute as a civil matter**

When a neighbour dispute is at the centre of a report to council, it does not necessarily mean there hasn't been unlawful activity by one or sometimes both parties. It is important in such situations to be clear about council's authority and role and not abrogate council's responsibility onto the parties themselves. If there has been clear contravention of the law, suggesting the neighbours attempt mediation might resolve their conflict, but will not necessarily address the unlawful activity.

---

## Case study

A council received 11 individual reports about excessive barking at a rural property. The complaints were made by seven complainants from six different properties.

After investigating the complaints, council issued a notice of intention to declare the dogs a nuisance. The recipient's solicitor made representations on their client's behalf stating a number of initiatives were undertaken to reduce the noise.

After considering the representations, council advised the complainants that it considered mediation should be undertaken before council would consider taking any further action.

Council decided not to continue with the action partly because the owner was willing to mediate.

In these circumstances it was unreasonable for the council to require mediation or refuse to take action. Council received reports from the owners of multiple properties indicating that the noise from the barking dogs was having a widespread impact in the surrounding area. Furthermore mediation was unlikely to be successful, given that there were several households involved.

Councils should always be prepared to make decisions in relation to contentious matters they have authority to resolve or enforce rather than abrogate their responsibility or force people to exercise alternative methods such as mediation.

---

- **Changing the original approach due to persistent pressure by one of the parties**

When repeat reports are received about the same issues councils can fall into the trap of changing their original approach for reasons that are not clearly apparent to all parties. In this way they can open themselves to criticism about being under the influence of one party to a dispute. Changing a decision is not wrong in itself. However where an expectation has been created, it is important to have a good reason for the new decision, to clearly communicate it to both parties, and to adequately document it.

---

## Case study

After an investigation of a complaint, a council decided that issues relating to a retaining wall between two properties was a civil matter and advised both parties. Some of the issues were then resolved privately in court, but repeated complaints from one party continued, and some many months later the council issued a Notice of Intention to the other party without an explanation or further discussion. It seemed to the recipient that the council had changed its mind based on the same information that led to the original decision. This caused innuendo and speculation to heighten about the council's role, powers and interest in the matter, and the dispute between neighbours only intensified.

Ongoing attempts by the council to deal with what turned out to be a potentially serious safety concern about the retaining wall were hampered for an excessive period of time.

---

## What councils can do to improve the way they handle complaints involving neighbour disputes:

- Make a thorough initial assessment of all the issues in a complaint to determine council's authority to resolve them before any action is contemplated.
  - One report concerning the same neighbour can contain many different issues, some of which will require council's involvement and some of which will be civil matters. Be clear in explanations as to which aspects council can deal with and which cannot be dealt with and why.
  - If an assessment has been made that an issue is a civil matter, be firm about saying council has no role or authority to get involved.
  - If decisions are changed in the course of dealing with the matter because of new information provided by one party to a dispute, for example, explain the reasons to the other party to the dispute even if it is not possible to share the information in detail due to privacy reasons.
-

- Give people information about how to resolve neighbour disputes by referring them to available resources (for example Law NSW Access, Community Justice Centres, etc.).
- Have publicly available policies on how council will generally deal with the most commonly complained about issues such as:
  - noise (from air conditioning units, after hours work, power tools, barking dogs, etc)
  - dividing fences and retaining walls
  - encroachments
  - illegal development
  - non-compliance with development consent
  - drainage and flooding issues
  - damage from trees.

Publicly available advice on how councils will deal with these common issues will assist with managing expectations even before a complaint is made and assist councils with making discretionary decisions in particular circumstances. Care should be taken however that such policies are not applied inflexibly.

- Consider whether the person reporting should be advised that council will no longer respond to issues already dealt with. Care should be taken to assess every new report, investigate, take appropriate action where warranted and document a decision not to take action.
- Keep adequate records of all significant interactions, advice given and decisions made.

### Further resources

- Ipswich City Council has developed a number of helpful fact sheets and information for people complaining about common neighbourhood issues. These can be accessed on [www.ipswich.qld.gov.au](http://www.ipswich.qld.gov.au)

## 4. Investigating allegations of unlawful activity

This section covers the key issues that need to be considered when conducting formal enforcement investigation. For more information on investigations, please see *Investigating Complaints – A Manual for Investigators* published by the NSW Ombudsman in June 2004 available at [https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0010/4213/Investigating-Complaints.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0010/4213/Investigating-Complaints.pdf).

In addition, the NSW Ombudsman offers an introductory course on Investigating Misconduct in the Public Sector. This covers the basics of conducting and managing an investigation in more detail than can be provided here. For more information, contact our community education and training team using the online form at <http://www.ombo.nsw.gov.au/training-workshops-and-events/community-education,-events-and-forums>.

### 4.1 The role of the investigator

Council staff charged with identifying and responding to unlawful activity will often be required to undertake an investigation into the relevant facts and circumstances. This task must be done in an impartial manner.

In certain circumstances, matters should be referred to an appropriate external agency or other third party for investigation or action. For example, a report about alleged unlawful activity should be referred if:

- it concerns possible criminal conduct or serious corruption and the council is unlikely to have adequate powers or expertise to investigate
- it is particularly complex or sensitive and there is an appropriate alternative agency (such as the Environment Protection Authority) with jurisdiction to investigate the matter
- the subject of the complaint is the council itself, or a senior manager of the council.

### 4.2 Recognising and avoiding conflicts of interests and bias

The integrity of the compliance and enforcement undertaken requires that any conflict of interests of an investigator be properly managed. A conflict of interests occurs when the private interests of the investigator conflict with, or may be reasonably perceived to conflict with, the conduct of an unbiased investigation.

All investigations must be conducted in an impartial and objective manner. The investigator must not have, and must not be perceived to have, any conflicts of interests in relation to the alleged unlawful activity, the person reporting the activity or the people or conduct being investigated.

There can be no confidence in the outcome of an investigation or the decision on enforcement action if the process is tainted by bias or an actual or perceived conflict of interests.

#### Practical tip

Some of the biggest 'conflict of interests' challenges faced by councils are when they have to investigate complaints of unlawful activity involving the council itself, councillors, council staff, or relatives or friends of the investigator.

Problems with investigating staff members can usually be avoided if the investigation is carried out by a more senior member of staff from a different section of the council. If the matter involves a councillor, ensuring the general manager oversees the investigation may be a good method of providing some degree of impartiality in the process.

If there is no suitable investigator available, the council can either engage an independent consultant or ask for assistance from another council to carry out the investigation. In such cases, council may wish to contact the our office to seek advice on an appropriate strategy.

If the council itself is suspected of having carried out the unlawful activity, there is a strong case for the use of an independent consultant or an appropriate member of staff of another council as an investigator.

It is no answer to an allegation of a conflict of interests to say that the investigator is not the ultimate decision maker. The allegation may be that, because of a conflict of interests, the investigator did not collect all the relevant facts or ask the necessary questions and in this way did not carry out a proper investigation to establish the facts on which the ultimate decision was based.

## How do I know if there is a conflict of interests?

It is not always easy to identify a conflict of interests. Although all investigations must be conducted impartially, it is unrealistic to expect that the investigator will always be someone having no previous connection with the person or issues being investigated. In our experience, reports about alleged unlawful conduct often have significant histories that involve the same people reporting and being investigated and the same council staff being called on to investigate matters they may have handled previously.

Simply knowing the person raising concerns or the person being investigated, or previously having investigated that person or the issue of concern, is not enough in itself to found a valid conflict of interests allegation. Such an allegation needs to be based on something more or something particular to the current investigation.

A conflict of interests may be reasonably perceived to exist when there are:

- family ties, personal friendship, or animosity between the investigator and any of the parties involved in the allegations – for example, the investigator and the complainant are in the same sporting team
- the fact or perception that the investigator has something to gain or lose by a particular investigation outcome
- a financial interest of the investigator in the subject of the investigation – for example, the investigator's spouse is employed by a contractor who is the subject of an investigation
- strongly held beliefs or views of the investigator about the subject matter of the investigation.

## Conflicts of interests – ‘perception is reality’

The test – would a member of the public who knew about these interests reasonably perceive that it might influence the conduct of the investigation or decision?

It is irrelevant whether the investigator or decision maker is personally satisfied that the conflicting interests have been put out of their mind in arriving at conclusions or making decisions. The important thing is how a situation might appear to a reasonable observer.

### Practical tip

To assess if you have, or could reasonably be perceived to have, a conflict of interests or whether there could be a reasonable apprehension of bias it is helpful to ask yourself the following questions.

- Do I have a personal or financial relationship with the person who is the subject of the allegations?
- Do I have a financial interest in the activity/development the subject of the allegations?
- Do I have a personal or financial relationship with the person who reported the allegations?
- Would I or anyone associated with me benefit from an adverse or favourable finding in this investigation?
- Have I expressed any personal or professional views that may lead others to conclude that I am not an appropriate person to investigate this matter?
- Does the council have a financial or other interest in the activity or work that is the subject of the report? If so, could this mean that it might not be seen as impartial in any investigation of the matter?

If you are not sure about your ability to act without a perception of bias or a real or perceived conflict of interests, you should discuss the matter with a senior member of staff or the general manager as soon as possible. Your council's code of conduct should include further information on these issues.

Remember, even if you remove yourself from the investigation, you may still need to keep the information you received from the person reporting the allegation or other sources confidential.

## Bias

There are several factors that should not be allowed to influence the conduct of an investigation or any subsequent decision on enforcement action. These include:

- the race, religion, sex, national origins or political associations of the person reporting the allegations or person being investigated
- the personal feelings of the investigator towards the person who reported the allegations, the subject matter of the investigation or the person being investigated
- any possible political advantage or disadvantage to any individual or group on or off the council
- the possible effect of the outcome of the investigation on the personal or professional circumstances of those involved in the investigation.



### Practical tip

A constant danger in the area of enforcement is the concept of 'regulatory capture'. Staff responsible for enforcement action often have regular dealings with the same builders, developers, restaurant owners, and operators of industrial premises. It is difficult to avoid developing a certain familiarity with people when you have ongoing contact with them.

Council staff need to maintain a degree of formality and professionalism in these relationships so that there is no actual or reasonable apprehension of bias in their dealings. While it is important to provide a good level of customer service, you need to make sure that this is not interpreted as an obligation to satisfy the expectations of those whose activities you are responsible for regulating. Good service in this context means timely, professional, fair and efficient provision of regulatory services.

## 4.3 Establishing a framework for the investigation

An investigation should only proceed once the investigator is properly authorised, and an investigation plan has been drawn up.

### What authorisation is needed to begin an investigation?

The level of authorisation required will depend on the nature of the investigation. In most circumstances where there are adequate and appropriate delegations of authority, all the investigator should need is a decision from the relevant member of staff. If the matter is more complex or sensitive, or not covered by a delegation or council policy, the investigator may need to obtain explicit authorisation from a relevant manager.

If there are any doubts about authorisation, questions should be referred to the general manager.

### Preparing an investigation plan

Before beginning a more complex investigation, an investigation plan should be prepared. The plan should be completed before conducting any inquiries because the 'planning process' will help the investigator clarify the approach they should take. The plan will become the road map for the investigation. It helps investigators to stay focused on the job and alerts them to potential problems before they encounter them.

For most investigators, a written plan is helpful in establishing the scope and sequence of tasks involved in their investigation. A written plan is also a useful tool if, for some reason, the investigation needs to be handed to someone else.

The first step in preparing an investigation plan is to clarify exactly what is being alleged. A single report may contain a number of separate allegations. Each allegation should be assessed to determine whether it needs to be individually dealt with.

### Determining the powers of investigation

At the outset an assessment needs to be made as to whether the investigator has the necessary powers to inspect premises, to obtain or view documents and to obtain information from other sources.

The powers to enter or inspect premises should be detailed in the investigation plan.<sup>20</sup> It may be advisable prior to exercising such powers (eg to enter or inspect premises), for the investigator to seek advice from a suitably qualified and experienced legal practitioner. See Appendix 2 Council powers to enter and inspect premises.

### Contents of the investigation plan

At the outset all investigators need to identify:

- what questions need to be answered (if an investigator asks themselves the wrong question, this can have serious implications; it may mean, for example, the investigator or council take unjustified actions that have a serious detrimental impact on others)

20. See Section 8, Part 2 and Section 16, Part 8 of the *Local Government Act 1993*.

- what information is required to answer those questions
- the best sources of information and methods to use to obtain that information, and
- any risks that need to be managed and the strategies that need to be implemented to do so.

The right to take legal action against unlawful activity may well be subject to a time limit. Legislation may impose a statute of limitation on taking matters to court from the date of offence or the date when council became aware of the offence. Investigation plans should identify and accommodate these limitations. The investigation must be completed within the actionable deadline so that there is time to assess evidence and make a final decision on what, if any, enforcement action is required.

It is important to start with a plan, but investigations rarely proceed as originally predicted. Investigators should therefore be ready to revise their plans as new situations emerge during the course of the investigation. Investigators should make sure they follow the facts and never try to make the facts fit into their plans.

Investigators should seek authorisation for any significant amendments to or variations from the terms of reference or investigation plan. This authorisation should be from the general manager, or the person who authorised the investigation under delegated authority, and should be properly documented. Doing this removes a major potential source of complaint about the conduct of an investigation.

An investigation plan may be as simple as documenting these points.

In more complex investigations the plan could deal with each allegation under the following headings:

- allegation
- possible offence/order
- proofs/facts in issue
- avenues of inquiry (primary tasks).

### **Possible offence/order**

Under 'possible offence/order' the practical implications of the allegation should be listed. For example, is the conduct complained of grounds for issuing an order or grounds for a prosecution? Being specific about this can avoid wasting resources on investigating a matter where the council has no power to act or is unlikely to take further action.

### **Proofs/facts in issue**

Under 'proofs/facts in issue' should be listed the facts that need to be established to determine whether the allegations are true or false. If the allegation is about the conduct of an individual, the facts in issue will usually involve finding out:

- the identity of the person alleged to have engaged in or carried out the unlawful activity
- the place and the date that the alleged unlawful activity occurred
- whether the conduct itself is an unlawful activity
- whether the person the subject of the allegation did the thing alleged
- whether the person concerned had authority to engage in or carry out the unlawful activity or had some other lawful basis for avoiding liability.

The relevant legislation, Regulation, instrument or terms/conditions of consent alleged to have been breached may also contain specific elements or requirements which must all be proven in order for a breach to be made out. The standard of proof to be met will depend on whether the allegation concerns a criminal offence or not. In criminal proceedings, the relevant standard is 'beyond reasonable doubt'. In other proceedings the relevant standard is usually the 'balance of probabilities'.

**Practical tip**

Follow the facts, rather than trying to make the facts fit into your plan.

Remember, at the end of the investigation, the investigator will be required to prepare an investigation report. Even at this early stage in the investigation, the investigator should be thinking about the types of issues the investigation report will cover.

**Avenues of inquiry**

Under 'avenues of inquiry' identify the methodology to be used, the procedures to be followed and the primary tasks to be undertaken to gather the necessary evidence. This may include site inspections, expert reports, physical evidence such as soil samples, interviews with specific witnesses and examining documents.

**Practical tip**

A good investigation starts with careful planning and preparation, proper authorisation and a clear understanding of the parameters of the investigation. Getting it right at the start will help avoid problems later on.

**4.4 Complying with secrecy, confidentiality and/or privacy requirements**

In all investigations, consideration should be given to whether secrecy, confidentiality and/or privacy are issues. Depending on the circumstances, there may be a need for secrecy or confidentiality in relation to one or more of the following:

- the fact that a report has been made
- the nature of the allegations
- the fact that an investigation is being undertaken
- the identity of the person who reported the allegations
- the identity of any persons the subject of the allegations and/or any investigation
- the identity of any witnesses, and/or
- any evidence gathered by the investigator.

There are various statutory, contractual, code of conduct or operational limitations on the disclosure of information that may apply to the conduct of investigations in local government.

**Privacy**

Under the *Privacy and Personal Information Protection Act 1998* (the PPIP Act) it is an offence to intentionally disclose any personal information about another person to which officers have access in their official capacity, unless the disclosure is in connection with the lawful exercise of official functions. Unauthorised disclosure of confidential information will also generally be covered by a council's code of conduct.

The PPIP Act also contains various information protection principles that are relevant to the actions that may be taken by a council in response to allegations of unlawful activity. These principles and exemptions are set out in the table in Appendix 3.

Effectively the requirements of the information protection principles set out in the PPIP Act do not prevent or hinder a council from investigating allegations of unlawful activity.

For more information see the website of the Information and Privacy Commission at [www.ipc.nsw.gov.au](http://www.ipc.nsw.gov.au)

**Secrecy**

There may be some secrecy provisions in some legislation administered by councils.

## Confidentiality

Confidentiality serves a number of important functions. Preserving the confidentiality of the identity of the person making the allegation and the person the subject of the allegation minimises the risk of harm to these parties.

Confidentiality also helps to ensure the integrity of the investigation. If a potential witness feels that they are unable to trust the discretion of the investigator, they will be more reluctant to come forward with relevant information. If material uncovered in an investigation is kept confidential, there is less risk of contamination of evidence. Any witnesses interviewed in the course of an investigation should be advised not to discuss the matter with other witnesses or other third parties. Before interviewing a witness, investigators should ask them whether they have discussed the matter with anyone else.

Council staff investigating alleged unlawful activity do not have absolute privilege against defamation. Failing to maintain confidentiality – by improperly or unnecessarily ‘publishing’ details of the allegation or any material uncovered in the course of an investigation – might expose investigators to defamation proceedings. However, investigators should be able to claim the defence of qualified privilege in any such proceedings provided the publication was for a proper purpose and made in good faith.

## Confidentiality limitations

It is extremely unwise to guarantee confidentiality to any witness, informant or other person involved in an investigation. Guarantees of complete confidentiality may not be practical or appropriate because:

- disclosing certain aspects of allegations for investigative purposes may leave little doubt as to the identity of the person who reported the allegations and/or witnesses
- procedural fairness may require disclosure of the allegations and aspects of the evidence to the subject of the investigation
- witnesses or other involved parties may disclose information, even if they have been asked not to
- properly investigating aspects of the allegations may require information or evidence to be disclosed
- information may be subpoenaed for use in legal proceedings or may be lawfully required by investigative authorities.

## 4.5 Providing procedural fairness

Sometimes called ‘natural justice’, procedural fairness helps to ensure that an investigation and its outcomes are fair and are reasonably perceived to be fair.

Procedural fairness ensures that any person whose rights or interests are likely to be affected by a conclusion, finding or decision is entitled to an adequate opportunity to respond.

Depending on the circumstances, procedural fairness may mean the investigators need to:

- inform people whose rights or interests may be adversely affected by the substance of any allegations against them or grounds for adverse comment about them (unless required by law, this need not be done until an appropriate stage in an investigation has been reached)
- inform people of the substance of any adverse finding proposed to be made about them, and provide them with a reasonable opportunity to put their case (this may not be necessary if a formal order is to be made under the Local Government Act or criminal or other court proceedings are to be taken)
- consider any submissions put forward to the investigator by a party to a matter
- make reasonable inquiries or investigations before making decisions
- act fairly and without bias
- conduct investigations without undue delay.

The obligation to inform people of the substance of the allegations made against them does not apply where an investigation is unlikely to affect a person’s rights or interests.

In most cases it will be sufficient to offer the person an opportunity to put their case in writing. However there may be occasions where procedural fairness requires that the person be able to make oral representations.

In some other cases there may be an overriding public interest in short-circuiting certain procedural fairness requirements. This is only likely to be in situations that involve serious risks to personal safety or where substantial public funds may be at risk. Investigators should always seek and document expert external advice if they believe they have such a case on their hands.

Adhering to the rules of procedural fairness is an essential part of an investigation as it enables the investigator to check on the thoroughness of the investigation and can help identify any weaknesses or conclusions not properly supported by fact. It also reduces the ability of those who have engaged in misconduct to avoid a just outcome by pointing out procedural flaws in the investigation.

While it may not be necessary to inform a person the subject of investigation of all the known evidence obtained throughout the investigation, key evidence, should be put to such persons. This will assist in demonstrating procedural fairness by allowing the person to comment on the evidence or to identify evidence of an exculpatory nature which may be taken into account.

Reasons for any decision involving procedural fairness considerations should always be recorded, in case the investigation later becomes the subject of a complaint to an accountability agency or an appeal to a tribunal or court.

For further information on procedural fairness requirements, please refer to the Ombudsman's *Investigating Complaints – A Manual for Investigators* (published June 2004).

## 4.6 Gathering evidence

Evidence is used to prove, or disprove the elements of a particular offence or breach.<sup>21</sup>

### The principal forms of evidence

The three main types of evidence are:

- oral evidence (recollections)
- documentary evidence (records)
- physical evidence (what can be seen, heard or smelt)
- expert evidence (technical advice).

In most investigations into unlawful activity at local government level, the main type of evidence is the physical evidence of the activity or work supported, if necessary, by oral evidence of witnesses and documentary evidence. In many cases, however, there may be a need to obtain expert evidence.

The fundamental principle of evidence gathering is that any evidence relied on should be relevant, reliable and shed light on the probability of the facts.

Investigators should also carefully consider whether there is a possibility that the evidence may eventually be used in court. This may be evident at the outset, or become apparent as they work through the facts and evidence. If this applies, investigators should seek advice about whether and how they obtain evidence and record or store it, so that they do not jeopardize the utility or admissibility of the evidence in legal proceedings.

Some enforcement methods issued by council officers are subject to appeal. Therefore it is prudent for officers to ensure that they have sufficient evidence to be able to defend the chosen method of enforcement action, before commencing the action.<sup>22</sup>

### Authority to obtain relevant evidence

When deciding whether the investigator has the authority to get access to relevant documents and to question witnesses, it is important to distinguish between the right to ask and the power to demand.

Investigators have a common law right to ask people to answer questions and to provide them with relevant documents. However if witnesses refuse to be interviewed or refuse access to documents, council investigators are unlikely to have the legal power to compel non-council witnesses to be interviewed or to provide information or records.

If the relevant records are all available within the council, then the investigation should be relatively straightforward. However, records may be held by other people or organisations that may be reluctant to produce them. If so, the investigation may stall.

If there is some doubt about the availability of the powers necessary to conduct an effective investigation into alleged unlawful activity, council may need to seek legal advice or ask the general manager about possible alternative strategies.

21. Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS), *Guideline Evidence Gathering* (2012) p. 2.

22. *Ibid.*

## Forensic evidence

The word forensic means 'used in, or connected with, a court of law'. The implications for an investigator of evidence being or becoming forensic are significant. If investigations of unlawful activity or work are likely to end up being the subject of legal proceedings, the task of preparing evidence will be much more onerous and investigators will have to take considerably more care in the way it is obtained and recorded.

Where there is evidence of, or a suspicion that a criminal offence has been committed, it should be reported to the NSW Police immediately. It may be necessary to cease investigation activity and secure all of the available evidence for the police. Failing to deal properly with evidence could result in its loss or destruction which could compromise any subsequent police investigation.

### Practical tip

If unsure, seek advice from the NSW Police Force on how to proceed.

Perhaps the most important consequence of evidence being forensic is the application of the rules of evidence. If the matter is likely to go to court, the investigator may need to get professional advice. A good investigator will always ask for this help.

Under some legislation in NSW, council officers may have specific investigation powers, eg the *Protection of the Environment Operations Act 1997* where a local council is an appropriate regulating authority. Investigation of those types of offences should be carried out in accordance with the requirements of the appropriate statutes ie the *Evidence Act 1995* or the *Criminal Procedure Act 1986*. Guidance on the investigation of these types of offences should be sought from the agency with primary responsibility for enforcing the legislation ie the Environmental Protection Authority.

## 4.7 Understanding the rules of evidence

It is useful for investigators to have a basic understanding of the rules of evidence. Even if allegations made in a complaint are unlikely to or do not become the subject of legal proceedings, the rules of evidence are based on principles that can help investigators by directing them to the best evidence. In addition, the allegations made may in some circumstances become the subject of legal proceedings, therefore evidence of a higher quality is more likely to be admissible and valuable in any related court proceedings.

The most fundamental consideration applying to any evidence is relevance. There must be a minimal logical connection between the evidence and the facts in issue. However, if the rules of evidence apply, even evidence that is relevant may be inadmissible in proceedings.

### Hearsay

Hearsay evidence is evidence based on what has been reported to a witness by others rather than what the witness has heard or witnessed themselves. Hearsay is not admissible in a court as evidence as to the truth of what the witness has heard. A dictionary definition of hearsay evidence is 'that which one hears or has heard someone say; report, rumour, common talk'.<sup>23</sup>

When investigating allegations of unlawful activity, hearsay can be a useful source of information that points to other relevant evidence or witnesses. However whenever a primary source is available, it should be used in preference to relying on hearsay evidence.

An important exception to the rule against hearsay is any statement made by an alleged wrongdoer where they admit their wrongdoing. Damaging confessions are treated as inherently likely to be true.

### Opinion evidence

Investigators have the task of finding out what happened and why. A witness's opinions about a person, or about what happened or should have happened, are usually irrelevant to an inquiry unless the witness is an expert whose opinion is of relevance to the subject matter of the investigation. As a general rule, a witness

23. *The New Shorter Oxford English Dictionary*.

statement should not contain expressions of opinion about something or someone unless the witness is an expert who is asked to provide an expert opinion.

Opinion evidence from a witness other than an expert may be admissible if it is based on what a person saw, heard or perceived about a matter, and the opinion is necessary to obtain an adequate understanding of the witness's perception of the matter. Similarly if the witness has acquired considerable practical expertise about a matter through life experience, they may be able to express an opinion about something even if they are not an expert.

## Cautioning

During the course of an interview, evidence may come to light which indicates that a previously-unknown criminal offence may have been committed by the interviewee. If this happened during a police interview, a caution would be given advising the person that he or she does not have to say or do anything, but anything that is said or done may be used in evidence in criminal proceedings. Evidence in relation to a criminal offence that is obtained in the absence of a caution has not been properly obtained, and may be excluded from criminal proceedings.

If during an interview it becomes apparent that the witness is implicating themselves in a criminal offence, the interview should be concluded as quickly and as subtly as possible. The police should then be contacted for advice about how to proceed. If investigators do proceed with their questioning and the matter is criminal, they risk contaminating evidence, and possibly jeopardising any subsequent criminal investigation.

## 4.8 Doing site inspections

The site inspection is the key investigative step for most council investigations of unlawful conduct complaints as well as proactive inspections as part of a risk-based compliance audit or monitoring. Physical evidence of what is or is not occurring or has or has not been built that will often prove crucial in deciding what enforcement action is required.

Where visual information or the physical context of evidence is important, it may be useful to conduct a site inspection. Depending on the nature of the investigation, the investigator may need to:

- view the site at a particular time of day and/or day of the week to match the conditions of allegation
- take notes, photographs, measurements or video, and/or make diagrams while on-site
- be accompanied by a witness who can point out relevant objects or layout
- interview or arrange interviews with any potential witnesses identified before or during the site inspection.

Good preparation is very important. Investigators should consider carefully what they need to know before they visit a site. For example, they should familiarise themselves with any relevant conditions of consent or licence conditions, the relevant legislation that may have been breached and the legislation under which any formal enforcement action may be taken.

On many occasions, the site will be able to be inspected from a public place or from the property of the person who made the allegation. Otherwise, the investigator will need to approach the owner or occupier of the premises and ask for permission to inspect the site.

If permission is refused, investigators will need to decide whether to use any formal inspection provisions available under legislation.

Other issues that should be considered include the need for photographic or video equipment, recording equipment and other measurement devices. It is important that investigators know their powers in relation to taking videos.

### Practical tip

Some councils give their enforcement staff a checklist of matters they should cover during site inspections to investigate allegations of unlawful activity.

The list includes:

- the need to identify themselves and carry proof of identity and authority
- key questions about the work or activity
- key questions to identify the subject of the allegation and the state of knowledge of that person about the unlawful activity
- key questions to identify who was responsible for the unlawful activity.

### Good record keeping

It is extremely important to keep good clear records of site inspections. Such notes should include:

- the time and date of the inspection
- precise details of where the investigator went, what he/she saw and who he/she spoke to
- what other information the investigator obtained, including a record of any photographs taken, and documents or other physical evidence obtained.

Investigators should make such records as soon as possible, either during or immediately following a site inspection. Accuracy is very important and the longer investigators leave it, the more scope there is for inaccuracy. Furthermore, contemporaneous records carry more weight in any subsequent proceedings than records made well after an inspection.

For more information on record keeping see Section 7 of these guidelines.

### Practical tip

Some councils use a standard form to record site inspections and conversations. The forms allow staff to record basic details of an inspection, including details of any undertakings made or directions given.

The advantage of these forms is that they build in a culture of good record keeping among council staff. It is important that councils don't just demand good record keeping of staff, but actually facilitate the practice.

### Some common problems with site inspections

There are several situations where special considerations apply to site inspections.

#### Serious persistent complaints

Serious and persistent complaints may require alternative evidence-gathering strategies. One example is persistent complaints about noise from barking dogs. Evidence can be gathered by surveying surrounding premises or encouraging complainants to maintain a diary of incidents.

Surveys of surrounding homes give councils a basis to judge whether there is evidence that the problem is sufficiently serious to warrant action. Diaries can highlight patterns of behaviour that help judgements to be made about the seriousness of the problem and enable the best time and place to gather further evidence to be identified.

#### After hours operations

Unlawful activity can occur at any time of the day or night, on weekdays or at weekends. Nights and weekends are particularly relevant for reports about offensive noise and failure to comply with limitations on hours of operation which are detrimentally impacting on neighbours.



Councils need to have systems and resources in place to be able to respond to after hours reports and make after hours inspections of compliance with the terms and conditions of consent if this is an issue.

### Using surveillance

Councils have the ability, at common law, to ask questions and request access to premises to investigate alleged breaches of the law or the terms and conditions of consents, approvals and licences. However, this common law right does not give councils any power to use compulsion or infringe a person's legal rights.

Councils do have certain powers of compulsion which are particularly relevant for conducting investigations. The main ones relate to powers of entry and inspection, and these are summarised in Appendix 2.

When conducting surveillance or any other methods of investigation, councils must comply with any legal requirements that may apply. These include the privacy protection principles in the *Privacy and Personal Information Protection Act 1998*, and the requirements of the *Surveillance Devices Act 2007*.

For more guidance councils are referred to the Hunter and Central Coast Regional Environmental Strategy (HCCREMS) *Guideline Utilising Surveillance Cameras*.

## 4.9 Obtaining oral evidence

The objective of an interview is to ascertain facts and to endeavour to gain sufficient information to confirm or deny the basis of the conduct being investigated. One of the key concerns for an investigator obtaining oral evidence should be to minimise the possibility of the witness subsequently denying, changing or contradicting their evidence.

### Practical tip

Eliciting information through interviewing people is a difficult task, and as in any complex or sensitive situation is one that requires training, skill and planning.

### Who should be interviewed?

All relevant witnesses should be interviewed, including:

- any complainant/victim – depending on the nature of the allegation and how it came to light, there may not be a complainant or victim
- witnesses – this may include people who were present when certain unlawful activity is alleged to have occurred, or who saw, heard or received relevant information about it. It may also include people who are familiar with relevant processes or practices in the organisation
- expert witnesses
- any subject of the investigation or the owner/manager/occupier of relevant premises.

Investigators should independently select witnesses based on their own inquiries and not merely rely on lists of names provided by the person making the allegation or any subject of the investigation. As part of the process of drafting an investigation plan, consideration should be given to who may have relevant information about the conduct or activity being investigated.

### Order of interviews

During the course of an investigation investigators should make sure that all relevant witnesses are interviewed. Generally the person who is the subject of the allegation should be interviewed last. This will allow the investigator to collect as much information as possible from other sources. This will put them in a good position to decide the appropriate questions to ask the alleged wrongdoer. This also minimises the risk of evidence being tampered with or manufactured, or witnesses being intimidated.

In some situations, this general rule does not apply. For example if the documentary evidence available at the outset clearly demonstrates the conduct alleged, it may be appropriate to interview the alleged wrongdoer first.

Also in many instances the subject of the investigation may be the only person who has complete knowledge of an event or sequence of events. It may therefore be valuable in some instances to interview the subject person at the outset.

In some instances it may not be possible to interview the subject person at all. This may be due to the person's refusal to take part, absence or the person's behaviour at interview.

## Are witnesses obliged to answer questions?

As previously noted, prior to commencing an investigation, it is essential to establish the extent of the powers available to conduct the investigation, including whether the investigator can compel a person to attend an interview and/or answer questions.

If the investigators have no powers to compel a witness to attend an interview and answer questions they should advise witnesses of this at the outset by informing them that they do not have to take part unless they wish to. In these instances they should also verify that the witness understands they are taking part in the interview of their own free will and can leave at any time.

## Witness responses

The oral evidence of witnesses, especially subjects of allegations, is often difficult to obtain.

The skills of the interviewer and the manner in which the interview is conducted influence the extent and quality of information obtained. Different witnesses will respond in different ways to particular forms and styles of questioning.

### Practical tip

Many people, particularly those with nothing to hide or gain, are unreservedly truthful and forthcoming when interviewed. It is important to remember, however, that memory is not perfect and even people who give an honest account will not have perfect recall. They may omit relevant information or have a skewed perception about things they have seen, heard or been involved in.

Other witnesses will vary in their degree of cooperation and their emotional reaction to the issue and/or the interview. Some witnesses will be forthcoming in their responses, while others will be more reticent. Some will deliberately withhold information. Some witnesses will feel confident giving their evidence, but others may feel intimidated and need support.

Some specific types of responses that may be encountered include:

**Non-cooperative.** Witnesses who do not remain silent but who do not cooperate eg by refusing to answer some or all questions. This may be because they do not wish to incriminate themselves, they may want to avoid the embarrassment that an answer may cause, they may fear becoming personally involved in the matter, or they may distrust authority.

**Partial.** Witnesses who are basically, or at least partly truthful, but will withhold certain items of information for varying reasons. They do not lie, they simply do not tell the whole truth.

**Distorted.** Witnesses who alter some or all of the information recounted so that it presents a better version, in their eyes, of events. They may still be truthful about most of their evidence.

**Exaggerated.** Witnesses who embellish or exaggerate their account of events either for a definite purpose, just to make the story sound impressive, or to maximise their part in a situation to boost their own feeling of importance.

**Minimalist.** Witnesses involved in some wrongdoing or who believe they may be seen as being so involved, may actively minimise their own involvement in the matter and this will be reflected in their account.

**Untruthful.** Some witnesses are untruthful when questioned and intentionally tell lies. This may be to hide facts or to divert the focus of an investigation, or simply because they enjoy lying.

### Practical tip

You are more likely to obtain evidence from a witness who is at ease. Before the interview, decide if you might need an interpreter and, if necessary, arrange for one to be present.

To help create a comfortable environment for the witness, start by setting the scene:

- introduce yourself
- explain the purpose of the interview
- let the witness know what is going to happen – how you will be conducting the interview and, if appropriate, how the interview fits into the investigation process as a whole
- advise the witness how you will be recording their evidence – if you are planning to record the interview, inform the witness that this is to occur
- confirm with the witness that they have been given the opportunity to bring a support person or observer with them to the interview
- assure the witness of your impartiality
- consider and deal appropriately with any objections that the witness may raise
- ask the witness whether they have any questions at the beginning, and again at the end, of the interview
- remind the witness of the importance of keeping things confidential.

### Strategies for dealing with threats and/or aggressive behaviour

Interviewees who are reluctant to participate in the interview process may become angry, and may even act in a threatening or aggressive manner. If, before the commencement of an interview, the investigator anticipates that an interviewee may act in such a manner, they should put strategies in place to minimise the likelihood of aggressive and unreasonable behaviour, and consider how they might best respond if the interviewee does begin behaving in an unreasonable manner.

Where possible, the following considerations should be made prior to conducting an interview, in particular with the person who is the subject of the investigation:

- interviews with persons who are the subject of the investigation should always be carried out with another officer present. This provides additional security and a third person who can corroborate what took place during the interview. In addition, that person should be responsible for taking notes during the interview.
- the best time and place to conduct the interview – it may be preferable to conduct the interview during business hours when other people are around, in an office that is visible (for example, from a reception area)
- the best seating arrangements during the interview – ideally the interviewer should sit across from the interviewee with a table between them, with both parties able to easily access the door – the interviewer should sit closest to the door
- whether the interviewer should carry a duress alarm.

In addition, the investigators should ensure they have prepared thoroughly for the interview and have everything they need. Make sure to greet the interviewee in a courteous, professional manner, and maintain composure throughout the interview, even if the interviewee becomes tense or hostile.

One of the most important ways of avoiding aggressive behaviour is to read the signs. Some of these are very obvious and some less so. The investigator's own feelings are often a good indicator if the person he/she is dealing with is aggressive. What they choose to do about the emerging or existing aggressive behaviour will depend largely on where they think it is heading. Explicitly referring to the aggressive behaviour, or asking the interviewee to confirm threats, etc, may stop aggression, particularly when it is followed by appropriate limits being set. The investigator may need to use their judgement as this approach may only add to a person's aggression.

Remember while it may be important to allow the person the opportunity to provide their version of events, where the person's behaviour is threatening, aggressive or violent, the interview should be terminated. The behaviour of the person concerned should also be detailed in the final investigation report.

### 4.9.1 Interview techniques

The objective of any interview is to ascertain facts and to try to gain sufficient information to confirm or disprove the basis of the issue being investigated. Building rapport with the interviewee is important as it can encourage them to provide a truthful and comprehensive account during an interview.

Preparation is one of the keys to good interviewing. Investigators need to make sure they have a clear idea what they are trying to achieve and plan the interview accordingly. Investigators also need to have good analytical skills, an ability to communicate effectively, and a high degree of good sense, judgement, professionalism and integrity. It is important that staff who have to investigate allegations of unlawful activity are properly trained, are able to maintain and update their skills, and have their performance regularly reviewed.

#### Interviewing approaches

At the start of the interview the investigators should inform the interviewee of the reason for the interview. The investigator must never make any statements that cause a witness to believe that he or she will obtain any privilege, concession or immunity from official action by giving evidence.

#### Practical tip

Generally witnesses respond better when the manner of the interview:

- is relatively friendly and non-threatening
- uses open questions.

Investigators sometimes have to ask unpleasant questions, for example if they suspect the witness is not being truthful. In these situations, and when there is a need to test the credibility or reliability of the evidence given by a witness, investigators may need to:

- make greater use of direct questioning
- ask questions that the witness may find objectionable or uncomfortable
- use supplementary questions to probe in depth the answers given to their questions.

#### Practical tip

If you have to ask difficult questions, it may be useful to preface the question with an explanation such as 'I'm sorry if the question I am going to ask is upsetting to you but I have to ask it to properly investigate this matter.'

Investigators will not always be able to get the cooperation of witnesses who are determined to be uncooperative. They may sometimes have to look elsewhere for evidence. If a witness refuses to cooperate, they should be advised that the investigator will need to reach some decision on the issues under investigation whether they choose to cooperate or not. Witness statements are useful but often not essential.

#### Questioning skills

The questions an investigator is going to ask a witness should be prepared before the interview, however it is best not to be too prescriptive in preparing the list of questions. It may be necessary to deviate from the list of questions to ask follow-up questions, or to follow a useful and relevant line of inquiry that may arise or come to light during an interview. As part of planning for the interview anticipate the possible responses likely to be given and think about further questions to test these responses. It is important to remember the objective is to gather information which will be proof or which will resolve the facts in issue identified in the investigation plan. Questions form part of the listening process. Being given an opportunity to respond to appropriate questions may mean witnesses will be more confident they are being listened to.

There are several different approaches that can be adopted:

### Open questions

Open questions use language which invites the interviewee to explore the subject, using words like 'who', 'what', 'where', 'when', 'how' and 'why'. They do not lead the witness in any particular direction. They are particularly useful for avoiding contamination of answers by matters that are not known to the witness, or by the investigator's preconceived assumptions. Starting a question with 'why' should be avoided where an investigator does not want to be perceived to be judgemental or threatening.

### Closed questions

Closed questions are questions to which the answers being sought are limited to 'yes' or 'no'. They are useful to confirm matters once information has been obtained, but tend to foreclose the opportunity for witnesses to articulate positions for themselves.

### Leading questions and non-leading questions

It is better to ask non-leading questions, such as 'Where did you go at lunch time?' as opposed to leading questions, such as 'Did you go to the records room at lunch time?' Leading questions should be avoided where possible, particularly in the early parts of an interview where the interviewer is trying to elicit the interviewee's version of events. They may be used later to clarify evidence/issues raised.

### Strategic questions

Strategic questions are those which take the interview away from information gathering to solution finding. They ask the witness to have some input into how the matter could be resolved. They are particularly useful if the council is anxious to facilitate a negotiated outcome. For example, 'How do you think this can be resolved in a way that is fair to all?' or 'What do you want to get out of this at the process?'

### Hypothetical questions

Hypothetical questions allow ideas to be discussed with the witness in a non-threatening manner. They are also useful in facilitating a negotiated outcome. For example, rather than the closed and challenging 'Don't you think your neighbour will reject that proposal', try 'What would you think/feel/do if your neighbour did not accept that proposal?'

### Other interviewing tips

- avoid long and drawn out questions
- avoid asking multiple questions as part of a single question
- always give the interviewee reasonable time to answer the last question before asking another
- do not be afraid of silence – leaving a gap at the end of an interviewee's answer which is just long enough to make people feel uncomfortable can be an extremely effective means of eliciting further information.

## 4.9.2 Recording oral evidence

There are three main ways to accurately record oral evidence in a form which can be used to support an investigation:

- by electronic sound recording or video recording
- by preparing a record of interview
- by creating a witness statement.

The main objective of recording oral evidence is to ensure accuracy, particularly if it may need to be used to support an investigation finding or a subsequent decision. The best way to do this is to record the interview. Sometimes, the necessary equipment will not be available, or the witness may refuse to allow the interview to be recorded. The investigator will then have to keep meticulous notes of the questions and answers. This can be very time consuming. It is a good idea for interviewers to check their notes and read them back to the witness. If possible, investigators should get the witness to sign off on the notes to indicate they are accurate. If resources allow, witnesses should be interviewed in the presence of a colleague who should take notes.

If it is impractical to take contemporaneous notes during an interview, it is important that a written record is made as soon as possible afterward. The longer the delay, the less likely they are likely to be; this will diminish the evidentiary value the record will have.

Witnesses will often ask for a copy of the recording or the interviewer's notes. It is important to consider whether there is a need to maintain confidentiality in relation to the investigation or any aspect of it. If confidentiality is important, copies of the recording or notes might only be made available to witnesses after any alleged wrongdoer or all other witnesses who are to corroborate the evidence of the first witness have been interviewed.

### Sound recording

If an interview is going to be taped, the consent of the person being interviewed should be obtained. The time, date and place of the interview, the names of every person who is present in the room and in what capacity, including any third parties, and the purpose of the interview should be clearly stated at the start of the recording.

### Records of interview

A record of interview should be verbatim. It should include information about the date, place and people present at the interview. Records of interview are most commonly used in serious or formal cases or if there is likely to be a dispute about certain elements of the conversation.

Unless there are extenuating circumstances which prevent it from being done, or the witness does not consent, interviews should be electronically recorded.

#### Practical tip

Standard forms for records of interview can be a good prompt for staff who are responsible for interviewing witnesses.

However, if they are to be used, there are two potential dangers. Firstly, there may be a loss of flexibility if staff stick strictly to what is in effect a script. Secondly, if staff vary from the standard form but do not adequately record these variations, there is a risk the evidence will be vulnerable to attack in court.

### Witness statements

The third way of recording oral evidence is via a witness statement.

The following guidelines for preparing a witness statement are particularly important if the statement may need to be used in any subsequent legal proceedings.

- Start by giving the name, address and occupation of the witness.
- At the end of the interview get the witness to sign and date the statement (with both time and date) and witness this signature.
- Witness statements should 'tell it like it is'. Avoid the temptation to improve a witness' grammar, syntax or use of the vernacular. If a witness is recounting a conversation with another person, the statement should quote the exact words used.
- Compose the statement from the witnesses' perspective (use the first person 'I' and the third person 'she/he').
- If a witness is offering an opinion such as 'I believe she was angry', ask the witness the basis for that opinion if it is not otherwise volunteered. The witness statement should set out the basis for that opinion before stating the opinion.
- Witness statements should contain only relevant and admissible information. This can be quite difficult to judge. If the investigator is unsure of the relevance or admissibility of a piece of information, the safest approach is to include it. Inadmissible material can always be excluded later but it is more difficult to try and introduce what appears to be new evidence at some later stage.
- Ask the witness to read the statement before they sign it. Getting the witness to read the statement aloud is one way to ensure that they actually understand the statement and agree with it.
- Number the pages of the statement and ask the witness to initial all pages at the bottom of the page, and fully sign on the last page.
- Refer to documents or things used by the person, and attach copies of them to the statement. In the person's statement say, 'I produce that document/thing being a '[describe the document or thing]'<sup>24</sup>
- If the witness refuses to sign the statement, make a clear file note that the statement had been gone through with them and they had been offered a copy. The reason given by the witness for refusing to sign should be noted.

---

24. *Independent Commission Against Corruption*, 'A guide to conducting internal investigations', *Fact Finder* March 2012, p. 36.

- Rule through any blank spaces at the end of the statement to avoid the possibility of additions being made later.<sup>25</sup>
- If the witness wants to alter their statement or add something else to it after they have signed it, get them to do another statement rather than amend the first one. If in the second statement the witness contradicts something in the first statement, make sure that the reasons for this contradiction are explained in the second statement.
- Carefully preserve all notes connected with the interview.
- If the matter being investigated could end up in court, it may be important to seek legal advice and prepare a sworn statement.

### 4.9.3 Support persons

Witnesses will sometimes ask if they can have another person present during their interview. If such a request is approved, make it clear to the support person that their role is simply one of observer and they must not take part in the discussion or interview. Should they wish to consult with the witness they should request that the interview be suspended for that purpose.

If a person is likely to be called or asked to give evidence, they should not be allowed to be present during the interview of another witness. The witness and any support person need to be reminded of the need for confidentiality.

## 4.10 Documentary evidence

Some of the most important evidence in an investigation is documentary evidence. One of the first steps to be taken at the start of an investigation should therefore be to secure any relevant documentary evidence. A record should be made of when, where and how the documents were obtained and how they were stored.

Where possible, investigators should take original documents rather than accept photocopies. If this is impractical, investigators should at least view all originals before or at the time of accepting photocopies. Useful information is often written in pencil in the margins of documents or on 'Post-It' notes. By taking, or at least viewing, the originals investigators will have access to this additional information. If the originals are taken, have them photocopied and use another copy during the course of an investigation. The original documents should be kept securely.

Whenever possession is taken of any documents, investigators should always leave behind a receipt or other record and their contact details in case anyone needs to access the documents or have a copy of them.

## 4.11 Expert evidence

An investigation may need to include the use of professional experts such as town planners, building surveyors, acoustic experts, engineers, accountants and valuers.

If an expert is going to be asked to produce a statement, investigators need to remember to 'qualify' the expert in the statement, ie the first paragraph of the statement should specify the things that make the expert an expert, such as their qualifications and training.

There is no foolproof formula for selecting an expert. Professional associations, universities and TAFE colleges can be useful sources of relatively affordable and independent expertise.

## 4.12 Recording and storing information obtained during an investigation

It is essential that investigators make contemporaneous notes of all discussions, phone calls and interviews that take place during the course of an investigation. All information, including original documents and records of other evidence examined during the investigation, should be promptly placed on a central file.

Investigators often find it useful to keep a 'running sheet' for the investigation on the inside cover of the investigation file. This running sheet is essentially a chronology of events that have taken place in the investigation. It provides a ready record of who did what and when and is particularly useful if:

- an investigation is complicated or involves a range of issues

25. *Independent Commission Against Corruption*, 'A guide to conducting internal investigations', *Fact Finder* March 2012, p. 36.

- there is more than one investigator
- there is a change in staff during the investigation and a new investigator has to take over.

The *State Records Act 1998* reinforces the importance of keeping a full and proper record of information obtained during an investigation. The Act requires that councils:

- make and keep full and accurate records of their activities
- provide for the safe custody and proper preservation of records made and kept, or received and kept, by any person in the course of the exercise of official functions.

### Practical tip

It is crucial that investigators create a paper trail of their actions in an investigation. This will protect them at a later stage if the methodology or conclusions become the subject of a complaint to an outside agency. They should:

- keep an accurate and up-to-date paper trail of their actions, decisions and conclusions
- take contemporaneous notes of all discussions and interviews (telephone and in person) connected with the investigation
- place all relevant information on a central and secure case file
- obtain, or at least view and copy, all original documents relevant to the investigation
- only use copies of documents during the investigation.

## 4.13 Does the person being investigated have the right to inspect documents related to the investigation?

Questions of access to documents relating to an allegation or an investigation involve balancing two competing principles. On the one hand, any person under investigation should be informed at an appropriate time of the allegations made against them and the nature of the evidence gathered that both supports and contradicts those allegations. On the other hand, there may be a need to preserve the integrity of the investigation. By prematurely revealing critical evidence the investigation might be prejudiced. There may also be circumstances where it may be a breach of statutory obligations, or not in the best of interests of the investigation, for information to be disclosed that may identify or tend to identify the person who made the allegation.

The person who is the subject of the allegation has some statutory rights of access.

*The Government Information (Public Access) Act 2009* (GIPA Act) gives members of the public an enforceable right to access government information. The GIPA Act operates with a general presumption that disclosure of information is in the public interest, unless a strong case to the contrary can be demonstrated. While certain exemptions may apply, complainants and subject officers can usually request access to information used in an investigation, under the GIPA Act. This means that all documentation in relation to an investigation should be prepared professionally, and in the knowledge that it may at some time be read by the parties to the investigation.

There is also a statutory right of access to personal information under the provisions of the *Privacy and Personal Information Protection Act 1998*.

Different considerations apply if documents are subpoenaed by a court. There are only limited grounds for objecting to producing documents that are subpoenaed, and investigators would need to obtain legal advice before doing so.



## 5. Discretion

Many councils have policies that guide the exercise of discretion and decision making in common situations. However, compliance and enforcement officers regularly encounter matters in which they are required to exercise independent judgement and make decisions, such as whether to take enforcement action or what enforcement action to take. Policies cannot account for the variety of individual circumstances. Often the situations are complex and involve the consideration and weighing up of many factors, including conflicting public interest considerations. It is important to gain an understanding of important administrative law and good conduct principles and concepts that should guide the exercise of discretion. The following sections discuss what discretion is and what officers can do to ensure they exercise it appropriately and responsibly.

Discretion in a statutory decision-making context entails the freedom to decide what should be done in a particular situation having regard to the applicable law, policy, relevant public interest considerations and the facts of the individual case. Simply put, it is the answer to the question: 'what is the right thing to do in the circumstances?'

Discretion exists where a decision maker has the power to make a choice about whether to act or not act, to approve or not approve, or to approve with conditions. The role of the decision maker is to make a judgement taking into account all relevant information.

Discretionary powers are powers granted either under statute or delegation which do not impose a duty on the decision maker to exercise them in a particular way. Within certain constraints, decision makers are able to choose whether and/or how to exercise discretionary powers.

In the council context discretionary powers operate in such a way that while a council has a responsibility to enforce a law, this does not mean there is a legal obligation to enforce the law in all cases, or at the insistence of a third party.<sup>26</sup>

### 5.1 How should discretionary powers be exercised?

No public official has an unfettered (unrestricted) discretionary power. Decision makers must exercise discretionary powers in accordance with relevant legal and administrative frameworks. This imposes an obligation on councils to ensure that their enforcement staff receive adequate training to enable them to do so appropriately.

In exercising discretionary powers, decision makers are obliged to:

- use discretionary powers in good faith, including for the intended and authorised purpose;
- base their decisions on facts and findings supported by the evidence, only relevant considerations and not irrelevant ones;
- give proper, genuine and realistic consideration to the merits of the particular case, including weighing up the relative importance of relevant factors;
- exercise the discretion independently and not under the dictation of a third person or body;
- make decisions in accordance with a rule or policy but without applying the policy inflexibly; and
- observe the basic rules of procedural fairness.

---

#### Case study – Exercising discretionary powers

During a targeted inspection program, an environmental health officer found a food shop that was in breach of its legislative requirements by failing to provide hand-washing facilities. This offence carried a monetary penalty. The officer spoke with the owner of the business, who showed remorse and quickly rectified the issue. The officer was also aware that the business was relatively new, and was compliant in all other areas of the inspection. On the basis of these considerations, the officer used his discretion and decided that issuing a warning letter and providing the food shop owner with education and advice was a more appropriate response.

The environmental health officer also made a note to do a follow-up inspection of the food shop in a few weeks to ensure they remained compliant.

---

26. See NSW Court of Appeal case, *Ryde City Council v Echt and Anor* [2000] NSWCA 108.

Council officers may find the following questionnaire helpful when making discretionary decisions.

**Table 2. Ten key questions to be considered when exercising discretion<sup>27</sup>**

<b>Do I have the power to make the decision?</b>	Officers should check the relevant legislation and council's policies and guidelines to ensure that they have the power or delegation of authority to act or to make the decision.
<b>Are there any pre-conditions before I can make the decision?</b>	There may be pre-conditions to the exercise of discretion such as requiring consultation with a range of people or to advertise a proposal and to receive and consider submissions before a decision is made. Make sure to follow any statutory and administrative procedures that apply.
<b>Have I gathered all the information and established the facts?</b>	Some facts might be submitted to the decision maker. Others might have to be obtained through inquiries or investigation. This may require: <ul style="list-style-type: none"> <li>• reviewing documents</li> <li>• undertaking a site inspection</li> <li>• conducting interviews, or</li> <li>• seeking specialist advice.</li> </ul>
<b>Have I evaluated the evidence?</b>	The evidence must be relevant to the decision and accurate so that any material facts can be established. When evaluating the evidence, investigators must ignore irrelevant considerations.
<b>What is the appropriate standard of proof?</b>	In administrative matters, the standard of proof of any relevant fact is generally considered to be equivalent to the 'balance of probabilities', ie it is more probable than not that the matter or allegations are proven. In criminal matters the offence must be proven 'beyond reasonable doubt'.
<b>Am I acting reasonably, fairly and without bias?</b>	Officers should not handle matters in which they have an actual or reasonably perceived conflict of interests.
<b>Do I need to provide procedural fairness before making the final decision?</b>	Before taking certain action or making some decisions, officers may be required to provide procedural fairness to anyone whose rights or interests (including reputation) are likely to be adversely affected by the outcome.
<b>Consider the merits of the case and make a judgement.</b>	Although policies, previous decisions, court and tribunal decisions may exist that provide guidance, officers must consider the matter on its merits and make a judgement about it.
<b>Have I kept all relevant parties informed, advised of the outcomes and provided reasons for my decision?</b>	Keep relevant parties informed: <ul style="list-style-type: none"> <li>• during the decision-making process</li> <li>• about the final outcome; and</li> <li>• provide reasons for the decision reached to those affected by the decision.</li> </ul>
<b>Have I created and maintained relevant records?</b>	It is vital that records are created and maintained about: <ul style="list-style-type: none"> <li>• the issues that were taken into account in the process and why</li> <li>• the weight given to the evidence and</li> <li>• the reasons for the decisions made.</li> </ul>

## 5.2 Wrongful exercise of discretion

In order to understand good decision making it is helpful to think about examples of misuse of discretion. A decision maker who is doing any of the following is likely to be abusing his or her authority:

- making decisions in matters in which he or she has a conflict of interests (actual or reasonably perceived)
- improperly restricting or fettering his or her own discretion (or that of future decision makers), for example, rigidly applying a policy without considering the particular circumstances of the case
- exercising discretion in an obviously unreasonable way
- exercising discretion in such a way that the result is uncertain

27. Adapted from Western Australia Ombudsman (2009), *Guidelines: Exercise of discretion in administrative decision-making*.

- making arbitrary, vague or fanciful decisions
- acting with bias or acting in a way that creates a reasonable apprehension of bias
- exercising discretion for an improper purpose
- failing to comply with legislative requirements
- ignoring relevant considerations or giving weight to irrelevant considerations
- making decisions that are not supported by the evidence
- unreasonably delaying a decision that he or she is under a duty to make
- ignoring valid advice or valid considerations, particularly for the purposes of avoiding discomfort or embarrassment on the part of council.

---

## Case study

A council was assessing development applications and issuing development consents for an 'as built' development. Because councils charge more for a development application than a building certificate application, there was financial incentive for them to require development applications. However as development consents cannot be issued retrospectively this practice was unlawful and improper.

---

### 5.3 Lawful exercise of discretion

In addition to not doing any of the points listed in 5.2 above, for a discretionary decision to be lawful the following requirements must all be met:

- the power must be used for a proper purpose (ie within the scope and purpose for which it was given)
- proper, genuine and realistic consideration must be given to the merits of the particular case
- only relevant considerations must be taken into account
- adequate weight must be given to factors of great importance
- excessive weight should not be given to factors of no great importance
- the decision must be exercised independently
- the basic rules of procedural fairness must be observed
- the decision maker must be free and reasonably seen to be free of bias.

### 5.4 Adopting policies and practices to guide the exercise of discretionary powers

Councils should develop policies and guidelines to assist decision makers to exercise discretion. Unlike legislation, policies and guidelines do not have the force of law, and they should not be inconsistent with legislation. If they are, the legislation takes precedence. Policies and guidelines assist to ensure decisions are made consistently and fairly. However, care should be taken when developing guidance not to inappropriately limit the discretion of staff charged with the implementation of discretionary powers.

To ensure policies and guidelines are most effective they should:

- contain a clear purpose (ie a succinct statement of what the policy or guideline is intended to achieve)
- be flexible enough to cover the range of circumstances under which discretion is to be exercised
- set out the relevant considerations to be taken into account by decision makers
- be expressed clearly to allow easy application and interpretation
- be communicated to relevant staff, and
- be made available to members of the public.

## 5.5 What is the public interest?

Acting in the 'public interest' is a concept that is fundamental to a representative democratic system of government and to good public administration. Councils and their staff must perform their official functions and duties, and exercise any discretionary powers, in ways that promote or preserve the public interest.

The 'public interest' refers to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. It has also been described as the benefit to society, the public or the community as a whole, rather than to individual or sectional interests.

Councils must determine the public interest as it applies by reference to the purposes expressed by the particular pieces of legislation they act under.

As public interest is difficult to define, it is often helpful to consider what is clearly *not* in the public interest. This includes:

- private interests of a particular individual or individuals
- personal interests of the decision maker
- personal curiosity: ie what is of interest to know, that which gratifies curiosity or merely provides information or amusement (to be distinguished from something that is of interest to the public in general)
- personal opinions: for example, the political or philosophical views of the decision maker, or considerations of friendship or enmity
- parochial interests: ie the interests of a small or narrowly defined group of people with whom the decision maker shares an interest or concern
- partisan political interests: for example the avoidance of political/council embarrassment.

## 5.6 Public interest considerations in enforcement

The act of exercising discretion can add a level of complexity to the decision-making process, as the decision to be made may not be straightforward. There are a range of considerations that councils need to take into account when deciding whether or not to take enforcement action, or deciding which action is appropriate. Consideration of these factors will normally indicate the appropriate response available for use (eg providing education and guidance; a warning letter; penalty infringement notice; a notice of intention to issue an order or prosecution). If council has developed a risk-based compliance program this will provide important guidance on when it is appropriate to use available regulatory tools.

In some cases, the appropriate response to non-compliance will be dictated by the relevant legislation which will require a particular enforcement action. In other cases, the legislation will provide the specific framework for council to enforce the rules and regulations, but how council chooses to enforce will remain at its discretion. Discretion in decision making must be exercised in accordance with the legislation, and the public interest considerations detailed below should only be considered where appropriate and within the scope of the legislation.

The following is a non-exhaustive list of public interest considerations which may be relevant when considering whether or what compliance/enforcement action to take.

Consideration should be given to what outcome would be best for the collective good and for the welfare of the community generally.

However, this should not limit consideration of the public interest. For example, it may be in the public interest to take action on unlawful activity which is individual in nature but occurs unreasonably often or is a serious breach with significant impact on an individual.

The following are examples of common considerations taken into account when making enforcement-related decisions. They are grouped into considerations about:

- the alleged offence
- the alleged offender
- the impact of the offence
- the impact of the proposed enforcement action
- the potential for remedy.

## 5.7 Considerations about the alleged offence

### Is the breach a technical breach only?

A breach of a technical, inconsequential or minor nature, in the absence of any other aggravating factor, will generally not warrant a decision to take formal enforcement action to remedy or restrain the breach.

The costs and benefits of taking enforcement action or instituting proceedings (ie cost of proceedings and allocation of council resources compared to the likely outcome) should also be considered where breaches are solely of a minor technical nature or resulting in no material impacts upon any other party or the health, safety and amenity of the environment and community.

---

### Case study – A minor technical breach

A man complained that the relevant complying development code required air conditioning units to be located at least 450mm from each lot boundary. His neighbour's air conditioning unit was about 50mm closer than the requirement. The man insisted that council take action to remove or authorise the placement of the unit. Council considered the matter and decided no action was necessary. Council took into consideration the amenity impacts of the works, the benefit to the community in taking action, the cost implications of taking any action and the likelihood of success as follows.

In order to request the applicant to remove the unit or lodge an application to authorise the works, the council had to follow a legal process that would require it to issue a notice of intention to serve an order, serve an order and attend to any subsequent legal action if the owner failed to satisfy the terms of any order that was issued.

Council also considered that in the event the order was challenged, a court would have regard to the impacts of the works and not simply the compliance with any applicable numerical standards.

Council took into account that a variation to the standard of 50mm in this case would not significantly impact on the likelihood of the code's objectives being satisfied (or any significant reduction in the noise impact on the neighbour), having regard to the position of the units and their distance from adjoining dwellings.

Council concluded the likely success of any court action to have the structures removed would be minimal and that the costs of such action would far outweigh any benefits gained.

Council also concluded the process to authorise the units in their current location by gaining formal approval would be a bureaucratic exercise of no real relevance except as a punitive measure.

This case study also highlights the fact that councils are not legally compelled to take any action to seek removal or authorisation of any works that have been undertaken without consent at the insistence of a third party alone. They must, however, consider the matter thoroughly, having regard to all relevant considerations as above. The council advised the complainant of all the reasons for its decision. The documented reasons also ensured later external scrutiny of the decision was straightforward.

---

### When was the alleged offence committed and for how long?

Legislation may provide time limits in which to commence proceedings and take enforcement action, and sometimes prosecution will be barred by statute despite good evidence that unlawful activity has taken place. In addition, consideration needs to be given to the time that has elapsed since the offence or breach occurred, and the 'reasonableness' of taking enforcement action if a significant time has elapsed since the time of the offence or breach. Courts generally look unfavourably on delays in taking action to prevent or prohibit unlawful activity, so evidence of a council's failure to take action within reasonable time may be an obstacle to successful prosecution.

Consideration should also be given to whether the offending behaviour is ongoing or has ceased.

## 5.8 Considerations about the knowledge, motive and circumstances of the alleged offender

### Was the offence committed with intent?

Consideration should be given to whether the offence was committed deliberately, recklessly or with gross negligence. It may be appropriate that cases of this nature are prosecuted. Conversely, where an offence was committed as a result of an accident or genuine mistake, providing education and guidance or a formal warning may be more suitable.

### Could the offender foresee the alleged offence?

If the offence that was committed could reasonably have been foreseen, and the offender failed to take reasonable avoidance or preventative measures, it may be appropriate to impose a penalty harsher than education and guidance or the issuing of a warning.<sup>28</sup>

### What is the previous history of the offender?

It is essential that councils continue to monitor situations where they decide not to take formal enforcement action despite evidence of unlawful activity. If monitoring reveals that previous instructions, advice or warnings have not been followed or complied with, a more formal and coercive enforcement approach would generally be appropriate. For example, where a formal caution had previously been used to deal with offending but there is a repeat of the offending, it is more appropriate that the offender be prosecuted, or, where available, a penalty infringement notice be served.

### Has the offender expressed contrition?

In some cases, the alleged offender will have acted appropriately by acknowledging their wrongdoing and assisting council in the resolution of the matter. In such cases, public interest may not be best served by prosecuting the offender, especially if the offending conduct or work has been rectified. Conversely, if the offender has demonstrated a lack of contrition and is uncooperative with the investigation or remediation, a prosecution or monetary penalty would appear more appropriate.

### Are there any mitigating personal circumstances of the offender?

Consideration should be given to any genuine mitigating circumstances. For example, it may not be appropriate to prosecute a first offence by a juvenile offender. This is also the case when considering a measure that incorporates a monetary penalty or a requirement to perform costly mediation. In this circumstance, consideration should be given to any financial hardship to the offender resulting in inability to pay. If it is determined that the penalty is beyond the offender's ability to pay, it may be appropriate to modify the penalty to bring payment within the reach of the offender.

Consideration should also be given to the age, and physical or mental health of the alleged offender or witnesses. This may include their ability to be involved in legal proceedings if required.<sup>29</sup>

It is also important to consider potentially serious consequences which can occur as a result of enforcement action. When considering an enforcement option which makes, or is likely to make a resident homeless, the council should consider whether the resident is able to arrange alternative accommodation, and if not, the council should provide the resident with information on the availability of alternative accommodation in the area and also provide any further assistance deemed appropriate.<sup>30</sup>

---

28. See Environment Agency [UK] (2011), *Enforcement and Sanctions – Guidance*.

29. NSW Department of Planning (2010), *Compliance and Enforcement: Prosecution Guidelines*.

30. See section 121G of the *Environmental Planning and Assessment Act 1979*.

### Case study – Taking mitigating circumstances of hardship into account

A couple had built a new house on their property, the DA for which required them to make the old house uninhabitable once the new house was completed. Council later received a report that the old house was still occupied by part of the family. An investigation confirmed this was the case. A notice of intention to serve an order was served, and representations were made by the couple, who said they built the new house for their son and his family. While the whole family initially lived together in the new house, the son's family grew and the wife became increasingly ill. The husband became her full-time carer and the old couple moved back to the old house. They provided medical reports in support of their claim.

Council considered the couple's individual circumstances, including financial hardship and health, and considering there were no discernible adverse environmental impacts from the use of the old house, determined to take no enforcement action at that point in time. However, a record was made to ensure enforcement would continue in accordance with the conditions when the family moved on.

## 5.9 Considerations about the impact of the offence

### Does the offence have an impact or potential impact on the natural or built environment or health and safety?

If there is actual or potential detriment to the natural or built environment, to the health or safety of residents or the amenity of an area, this would normally warrant a decision to take action to remedy or restrain the breach.

Examples of situations where there is a significant risk of detriment include serious noise, air or water pollution, unsafe building work (especially in relation to occupied buildings), dangerous dogs, seriously unhealthy food premises and detriment existing in or threatening any public place. Other examples will be matters which are specifically negotiated by a council at DA stage to address neighbourhood amenity issues and community concerns. The issue that needs to be considered is the degree of detriment or risk to the environment.

There may also be cases where the unlawful activity will have a positive or beneficial impact on the environment or amenity of the locality.

### Will or has the alleged offender gained financially from the offence?

Some offences are clearly motivated by financial gain, and should attract enforcement action with a suitable, deterrent effect. Where legitimate business is undercut, or where profits are made or costs are avoided, such as costs saved by not obtaining a permit, it may well be appropriate for council to issue a penalty infringement notice, or take prosecution action depending on the severity of the offence.

### Are there any existing use rights?

Hardship may also be caused to the person the subject of the complaint if the onus of proof is difficult or impossible to discharge. For example, the onus at law in disputes over existing use rights falls upon the person asserting that right. If it is recognised that an existing use is long established, say over 20 years, it may not be reasonable to require the owner to produce documentary evidence of the use at a particular date if, for example, the business has changed hands several times or fire/flood has destroyed documents.

A heavier responsibility may fall upon the person asserting an existing use right to prove the existence of that right in relation to larger scale developments and those with significant environmental impacts.

It is in the interests of councils, and ratepayers, that they maintain comprehensive records of the existing uses, and changes in uses, of all land within their jurisdiction.

## 5.10 Considerations about the impact of the enforcement action

### Will the chosen enforcement option have a deterrent effect?

When choosing the appropriate response, consideration should be given to the deterrent effect, both on the offender and others. Prosecutions, because of their great stigma if a conviction is secured, may be appropriate even for minor non-compliances where they might contribute to a greater level of overall deterrence. However, where the use of a punishment is likely to reduce future self-reporting of offences or non-compliance, a different response may be appropriate. Such assessments require a thorough knowledge of the offending party and the motivation for offending.

### Is there an adverse impact on council's ability to carry out its enforcement functions?

If the breach or offence impacts on the ability of a council to be an efficient and effective regulator, for example if officers are obstructed in the conduct of their duties, when a particular type of offending is being targeted, or if council is provided with false or misleading information, a prosecution may be appropriate even if the breach was minor.<sup>31</sup>

### Would an educative approach be more appropriate than a coercive approach?

When deciding whether to take an educative approach or enforcement approach, consideration should be given to the following matters:

- the likelihood that the person may have known or should have known the relevant requirements or rules
- the level of contrition shown by the responsible person
- whether the parties have previously been advised of the regulatory requirements or provisions
- whether or not any previous warnings or instructions have been provided
- the apparent level of intent shown by the responsible person.

### What are the chances of success if challenged?

A council may validly take into consideration whether or not there is sufficient admissible evidence to prove each element of the offence or breach. It may not be appropriate to take enforcement action if the chances of success, in the event of an appeal or hearing, are unlikely. In such situations, officers would need to identify the causes of that likelihood and address them in the particular case or as a general issue.

### What are the relative costs and benefits of taking formal enforcement action as opposed to taking no action or taking informal action?

Most councils dislike taking formal legal action beyond issuing orders under the existing legislation because of the cost of legal proceedings.

When doing a cost-benefit analysis, council should assess costs and benefits broadly and remember to consider indirect costs and benefits. For example, the indirect cost of taking no action is that broader levels of compliance may fall and there may be a general increase in the demands on the council to intervene. Conversely, the indirect benefit of formal proceedings is the educative and deterrent effect of a successful prosecution.

### Is the enforcement action reasonable and proportionate?

Council should always act in ways that are reasonable in the particular circumstances. This includes proportionality between the ends to be achieved and the means used to achieve them.

Consideration needs to be given to what is reasonable in the circumstances and to ensure that any action taken is not disproportionate to the level of harm or damage arising from the breach.

Where decisions are based on technical advice (eg engineering or legal advice), council should also make sure that non-technical issues, such as the reasonableness of the conduct and the effect of possible decisions,

---

31. Environment Agency [UK] (2011), *Enforcement and Sanctions – Guidance*.



are not ignored. The obligation on councils to comply with the law does not relieve them of the moral obligation to ensure that the effects of strictly following the law does not result in, or likely result in, noticeably unjust or unreasonable treatment of an individual or organisation. For example, sometimes the result of enforcing one condition of a larger development may be disproportionate to the harm or damage arising from the breach. In these circumstances, councils should weigh up the costs and benefits of taking enforcement action.

Considerations such as the impact of the breach on other people, whether there are other acceptable options available to address the breach, and the attitude of the developer should be assessed. If the breach is not a structural breach likely to result in an unsafe development, council might consider negotiating a settlement with the developer and resolving variations through, for example, the use of building certificates.

### Is there an estoppel?

Estoppel is a legal rule which prevents a person from later denying something which another person may have previously relied on or acted upon.

Councils must be aware of this where the conduct of the council could lead people to take action in reliance on council's actions or inactions that have led to a reasonable expectation that council is not concerned about the conduct in question. For example:

- Has the council previously notified the owner/occupant/individual that the council would not be taking action?
- Has the matter previously been brought to the attention of the council yet no action was taken?
- Has the council contributed to an owner/occupier/individual acting upon a reasonable expectation that no action would be taken?

In these situations, council may be legally prevented from taking action.

---

### Case study – Estoppel

A council received a complaint about an illegal chicken enclosure. An investigation established the enclosure was illegal. However, before the enclosures were erected the property owner was given advice by a council officer that the enclosures were 'exempt development' and could be erected in the particular spot he chose. Council received legal advice to the effect that the property owner had relied on council's advice and erected the sheds in good faith. For this reason council was likely estopped from taking action against him to relocate the sheds even though they were illegal.

The advice also considered that the test the courts would be likely to apply would be a comparison of the potential environmental harm caused by the enclosure as opposed to the cost and inconvenience caused by relocating it. As there was no evidence of actual environmental harm, the likelihood of success was considered minimal. As a result a decision was made to take no action.

---

## 5.11 Considerations about the potential for remedy

There is a need to balance the public interest in enforcing the law with whether it is possible to remedy a breach and, if so, how expensive and inconvenient this would be. Discretion may be more readily used in the case of a static development (such as when a building has already been erected) rather than when there is a continuing, easily remedied breach. However, there are no hard and fast rules, and it is important that discretion is exercised on a case-by-case basis.

### Can any unauthorised works or failure to comply with conditions be easily remedied?

If there is evidence that a non-compliance can be easily remedied by some action on the part of the person responsible, there is a less compelling case for taking formal enforcement action, provided the person responsible remedies the situation.

---

### **Case study – Remedy of breach**

Because of a measurement error, the parking spaces available in a development were insufficient to comply with the approval. Requiring strict compliance involved further excavation, which may be impossible due to site constraints and subsequent works. Other options were considered to remedy the breach, such as a monetary contribution or the provision of off-site spaces to make up the shortfall. These options were considered to achieve the council's objective in imposing the condition while still permitting the development to proceed without prejudicial expense and delay.

---

### **Would consent have been given if it had been sought?**

In the absence of aggravating circumstances, a council should be less inclined to proceed with legal action. This is especially so if the unlawful activity could be carried out lawfully if consent had been sought. In these circumstances, council might consider delaying action to allow the owner time to lodge an application for assessment.

Similarly, if an unauthorised use comes to the council's attention only because the owner has sought approval, it is reasonable to delay action until the application is determined. If an owner actively and positively attempts to regularise an unauthorised use by lodging an application, councils should take this conduct into account as a mitigating factor in determining whether to take action. However, if there has been a blatant attempt to disregard the law or to use the application process as a delaying action, deferral would not be appropriate.

The following case study supports the proposition that carrying out unauthorised work generally does not prevent a council from considering a subsequent application for a building certificate on its merits.

---

### **Case study – Delayed application for consent**

A resident reported that her neighbours had converted a garage/billiard room into a dual occupancy without council's approval. After considering the occupant's personal circumstances, council decided it was reasonable to allow the occupation to continue while steps were being taken to regularise its use. Since the use could possibly be approved, council was obliged to consider all reasonable applications to regularise it. A court would not support an order to vacate or cease using the building solely based on the fact consent was not obtained in the first place if such consent was likely to be granted if an application had been made.

---

### **Would a draft local environmental plan make an unauthorised use legal?**

If there is a draft local environment plan (LEP) on exhibition that would make the unauthorised use legal, council could consider delaying any enforcement action until after the LEP is made and the owner given time to apply for approval.

## 6. Deciding on prosecution action

Regardless of any other enforcement action available to or contemplated by council, there will be matters where consideration will need to be given to prosecuting an offender. Prosecution can be an important enforcement option, which aims to punish wrongdoers and act as a deterrent to the individual and the community at large.

The purpose of this section is to provide councils with guidance on:

- the basis on which council should make a decision to prosecute
- the factors to be taken into account in deciding who to prosecute
- the factors to be taken into account when deciding which charges to lay
- what alternatives to prosecution might be available.

When prosecution is contemplated it is important to obtain legal advice as early as possible in the process.

### 6.1 The decision to prosecute

Not all offences should automatically result in a prosecution.

The decision whether or not to prosecute is the most important step in the prosecution process. Given the seriousness of a criminal conviction, the significant penalties that may be imposed and the cost to council involved in prosecuting offenders, the decision to prosecute requires careful consideration of a number of factors which will vary from case to case. However, in every case, council must consider the impact on any victims, the suspected offender and the community at large. An inappropriate decision to prosecute or, conversely, an inappropriate decision not to prosecute, can undermine the confidence of the community in the council.<sup>32</sup>

The law recognises that the dominant consideration in deciding whether to prosecute is whether a prosecution is in the public interest. According to the NSW Director of Public Prosecutions, the general public interest is the key decisive factor in a decision to prosecute in NSW.

In determining whether or not the public interest requires that a matter be prosecuted, there are three key questions to be considered:

1. Is there enough evidence to prove an offence beyond reasonable doubt?
2. Is there a reasonable prospect of conviction?
3. Are there discretionary factors to be considered?

The following provides guidance on these questions which need to be considered when deciding whether a criminal prosecution is the most appropriate option for responding to an offence.

#### Is there admissible evidence that establishes each element of the offence beyond reasonable doubt?

The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify a prosecution. The basic requirement of any prosecution is that the available evidence establishes a *prima facie* case. If there is no *prima facie* case a prosecution should not be commenced.

#### Is there a reasonable prospect of conviction?

While having a *prima facie* case is a pre-condition to commencing a prosecution, it is not enough by itself. A prosecution should not be commenced if there is no reasonable prospect of a conviction being secured. This means that there needs to be enough available evidence to establish and prove each element of the offence beyond reasonable doubt. Such a decision requires an evaluation of how strong the case is likely to be when presented in court. This consideration can include the availability, competence and credibility of witnesses and their likely impression on the court, the admissibility of the evidence, all potential defences, and any other factors which in the view of the prosecutor could affect the likelihood of the offences being proved. It is important that these considerations are taken into account to avoid the risk of prosecuting a person likely to be found to be innocent of the offence and the useless expenditure of public funds.<sup>33</sup>

32. See Commonwealth Director of Public Prosecutions (2014) *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*.

33. *ibid.*

## Are there discretionary factors to be considered?

While councils have a responsibility to enforce the law, the decision to prosecute for an offence or breach is discretionary. In other words, councils may choose whether or not to commence a prosecution, or whether other enforcement options may be more appropriate in the circumstances.

The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors weigh against a decision to proceed with prosecution, there are public interest factors which support proceeding with a prosecution. Generally speaking, the more serious the offence or breach, the more appropriate it will be that a prosecution proceed.

Factors which may arise for consideration in determining whether the public interest requires a prosecution include the following:<sup>34</sup>

- How serious or trivial is the alleged offence?
- Is the applicable law obsolete or obscure?
- What is the harm or potential harm to the environment or the community caused by the offence?
- Would the prosecution be perceived as counter-productive, for example by bringing the law into disrepute?
- How much time has elapsed since the alleged offence?
- How prevalent is the alleged offence and is there any need for deterrence (either personal or general)?
- Is the breach a continuing or second offence?
- Has the offender been previously dealt with by other less serious enforcement options (and therefore prosecution may be more effective)?
- Are there any effective alternatives to prosecution?
- How long and expensive would a trial be?
- Is an urgent or prompt resolution required (prosecution proceedings do not bring about an immediate solution)?
- What are the sentencing options available to the court if there is a guilty finding?
- Would the proceedings or the consequences of any resulting conviction be unduly harsh or oppressive?
- What is the alleged offender's degree of culpability in connection with the offence?
- Are there any mitigating or aggravating circumstances?
- Does the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim need to be considered?
- Is the alleged offender willing to cooperate in the investigation and prosecution of others?
- Would the consequences of any conviction be unreasonably harsh or oppressive?
- What is the attitude of the victim and possibly the material witnesses to a prosecution?
- Will a precedent be set by instituting proceedings?

The applicability of these factors and the weight given to them will vary widely depending on the nature of the unlawful activity and the particular circumstances of each case.

For more information regarding these discretionary factors, see Section 5 Discretion.

## Matters not relevant to a decision to prosecute

There are also several factors that should **not** influence a decision about prosecution action. These factors include:

- the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved
- the personal feelings of the investigator, decision-maker or prosecutor concerning the alleged offence, the alleged offender or a victim
- any possible political advantage or disadvantage to any political party, group or individual

---

34. Adapted from the Commonwealth Director of Public Prosecutions (2014), *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* and NSW Planning (2010), *Compliance and Enforcement Prosecution Guidelines*.

- the possible effect of the decision on the personal or professional circumstances of those involved
- possible media or community reaction to the decision.

Councils should always seek legal advice to help them decide whether or not to prosecute a matter. However, ultimately the decision is one for the council to make and will involve the consideration of both legal and non-legal factors. A record must always be made of the decision reached and the reasons for that decision.

## 6.2 Time within which to commence proceedings

Unless the proceedings relate to an indictable offence, proceedings for an offence against an Act must generally be commenced within a strict time limit specified in the Act:<sup>35</sup>

- after the offence was alleged to be committed; or
- after the date on which the alleged offence came to the attention of an 'authorised officer'.<sup>36</sup>

It is therefore essential to be aware of the relevant time limitation that applies, properly record the date on which evidence of an alleged offence first came to the attention of an authorised officer and plan the investigation in such of way as to ensure any time limitation for commencing a prosecution is not exceeded, thereby rendering any prosecution for that offence impossible.

## 6.3 Alternatives to prosecution

In determining whether a prosecution is in the public interest, councils should also consider whether alternative enforcement options are more appropriate. The following provides an overview of alternatives to prosecution.

### Penalty notices

Where available, penalty notices provide an effective and efficient way of dealing with breaches that are not considered serious enough to warrant prosecution proceedings. A penalty notice carries a fixed penalty, which is much less than the available maximum penalty applicable if the matter is determined by a court.

A penalty notice is issued because an alleged offence has been committed, but payment of the fine does not lead to the recording of a criminal conviction. Non-payment of the fine is not dealt with by way of criminal sanctions, but is recoverable as a civil debt. On the other hand, if a person elects to have the matter heard, proceedings are instituted in the criminal jurisdiction of the local court.

Penalty notices are appropriate where:

- the breach is minor
- the facts are apparently indisputable
- the breach is a one-off situation that can be remedied easily, and
- the issue of a penalty notice is likely to be a practical deterrent.

It is not appropriate to issue penalty notices where:

- the breach is on-going and not within the alleged offender's capacity to remedy quickly
- the penalty prescribed by the notice would be clearly inadequate for the severity of the offence
- the extent of the harm, to the environment or otherwise, cannot be assessed immediately
- the evidence is controversial or insufficient and if a court heard the matter, it would be unlikely to succeed
- multiple breaches have occurred.<sup>37</sup>

35. The statute of limitation can vary from 12 months to three years depending on the specific Act.

36. As defined by the relevant Act and appointed by council.

37. Based on NSW EPA *Prosecution Guidelines* (2013).

## Civil proceedings

An alternative to criminal prosecution would be the institution of civil proceedings for a breach of an Act or Regulation.

Unlike criminal proceedings, where available a private citizen may bring civil proceedings regardless of whether the breach has affected (or will affect) the rights of that person. For example, council may advise a complainant to take civil action to seek a noise abatement order against a noisy neighbour.

Council may provide this kind of advice where there is minimal evidence to support criminal prosecution, or where the impact on the public is limited to the two opposing parties.

## Orders/directions given by council

An authorised council officer can give directions/orders in respect of various matters or offences against an Act or Regulation. Orders cannot require the payment of a fine. Orders are an effective enforcement option when a person complies with its terms in the required timeframe. Where there is non-compliance, civil or criminal proceedings may ultimately be necessary to enforce the order.

Depending upon the statute, there may be an administrative fee payable for the issue of an order or direction.

## Undertakings to restrain or remedy a breach

An alternative to prosecution might be where an offender enters into an undertaking to take action to remedy a breach which has already occurred, or refrain from taking action where a breach is anticipated. This option is an 'outcome-based' option rather than one which seeks to punish an offender.

Such an undertaking is, in effect, a record of what the offender has agreed to do and is not legally enforceable against the offender. However, this option may result in an outcome which is quicker and less costly than a prosecution. If an offender fails to comply with an undertaking, more serious enforcement options can then be implemented. A failure to comply with an earlier undertaking would not weigh in the offender's favour in a consideration of commencing any later prosecution proceedings for that offence.

## 6.4 Selecting the appropriate defendant

For some offences, particularly those relating to pollution or other harm to the environment, liability can be imposed on a wide range of people who may have participated in or contributed to the offence. This may mean that a number of people commit an offence even though there was only one incident. However, it is not always appropriate to prosecute every person who may be liable for an offence.

There are some considerations that may need to be taken into account to determine the appropriate defendants. These are:

- who is primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence, or who formed any relevant intention
- in relation to the matters set out above, what was the role of the proposed defendant, and
- the effectiveness of any court orders that might be made against the proposed defendant.<sup>38</sup>

## Different bases of liability

Liability for offences under an Act may be imposed on:

- the person who actually committed the offence
- a person who did not personally commit the offence, but who the law holds vicariously responsible for an offence committed by a person who may be acting on their behalf or is under their control and direction (for example, employers may be responsible for the acts of their employees, corporations may be held liable for their company directors)
- a person who participated in a crime committed by another person and is therefore liable as an accessory.

---

38. NSW EPA Prosecution Guidelines (2013).

More than one person may therefore be liable for an offence arising from the one activity. For example, where unauthorised development work has been carried out by a builder in accordance with a direction given by the owner of the property, both the builder (as the principal offender) and the owner (as an accessory) may be liable for an offence.

## Relevant factual issues

Factual matters which may need to be established before deciding who to prosecute for an alleged offence include:

- who actually committed the act (or omitted to act) which gave rise to the offence (the principle offender);
- who assisted the principal offender in the commission of the offence;
- whether the person is an employee and, if so, the scope of their employment and the seniority of the position held;
- whether the person is a corporate officer (eg company director) and, if so, the scope of their duties and functions;
- where an offence was committed by an employee or corporate officer, whether they committed the offence:
  - in the course of carrying out their employment or duties (so that the employer/corporation may also be liable); or
  - outside the scope of their employment or duties (so that only the individual and not the employer/corporation may be liable)
- The state of mind of the offender (and any accessory), for example, whether they acted in good faith, whether they knew or should have known that the conduct was an offence and whether they took reasonable steps to avoid the offence.

It is often difficult to determine the most appropriate person(s) to be held liable for an offence. This issue is fundamental to a successful prosecution, and legal advice needs to be obtained before proceedings are commenced.<sup>39</sup>

## 6.5 Choosing preferable charges

In some cases the evidence will disclose a number of offences, both more and less serious. While there is a prosecutorial discretion as to which charge or charges should be preferred, care must therefore be taken to choose a charge or charges which properly take into account the public interest in bringing proceedings that reflect the seriousness and extent of the criminal conduct disclosed by the evidence, and which will provide the court with an appropriate basis for sentence.

### Further resources:

- Commonwealth Director of Public Prosecutions (2014), *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* Guidelines for the making of decisions in the prosecution process, available at <https://www.cdpp.gov.au/sites/g/files/net391/f/Prosecution-Policy-of-the-Commonwealth.pdf>
- NSW Director of Public Prosecutions (2007) *Prosecution Guidelines*, available at <http://www.odpp.nsw.gov.au/docs/default-source/default-document-library/prosecution-guidelines.pdf?sfvrsn=2>
- NSW Environment Protection Authority (2013) *EPA Prosecution Guidelines*, available at <http://www.epa.nsw.gov.au/resources/legislation/20130141EPAProsGuide.pdf>
- NSW Planning (2010) *Compliance and Enforcement Prosecution Guidelines*, available at [http://www.planning.nsw.gov.au/~/\\_media/files/DPE/Guidelines/compliance-and-enforcement-prosecution-guidelines-2010-10-29.ashx](http://www.planning.nsw.gov.au/~/_media/files/DPE/Guidelines/compliance-and-enforcement-prosecution-guidelines-2010-10-29.ashx)
- SA Director of Public Prosecutions (date) *Prosecution Policy Guidelines*, available at [http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf)

39. See NSW Planning *Compliance and Enforcement Prosecution Guidelines* (2010).

## 7. Fair procedures

As a way of describing how individuals react to decisions and the way they are made, organisational scientists have put forward a theory referred to as 'organisational justice theory' or 'justice theory'. According to justice theory, disputants care as much about **how** their disputes are resolved as they do about the outcomes they achieve. Subsequent research from around the world has supported this view.

Organisational scientists argue that there are four dimensions to any decision-making process:

- **Decisions** ('distributive justice') is concerned with the perceived fairness of the outcomes of the decision-making process. The focus is on the perceived fairness of:
  - any decision to take no action;
  - the findings arising out of any investigation as to whether allegations are substantiated or not;
  - any recommendations; and
  - any decisions.
- **Procedures** ('procedural justice') – is concerned with the perceived fairness of processes/procedures used to make decisions, resolve conflicts and/or reach outcomes, ie the means by which decisions are made.
- **Treatment** ('interpersonal justice') – is concerned with the perceived fairness of the treatment of the individual concerned. The focus is on demonstrated:
  - respect
  - empathy
  - concern
  - responsiveness etc.
- **Information** ('informational justice') – is concerned with the perceived fairness of the information provided to the person about the procedures used and the decisions made. The focus is on whether the information provided in relation to key decisions made is:
  - understandable
  - adequate
  - accurate
  - timely.

Each element of justice theory focuses on the **perception of fairness** by the person affected by a decision. Justice theory emphasises the importance of transparency in the implementation of processes that can impact on the rights and interests of individuals.

Justice theory argues that where the procedures followed and the interactions with the person concerned are perceived to be fair, reasonable and appropriate, then a negative outcome will not necessarily mean a negative perception of the decision-maker.

In the enforcement area, it has been shown that when regulators use procedures that are seen to be fair when making decisions and implementing laws, they are much more likely to achieve positive compliance outcomes. Research has shown that people are more likely to comply with rules if they believe the rules are legitimate. People tend to see rules as legitimate if they believe the procedures used by the authority to implement the rules are fair. If rules are seen as procedurally just, they are viewed as more legitimate and are more likely to be obeyed.<sup>40</sup> People are also more likely to adhere to agreements that are made using procedures that are perceived to be fair.<sup>41</sup>

### 7.1 Procedures to ensure the actual and perceived fairness of enforcement-related decisions

A number of practical steps can be taken by councils to ensure procedures used in enforcement are both fair and seen to be fair.

Councils should foster a culture of transparency and accountability, and ensure they have policies, procedures and appropriate training, ensure all staff who handle complaints or have enforcement-related responsibilities are aware of council's expectations in the following areas:

40. See Tom R. Tyler, *Why People Obey the Law*, Princeton University Press, 2006.

41. Pruitt et al, 1993, 'Long-term success in mediation', *Law and Human Behaviour*, 17:313-330.



- procedural fairness is observed when required, and when it is good practice to do so
- comprehensive reasons are given for all key decisions made on complaints and decisions that affect people's rights or interests and in particular decisions to take no action or depart from published policy or practice
- decisions are made based on logically probative evidence
- conflicts of interests are appropriately managed
- information is provided to all relevant parties to an enforcement-related issue in a timely, accurate and understandable fashion
- good customer service and complaint-handling principles are practiced
- adequate records are kept of all decisions and supporting evidence.

For guidance on procedural fairness, conflicts of interest and collecting evidence see Section 4 Investigating allegations of unlawful activity.

For detailed guidance on the other areas see the following NSW Ombudsman publications at [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au):

- *Good Conduct and Administrative Practice Guidelines* (2006)
- *Reporting of progress and results of investigations*
- *Managing information arising out of an investigation – balancing openness and confidentiality*
- *Better Service and Communication for Councils*
- *Effective Complaint Handling Guidelines* 2nd edition.

The following points are highlighted as we have found they are frequent causes of complaints involving enforcement.

### 7.1.1 Giving of reasons

The giving of reasons for a decision serves a number of vital purposes, including:<sup>42</sup>

Transparency	<p>A person affected by a decision is better able to see:</p> <ul style="list-style-type: none"> <li>• the facts and reasoning that were the basis for the decision</li> <li>• that the decision was not made arbitrarily or based on speculation or suspicion</li> <li>• to what extent any arguments they put forward have been understood, accepted or formed a basis for the decision</li> <li>• whether they have been dealt with fairly</li> <li>• whether or not they should exercise any rights of objection, review or appeal</li> <li>• the case they will have to answer to or counter should they wish to exercise any right of objection, review or appeal that may be available</li> <li>• a person affected by a decision is also better able to adjust their position to ensure that if the discretion is exercised again they are more likely to succeed or will not be adversely affected</li> <li>• public confidence in the decision, the decision making process and the council.</li> </ul>
Accountability	<p>Decision makers who are required to give reasons have a greater incentive to base their decisions on acknowledged facts.</p> <p>Supervisors and managers are better able to see if legal requirements, agency/government policies and standard practices have been complied with.</p> <p>People or bodies with an external review role are in a better position to assess the decision, for example where it was reached lawfully, based on relevant considerations, or based on the merits of the case.</p>
Quality	<p>Decision makers who are required to give reasons have a greater incentive to:</p> <ul style="list-style-type: none"> <li>• rigorously and carefully identify and assess the relevant issues</li> <li>• properly justify recommendations and decisions</li> <li>• other decision makers are able to apply decisions to future cases by using the reasons as guidance for the assessment or determination of similar issues, creating consistency across different decision-makers.</li> </ul>

42. Adapted from NSW Ombudsman [2006] *Good Conduct and Administrative Practice Guidelines*.

Reasons should be drafted with their potential audience in mind. Reasons should be in plain English, and intelligible to a person with no legal or other relevant technical training. The language should be clear, unambiguous and not be merely a re-statement of (or a quote from) legislation.

---

### Case study – The importance of communicating reasons

During a targeted inspection program, a business owner was found to be in breach of legislative requirements. The inspectors decided to issue the business owner with a formal Warning Letter. The warning letter quoted the legislation the business owner had breached, but did not provide any additional information or explain the breach in plain English. The man, who spoke English as a second language, had trouble understanding what he had done wrong. As a result, he continued to be non-compliant with the legislative requirements necessitating further action by council.

This case study highlights the importance of explaining legislative offences in plain English, so offenders are able to clearly understand what they have done wrong and are able to remedy the issue.

---

### Treatment

Research has shown that treating people with dignity and respect influences whether they assess decisions as fair.<sup>43</sup> A central component of good administrative practice is providing good customer service to the public. Council officers and investigators should always ensure they demonstrate the following when responding to and investigating complaints about unlawful activity:

**Consideration and respect** – the views of the parties are considered, and parties are treated politely and respectfully, including by a reasonable attempt being made to understand their perspective;

**Empathy and concern** – an attempt to understand the impact of the decision or conduct on the parties (focusing on understanding their feelings);

**Propriety** – improper questions are not asked and prejudicial statements are not made;

**Honesty and candidness** – realistic and accurate information is provided about the decision or the outcome.

There is sometimes a misconception amongst enforcement officers that treating people with courtesy, respect and empathy will impede their ability to make impartial decisions. This is not the case. It is acknowledged that many decisions made in the enforcement context will inconvenience and have a detrimental effect on individuals and businesses. However, by making it as easy as possible for parties to understand the reasons for actions and how they can comply and treating people with respect, councils are far more likely to get cooperation in the majority of cases. Councils should see their role as helping people comply with laws and regulations.

### Further resources

- *Good Conduct and Administrative Guidelines*, NSW Ombudsman, available at [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)
- *Better Service and Communication Guidelines for Local Government*, NSW Ombudsman [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

## 7.2 Record keeping

Records are information created, received, and maintained as evidence.<sup>44</sup> Examples of records include files, documents, emails, spreadsheets, databases, entries in a customer relation management system, notebooks and diaries, tweets, Facebook entries, digital copies of paper records, photographs, films, sound recordings etc.

Records tell us **what**, **where** and **when** something was done or **why** a decision was made. They also tell us **who** was involved and under what authority.<sup>45</sup> Councils have an obligation to ensure that key decisions and events are recorded in a way that captures the important features of a discussion or decision, presents a faithful and accurate account of the key things that have occurred and can easily be retrieved when needed.<sup>46</sup>

---

43. Tom R. Tyler, *Why People Obey the Law*, Princeton University Press, 2006.

44. AS ISO 15489.1-2002: Records Management, section 3.15.

45. State Records Authority of NSW (2010) 'What have records got to do with me?' Leaflet for Local Government.

46. Management Advisory Committee (2007) Note for File: A report on record-keeping in the Australian Public Service.

It is crucial that council staff document their actions. This provides the evidence of what has taken place and the decisions made, and allows the council to account for their actions and decisions. This is especially useful if those actions or decisions become the subject of an appeal or a complaint to an oversight agency or the courts.

Records may naturally arise in the course of somebody's work, such as sending or receiving an email. In other cases, where activity does not automatically result in the creation of a record, council staff will need to create one. It is important that staff make contemporaneous notes during telephone conversations, meetings and informal discussions which cover council matters, including where they provide advice and make decisions. The records should accurately reflect the transaction or activity that has taken place. These notes or minutes of meetings should be saved in the council's records management system as soon as possible after the meeting or discussion.

HCCREMS Management Strategy recommends that a record-keeping policy should require council officers to record the following information:

- who the record/activity/incident relates to and details of property, and property location;
- date and time of activities, discussions or other relevant interactions;
- specific details of activities undertaken, analysis and assessment of situation, directions given and determination of any applicable enforcement action (including the reason for the final decision); and
- all council officers involved in the activity and details of all other individuals or corporations involved in the activity/incident.<sup>47</sup>

### 7.2.1 Why keep records?

Councils are required by the *State Records Act 1998* to make and keep full and accurate records of all official activities.

In addition, good record keeping assists in improving accountability and promoting transparent decision-making. In particular good record keeping:

- helps councils to work more efficiently
- enables council and its staff to meet legislative and regulatory requirements
- protects the interests of the government and the council concerned
- protects the interests of ratepayers and residents
- demonstrates the cost and impact of the council's business
- supports better performance of business activities throughout the council
- enables a review of council processes and decisions
- retains the corporate memory of the council
- assists in research and intelligence activities
- enables consistency and continuity in decision making.<sup>48</sup>

---

### Case study – How record keeping can benefit an investigator

Two investigators conducted an inspection of a licensed premises. During that inspection, the director produced his drivers licence as formal identification. The investigators took a digital photograph of the licence, and recorded the licence details in their investigator notebooks, thus creating contemporaneous notes.

A few months later, an investigation revealed the same business was involved in illegal activities. The investigators were required to attend a private residence to serve court attendance notices on the accused offender. The offender refused to accept the court attendance notices, denying his identity and claiming he did not know anyone under that name. The investigators were then able to produce the digital copy of the offender's identification which had been produced to the investigators a few months earlier. Based on these records, the offender was unable to refuse his identity and accepted the court attendance notices.

---

47. Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS) (2012), *Model: Compliance and Assurance Policy*.

48. See NSW Ombudsman (2006), *Good Conduct and Administrative Practice Guidelines*.

### 7.2.2 Problems that arise from bad record keeping

Records are an indispensable ingredient for accountable government. Ad hoc record-keeping practices and the failure to keep records contributes to poor decision making.<sup>49</sup>

A common problem we find when reviewing allegations that councils have failed to take any, or adequate, enforcement action, is a lack of records. This includes records of inspections (such as by who, when, what was the purpose, what was found), records of telephone conversations, or records of agreements reached or directions given for the purpose of resolving problems.

In many instances, when we examine files relating to enforcement complaints we find that we cannot come to a conclusion about whether decisions were reasonable because there are no written assessments, no records of supervisor's instructions or minutes of committee meetings that impact on the decision.

#### Further resources

- See the State Records Authority's guidance for local government at [www.records.nsw.gov.au/record-keeping/resources/for-local-government](http://www.records.nsw.gov.au/record-keeping/resources/for-local-government)
- Appendix 4 – Record-keeping flowchart or - Guidance on records management.

---

49. State Records Authority of NSW (2010), 'What have records got to do with me?' Leaflet for Local Government.

# Appendix 1

## 8.1 Examples in determining significance of unauthorised activity

**Table 3. Significance of unauthorised activity**

Severity/ seriousness	Public interest	Aggravating or mitigating factors	Significance of unauthorised activity
Low to moderate environmental harm	Public interest low due to minimal cost to the community and the 'one-off' nature of the unauthorised activity with minimal need for deterrence against further unauthorised activity.	No significant aggravating factors; Offender cooperated with investigation.	LOW
Moderate, short-term loss of amenity; Low environmental harm	Public interest likely to be moderate due to the need to deter the offender from further unauthorised activity of this nature but little public perception of the unauthorised activity.	No significant aggravating factors; Offender rectified unauthorised activity quickly when notified by Council.	LOW
Moderate or high degree of environmental harm	Public interest high due to the unauthorised activity impacting on the amenity of several residential neighbours and the need to deter against further unauthorised activity of this nature.	Significant aggravating circumstances due to offender knowingly committing the unauthorised activity despite likely impacts.	HIGH
Large magnitude of unauthorised activity; High level of unjust benefit; Low to moderate risk of environmental harm	Public interest moderate due to the need to deter the offender against further unauthorised activity of this nature.	Aggravating circumstances due to offender knowingly committing the unauthorised activity for significant financial gain.	HIGH
High level of compliance with approval/consent	Public interest moderate due the need to deter the offender against further unauthorised activity of this nature.	Minor aggravating circumstances due to offender submitting false and misleading information about the unauthorised activity.	MEDIUM
Low level of compliance with approval/consent	Public interest high due to the high public perception of the unauthorised activity and likelihood of the offender committing further unauthorised activity.	No mitigating circumstances due to offender failure to acknowledge the unauthorised activity and instigating measures to prevent further unauthorised activity.	HIGH

Source: Byron Shire Enforcement Policy

Enforcement options are not necessarily mutually exclusive, for example in some circumstances it may be appropriate to simultaneously issue an order and a penalty notice.

### Choosing the appropriate enforcement response

In all cases, council will choose an enforcement response which is proportionate to the seriousness of the offence and which:

- sets a proper precedent for future cases;
- is consistent with the intent and objectives of the legislation;
- is an appropriate use of council's resources;
- does not adopt an unreasonable or extreme interpretation of a condition of approval or consent. Council will cast itself as the 'reasonable person'; and
- is consistent with responses previously adopted for similar incidents.

Enforcement options which may be appropriate for unauthorised activities determined to be of low, medium or high significance are set out below. It is important to remember that the following is a guide only and each case must be assessed on the particular facts. A summary of the guide is provided in Table 4.

Enforcement options for unauthorised activities of **low significance**:

- take no action but record the unauthorised activity (only where the degree of harm and severity of the unauthorised activity are low to very low, some mitigating circumstances exist, there are no aggravating circumstances, and the public interest does not compel further action);
- send a warning or advisory letter to the alleged offender to encourage them to comply in the future;
- negotiate a corrective action with the alleged offender and confirm commitments made in writing;
- send a letter identifying the unauthorised activity and requesting an undertaking that corrective action will be taken within a specific timeframe;
- issue an order under section 121B of the EP&A Act, for example to cease specified activities, comply with a development consent or project approval, and/or effect a remedy or restraint of the alleged unauthorised activity.

Enforcement options for unauthorised activity of **medium significance**:

- send a warning or advisory letter to the alleged offender to encourage them to comply in the future;
- negotiate a corrective action with the alleged offender and confirm commitments made in writing;
- send a letter identifying the unauthorised activity and requesting an undertaking that corrective action will be taken within a specific timeframe;
- issue an order, for example to cease specified activities, comply with a development consent or project approval, and/or effect a remedy or restraint of the alleged unauthorised activity;
- issue a PIN.

Enforcement options for unauthorised activity of **high significance**:

- send a letter identifying the unauthorised activity and requesting an undertaking that corrective action will be taken within a specific timeframe;
- issue an order;
- commence civil proceedings in the Land and Environment Court seeking court orders requiring certain things to be done to achieve compliance or to remedy or restrain an alleged unauthorised activity;
- issue a PIN;
- commence criminal prosecution proceedings in the Land and Environment Court or in a local court.

Note that it may be appropriate to use more than one enforcement option in some cases. If initial enforcement action does not achieve a satisfactory outcome, it may be necessary to proceed to a higher level of enforcement response. For example, if a warning letter does not achieve the desired response, it may be appropriate to give an order or to seek an order from the court; or if an order is not complied with it may be appropriate to bring enforcement or prosecution proceedings.

**Table 4. Enforcement options summary**

Enforcement action	Significance of unauthorised activity		
	High	Medium	Low
Prosecution	*		
Court order	*		
Penalty notice	*	*	
Order	*	*	*
Letter requesting undertaking	*	*	*
Negotiated outcome		*	*
Warning letter		*	*
Record unauthorised activity			*

# Appendix 2

## 8.2 Council powers to enter and inspect premises

**Please note:** We have tried to summarise these powers as clearly and concisely as possible. You may also want to check the exact wording in the relevant sections of the Acts.

- *Local Government Act 1993* (LG Act )
- *Protection of the Environment Operations Act 1997* (PEO Act)
- *Environmental Planning and Assessment Act 1979* (EPA Act)

The EPA Act has very broad offence provisions and any breach of the Act is a potential offence. This means that there is little need to identify specific offences as in other legislation.

### 1. Powers of entry

A council may authorise any person, in writing, to enter any premises to enable the council to exercise its functions. [LG Act ss.191(1), EPA Act s.118A(1)]

Entry may only be made at:

- any reasonable hour in the day time
- any hour during which business is in progress or is usually carried on at the premises.

[LG Act s.191(2), EPA Act s.118A(3)]

Council employees, agents or contractors may enter any premises at any reasonable time to exercise the council's functions under Section 4 of the PEO Act (Environment Protection Notices). This power extends to entering other premises if this is necessary to enter or leave the target premises. Entry may be by foot, by motor or other vehicle, or in any other manner. Council staff may, if necessary, enter the premises with the assistance of other authorised officers or police officers and use reasonable force.

[PEO Act s.111]

A person authorised by a council under the PEO Act may enter:

- any premises at which they reasonably suspect that any industrial, agricultural or commercial activities are being carried out – at any time during which those activities are being carried out
- any premises at or from which they reasonably suspect pollution has been, is being or is likely to be caused – at any time
- any other premises – at any reasonable time.

A power to enter premises conferred by the PEO Act authorises entry by foot, by a motor or other vehicle, by aircraft or any other manner. An authorised person may, if necessary, enter the premises with the assistance of other authorised officers or police officers and use reasonable force. Entry may be made to any premises with the authority of a search warrant under section 199 of the PEO Act.

[PEO Act s.196]

### 2. Inspections and investigations

A person authorised by a council to enter premises may:

- inspect the premises or any article, matter or thing on the premises
- open any ground and remove any flooring and take any measures necessary to inspect the character and condition of the premises and of any pipe, sewer, drain, wire or fitting
- require the opening, cutting into or pulling down of any work if they believe or suspect that anything on the premises has been done in contravention of the Act or the Regulations or, in the case of the EPA Act, an environmental planning instrument
- take measurements, make surveys and take levels and, for those purposes, dig trenches, break up the soil and set up any posts, stakes or marks

- require any person at those premises to answer questions or provide information about the matter being investigated
- take samples or photographs in connection with any inspection
- in the case of the LG Act, examine and test any meter or measure a supply of water.

[LG Act s.192, EPA Act s.118B]

A person authorised by a council to enter premises under Division 1A of Part 6 of the EPA Act may require an accredited certifier, a person carrying out building work or subdivision work or any other person whom the authorised person suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required to enable the council concerned to exercise its functions under this Act to answer questions in relation to those matters.

[EPA Act s.118BA]

A person authorised under the PEO Act may, at any premises lawfully entered, do anything that they believe is necessary for the purposes of Section 7 of the PEO Act.

This includes:

- examining and inspecting any works, plant, vehicle, aircraft or other article
- taking and removing samples
- making any examinations, inquiries and tests they consider necessary
- taking any photographs, films, audio, video and other recordings they consider necessary
- requiring records to be produced for inspection
- examining, inspecting and copying any records
- seizing anything that they have reasonable grounds for believing is connected with an offence against the PEO Act or the regulations
- directing the occupier of the premises where something is seized to retain it at those premises or at another place under their control
- doing any other thing the authorised person is empowered to do under Section 7 of the PEO Act
- turn off or otherwise disable a building intruder alarm or a motor vehicle intruder alarm that is or has been sounding in breach of the PEO Act or regulations (PEO Act s.198A).

The power to seize anything connected with an offence includes the power to seize anything:

- related to the offence committed
- that will provide evidence that the offence has been committed
- that was used to commit the offence.

An offence includes any offence that there are reasonable grounds for believing has been committed.

[PEO Act s.198]

### 3. Notice of entry

Before an authorised person enters premises, the council must give the owner or occupier of the premises written notice of the intention to enter the premises.

Notice need not be given if:

- entry to the premises is made with the consent of the owner or occupier
- entry to the premises is required because of the existence or reasonable likelihood of a serious risk to health or safety
- entry is required urgently and the case is one in which the general manager has authorised in writing (either generally or in the particular case) entry without notice
- in the case of the LG Act, entry is made solely to read a meter or other device for measuring the supply of water to the premises from the council's water mains or the discharge of sewerage or other waste matter from the premises into the council's sewer mains.

[LG Act s.193, EPA Act s.118C]



#### 4. Use of force

Reasonable force may be used to gain entry to any premises (other than residential premises) under a power conferred by the relevant Act, but only if authorised by the council in accordance with the Act.

The council's authority must:

- be in writing
- be given for the particular entry concerned
- specify the circumstances which are required to exist before force may be used.

[LG Act s.194, EPA Act s.118D]

A council is not able to delegate to its general manager the power of the council to authorise the use of reasonable force to enter premises under the LG Act s.194.

[LG Act s.377(1)]

#### 5. Notification of use of force or urgent entry

A person authorised to enter premises must promptly advise the council if they:

- use force to gain entry to the premises
- enter the premises in an emergency without giving written notice to the owner or occupier.

The council must give notice of the entry to the appropriate people or authorities in the circumstances.

[LG Act s.195, EPA Act s.118E]

#### 6. Care to be taken

A person authorised to enter or search premises must do as little damage as possible.

[LG Act s.196(1), EPA Act s.118F(1), PEO Act s.201]

The council must provide, if necessary, other means of access in place of any taken away or interrupted by an authorised person.

As far as practicable, entry on to fenced land is to be made through an existing opening in the enclosing fence. If entry by that means is not practicable, a new opening may be made in the enclosing fence but the fence must be fully restored when the need for entry ceases.

[LG Act s.196(3), EPA Act s.118F(2)]

If any pit, trench, hole or bore is made during an inspection, the council must, if the owner or occupier of the premises so requires, fence it and keep it securely fenced as long as it remains open or not sufficiently sloped down. It must be filled up, levelled or sufficiently sloped down as soon as possible.

[LG Act s.196(3)]

#### 7. Recovery of cost of entry and inspection

If a person authorised by council enters any premises to do an inspection and, as a result of that inspection, the council requires any work to be carried out on or in the premises, the council may recover the reasonable costs of that entry and inspection from the owner or occupier of the premises.

[LG Act s.197, EPA Act s.118G]

#### 8. Compensation

A council must pay compensation for any damage caused by any person authorised by the council to enter premises. This does not include any damage arising from work done during the inspection which reveals that there has been a contravention of any Act. In the case of the EPA Act, this includes a contravention of the Regulations or an environmental planning instrument.

[LG Act s.198, EPA Act s.118H]

A council must compensate all interested parties for any damage caused by an authorised person entering premises under the PEO Act. This does not include any damage caused by the exercise of any other power unless the occupier obstructed or hindered the authorised person in the exercise of the power of entry.

[PEO Act s.202]

## 9. Authority to enter premises

A power to enter premises, or to make an inspection or take other action on the premises, may not be exercised unless the person proposing to exercise the power:

- has written authority from the council
- produces the authority if required to do so by the owner or occupier of the premises.

This written authority must:

- state that it is issued under the relevant Act
- give the name of the person to whom it is issued
- describe the nature of the powers conferred and the source of the powers
- state the date (if any) on which it expires
- describe the kind of premises the power covers
- in the case of a council, be signed by the general manager.

These requirements do not apply to a power conferred by a search warrant.

[LG Act s.199, EPA Act s.118I]

A person authorised under the LG Act to enter premises who does not, on demand by the owner or occupier of the premises, produce their written authority is guilty of an offence – maximum penalty: 5 penalty units.

[LG Act s.659]

A person authorised to exercise a function under the PEO Act must, if requested to do so by any person affected by this function, produce their identification card.

[PEO Act s.189]

## 10. In what circumstances can entry be made to a residence?

The powers of entry and inspection conferred on councils cannot be used for that part of any premises being used for residential purposes unless:

- the occupier of that part of the premises has given permission
- entry is necessary to inspect work being carried out under an approval such as a development consent or a development certificate under the EPA Act
- the authority has been conferred by a search warrant
- an application has been made for a building certificate under section 149B of the EPA Act for premises used for residential purposes and entry is necessary to inspect the premises.

[LG Act s.200, EPA Act s.118J]

Part 7.4 of the PEO Act does not empower an authorised person to enter any premises used only for residential purposes without the permission of the occupier or the authority of a search warrant issued under section 199 of the PEO Act.

[PEO Act s.197]

## 11. Search warrants

An authorised person may apply to an authorised justice if they have reasonable grounds for believing that the provisions of the relevant Act or the Regulations have been or are being contravened in or on any premises. This includes the terms of an approval or order made under the LG Act and an environmental planning instrument or the terms of a development consent, complying development certificate or order under the EPA Act.

An authorised justice may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised person named in the warrant to:

- enter the premises
- search the premises for evidence of a contravention of the relevant Act or the Regulations.

Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibility) Act 2002* applies to a search warrant issued under the above powers.

[LG Act s.201(1)–(3), EPA Act s.118K(1)–(3), PEO Act s.199]

## 12. Assistance

A police officer may accompany an authorised person executing a search warrant issued under the relevant Act and may take all reasonable steps to assist the authorised person exercise their function under the relevant section.

[LG Act s.201(4), EPA Act s.118K(4)]

A person may accompany a person authorised under the PEO Act and take all reasonable steps to assist them exercise their functions under Part 7 of the PEO Act if the authorised person believes that the person is capable of providing such assistance.

[PEO Act s.199A]

A council that has appointed an authorised person under the PEO Act may give the owner or occupier of the premises written notice requiring them to provide such reasonable assistance and facilities as are specified in the notice within a specified time and in a specified manner.

[PEO Act s.200]

## 13. Obstruction

A person is guilty of an offence if they wilfully obstruct any authorised person exercising any function under the LG Act or any regulation – maximum penalty: 20 penalty units.

[LG Act s.660]

A person must not obstruct, hinder or interfere with an authorised person exercising their functions under Division 1A of Part 6 of the EPA Act.

[EPA Act s.118N]

A person is guilty of an offence if they wilfully delay or obstruct:

- a person who is carrying out any action in compliance with an environment protection notice or another person authorised to carry it out
- a council that is taking clean up action under Part 4.2 of the PEO Act or another person authorised to carry it out
- a council that is taking action under sections 98 or 103 of the PEO Act or another person authorised to take the action.

[PEO Act s.112]

## 14. Refusal to give name of owner, manager or occupier

An occupier or manager of any premises or an agent of the owner of the premises is guilty of an offence if they, on the request of a council or an authorised person, refuse or wilfully omit to disclose or wilfully misstate the name and address of the owner of the premises or the person receiving or authorised to receive the rents of the premises – maximum penalty: 5 penalty units.

[LG Act s.662]

An owner of premises is guilty of an offence if they, on the request of a council or an authorised person, refuse or wilfully omit to disclose or wilfully misstate the name and address of the manager or occupier of the premises – maximum penalty: 5 penalty units.

[LG Act s.663]

## Appendix 3

### 8.3 Application of information protection principles to council enforcement action

This appendix relates to Part 2 of the *Privacy and Personal Information Protection Act 1998* (PIPP Act) and follows the same numbering set out in the Act.

#### Information protection principle

##### 1. Collection of personal information for lawful purposes

A public sector agency must not collect personal information unless:

- the information is collected for a lawful purpose that is directly related to a function or activity of the agency
- the collection of the information is reasonably necessary for that purpose.

A public sector agency must not collect personal information by any unlawful means.

##### Exemptions from principles

Personal information is not defined as collected by a council if the information was unsolicited (s.4(5)).

##### 2. Collection of personal information directly from an individual

A public sector agency must collect the personal information directly from the individual to whom the information relates unless:

- the individual has authorised collection of the information from someone else
- the information is about a person under the age of 16 years and has been provided by their parent or guardian (s.9).

##### Exemptions from information protection principles

Personal information is not defined as collected by a council if the information was unsolicited (s.4(5)).

Division 3 of Part 2 of the PIPP Act sets out specific exemptions from the principles. For example, a council is not required to comply with this information protection principle if:

- the information concerned is collected in connection with proceedings before any court or tribunal (s.23(2)).
- compliance might detrimentally affect, or prevent the proper exercise of, the council's complaint-handling or investigative functions. This applies only to complaints or other matters that could be referred or made to an investigative agency such as the Ombudsman or the ICAC, or that have been referred from or made by such an agency (s.24(4)).
- it is lawfully authorised or required not to comply with the principle or non-compliance is otherwise permitted under an Act or any other law (s.25).
- compliance is reasonably likely to detrimentally affect, or prevent the proper exercise of, the council's conduct of a lawful investigation. These investigations include those carried out by the council under specific legislative authority, or where the power to conduct the investigation is necessarily implied or reasonably contemplated under an Act or other law. They are investigations which may lead to the council prosecuting the behaviour under investigation.

### 3. Requirements when collecting personal information

If a public sector agency collects personal information from an individual, the agency must take reasonable steps to ensure that, before the information is collected or as soon as practicable after collection, the individual to whom the information relates is made aware of the following:

- the fact that the information is being collected
- the purposes for which the information is being collected
- the intended recipients of the information
- whether the supply of the information by the individual is required by law or is voluntary, and any consequences for them if the information (or any part of it) is not provided
- the existence of any right of access to, and correction of, the information
- the name and address of the agency that is collecting the information and the agency that is to hold the information.

#### Exemptions from principles

Personal information is not defined as collected by a council if the information was unsolicited (s.4(5)).

A council is not required to comply with this information protection principle if:

- the information concerned is collected for law enforcement purposes. However, all other protections provided by any other law in relation to the rights of accused persons or persons suspected of having committed an offence still apply.
- compliance might detrimentally affect, or prevent the proper exercise of, the council's complaint handling or investigative functions. This applies only to complaints or other matters that could be referred or made to an investigative agency such as the Ombudsman or the ICAC, or that have been referred from or made by such an agency (s.24(4)).
- it is lawfully authorised or required not to comply with the principle or non compliance is otherwise permitted under an Act or any other law (s.25).
- compliance is reasonably likely to detrimentally affect, or prevent the proper exercise of, the council's conduct of a lawful investigation. These investigations include those carried out by the council under specific legislative authority or where the power to conduct the investigation is necessarily implied or reasonably contemplated under an Act or other law. They are investigations which may lead to the council prosecuting the behaviour under investigation.

### 4. Other requirements relating to collection of personal information

If a public sector agency collects personal information from an individual, the agency must take reasonable steps to ensure that:

- the information collected is relevant to that purpose, is not excessive, and is accurate, up to date and complete
- the collection of the information does not intrude to an unreasonable extent on the personal affairs of the individual concerned.

#### Exemptions from principles

Personal information is not defined as collected by a council if the information was unsolicited (s.4(5)).

### 5. Retention and security of personal information

A public sector agency that holds personal information must ensure that:

- the information is kept for no longer than is necessary
- the information is disposed of securely and in accordance with any requirements for the retention and disposal of personal information
- the information is protected by taking reasonable security safeguards against loss, unauthorised access, use, modification, disclosure or other misuse.

If the information needs to be given to a person in connection with the provision of a service to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or disclosure of the information.

## 6. Information about personal information held by agencies

A public sector agency that holds personal information must take reasonable steps to enable any person to find out:

- whether the agency holds personal information and whether they hold personal information relating to them
- if the agency holds personal information relating to that person, the nature of that information, the main purposes for which it is used and their entitlement to have access to the information.

### Exemptions from principles

The provisions of the *Government Information (Public Access) Act 2009* that impose conditions or limitations on any matter referred to in this section are not affected by this Act. Those provisions continue to apply as if they were part of this Act (s.20(5)).

## 7. Access to personal information held by agencies

A public sector agency that holds personal information must, at the request of the individual to whom the information relates and without excessive delay or expense, provide the individual with access to the information.

### Exemptions from principles

The provisions of the *Government Information (Public Access) Act 2009* that impose conditions or limitations on any matter referred to in this section are not affected by this Act. Those provisions continue to apply as if they were part of this Act (s.20(5)).

## 8. Alteration of personal information

A public sector agency that holds personal information must, at the request of the individual to whom the information relates, make appropriate amendments by either corrections, deletions or additions to ensure that the personal information is accurate, relevant, up to date, complete and not misleading.

If a public sector agency is not prepared to amend personal information in accordance with a request by the individual to whom the information relates, the agency must take reasonable steps to attach to the information any amendment provided by the individual concerned.

If the personal information is amended, the individual to whom the information relates is entitled, if it is reasonably practicable, to have recipients of that information notified of the amendments made.

### Exemptions from principles

The provisions of the *Government Information (Public Access) Act 2009* that impose conditions or limitations on any matter referred to in this section are not affected by this Act. Those provisions continue to apply as if they were part of this Act (s.20(5)).

## 9. Agency must check accuracy of personal information before use

A public sector agency that holds personal information must not use the information without taking reasonable steps to ensure that the information is relevant, accurate, up to date, complete and not misleading.

## 10. Limits on use of personal information

A public sector agency that holds personal information must not use the information for a purpose other than that for which it was collected unless:

- the individual to whom the information relates has consented to the use of the information for that other purpose
- the other purpose for which the information is used is directly related to the purpose for which it was collected
- the use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.

## Exemptions from principles

A council is not required to comply with this information protection principle if:

- the use of the information for a purpose other than the purpose for which it was collected is reasonably necessary for law enforcement purposes or to protect the public revenue (s.23(4)).
- it is lawfully authorised or required not to comply with the principle or non-compliance is otherwise permitted under an Act or any other law (s.25).
- compliance is reasonably likely to detrimentally affect, or prevent the proper exercise of, the council's conduct of a lawful investigation. These investigations include those carried out by the council under specific legislative authority, or where the power to conduct the investigation is necessarily implied or reasonably contemplated under an Act or other law. They are investigations which may lead to the council prosecuting the behaviour under investigation.

A council may use personal information for another purpose if that purpose is part of the council's lawful and proper functions and the council is satisfied that the personal information is reasonably necessary for the exercise of such functions (Privacy Code of Practice for Local Government).

## 11. Limits on disclosure of personal information

A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other public sector agency unless:

- the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure
- the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or agency
- the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.

If personal information is disclosed to another person or public sector agency, that agency must not use or disclose the information for a purpose other than the purpose for which the information was given.

## Exemptions from principles

Personal information is not defined as collected by a council if the information was unsolicited (s.4(5)). However the information is still defined as being held by the agency.

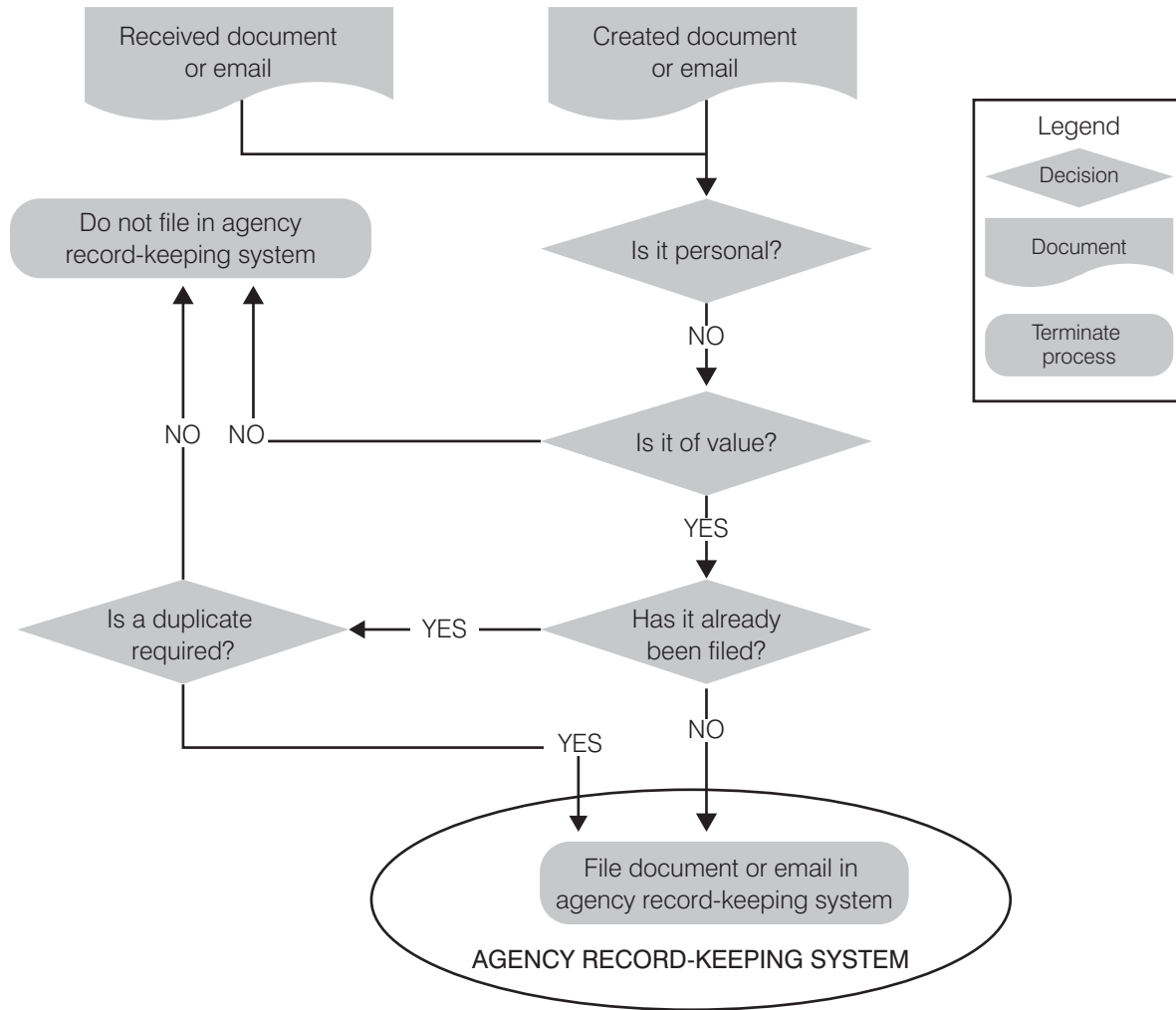
A council is not required to comply with this information protection principle if:

- the disclosure of the information concerned is made in connection with proceedings for an offence or for law enforcement purposes or is needed to investigate an offence where there are reasonable grounds to believe that an offence may have been committed (s.23(5)(a),(d)).
- it is lawfully authorised or required not to comply with the principle or non-compliance is otherwise permitted under an Act or any other law (s.25).
- the disclosure of information is made to another agency that is conducting, or may conduct, a lawful investigation and provided the information is reasonably necessary for that investigation.

# Appendix 4

## 8.4 Guidance on records management

Based on DEST *Management Instructions for Corporate Administrative Records* describing the difference between records of short-term and lasting value.<sup>50</sup>



50. Department of Education, Science and Training 2005, *Management Instructions, Corporate Administrative Records*.







# Annexure 1

## Model Compliance and Enforcement Model Policy

**December 2015**

## How to use the model policy template

**The attached document is a model compliance and enforcement policy. It is intended to be used as a foundation for council policy, to be tailored to the specific council on an as needs basis. For example, councils may include details of regulatory activities which are not included in this model policy such as proactive compliance assurance activities and community education.**

In this model policy, we have attempted to bring together all aspects of compliance and enforcement. We acknowledge that your council may already have, or may prefer to have, separate policy documents dealing with some areas such as section 13 (Taking legal action). Your council may also have separate documents dealing with particular areas of regulation for example, parking and traffic. Where separate policies are maintained, those documents should be cross-referenced with this policy and also made publicly available.

Most of the model policy can be used as a template and replicated by councils. We have also provided advice and guidance [\[marked in blue text\]](#) on what you may wish to consider when modifying the policy to suit your particular needs – such as details of council procedures, compliance and enforcement activities and other matters.

A template is not provided for section 3 (Organisational approach). This section of the policy will be unique to each council. We have provided guidance on what you could consider including in these sections.

Once adopted, this policy should be publicly available on the council's website and be implemented by the council through staff training.

Please refer to our updated *Compliance and Enforcement Guidelines 2015* for assistance in developing better processes for compliance officers and managers who engage with individuals and businesses who may be breaking the law.

## Acknowledgements

In conducting research for and writing this policy, as well as referring to our *Compliance and Enforcement Guidelines for Councils 2015*, we have also referred to the policies and other materials of numerous councils and other bodies. We acknowledge the materials and assistance in writing this policy from the following:

- Ashfield Municipal Council – *Enforcement Policy 2007*
- Australian/New Zealand Standard – *Guidelines for complaint management in organizations AS/NZS 10002:2014*
- Building Professionals Board NSW – *Roles in enforcement*
- Cessnock City Council – *Compliance and Enforcement Policy 2013*
- City of Sydney – *Compliance Guidelines 2013, Compliance Policy 2014, Prosecution and Civil Enforcement Policy 2014*
- Dubbo City Council – *Enforcement and Prosecution Policy 2010*
- Hunter and Central Coast Regional Management Strategy (HCCREMS) – *Guideline Enforcement Options 2012, Guideline Investigations 2012, Guideline Managing Reports of Non Compliance 2012, Model Compliance Assurance Policy 2012*
- Lismore City Council – *Fact Sheet Information for Complainants*
- Woollahra Municipal Council – *PCAs and Council – Information on the Role of PCAs and Council in Relation to Building Works and Development Sites 2010*

# Contents

How to use the model policy template .....	72
Acknowledgements .....	72
1. Introduction .....	74
2. Purpose and scope .....	74
3. Organisational approach .....	74
4. Definitions .....	75
5. Policy objectives .....	75
6. Application .....	76
7. Compliance and enforcement principles .....	76
8. Responsibility .....	77
9. Responding to concerns about unlawful activity .....	78
10. Investigating alleged unlawful activity .....	80
11. Taking enforcement action .....	82
12. Options for dealing with confirmed cases of unlawful activity .....	83
13. Taking legal action .....	84
14. Shared enforcement responsibilities .....	85
15. Role of council where there is a private certifier .....	85
16. Role of councillors in enforcement .....	85
17. Delegations .....	85
18. Approval .....	86
19. Review .....	86
20. Other resources .....	86
<b>Appendix 1</b> .....	<b>87</b>
Taking enforcement action .....	87
<b>Appendix 2</b> .....	<b>89</b>
Developing compliance and enforcement guidelines .....	89
Unauthorised building works .....	89

## 1. Introduction

Council's regulatory responsibilities are applicable to *actual unlawful activity*, as well as a *failure to take action* (in order to be compliant with certain legal requirements). For simplicity, this policy refers to both an act and/or an omission by an alleged offender as 'unlawful activity'.

This policy distinguishes between a 'report alleging unlawful activity' and a 'complaint'.

For the purposes of this policy, a report alleging unlawful activity is where an individual expresses concern in relation to alleged unlawful activity, or they request service from council about such matters. Council considers that a response or resolution to a report alleging unlawful activity is explicitly or implicitly expected by the individual, or may be legally required.

A complaint is where an individual expresses dissatisfaction about council services, staff or the handling of a complaint. Therefore, a complaint may arise where an individual claims that council staff have failed to take action in relation to a report alleging unlawful activity. A complaint will be recorded separately and responded to in accordance with council's complaints management policy and procedures.

## 2. Purpose and scope

This policy provides information for all internal and external stakeholders and interested parties about council's position on compliance and enforcement matters in the local government area.

The purpose of this policy is to provide structure for consistency and transparency in decision making, and to facilitate a proportional approach to compliance and enforcement. It is also intended to assist council staff to act promptly, effectively and consistently in response to allegations of unlawful activity.

This policy outlines matters to be considered at the various stages of the enforcement process from the receipt and investigation of reports alleging unlawful activity, through to what enforcement option council will choose and whether to commence criminal or civil proceedings.

In certain circumstances council will have shared enforcement responsibilities with other regulatory authorities. This policy sets out a collaborative and cooperative approach to such matters. Advice and guidance is also provided on the role of council in building and construction compliance matters where there is a private certifier, and the role of councillors in enforcement.

Responsible council staff are not limited by this policy in their use of discretion and exercise of official functions. The full circumstances and facts of each case need to be considered and a decision made on the merits.

## 3. Organisational approach

*This section will be unique to each council. Broadly speaking, council may consider including details of why compliance and enforcement is important and what activities council undertakes to achieve that.*

1. Why compliance and enforcement is important. Some things to consider include:
  - to prevent or minimise harm to health, welfare, safety, property or the environment
  - to improve the safety and amenity of residents and visitors to the area
  - for the collective good, the welfare of the community or the public interest
  - to promote social policies (eg to preserve or protect the environment)
  - to manage risks
  - to uphold social order
  - to meet the expectations of the community
  - to encourage reports about possible unlawful activity from the community
  - to make the regulated community aware of their legal obligations and how to comply
  - details of any other relevant strategic planning.

The objects section of an Act will often list the specific nature of the harm that is being addressed and explicitly state the regulatory purposes of the legislation. For example, under section 8 of the *Local Government Act 1993* councils are obliged to ensure that regulatory functions are exercised consistently and without bias.

2. What activities does council regulate?
3. What proactive and reactive compliance and enforcement activities does council undertake?

## 4. Definitions

The following are the definitions of key terms in this policy:

Term	Meaning
Complaint	<p>A complaint is an expression of dissatisfaction made about council services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</p> <p>For the purposes of this policy, a complaint does not include:</p> <ul style="list-style-type: none"> <li>• a report alleging unlawful activity (see definition below)</li> <li>• a request for information about a council policy or procedure</li> <li>• a request for an explanation of actions taken by council</li> <li>• a request for internal review of a council decision.</li> </ul>
Enforcement	Actions taken in response to serious or deliberate contraventions of laws.
Regulation	Using a variety of tools and strategies to influence and change behaviour to achieve the objectives of an Act, Regulation or other statutory instrument administered by council.
Report alleging unlawful activity	An expression of concern or a request for service in relation to alleged unlawful activity, where a response or resolution is explicitly or implicitly expected or legally required.
Unlawful activity	<p>Any activity or work that has been or is being carried out contrary to the below and/or failure to take required action in order to be compliant with:</p> <ul style="list-style-type: none"> <li>• terms or conditions of a development consent, approval, permit or licence</li> <li>• an environmental planning instrument that regulates the activities or work that can be carried out on particular land</li> <li>• a legislative provision regulating a particular activity or work</li> <li>• a required development consent, approval, permission or licence.</li> </ul>

## 5. Policy objectives

The intent of this policy is to establish clear guidelines and protocols for council staff in the management of council's regulatory activities.

It provides workable guidelines on:

- responding to reports alleging unlawful activity
- assessing whether reports alleging unlawful activity require investigation
- deciding on whether enforcement action is warranted
- options for dealing with confirmed cases of unlawful activity
- taking legal action
- implementing shared enforcement responsibilities.

The policy also provides advice and guidance on:

- the role of the Principal Certifying Authority and
- the role of councillors in enforcement.

## 6. Application

This policy applies to regulatory issues within council's area of responsibility including, but not limited to:

- development and building control
- pollution control
- environmental health
- public health and safety
- noxious weeds
- water and sewer
- septic systems
- control over animals
- food safety
- fire safety
- tree preservation.

[Enter details of any other matters the policy does or does not apply to. Parking and traffic matters have not been included as penalty notices are generally issued on the spot and most councils have contractual arrangements with the State Debt Recovery Office to deal with applications for internal review under the *Fines Act 1996 (NSW)*.]

## 7. Compliance and enforcement principles

The following are the principles that underpin council actions relating to compliance and enforcement:

Principle	Action
Accountable and transparent	<ul style="list-style-type: none"> <li>• acting in the best interests of public health and safety and in the best interests of the environment</li> <li>• ensuring accountability for decisions to take or not take action</li> <li>• acting fairly and impartially and without bias or unlawful discrimination</li> <li>• providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the regulated community</li> <li>• ensuring meaningful reasons for decisions are given to all relevant parties, particularly when there is a departure from this policy</li> <li>• acting on any complaints or concerns about the conduct of compliance officers in accordance with council's complaints management policy and procedures</li> <li>• advising people and organisations subject to enforcement action of any avenues available to seek an internal or external review of a decision.</li> </ul>
Consistent	<ul style="list-style-type: none"> <li>• ensuring all compliance and enforcement action is implemented consistently</li> <li>• encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter.</li> </ul>
Proportional	<ul style="list-style-type: none"> <li>• ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach</li> <li>• making cost-effective decisions about enforcement action</li> <li>• taking action to address harm and deter future unlawful activity.</li> </ul>
Timely	<ul style="list-style-type: none"> <li>• ensuring responses to reports alleging unlawful activity and decision making in relation to those is timely.</li> </ul>



## 8. Responsibility

Council receives information about alleged unlawful activity from members of the public, contact from other government agencies and information gathered by its officers during proactive inspections.

All council staff who deal with reports alleging unlawful activity are responsible for implementing this policy. Council staff are also responsible for ensuring that any other possible unlawful activity identified as a result of an inspection, proactive enforcement or other activity is brought to the attention of the appropriate business unit of council.

Council staff are required to:

- treat all relevant parties with courtesy and respect
- communicate with all relevant parties and provide feedback on the progress of an investigation and any reasons for delay without compromising the integrity of the investigation
- make full and proper records in relation to the assessment and investigation of reports alleging unlawful activity, including reasons for any decisions
- inform all relevant parties of reasons for decisions
- provide as much information as possible to all relevant parties about the outcomes of investigations to show that adequate and appropriate action was taken and/or is proposed to be taken in response to a report of alleged unlawful activity
- provide information to all relevant parties about any avenues to seek an internal or external review of a decision.

All reports alleging unlawful activity are to be entered into council's case management system and actioned in a timely manner by the appropriate business unit.

[Councils should have procedures on how reports alleging unlawful activity should be received, registered and processed. Enter details here including:

- *responsibilities of those recording reports eg level of detail to be entered on case management system, who is responsible for acknowledging/forwarding report to relevant business unit*
- *reasonable response time requirements and type of response eg an acknowledgement letter will be issued within five days*
- *reasonable timeframes in which actions need to be completed eg assessment/inspection/inquiries/ investigation will be conducted within x days*
- *what information should be provided to the individual eg updates, council decisions*
- *how information should be provided to the individual eg over the phone or in writing, with approval of general manager or team leader*
- *when such information should be provided to the individual eg after a preliminary assessment, after an inspection, at the conclusion of a matter*

*Council may wish to include a schedule in the Appendix setting out the relevant business units and their responsibilities. Council may also wish to publish expected investigation turnaround times for common types of unlawful activity.]*

Only council staff with appropriate delegations from the general manager can undertake investigations or compliance and enforcement action in relation to this policy.

## 9. Responding to concerns about unlawful activity

### How reports alleging unlawful activity will be dealt with by council

Council will record and assess every report alleging unlawful activity.

Council will respond to every such report unless the person raising the matter has indicated they do not wish to receive a response about council's handling of the matter, or the report is anonymous.

Generally speaking, council's objectives when dealing with reports alleging unlawful activity are to:

- maintain the collective good and welfare of the community
- prevent or minimise harm to health, welfare, safety, property or the environment
- consider the broader public interest having regard to council's priorities and any resource limitations
- consider the report fairly and impartially.

Not all reports will need to be investigated. A preliminary assessment of all matters will be made to determine the priority for a response, and whether investigation or other action is required.

An investigation of alleged unlawful activity may take a significant amount of time to complete, particularly where the issues are complex. If council decides to investigate, staff will give the person who reported the alleged unlawful activity regular feedback on the progress of the investigation, and any reasons for delay. This does not mean that the individual can expect to be given details about every aspect of the investigation or information that would compromise the integrity of the investigation.

Decisions about what action should be taken by council are made at the council's discretion. This means the objective is that reports alleging unlawful activity will be resolved to the satisfaction of council, not necessarily the person raising the matter. Council will generally try to resolve matters as quickly and informally as possible so as to avoid the need to take formal action.

Council staff will endeavour to manage the expectations of people who report alleged unlawful activity, and in particular explain that in the absence of sufficient evidence of unlawful activity, council may be unable to take further action. They will also explain that council does not have unlimited resources and powers to deal with reports alleging unlawful activity. If council is unable to fully investigate or take action on a matter because it is restricted by any legal or resource limitations this will be explained to the individual.

While there are certain statutory requirements that must be met in relation to notices and orders council staff will ensure that all explanatory communications are made in plain English and explain any technical language the law requires to be used.

### Confidentiality of people who report allegations of unlawful activity

People who report allegations of unlawful activity should not expect that their identities will remain confidential from the subject of their report in all circumstances. Council may have to disclose information that identifies them in the following cases:

- the disclosure is necessary to investigate the matter
- their identity has already been disclosed to the subject of their report directly or in a publicly available document
- the individual was consulted following receipt of a *Government Information (Public Access) Act 2009* application and did not object to the disclosure
- the individual consents in writing to their identity being disclosed
- the disclosure is required to comply with principles of procedural fairness
- the matter proceeds to court.

Council will take seriously any concerns an individual may have about their physical safety being endangered as a result of making a report. However, this may limit council's ability to investigate the matter.

## What council expects from people who report allegations of unlawful activity

Council expects that people who report allegations of unlawful activity will cooperate and act in good faith in respect of any investigations conducted by council. This includes:

- providing a clear description of the problem (and the resolution sought, if relevant)
- giving all available and relevant information to council, including any new information about the alleged activity that may become known to the person following the making of their report
- not giving any information that is intentionally misleading or wrong
- cooperating with council's inquiries and giving timely responses to questions and requests for information
- treating council's staff with courtesy and respect
- allowing the investigation to be completed without prematurely taking the matter to other agencies unless referred to by council.

If these expectations of the individual are not met, council may need to set limits or conditions on the continuation of the investigation or may need to restrict any further communications with the individual.

Any unreasonable conduct will be dealt with in accordance with the principles of the NSW Ombudsman's *Managing Unreasonable Complainant Conduct Manual 2012* and any applicable council policy.

## What parties can expect from council staff

People who report alleged unlawful activity, as well as individuals or businesses that are subject to investigation and any enforcement action, can expect that council staff will:

- treat them with courtesy and respect
- advise them of the outcome of the allegation reported, including a full explanation of the reasons why that outcome was considered to be reasonable in the circumstances
- clearly explain decisions in plain English
- provide information about any relevant internal and external appeal processes that may be available
- carefully assess any new information provided by any party after a decision has been made and advise whether further action will be taken.

## Complaints about council's enforcement actions

Any complaints about council's handling of reports alleging unlawful activity will be recorded separately and handled in accordance with council's complaints management policy and procedures.

Where a person or organisation subject to enforcement action merely disputes council's decision to take enforcement against them, they will be directed to make representations in accordance with any relevant internal and external appeal processes.

Council staff will act on any complaints about the conduct of compliance officers in accordance with council's complaints management policy and procedures and the code of conduct.

## Anonymous reports

Anonymous reports will be recorded and assessed in accordance with the above requirements. However, because it is not possible to seek clarification or additional information about a matter, it may be more difficult to evaluate the allegations and therefore these reports are less likely to warrant investigation.

## Unlawful activity outside business hours

Unlawful activity can occur outside business hours. In particular, council may receive reports about matters such as offensive noise and failure to comply with limitations on hours of operation during nights and weekends.

Due to resource and operational capability restraints on council, investigations into alleged unlawful activity outside business hours will be assessed on the basis of risk of *harm to health, welfare, safety, property or the environment* or it is otherwise in the public interest to take such action.

## Neighbour disputes

Council will at times receive reports from parties involved in neighbour disputes seeking council's involvement. When a dispute between two neighbours is a civil matter, council will often have no authority to resolve the issue in dispute. Some reports will raise several matters, some of which will require council's involvement and some of which will be personal to the parties.

Council staff will thoroughly assess such reports to determine whether there is evidence of any possible unlawful activity requiring action by council. Care will be taken to explain which aspects of a report council can deal with and which cannot be dealt with and why. Where possible, individuals will be provided with information about how to resolve neighbour disputes including referral information resources such as LawAccess NSW and Community Justice Centres.

It is possible that one party will provide further information about a matter which changes council's decision about whether it will become involved. In such circumstances, council staff will carefully consider the matter before taking action and document reasons for the new decision. Relevant parties will be advised about the reasons council has changed its position on a matter. Council staff will not change a decision about whether or not council should be involved purely as a response to the conduct of an individual such as persistent demands or threats.

[Councils should maintain policies and may publish advice on how they will generally deal with the most common types of neighbour issues including:]

- *noise (from air conditioning units, after hours work, power tools, barking dogs, etc)*
- *dividing fences and retaining walls*
- *encroachments*
- *illegal development*
- *non-compliance with development consent*
- *drainage and flooding issues*
- *damage from trees.*

## 10. Investigating alleged unlawful activity

Not all reports alleging unlawful activity will warrant investigation. A preliminary assessment of all matters will be made to determine whether investigation or other action is required. Council will prioritise matters on the basis of risk to public safety, human health and environment.

[HCCREMS suggest that councils develop a well defined category system for common unlawful activity incidents, such as, critical, high, medium and low categories to prioritise action. This will assist councils with managing expectations and the allocation of their resources. An example of a risk category system can be found in the NSW Ombudsman's *Enforcement Guidelines for Councils 2015*. Enter details here where applicable.]

If there is insufficient information in the report to undertake a preliminary assessment, further information may need to be sought from the person who made the report or an inspection undertaken. Staff may also need to consult council records and other internal business units to understand the relevant history and context of a matter.

### **Circumstances where no action will be taken:**

Council will take no further action if, following a preliminary assessment, it is identified that:

- council does not have jurisdiction to investigate or is not the appropriate authority to take action on the issues raised. Where there is another appropriate authority or course of action, council may bring the matter to the attention of the authority or provide information and contact details to the individual. For example NSW WorkCover for workplace safety matters, the NSW Environment Protection Authority for possible environmental offences and Community Justice Centres NSW for personal disputes
- the report relates substantially to a matter previously determined by council and no new or compelling information is presented which would cause council to change its earlier decision. In this case, staff will acknowledge the report and advise that no further action will be taken as no new information had been provided (other than where the person has previously been advised they would receive no further response)
- the allegations relate to a lawful activity (eg where there is an existing approval or the activity is permissible without council approval or consent being required)
- the report is not supported with evidence or appears to have no substance
- the relevant manager, director or the general manager determines that investigation or other action would have an unreasonable impact on resources and/or is unlikely to achieve an outcome sufficient to justify the expenditure of resources.

### **Relevant factors guiding decisions as to whether to take action:**

When deciding whether to investigate, council will consider a range of factors including whether:

- the activity is having a significant detrimental effect on the environment or it constitutes a risk to public safety
- the report is premature as it relates to some unfinished aspect of work that is still in progress
- the activity or work is permissible with or without permission
- all conditions of consent are being complied with
- much time has elapsed since the events the subject of the report took place
- another body is a more appropriate agency to investigate and deal with the matter
- it appears there is a pattern of conduct or evidence of a possible wide spread problem
- the person or organisation reported has been the subject of previous reports
- the report raises matters of special significance in terms of the council's existing priorities
- there are significant resource implications in relation to an investigation and any subsequent enforcement action
- it is in the public interest to investigate the report.

The above are factors for council to consider and weigh in making a determination. Council staff are not limited in their use of discretion by these considerations and may decide to investigate based on these and other factors.

The objective of the processes council staff use when investigating incidents of alleged unlawful activity is to:

- determine the cause of the incident
- determine if there has been a contravention of law, policy or standards
- gather evidence to the required standard to support any required enforcement action
- determine any necessary action to mitigate the possibility of reoccurrence of similar incidents.

Any decision not to investigate an allegation of unlawful activity will be recorded and the reasons for that decision clearly stated.

[Enter details of council's relevant internal procedures for investigations and/or guidance material such as NSW Ombudsman *Enforcement Guidelines for Councils* 2015 and NSW Ombudsman *Investigating complaints – a manual for investigators* 2004].

## 11. Taking enforcement action

When deciding whether to take enforcement action in relation to a confirmed case of unlawful activity, council will consider the full circumstances and facts of the matter and the public interest. The following common considerations will assist council staff in determining the most appropriate response in the public interest:

### Considerations about the alleged offence and impact:

- the nature, extent and severity of the unlawful activity, including whether the activity is continuing
- the harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity
- the seriousness of the breach, including whether the breach is merely technical, inconsequential or minor in nature
- the time period that has lapsed since the date of the unlawful activity.

### Considerations about the alleged offender:

- any prior warnings, instructions, advice that was issued to the person or organisation reported or previous enforcement action taken against them
- whether the offence was committed with intent
- whether the person or organisation reported has been proactive in the resolution of the matter and assisted with any council requirements and instructions
- any mitigating or aggravating circumstances demonstrated by the alleged offender
- any particular circumstances of hardship affecting the person or organisation reported.

### Considerations about the impact of any enforcement action:

- the need to deter any future unlawful activity
- whether an educative approach would be more appropriate than a coercive approach in resolving the matter
- the prospect of success if the proposed enforcement action was challenged in court
- the costs and benefits of taking formal enforcement action as opposed to taking informal or no action
- what action would be proportionate and reasonable in response to the unlawful activity
- whether council is prevented from taking action based on earlier advice given, ie whether an estoppel situation has been created.

### Considerations about the potential for remedy:

- whether the breach can be easily remedied
- whether it is likely consent would have been given for the activity if it had been sought
- whether there is a draft planning instrument on exhibition that would make the unauthorised use legal.

A further explanation of the above considerations is provided in Appendix 1.

## Legal or technical issues

Where legal and/or technical issues are in question, council staff will consider whether legal advice or professional advice from duly qualified staff or other experts should be obtained and considered. Council may also require a person subject to possible enforcement action to obtain professional advice in relation to issues of concern to council for assessment as to whether further action is required.

## Requirements of council staff considering enforcement action

Prior to taking enforcement action, council staff will take into account the above considerations as well as the evidence gathered during their investigation. Council staff must act impartially, be mindful of their obligations under council's code of conduct and not act as a decision-maker in relation to any matter in which they have a personal interest. Enforcement action will not be taken purely as a response to the conduct of an individual such as persistent demands or threats.

Council staff are required to maintain records about critical thinking and decision-making processes in relation to reports alleging unlawful activity and any enforcement action, as well as records of interactions with relevant parties. Council staff will at all times adhere to council's internal approval processes prior to the commencement of any enforcement action.

Council staff will take steps to ensure that any enforcement action is taken against the correct person or organisation. Where there are multiple possible parties to an alleged unlawful activity, it will generally not be appropriate to take enforcement action against every person who may be liable for the alleged unlawful activity. In such circumstances, council staff will be guided by legal advice in determining the appropriate persons to pursue.

[Council may enter details of internal approval processes.]

In addition to this policy, councils may also adopt guidelines for staff about specific types of regulatory activity and the circumstances in which enforcement action will or will not be taken. See for example, Appendix 2 which has been adapted from the City of Sydney's *Compliance Guidelines 2013*. It can be used as a tool by councils and adapted for each area of regulatory activity.]

## 12. Options for dealing with confirmed cases of unlawful activity

Council will try to use the quickest and most informal option to deal with unlawful activity wherever possible unless there is little likelihood of compliance with such options. Council staff will use discretion to determine the most appropriate response to confirmed cases of unlawful activity and may take more than one approach. Any enforcement action taken by council will depend on the full circumstances and facts of each case, with any decision being made on the merits.

At all times, council's key concerns are:

- to prevent or minimise harm to health, welfare, safety, property or the environment
- to influence behaviour change for the common good and on behalf of the community.

The following enforcement options to be considered by council are ordered to reflect an escalation in response that is proportionate to the level of risk, the seriousness of the confirmed breach or the need for a deterrent:

Level of risk	Enforcement options
Very low	<ul style="list-style-type: none"> <li>• take no action on the basis of a lack of evidence or some other appropriate reason</li> <li>• provision of information/advice on how to be compliant</li> </ul>
Low	<ul style="list-style-type: none"> <li>• negotiating with the person to obtain voluntary undertakings or an agreement to address the issues of concern</li> <li>• issuing a warning or a formal caution</li> </ul>
Medium	<ul style="list-style-type: none"> <li>• issuing a letter requiring work to be done or activity to cease in lieu of more formal action</li> <li>• issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate</li> </ul>
High	<ul style="list-style-type: none"> <li>• issuing a penalty notice</li> <li>• carrying out the works specified in an order at the cost of the person served with the order</li> </ul>
Very high	<ul style="list-style-type: none"> <li>• seeking an injunction through the courts to prevent future or continuing unlawful activity</li> <li>• commence legal proceedings for an offence against the relevant Act or Regulation.</li> </ul>

[Councils may wish to include in this table some examples of enforcement scenarios that would warrant the use of the enforcement options.]

## Following up enforcement action

All enforcement action will be reviewed and monitored to ensure compliance with any undertakings given by the subject of enforcement action or advice, directions or orders issued by council. Reports alleging continuing unlawful activity will be assessed and further action taken if necessary. If the unlawful activity has ceased or the work has been rectified, the matter will be resubmitted for follow up action to ensure compliance outcomes are met. Should initial enforcement action be found to have been ineffective, council staff will consider other enforcement options.

[\[Enter details of council's relevant internal procedures for following up enforcement action\].](#)

## 13. Taking legal action

The council and its delegated staff will be guided by legal advice in deciding whether to commence criminal or civil proceedings and will consider the following:

- whether there is sufficient evidence to establish a case to the required standard of proof
- whether there is a reasonable prospect of success before a court
- whether the public interest warrants legal action being pursued.

### Whether there is sufficient evidence to establish a case to the required standard of proof

Council considers the decision to take legal action a serious matter, and as such will only initiate and continue proceedings once it has been established that there is admissible, substantial and reliable evidence to the required standard of proof.

The basic requirement of any **criminal** prosecution is that the available evidence establishes a *prima facie* case. The prosecutor is required to prove the elements of the offence beyond reasonable doubt.

In **civil** enforcement proceedings, council will require sufficient evidence to satisfy the court that an actual or threatened breach has occurred on the balance of probabilities.

### Whether there is a reasonable prospect of success before a court

Given the expense of legal action council will not take legal action unless there is a reasonable prospect of success before a court. In making this assessment, council staff will consider the availability, competence and credibility of witnesses, the admissibility of the evidence, all possible defences, and any other factors which could affect the likelihood of a successful outcome.

### Whether the public interest requires legal action be pursued

The principal consideration in deciding whether to commence legal proceedings is whether to do so is in the public interest. In making this determination, the same factors to be considered when taking enforcement action apply. (See Section 11, Taking enforcement action).

The following considerations relate more specifically to the decision to commence legal proceedings and will assist council and its delegated staff in making this determination:

- the availability of any alternatives to legal action
- whether an urgent resolution is required (court proceedings may take some time)
- the possible length and expense of court proceedings
- any possible counter-productive outcomes of prosecution
- what the effective sentencing options are available to the court in the event of conviction
- whether the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive.



## Time within which to commence proceedings

Council staff must be aware of legislative time limits in which enforcement proceedings must be commenced. Sometimes legal action will be statute barred despite good evidence that unlawful activity has occurred.

## 14. Shared enforcement responsibilities

Some reports will raise matters involving shared regulatory responsibilities between council and other authorities including the Environment Protection Authority, the NSW Police Force, the Office of Liquor, Gaming and Racing, NSW Fair Trading, NSW Food Authority and Crown Lands.

Council recognises that collaboration and cooperation between authorities to address issues of shared regulatory responsibility is the best approach. To this end, where there are shared legislative responsibilities, council staff will liaise with relevant authorities to establish:

- which authority will take the leading role on any joint investigation
- which activities each authority will carry out
- responsibilities for updating an individual where relevant
- protocols for exchanging confidential information between the relevant authorities.

Council will reasonably endeavour to respond to requests for information or assistance on joint regulatory matters in a timely manner.

## 15. Role of council where there is a private certifier

Council retains its regulatory role and enforcement powers where a private certifier has been appointed the Principal Certifying Authority (PCA). However, if a private certifier is appointed the PCA, it is not council's responsibility to ensure building and construction compliance.

Private certifiers have limited enforcement powers as the PCA. They have the power to issue a notice of intention to issue an order to the owner or builder to comply with the conditions of consent or rectify any breaches. A copy of any notice of intention issued by a private certifier must be provided to council for assessment as to whether council will enforce the notice by issuing an order.

Council and private certifiers will work together to resolve any issues when they arise to achieve compliance with the development consent or complying development certificate. Council staff will take steps to ensure individuals are clear about which agency performs which role.

## 16. Role of councillors in enforcement

Decision making relating to the investigation of reports alleging unlawful activity and taking enforcement action is the responsibility of appropriately authorised council staff or the council itself.

Individual councillors do not have the right to direct council staff in their day-to-day activities. Councillors can help individuals who raise concerns with them by satisfying themselves that their council's policies are being carried out correctly, however they cannot ignore or alter a policy in order to satisfy the demands of special groups.

The general manager may present certain decisions to be ratified by the elected council if this is necessary or desirable, and the councillors may also have the right to call for a report about particular issues to a council meeting.

## 17. Delegations

Council staff delegations for taking action under this policy are included in council's Delegation Register.

## 18. Approval

[Council to enter details of when the policy was approved.]

## 19. Review

[Council to enter details of review cycle including who will conduct the review and when.]

## 20. Other resources

The NSW Ombudsman website has the following helpful resources at [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au):

- Managing unreasonable complainant conduct – a model policy and procedure
- *Managing Unreasonable Complainant Conduct Manual 2012*
- *The Rights Stuff – Tips for making complaints and solving problems*
- *Effective complaint handling guidelines – 2nd edition*
- Managing information arising out of an investigation – Balancing openness and confidentiality
- *Reporting of progress and results of investigations*
- *Good Conduct and Administrative Practice*
- Options for Redress
- *Investigating Complaints – A manual for investigators*
- *Enforcement guidelines for councils*
- *Better Service and Communication for Council*

See also:

- Commonwealth Director of Public Prosecutions (2014), *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*
- NSW Planning (2010), *Prosecution Guidelines*.

# Appendix 1

## Taking enforcement action

When deciding whether to take enforcement action in relation to a confirmed case of unlawful activity, council will consider all the circumstances of the matter. The section below is intended to assist staff by providing a further explanation of matters to be taken into consideration when deciding whether to take enforcement action.

### Considerations about the alleged offence and impact

- the nature, extent and severity of the unlawful activity including whether the activity continued
- the harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity
- the seriousness of the breach, including whether the breach is merely technical, inconsequential or minor in nature
- the costs and benefits of taking formal enforcement action as opposed to taking informal or no action
- the time period that has lapsed since the date of the unlawful activity.

Consideration should be given to the nature, extent and severity of any actual or potential impact of the unlawful activity. If there is actual or potential detriment to the natural or built environment, to the health or safety of residents or the amenity of an area, this would normally warrant a decision to take action to remedy or restrain the breach. It is also important to consider whether the unlawful activity is ongoing or has ceased.

Consideration should be given to whether the likely costs and benefits of any enforcement action is justifiable where breaches result in no material impacts upon any other party or the health, safety and amenity of the environment and community. A breach of a technical, inconsequential or minor nature, in the absence of any other aggravating factor, will generally not warrant a decision to take action to remedy or restrain the breach.

Legislation may provide time limits in which to commence proceedings and take enforcement action, and sometimes prosecution will be statute barred despite good evidence that unlawful activity has taken place.

In addition, consideration should be given to the time which the offence or breach occurred and the 'reasonableness' of taking enforcement action if a significant time has lapsed since the time of the offence or breach.

### Considerations about the alleged offender

- any prior warnings, instructions, advice that was issued to the person or organisation reported or previous enforcement action taken against them
- whether the offence was committed with intent
- whether the person or organisation reported has been proactive in the resolution of the matter and assisted with any council requirements and instructions
- any mitigating or aggravating circumstances demonstrated by the subject of the report
- any particular circumstances of hardship affecting the person or organisation reported.

Consideration should be given to the previous history of the offender. If prior warnings, instructions or advice has been issued to the person or organisation reported which was not followed, a more formal and coercive enforcement approach would appear more appropriate.

Consideration should be given to whether the offence was committed deliberately, recklessly or with gross negligence. It may be appropriate that cases of this nature are more likely to result in prosecution. Where an offence was committed as a result of an accident or genuine mistake, providing education and guidance or a formal warning may be more suitable in achieving desired outcomes.

Where the offender has been proactive in the resolution of the matter and has assisted council in the resolution of the matter, it may be that the public interest would not be best served by prosecuting the offender, especially if the offending conduct or work has been rectified. If the offender has demonstrated a lack of contrition and is uncooperative with the investigation or remediation, a prosecution or monetary penalty would appear more appropriate.

Consideration should be given to any genuine mitigating circumstances of the offender such as age, physical or mental health, disability and any financial hardship of the offender resulting in an inability to pay.

### Considerations about the impact of the enforcement action

- the need to deter any future unlawful activity
- whether an educative approach be more appropriate than a coercive approach in resolving the matter
- the prospect of success if the proposed enforcement action was challenged in court
- the costs and benefits of taking formal enforcement action as opposed to taking informal or no action
- what action would be proportionate and reasonable in response to the unlawful activity
- whether the council has created an estoppel situation.

Consideration should be given to the deterrent effect, both on the offender and others. Prosecutions, because of their great stigma if a conviction is secured, may be appropriate even for minor unlawful activity where they might contribute to a greater level of overall deterrence.

When deciding whether to take an educative approach or enforcement approach, consideration should be given to the following matters:

- the reasonable likelihood that the person may have known or should have known the relevant requirements or rules
- the level of contrition shown by the responsible person
- whether the parties have previously been advised of the regulatory requirements or provisions
- whether or not any previous warnings or instructions have been provided
- the apparent level of intent shown by the responsible person.

It may not be appropriate to take enforcement action if the chances of success, in the event of an appeal or hearing, are unlikely. In such situations, you would need to identify the causes of that likelihood and address them in the particular case or as a general issue.

Consideration should be given to what is reasonable in the particular circumstances that apply. This includes a reasonable proportionality between the ends to be achieved and the means used to achieve them.

Consideration is to be given to what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the breach.

Legal proceedings are expensive. When doing a cost-benefit analysis, costs and benefits should be assessed broadly and indirect costs and benefits should also be considered.

Estoppel is a legal rule which prevents a person from later denying something which may have previously been relied on, and acted upon by another person.

Consideration should be given to whether the actions of council have created a reasonable expectation that no enforcement action would be taken.

### Considerations about the potential for remedy

- whether the breach can be easily remedied.
- whether it is likely consent would have been given for the activity if it had been sought.
- whether there is a draft planning instrument on exhibition that would make the unauthorised use legal.

If there is evidence of a significant issue of unlawful activity and that matter can be easily remedied by some action on the part of the person the subject of the report, there is a less compelling case for enforcement action, depending on the other circumstances of the case such as the conduct of the offender.

If retrospective approval is possible, it may be reasonable to allow an opportunity to obtain this prior to taking other enforcement action. In some cases, compliance by informal means may be the most efficient way to resolve the matter and other enforcement action may not be necessary. This needs to be balanced with other considerations such as the public interest in enforcing the law.

## Appendix 2

### Developing compliance and enforcement guidelines

In addition to a compliance and enforcement policy, councils may adopt guidelines for staff about specific types of regulatory activity undertaken and the circumstances in which enforcement action will or will not be taken.

Below is an example dealing with unauthorised building works. Councils may wish to refer to it when developing compliance and enforcement guidelines. The section below is intended to be used as a guide only and as such it is not purported to contain up-to-date legislative references or direction to councils on when to take enforcement action. These are matters for individual councils to determine.

It is important for councils to note in their publication that guidelines are intended to be used as a guide only, and therefore may be departed from by staff at any time. The full circumstances and facts of each case will be considered and a decision made on the merits. The guidelines should be cross-referenced with council's compliance and enforcement policy and also be made publicly available.

#### Unauthorised building works

##### Scope of council role

Council's role as a regulatory authority under the *Environmental Planning and Assessment Act 1979* and *Local Government Act 1993* is to protect public health and safety. Council is also responsible for certification and compliance with building standards and fire safety requirements. Council deals with reports alleging unlawful activity and takes action where appropriate.

Council's officers are authorised to inspect premises and structures for compliance with the legislation.

Structural and other work to a property and some uses of buildings for activities may require council approval.

##### Relevant legislation and standards

*Environmental Planning and Assessment Act 1979*

*Local Government Act 1993*

National Construction Code – Volumes 1, 2 and 3 (includes the Building Code of Australia)

State Environmental Planning Policy – Exempt and Complying Development Codes

Relevant Local Environmental Plan

##### What action may be taken on confirmed cases of unlawful activity

Council assesses allegations of unlawful activity in accordance with its compliance and enforcement policy.

Some examples of how council staff may decide to act in particular circumstances are outlined below. The examples are not exhaustive and are intended as a guide only.

<b>Enforcement options</b>	<b>Example scenario</b>
Warning	Issued for minor issues. For example, displaying a small sign or where education is the preferred first option.
Penalty notice	Issued for minor unauthorised works which have no impact on the amenity of surrounding neighbours and there is no ongoing risk to public health or safety. Generally where the breach is a one-off and where the breach is significant enough to require deterrence from further unlawful activity. For example, an unauthorised pergola which does not overshadow or cause loss of solar access/view, residency without an Occupation Certificate (where there are no safety risks).
Notice of intention to issue an order	Issued for unauthorised works which would not be permitted to remain, where there is a threat to public health and safety, works being undertaken without permission. Examples include, renovations undertaken without consent, unauthorised works to a heritage item, installation of a shed which would not be permitted to remain.
Emergency order (without notice)	Issued where a building structure is compromised and is likely to cause imminent threat to public health and safety or works are being undertaken without permission. For example, the failure of the façade of a building, unauthorised demolition works.



NSW Ombudsman  
Level 24, 580 George Street  
Sydney NSW 2000

General inquiries: 02 9286 1000  
Facsimile: 02 9283 2911

Toll free: 1800 451 524 (outside Sydney metro)

[www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)