

## POLICY DOCUMENT

3.63.8

<b>Policy Name</b>	Enforcement
<b>Policy No.</b>	3.63.8
<b>Version:</b>	1
<b>Strategic Reference:</b>	3.2 A strategically driven, community aware and accountable Council
<b>Responsible Department:</b>	Infrastructure & Environmental Services
<b>Policy Adopted:</b>	14 December 2020
<b>Last revised date:</b>	17 August 2015
<b>Minute reference:</b>	CO 20/217
<b>Next review date:</b>	Council will endeavour to review this policy 4 years after adopted date or following significant change to legislation or where required by relevant public policy considerations.
<b>Applicable Legislation:</b>	<p>Local Government Act 1999</p> <p>Local Government (General) Regulations 1999</p> <p>Australian Road Rules &amp; Regulations</p> <p>Road Traffic Act 1961</p> <p>Development Act 1993 &amp; Regulations 2008</p> <p>Dog and Cat Management Act 1995 &amp; Regulations 2017</p> <p>Environment Protection Act 1993</p> <p>Environment Protection (Air Quality) Policy 2016</p> <p>Expiation of Offences Act 1996</p> <p>Fire and Emergency Services Act 2005 &amp; Regulations 2005</p> <p>Food Act 2001 &amp; Regulations 2017</p> <p>Local Nuisance &amp; Litter Control Act 2016</p> <p>Planning, Development &amp; Infrastructure Act 2016 and Regulations 2017</p> <p>SA Public Health Act 2011 (and Regulations)</p> <p>Safe Drinking Water Act 2011</p> <p>Supported Residential Facilities Act 1992</p>
<b>Related Policies:</b>	<p>5.63.1 Order Making Policy</p> <p>9.63.26 Complaint Handling Policy</p>
<b>Related Documents:</b>	Council By-Laws

### 1. PREAMBLE

Local Government has legislative responsibilities to protect individuals and the community as a whole. With respect to individuals, entities and the community, relevant laws both place a duty and afford protections. While it is ultimately the responsibility of individuals and entities to comply with the law, the Council and its officers are required to enforce compliance.

In addition to enforcement, Council carries out a range of activities to ensure compliance such as community education programs to encourage conformance. Policies and procedures about these specific activities may also apply.

Enforcement activities include:

- patrolling streets and public places;
- inspecting premises either on a routine programmed basis or on a random basis; and
- responding to enquiries and complaints.

## **2. POLICY**

In the enforcement of relevant laws, the Council and its officers and agents will:

- use a decision-making framework based on this Policy;
- be consistent in enforcement action in response to matters of non-compliance;
- ensure transparency and procedural fairness, and that natural justice principles are applied; and
- ensure that enforcement action is proportionate to the alleged offence in each case.

## **3. DEFINING ENFORCEMENT**

Council adopts a broad definition of “enforcement” which combines the provision of advice and assisting compliance with formal action where necessary. This is intended to encourage higher levels of voluntary compliance with legal requirements by individuals and entities.

Notwithstanding the above, Council will take immediate action when required (for example to ensure public health and safety or to protect the environment) and take firm action against those who act unlawfully when circumstances warrant.

## **4. PRINCIPLES OF GOOD ENFORCEMENT**

The City of Port Lincoln is responsible for administering various legislation and regulations within the community. Enforcement of the applicable legislation or regulation must be fair, consistent, balanced and ensure the public is adequately protected. Council staff will carry out their enforcement related work with due regard to the following principles.

### **4.1. *Proportionality***

A proportionate response means that Council’s actions will be scaled to the seriousness of the breach.

Council recognises that most individuals and entities seek to comply with the law and therefore Council will facilitate compliance by being open and helpful, offering informal advice and providing the chance to discuss compliance problems.

Enforcement attention will be focussed on activities that give rise to the most serious risks, or where potential hazards are least well controlled.

Council’s financial resources are finite and should not be used to pursue inappropriate and/or relatively minor matters. Council’s resources should be deployed in pursuing those cases worthy of enforcement or prosecutorial action.

Relevant considerations to the Council's exercise of discretion include:

- The seriousness and nature of the breach;
- The relevant legislation;
- Willingness of the individual or entity to cooperate with any investigation;
- The alleged offender's contrition; and
- The cost to the Council in pursuing the breach.

Depending on the seriousness and persistence of the infringement, Council will minimise the costs to the person or body infringing the law by enforcing the minimum action necessary to secure future compliance.

Prosecution will generally be used as a last resort, or for continuous serious offences or where prosecutorial action serves as a deterrent to repetition of the alleged offence by the individual/entity or others.

#### **4.2. Consistency**

Council will take a similar approach in similar cases to achieve similar outcomes. While decisions on enforcement require the use of professional judgement and discretion to assess varying circumstances, officers will:

- follow standard operating procedures wherever possible;
- ensure fair, equitable and non-discriminatory treatment; and
- record any deviation from standard operating procedures and the reasons.

#### **4.3. Transparency**

Council will be open and transparent about the manner in which it undertakes enforcement activities and the laws it enforces. It will consult on and provide ready access to published standards and levels of service and performance that can be expected and be clear and open about what is expected from those on whom the law places a duty (duty holders).

In educating the community at large and dealing with duty holders, Council will make a clear distinction between what is legally required and what is desirable but not compulsory.

Staff will be open to discussing potential and actual compliance failures, before, during and after formal action has been taken.

When remedial action is needed Council will explain clearly and in plain language why the action is necessary. Where practicable, it will give notice of its intent to commence formal action. It will point out what action is required to achieve compliance and the timeframe for undertaking that action. Advice will be provided on the process for seeking a review of, or how to appeal against that decision.

Where it is not practical to give notice, the reasons will be recorded in accordance with Council's Records Management protocols.

Complainants will be advised of the action taken and the reasons for the action taken.

## 5. AUTHORISATION OF OFFICERS

Only officers who are competent by training, qualification and/or experience will be authorised to take enforcement action. Officers will also have sufficient training and understanding of Council's policies and procedures to ensure a consistent approach to their duties. Any decision to act other than in accordance with this policy must have approval from the relevant Manager and the reasons for action recorded in accordance with Council's Records Management protocols.

Officers are required to show their authorisations on demand.

## 6. DECISION MAKING

Where non-compliance is discovered as a result of enforcement activities, options available to the Council to seek or promote compliance include:

- explaining legal requirements and, where appropriate, the means to achieve compliance;
- providing an opportunity to discuss points of issue where appropriate;
- allowing reasonable timeframes to achieve compliance;
- facilitating mediation between affected parties;
- issuing a verbal or written warning; or
- enforcement actions such as issuing an expiation, issuing an order, notice, direction or prosecution.

Enforcement decisions must be fair, consistent, balanced and relate to common standards that ensure the public is adequately protected. Where a decision is made not to investigate a complaint, the decision and reasons, will be recorded in accordance with Council's Records Management protocols and the complainant will be advised in writing.

In determining the most appropriate means of enforcement, the following matters will be considered:

- the seriousness of the offence
- the degree of wilfulness involved
- past history
- the consequences of non-compliance
- the capacity of an individual or entity to understand and achieve compliance
- cultural values
- the likely effectiveness of the various enforcement options
- deterrence
- the effect on the community and other people
- consistency of approach to similar breaches/offences

The following factors are to be ignored when determining an appropriate method of enforcement:

- any element of discrimination or bias against the person such as ethnicity, nationality, political association, religion, gender, sexuality or beliefs; and
- possible political advantage or disadvantage to a government, person holding (or a candidate for) public office, or any political group or party.

Where a personal association or relationship with the alleged offender or any other person involved exists:

- an alternative person will make decisions where possible; and
- the facts about any conflict/relationship will be recorded in accordance with Council's Records Management protocols.

Written documentation will:

- include all the information necessary to make clear what needs to be done to comply with legal requirements, the required time frame and if necessary, the reasons for these actions and potential penalties for failing to comply with the request;
- include the legislation contravened, measures necessary to ensure compliance and the consequences of non-compliance; and
- clearly differentiate between legal requirements and recommendations of good practice.

## **7. ENFORCEMENT OPTIONS**

### **7.1. *No Action***

No action will be taken when, after investigation, no breaches of the legislation are discovered.

It may also be appropriate to take no action when:

- the complaint is frivolous, vexatious or trivial in nature;
- the alleged offence is outside Council's area of authority; or
- taking action may prejudice other major investigations.

### **7.2. *Informal Action***

Informal action to achieve compliance with legislation may include:

- offering verbal or written advice;
- verbal warnings and requests for action; or
- written warnings.

**Advice from officers will be put clearly and simply and will be confirmed in writing.**

The circumstances in which informal action may be appropriate include:

- the act or omission is not serious enough to warrant formal action;
- the duty holder's past history reasonably suggests that informal action will secure compliance;
- confidence in the individual/other body is high;
- the consequences of non-compliance will not pose a significant risk; or
- where informal action may prove more effective than a formal approach.

Where statutory action is not possible, but it would be beneficial in a wider public safety context to urge a particular outcome, such action will be taken by a senior officer of Council and the reasons recorded in accordance with Council's Records Management protocols. The recipient will be made aware that the requested actions are not legally enforceable.

### **7.3. *Mediation***

Where practical, Council may make mediation available. Mediation is a possible alternative where, after investigation, an officer determines that the problems being complained of are unlikely or incapable of resolution through other formal or informal means. The use of mediation services may also be appropriate where an aggrieved individual has no wish to pursue action to resolve a complaint by legal means.

## **7.4. Formal Action**

### **7.4..1. Service of Orders and Directions**

Various pieces of legislation specify the procedures which Councils must follow, in order to:

- advise of the intention to issue an Order;
- invite submissions with respect to the matter;
- order a person to do or refrain from doing a thing under specified circumstances; and/or
- issue directions specifying how the Order may be complied with.

Council Officers will use professional judgement and discretion to assess the variables relating to each matter under consideration, including the reasonableness of the actions required by an Order/direction and the timeframe to comply.

Only in circumstances such as a threat to life or immediate threat to public health or safety will an order be made without giving notice of intention. In these circumstances immediate compliance to resolve a situation can be required.

In most cases the person receiving the Order has a right of appeal to the appropriate court if the Order is considered unreasonable. If an Order is served for which an appeal is possible, Council will advise the recipient in writing of the right to appeal and the relevant legal provisions at the time of serving the Order.

Where there is evidence that an offence has been committed Council may issue an Expiation Notice or launch a prosecution in addition to serving an Order. This will only be done where it is determined that the conduct of the recipient justifies taking both steps.

Failure to comply with Orders and notices will incur further enforcement actions as available within the relevant legislation.

Where action in regard to a default is provided for by legislation and the necessary work has not been carried out in the time allowed without good reason, Council may undertake the required work. Before doing the work Council will consider whether there is a realistic prospect that the person responsible will complete the work within a reasonable time. Where work in default is undertaken Council will seek to recover all costs over a fair period, using all statutory means available. The decision to carry out action in default will be made by the Chief Executive Officer or delegate.

Where an offence has been committed Council may issue an Expiation Notice or launch a prosecution in addition to taking action to fulfil an Order. This will only be done where the conduct of the recipient justifies taking such steps. Factors such as giving false information, the obstruction of Council staff and the harm or risk of harm caused by the recipient's delay will be considered in determining additional enforcement actions.

### **7.5. Service of an Expiation Notice**

An expiation notice alleges that an individual or entity has committed an offence and sets out an expiation fee, which can be paid to expiate the offence rather than the individual or entity being prosecuted. The evidence obtained to substantiate the issuing of an expiation notice must be sufficient to prove that the offence occurred.

Expiation notices may be issued by Council for but not limited to:

- Parking offences under the *Road Traffic Act 1961*, Australian Road Rules
- Dog management offences pursuant to the *Dog and Cat Management Act 1995*
- Development related offences pursuant to the *Development Act 1993* and Regulations
- *Planning Development and Infrastructure Act 2016*
- Food safety offences under the *Food Act 2001*
- Local Nuisance & Litter Control Act 2016
- Public realm use and management offences under the *Local Government Act 1999*
- Public health offences under the *South Australian Public Health Act 2011*
- Offences under the *Local Nuisance and Litter Control Act 2016*
- Offences against Council's By-laws.

An individual or entity that receives an expiation notice has a right to elect to be prosecuted for their alleged offence, instead of paying the expiation fee. Payment of an expiation fee is voluntary and is not an admission of guilt or civil liability.

### **7.6. Prosecution**

A decision to prosecute must be in the public interest. Council may initiate prosecution proceedings in the following instances:

- If the breach is of a serious nature so as to warrant prosecution.

If a person who receives an expiation notice does not expiate the offence by payment or otherwise elects to instead be prosecuted. A prosecution will only proceed where there is a reasonable prospect that an offence can be proved beyond reasonable doubt. All relevant evidence and information will be considered to enable a consistent, fair and objective decision to commence prosecution to be made.

- In considering whether prosecution is in the public interest, the following factors will be considered: Whether the alleged offender/s can be reliably identified.
- The prevalence of the alleged offence and the need for deterrence, both personal and general.
- Whether the individual or entity has committed a similar offence in the past.
- Whether the individual or entity has shown remorse or contrition.
- Whether the alleged offence was premeditated.
- The effect on the physical or mental health of the individual or persons comprising an entity or witness, balanced against the seriousness of the alleged offence.
- The availability, competence and credibility of witnesses and their likely impression on the Court.
- The admissibility of any alleged confession or other evidence
- Any lines of defence.
- The likely length of a trial.
- The need to maintain confidence in the Council as an enforcement authority.

The proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify it. Any mitigating factors present in a particular case will be put to the sentencing court.

Nevertheless, where the alleged offence is not as serious as plainly to require prosecution, Council as the prosecuting authority, will always apply its mind to whether the public interest requires a prosecution to be pursued.

#### **7.7. Cost Recovery**

Council may incur significant costs (legal and / or otherwise) when enforcement action is taken to rectify illegal activities. In the interest of reducing the financial burden of pursuing enforcement and compliance matters on ratepayers, where possible, the Council will seek to recover those costs incurred in attempting to rectify the breach through the relevant court.

### **8. RELEVANT DELEGATED POWERS AND DUTIES**

Any actions or decisions made regarding this policy, will be enacted upon as per Council's current Delegations Register.