

POLICY

Policy Name	Enforcement Policy
Policy Category	Statutory
Department / Officer	Community and Development Environment and Infrastructure Services
Date Adopted	28 July 2014
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Review Frequency	Every Three Years
Strategic Plan Reference	Aspiration 6 – We are a financially sustainable and well-governed organisation

Attachments

1. Purpose

The purpose of this Policy is to establish a framework to provide consistency in enforcement action in matters of non-compliance and so that any action is proportionate to the alleged offence in each case. This policy will assist to ensure transparency, procedural fairness and natural justice principles are applied in regard to enforcement action.

2. Scope

This Policy is relevant to all enforcement actions undertaken by Council employees and authorised contractors for and on behalf of the Council within the City of Victor Harbor.

3. Policy Statement (Summary)

Enforcement activity is underpinned by the principles of fairness and impartiality and transparent and accountable decision-making. Authorised Officers undertake enforcement activity in a fair, equitable, transparent, timely and consistent manner.

4. Legislation and Compliance

This Policy is intended to deal with enforcement action taken by the Council under the following Acts:

Local Government Act 1999

Fire and Emergency Services Act 2005

Planning, Development and Infrastructure Act 2016

Dog and Cat Management Act 1995
 Expiation of Offences Act 1996
 Environment Protection Act 1993
 Graffiti Control Act 2001
 Housing Improvement Act 1940
 Impounding Act 1920
 Local Nuisance and Litter Control Act 2016
 Road Traffic Act 1961
 Australian Road Rules 1999
 Harbors and Navigation Act 1993
 SA Public Health Act 2011
 Private Parking Areas Act 1986
 Supported Residential Facilities Act 1992
 Food Act 2001
 City of Victor Harbor By-laws

5. Definitions

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, businesses and other bodies.

Notwithstanding the above, Council sometimes may consider immediate action is necessary, such as to ensure public health and safety or to protect the environment and take firm action against those who act unlawfully when circumstances warrant.

An **Authorised Officer/Person** is someone who is authorised (by the Chief Executive Officer) to carry out statutory functions and powers.

Compliance means the act of adhering to and demonstrating adherence to an Act, By-Law, Regulation or similar.

Enforcement means the initiating of compliance by an Authorised Officer or Council, such as warnings, expiations, orders, notices, prosecution, on a person (the alleged offender) if they engage in conduct that is in contravention to an Act or a Council by-law.

Order/Notice means a written direction of Council requiring specific action to be taken to ensure legislative compliance.

Prosecution means the process of instituting criminal proceedings via the Courts.

Regulatory activity means an activity which involves the making or enforcement of by-laws, orders, standards or other controls under the *Local Government Act 1999* or another Act.

6. Policy Content

Council is charged with legislative responsibilities which protect individuals and the community. The Council’s customers include both those on whom the law places a duty and

those whom the law protects. While it is ultimately the responsibility of individuals and other bodies to comply with the law, Council staff are required to carry out activities which enforce compliance.

This policy is an “umbrella” policy which outlines Council’s approach to enforcement matters and provides staff with direction about the manner in which enforcement activities are to be undertaken. Council will adopt an education, encouragement and enforcement approach where appropriate to secure legislative compliance.

In accordance with legislation such as the Dog and Cat Management Act and Council by-laws certain activities require registration or a licence, permit or authority. Without such, conduct of the activity is an offence and subject to enforcement action.

In addition to enforcement, Council may carry out a range of activities to promote compliance such as liaising with the community, providing education awareness initiatives and making available information on Council’s website. Policies and procedures about specific activities may also apply e.g., Council’s Street Permit Policy and Guidelines.

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.

6.1 Principles of Good Enforcement

Enforcement actions are taken within the context of both a legal and policy framework. Council employees should carry out their enforcement related work with due regard to the following principles.

6.1.1 Proportionality

A proportionate response means that Council’s actions will be scaled to the seriousness of the breach. It is important to note expiation amounts for offences are set by the State Government which each piece of legislation administered; therefore, Council does not have the discretion to reduce or set these fees.

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

Attention will be focussed on those whose activities that give rise to the most serious risks, or where potential hazards are least well controlled. 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. To this effect mediation will be considered and utilised as appropriate to resolve disputes.

Prosecution will generally be used as a last resort, or for continuous serious offences.

6.1.2 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, where possible Departmental Standard Operating Procedures wherever possible
- ensure fair, equitable and non-discriminatory treatment; and
- record any deviation from standard operating procedures and the reasons.

6.1.3 Transparency

In educating the community at large, Council should 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 should 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. Where appropriate, 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, where legislation requires or where there is a risk of hazard the reasons why will be recorded in Council's Records Management system.

People raising concerns should be advised of what action has been taken and why that action has been taken, relevant to the circumstances and legislative provisions.

6.2 Authorisation of Officers

Enforcement action should be taken by Council, rather than an Authorised Officer, where possible. Only officers who are competent by training, qualification and/or experience will be authorised (by the Chief Executive Officer) to take enforcement action (refer Council's Authorised Officer Procedure). 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 present their Authorised Officer/Person card on request to members of the Public.

6.3 Decision making

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

- explaining legal requirements and/or how the activity has breached Council's 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/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 proceed with a formal complaint, the decision and reasons should be recorded in Council's Records Management System and the complainant advised in writing.

In coming to a decision on the most appropriate means of enforcement, the officer should consider, amongst other relevant factors:

- any terms and conditions set by the Council for controlling an activity such as the Street Permit Policy and Guidelines.
- the objectives of the legislation (note: not all allegations of non-compliance with the *Planning, Development and Infrastructure Act 2016* will warrant investigation).
- the particular circumstances of the offence and the individual circumstances of the persons/business.
- the seriousness of the offence.
- whether the incident has been implicated in any accident.
- the size and scope of the matter and whether highly visible.
- the degree of wilfulness involved.
- past history.
- the consequences of non-compliance i.e., not pose a significant risk to health and/or safety.
- the likely effectiveness of the various enforcement options.
- deterrence.
- the effect on the community and other people; and
- consistency of approach to similar breaches/offences.
- the extent of powers conferred by authorisation or delegation under the relevant legislation.

The following factors are to be ignored when choosing an enforcement strategy:

- 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:

- Provide a record of all actions taken relevant to the breach to ensure decision making is audible and withstands scrutiny.
- Include all the information necessary to make clear what needs to be done to comply with legal requirements including any terms and conditions set by Council, reasons for these actions and the required time frame, if necessary.
- State the legislation contravened, measures necessary to ensure compliance and the consequences of non-compliance, such as the potential penalties for failing to comply; and
- Clearly differentiate between legal requirements and recommendations of good practice.

6.4 Enforcement options

Several enforcement options are available which will be dependent on the merits of each matter being considered. These options are summarised below:

6.4.1 No Action

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

- the complaint is frivolous, vexatious or trivial in nature.
- it is more effective to deal with the concerns using other regulatory tools, such as engagement with stakeholders, surveillance, guidance, education and policy advice.
- Lack of evidence.
- the alleged offence is outside Council's area of authority; or
- taking action may prejudice other major investigations.

6.4.2 Informal Action

Informal action to achieve compliance with legislation may include:

- offering verbal or written advice.
- facilitating communication between affected parties to achieve a resolution as relevant under legislation (i.e., *Planning, Development and Infrastructure Act 2016*).
- verbal warnings and requests for action; or

- written warnings.

Advice from officers will be put clearly and simply and confirmed in writing or documented in accordance with Council Procedures.

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 should be made aware that the requested actions are not legally enforceable.

6.4.3 Mediation

Where appropriate, Council will make mediation available, through an external provider. Mediation is a possible alternative where, after investigation, an officer determines that the problems being complained of are 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.

6.4.4 Formal Action

6.4.4.1 Service of Orders/Notices

An Order/Notice is a written direction of Council requiring specific action to be taken to secure legislative compliance. A range of legislation specify the requirements as detailed in the appropriate Act that the officer is working under. For example, a number of Acts follow a similar process to the following procedure:

- Advise of the intention to issue an Order; or to Prosecute.
- 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/Notice and the timeframe to comply.

In most circumstances, notice of intention will be given prior to issuing an Orders/Notices.

In most cases the person receiving the Order/Notice has a right of appeal to the appropriate court if the Order is considered unreasonable. If an Order/Notice 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/Notice.

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

6.4.4.2 Action in regard to a default of Order/Notice

Failure to comply with Orders/Notices will incur further enforcement action such as expiation or prosecution.

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.

6.4.4.3 Service of an Expiation Notice

A person receiving an Expiation Notice is entitled to elect to be prosecuted for the alleged offence. Hence there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the alleged offence. In other words, there must be sufficient evidence on the face of it to enable a conclusion to be reached that there is a reasonable prospect of being able to prove an offence beyond reasonable doubt.

The following circumstances are likely to warrant an Expiation Notice:

- certain breaches of the legislation including by-laws and any associated guidelines administered by Council.
- failure to correct an identified problem after having been given reasonable opportunity to do so by an Authorised Officer.
- failure to comply with the requirements of an Order.
- confidence in the individual/other body is low; or
- a written warning has previously been given for a similar offence.

6.4.4.4 Civil Penalties

Council has obtained the authorisation from the State Planning Commission under Section 225 of the *Planning, Development and Infrastructure Act 2016* to recover civil penalties in relation to offences of that Act. If Council is satisfied that a person has committed an offence, it has the power to recover, either by negotiation or application to the Court, an amount as a civil penalty in respect of that offence.

Council is to use its discretion as to when it is appropriate to utilise this power, bearing in mind, that as a general rule, it is appropriate to use this power when the offending is more serious than that warranting an Expiation Notice, but not so serious that a Prosecution is warranted.

If Council applies to the Court for a civil penalty, it is required to give the offender the option of electing to be prosecuted first. It therefore should, prior to making such an application, ensure that there is a reasonable prospect that the offence can be proved beyond reasonable doubt.

If Council negotiates a civil penalty, in determining what it considers an appropriate penalty, it needs to take into account:

- The maximum penalty for the offending under the *Planning, Development and Infrastructure Act 2016*
- The nature and extent of the offence.
- The seriousness of the offence.
- The offender's history of compliance with the *Planning, Development and Infrastructure Act 2016*.
- Any detriment to the public interest that has resulted from it.
- Any financial benefit or saving the offender stood to gain from the offending.
- Any other factors that aggravate or mitigate the offending.

Should Council determine that a civil penalty is appropriate, the alleged offender is to be notified in writing setting out basic details of the alleged offence, the appropriate penalty and the factors taken into account in arriving at that quantum.

It is a condition of Council's authorisation that it must, to the best of its ability, make use of this power in a consistent manner that is proportionate to the alleged offence or breach.

6.4.4.6 Prosecution

A prosecution will only proceed where there is a reasonable prospect that an offence can be proved beyond reasonable doubt.

The following circumstances are likely to warrant a prosecution:

- a blatant breach of the law, including by-laws, such that public health, safety or welfare have been put at risk.
- the alleged breach is too serious or the risks too great to be dealt with by means of an expiation.
- a failure to correct an identified serious problem after having been given reasonable opportunity to do so.
- a failure to comply with the requirements of an Order.
- an established and recorded history of similar offences.
- an unwillingness, on the part of the individual or other body, to prevent a recurrence of the problem; or
- the recovery of the costs of the investigation or remedial work or financial compensation that are required by Council or an aggrieved party.

Where circumstances warrant a prosecution all relevant evidence and information will be considered to enable a consistent, fair and objective decision to be made.

Before a prosecution is recommended there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the offence.

A decision to prosecute should be in the public interest. In considering whether prosecution is in the public interest, the following additional factors will be considered:

- whether the offence was premeditated.
- the need to influence the offender's future behaviour.
- the effect on the offender's or witness's physical or mental health, balanced against the seriousness of the offence.
- the effect on the community at large.
- the availability and efficacy of any alternatives to prosecution.
- the prevalence of the alleged offence and the need for deterrence, both personal and general; and
- the likely length, expense and outcome of a trial.

The final decision to prosecute will be made by the Chief Executive Officer (or delegate).

7 Risk Management

This Policy promotes a consistent, fair and transparent approach to activities associated with enforcement actions in accordance with Standard Operating Procedures.

8 Implementation/Delegations

The Chief Executive Officer is delegated authority to implement this Policy and to appoint Authorised Officers in accordance with Council's Delegations Register.

9 Related Documents

Council's Standard Operating Procedures (SOP's)
Order Making Policy
Conflict of Interest Policy (Administrative)

10 Availability of Policy

This policy is available on Council's website at www.victor.sa.gov.au.