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Enforcement Policy

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1 Introduction

1.1 The Policy

This policy is the Council's *Enforcement Policy*.

1.2 Commencement

This Policy replaces Council's *Enforcement Policy* originally adopted by Council on 16 April 2007.

1.3 About Council

The legislation under which Council operates and pursuant to which the Council exercises regulatory powers is numerous. The most commonly applied statutes are the EPA Act, POEO Act, LG Act, the *Companion Animals Act 1998*, the *Food Act 2003*, the *Impounding Act 1993*, and the *Swimming Pools Act 1992*.

Council undertakes compliance and enforcement to ensure acceptable community, environmental and public interest outcomes. As part of this role, Council collaborates with agencies at the State and Commonwealth level.

1.4 Purpose

This Policy assists Council Officers to act promptly, consistently and effectively in response to allegations of unlawful activity.

1.5 Policy Statement

Council is strongly opposed to unlawful activity at any time or under any circumstances. Council will initiate enforcement action in accordance with this Policy.

1.6 Policy Objective

The aim of this Policy is to establish clear guidelines for the exercise of the discretion the Council must use in dealing with unlawful activity, taking into account all relevant information including the available evidence, cost to the community, the circumstances of the individual case and public policy and precedent considerations.

The Policy:

- Provides a framework to assist Council in making decisions in its enforcement functions;
- Specifies the criteria which the Council will take into consideration when deciding:
 - (a) if enforcement action is necessary; and
 - (b) the most appropriate type of action;
- Provides information to the public about Council's role and policy on enforcement; and
- Ensures that the enforcement process is conducted efficiently and with minimal delay.

This Policy does not limit Council Officers' discretion in the exercise of their enforcement functions. The full circumstances and facts of each case need to be considered and decisions made on the merits of those circumstances.

1.7 Application

This policy applies to regulatory issues including investigation and enforcement, within Council's area of responsibility including, but not limited to:

- development and building control;
- environmental heritage and heritage conservation;
- tree preservation;
- fire safety;
- public health and safety;
- pollution control;
- animal control;
- food safety;
- environmental health;
- regulation of public spaces (including impounding of unattended property); and
- regulation of parking.

This Policy does not apply to the issuing of on-the-spot penalty infringement notices by Council's Parking Enforcement Officers in the proper exercise of their functions under the Road Rules.

1.8 Compliance and enforcement principles

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

| Principle | Action |
|-----------------------------|---|
| Accountable and transparent | <ul style="list-style-type: none"> • Acting in the best interests of public health, safety and the environment, • Ensuring accountability for decisions to take or not take action, • Acting fairly and impartially and without bias or unlawful discrimination, • Providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the community, • Ensuring reasons for decisions are given to relevant parties, particularly when there is a departure from this policy, and • Acting on any complaints or concerns about the conduct of enforcement and compliance officers in accordance with Council's Complaints and Unreasonable Complaint Policy. |

| Principle | Action |
|--------------|---|
| Consistent | <ul style="list-style-type: none"> Ensuring compliance and enforcement action is implemented consistently, and Encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter. |
| Proportional | <ul style="list-style-type: none"> Ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach, Making cost-effective decisions about enforcement action, and Taking action to address harm and deter future unlawful activity. |
| Timely | <ul style="list-style-type: none"> Ensuring Council's responses and decision making in respect of reports alleging unlawful activity is timely. |

1.9 Responsibility

Generally only Council Officers with appropriate delegations or authorisations from the General Manager or another statutory authority will undertake investigations or compliance and enforcement action in relation to this Policy.

2 Responding to reports about Unlawful Activity

2.1 How reports alleging Unlawful Activity will be dealt with by Council

Council will act in accordance with the principles at section 1.8 when dealing with reports alleging Unlawful Activity, and will respond to every report alleging Unlawful Activity unless the report is anonymous, or the person has indicated they do not require a response.

Council will conduct a preliminary assessment of every report it receives to determine the priority for a response, and whether investigation or other action is required.

Investigations into alleged Unlawful Activity may take a significant amount of time to complete, particularly where the issues are complex. If Council investigates a report alleging Unlawful Activity, Council Officers will, subject to appropriate confidentiality requirement provide updates of the key actions taken to the person who reported the matter, including:

- a decision not to investigate the matter,
- a decision to take enforcement action in respect of the matter, including a decision to prosecute or issue a civil enforcement order, and
- the outcome of the investigation.

Council will not provide details of an investigation that would compromise the integrity of the investigation.

Any investigation or enforcement action that Council takes in respect of alleged Unlawful Activity is at the discretion of Council.

2.2 Confidentiality of people who report allegations of Unlawful Activity

Council will take all reasonable measures to protect the privacy of the person submitting the report alleging Unlawful Activity.

However, Council may be required to disclose information that identifies the person in the following circumstances:

- the disclosure is necessary to investigate the matter, even though the complainant's identity may still be inferred from the circumstances;
- the individual was consulted following receipt of a GIPA Act application and did not object to the disclosure (and the public interest considerations in favour of disclosure otherwise outweigh the considerations against);
- the individual consents in writing to their identity being disclosed;
- the disclosure is required by any law;
- the disclosure is required to comply with principles of procedural fairness; and
- the matter proceeds to court and the person is required as a witness.

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. Threats of, or actual physical violence or abuse are matters for the Police and should be reported by the concerned party to their nearest Police station without delay.

2.3 Anonymous reports

Anonymous reports will be recorded and assessed in accordance with section 2.1. However, because it is not possible to seek clarification or additional information about a matter, Council's ability to properly investigate the matter may be limited.

2.4 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 relevant information to Council, including any new information about the activity that becomes known to the person;
- not giving any information that is intentionally misleading or incorrect;
- cooperating with Council's inquiries and giving timely responses to questions and requests for information;
- treating Council's staff with courtesy and respect; and
- allowing the investigation to be completed without prematurely taking the matter to other agencies unless referred to by Council.

If these expectations cannot be met then it may impact Council's ability to properly investigate the matter.

2.5 What parties can expect from Council Officers

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 Officers will:

- act at all times in accordance with the standards prescribed by Council's Code of Conduct;
- treat all parties with courtesy and respect;
- communicate with all parties as set out at section 2.1 above;
- explain decisions in plain English; and
- carefully assess any new information provided by any party after a decision has been made and advise whether further action will be taken.

Council has a duty to act fairly and in accordance with the principles of procedural fairness and natural justice, and Council will:

- provide information on the substance of the complaint to the alleged offender at an appropriate stage in the investigation;
- provide an opportunity for the alleged offender to make any representations to Council in respect of their conduct. This may not be necessary if there is a serious risk to personal or public safety or risk of serious environmental harm;
- consider any submission put forward by the parties to the matter;
- make reasonable inquiries or investigations before making a decision;
- make full and proper records in relation to the assessment and investigation of reports alleging unlawful activity, including reasons for any decisions;
- ensure no person decides a case in which they have an interest, as detailed in Council's Code of Conduct; and
- act fairly and without bias.

2.6 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 dispute.

Council Officers will assess such reports to determine whether there is evidence of any possible Unlawful Activity requiring action by Council. Where practicable, individuals will be provided with information about how to resolve neighbour disputes including referral information on resources that are available or the body that may be able to assist, including:

- conflict over the management of private trees in neighbouring properties is the responsibility of both neighbours to resolve. Disputes may be settled with the assistance of a Community Justice Centre or under the *Trees (Disputes Between Neighbours) Act 2006* in the LEC (refer to <https://lec.nsw.gov.au/lec/types-of-cases/class-2---tree-disputes-and-local-government-appeals.html>); and

- complaints in relation to building works on a building site may need to be referred to the appointed Principal Certifier in the first instance (see section 9).

2.7 Unreasonable complainant behaviour and vexatious reports of Unlawful Activity

The majority of reports of Unlawful Activity have legitimate concerns and genuinely seek a resolution. A small proportion of complainants may demonstrate unreasonable or vexatious concerns and unreasonable and uncooperative behaviour. In the unlikely event that this occurs, such matters will be managed in accordance with the guidelines issued by the NSW Ombudsman, as acknowledged in Council's Complaints and Unreasonable Complainant Policy.

2.8 Complaints about Council's enforcement actions

Complaints about Council's handling of reports alleging Unlawful Activity will be recorded separately and handled in accordance with Council's Complaints and Unreasonable Complainant Policy and complaints procedures. Refer to www.woollahra.nsw.gov.au/council/contact_us/complaints.

3 Investigating alleged unlawful activity

Investigations of alleged contraventions of the legislation Council administers is an important part of its regulatory function. Investigations are to be conducted in accordance with the principles under section 1.8.

3.1 Investigation powers and tools

Council investigation officers have a range of legislative powers to conduct site inspections and to investigate potential breaches of the legislation administered by Council. Depending on the relevant legislation that has been contravened, officers may have the power to enter and search premises, conduct interviews, obtain information and records, and require persons to answer questions. The relevant legislation imposes restrictions as to when Council Officers can enter residential premises.

The tools that investigation officers use to monitor compliance and detect breaches include:

- reviewing community reports of alleged breaches;
- carrying out site inspections; and
- considering referrals from other agencies or regulatory authorities.

The objective of any investigation carried out by a Council Officer is to:

- determine the cause of the incident;
- determine if there has been a contravention of law, policy or standards;
- mitigate or rectify any harm;
- gather evidence to the required standard to support any appropriate enforcement action; and
- determine any necessary action to prevent the future occurrence of similar incidents.

3.2 Preliminary assessment of breaches

Not all reports alleging unlawful activity will warrant investigation. Council will carry out a preliminary assessment of all reports to determine whether further investigation, or other action is required. Council will prioritise matters on the basis of the seriousness of the breach and the risk of harm, including to:

- human life and public safety;
- human health and wellbeing;
- the environment;
- property safety; and
- heritage significance.

If Council does not have sufficient information to undertake a preliminary assessment, it may seek further information from the person who reported the incident to Council, or it may carry out a preliminary inspection.

3.3 Factors to determine whether further investigation is required

When deciding whether to investigate Unlawful Activity, Council Officers must consider and weigh up a range of factors.

The table below sets out the range of factors that Council Officers must commonly consider. Council Officers will generally further investigate the matter if one or more of the factors in Column A are satisfied. Council Officers will generally determine not to further investigate the matter if one or more of the factors in Column B are satisfied.

Council Officers are not limited in their use of discretion by these considerations and may decide to investigate based on these and other factors.

| A – Factors which support further investigation | B – Factors which do not support further investigation |
|---|---|
| <ul style="list-style-type: none"> • The activity constitutes a risk to human life and public safety. | <ul style="list-style-type: none"> • The report is premature as it relates to some unfinished aspect of work that is still in progress. |
| <ul style="list-style-type: none"> • The activity is having a significant detrimental effect on the environment, or involves unauthorised demolition or alteration of a heritage item. | <ul style="list-style-type: none"> • The activity or work is permissible with or without permission, or all conditions of consent are being complied with. |
| <ul style="list-style-type: none"> • It appears there is a pattern of conduct or evidence of a possible wide spread problem. | <ul style="list-style-type: none"> • A significant period of time has elapsed since the events the subject of the report took place or Council is statute-barred from taking enforcement action. |
| <ul style="list-style-type: none"> • The person or organisation reported has been the subject of previous substantiated reports. | <ul style="list-style-type: none"> • Another body is a more appropriate agency to investigate and deal with the matter (e.g. SafeWork NSW for workplace safety matters; the NSW Environment Protection |

| A – Factors which support further investigation | B – Factors which do not support further investigation |
|---|--|
| | Authority for environmental offences; the NSW Liquor & Gaming for disturbance complaints associated with licensed premises and Community Justice Centres NSW for personal disputes). |
| <ul style="list-style-type: none"> The report raises matters of special significance in terms of the Council's existing priorities (e.g. the activity is carried out on a heritage item and may adversely affect heritage significance). | <ul style="list-style-type: none"> 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. The report is not supported with evidence or appears to have no substance. |
| <ul style="list-style-type: none"> It is in the public interest to investigate the report. | <ul style="list-style-type: none"> 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. |

Any decision not to investigate an allegation of Unlawful Activity will be recorded and the reasons for that decision clearly stated.

4 Taking enforcement action

Once Council Officers have investigated and confirmed that an activity is unlawful, Council Officers have a discretion to determine what, if any, enforcement action should be taken.

The outcomes of enforcement action are, broadly, to:

- restrain or remedy a breach;
- punish an offender for breaking the law (by imposing a penalty or commencing prosecution proceedings);
- prevent and provide a deterrent to potential future breaches; and
- preserve the integrity of the relevant legislative system.

Based on the evidence collected during the investigation, Council Officers will determine what enforcement action is to be taken having regard to:

- the seriousness of the breach, and
- what is the appropriate enforcement outcome to;
 - ensure that any impacts to the community or environment are minimised or rectified;
 - deter re-offending; and
 - serve the public interest.

If Council decides not to commence proceedings under the EPA Act, LG Act or POEO Act, any person may commence their own proceedings for an order to remedy or restrain a relevant breach.

4.1 Matters to consider

4.1.1 Determining the seriousness of the breach

In determining the seriousness of the breach, Council Officers will have regard to:

- the level of actual or potential harm caused by the breach, and
- the culpability of the offender (compliance history, intention, foreseeability, financial benefit, timeframe of the non-compliance, whether the harm is ongoing or has been reduced or rectified).

Council officers will use the tables below to assist them in determining each of these matters, and to inform their determination of what, if any, enforcement action should be taken in the circumstances.

4.1.1.1 Determining the level of harm

| Category | Factors to consider |
|---------------|--|
| Low | <ul style="list-style-type: none"> • The breach is merely technical, very minor or administrative, and it does not go to the integrity of the legislative system. • Nil or negligible harm or potential harm to the environment and no actual or potential human health impacts. • Any harm is easily rectified or a short term impact to amenity. • No impact to the integrity of the relevant legislative system. |
| Medium | <ul style="list-style-type: none"> • An impact of low to medium extent that has caused some actual or potential harm to the environment, safety or amenity of some individuals. • The duration of the impact is medium-term, localised and may require remediation. • An impact of low to medium extent on the integrity of the legislative system. |
| High | <ul style="list-style-type: none"> • A large or very large impact that has caused a high degree of actual or potential harm to the environment, safety or amenity or any impact on health of many individuals. • The impact has medium to long-term or permanent environmental impact that will require remediation and or mitigation works, or compensatory offsets in some cases. • The offender has obtained an economic benefit from the non-compliance. • A significant impact on the integrity of the relevant legislative system. |

4.1.1.2 Determining the culpability of the offender

| Category | Factors to consider |
|---------------|---|
| Low | <ul style="list-style-type: none"> No history of non-compliances, the non-compliance was of short duration caused by unforeseen circumstances or genuine misunderstanding of requirements. Operational standards at the time of the incident were high. Harm was avoided or was quickly remedied. Promptly reported the incident to Council. |
| Medium | <ul style="list-style-type: none"> Past non-compliances (reported or determined). Harm was unintended, yet there was a disregard for controls or conditions to prevent harm. Non-compliance was of short or medium duration and operational standards were satisfactory at the time of the incident. Any harm was quickly abated or rectified. Incident was not promptly reported to Council. |
| High | <ul style="list-style-type: none"> The offender has been subject to past enforcement activities (including given prior warnings, advice, penalty notices, or legal action has been taken). Did or should have known that harm or potential harm to the environment or community could result. Harm has not been abated or remediated, or the breach has not been rectified. Reckless or wilful disregard of statutory requirements, or involved misleading or dishonest conduct. The offence was committed for financial gain. Incident was not reported or significant delay in reporting. |

4.1.2 Considerations about the impact and public interest of any enforcement action

Having assessed the matter against the above tables, Council officers will consider what is the appropriate enforcement outcome to:

- ensure that any impacts to the community or environment are minimised or rectified;
- deter re-offending; and
- serve the public interest.

Council officers will use the table below to assist them in determining these matters and to inform their determination of what, if any, enforcement action should be taken in the circumstances.

| Category | Factors to consider |
|---------------|--|
| Low | <ul style="list-style-type: none"> An educative approach is more appropriate to resolve the matter than a coercive approach. The prospects of success if the proposed enforcement action was challenged in court are low. The costs and resources required to take formal enforcement action greatly outweigh any benefit that would be obtained by issuing a PN or obtaining a court order. There is no need for specific or general deterrence. Council is statute barred from commencing taking the enforcement action. |
| Medium | <ul style="list-style-type: none"> There is a need for specific deterrence because of the seriousness of the breach, or the offender's compliance history, or there is a need to deter others from the same conduct. The costs and resources required to take formal enforcement action are appropriate given the circumstances of the case, including the seriousness of the breach, serving the public interest and Council's enforcement objectives. Council has good prospects of success if the proposed enforcement action was challenged in court. |
| High | <ul style="list-style-type: none"> Council has good prospects of success if the proposed enforcement action was challenged in court. There is a significant need for specific deterrence because of the seriousness of the breach, or the offender's compliance history, or there is a significant need to deter others from the same conduct. The costs and resources required to take formal enforcement action are appropriate given the circumstances of the case, including the seriousness of the breach, serving the public interest and Council's enforcement objectives. There is a reasonable community expectation that legal action would be commenced in respect of the breach. |

4.2 Enforcement options

Based on the Council Officer's determination of the matters in sections 4.1.1 and 4.1.2, Council's enforcement response will escalate based on the seriousness of the breach and appropriateness of enforcement action in the circumstances.

Depending on whether the circumstances of the breach fall within the 'Low', 'Medium' or 'High' categories in the tables in sections 4.1.1 and 4.1.2, Council will generally take the following enforcement actions in respect of a breach:

- Low:** no enforcement action, informal action, or a PN or civil enforcement order may be issued.
- Low – Medium:** informal action; a PN or civil enforcement order may be issued, or prosecution proceedings may be commenced in the Local Court, or civil

enforcement proceedings commenced in the LEC; or an Enforceable Undertaking entered into.

- **Medium – High:** Prosecution proceedings may be commenced in the Local Court or the LEC, or civil enforcement proceedings commenced in the LEC.

Council's enforcement options, and the circumstances in which they may be exercised, are further detailed below.

4.2.1 No breach/no enforcement action

Council will not take formal enforcement action where the outcome of an investigation is that a breach has not occurred or there is insufficient evidence to establish that there has been a breach and/or who committed the breach.

4.2.2 Informal action

4.2.2.1 Non-compliance recorded.

For very minor non-compliances that are administrative and do not go to the integrity of the relevant legislative system, or for other minor non-compliances that result in no or minimal impacts on the community or the environment, informal action may be appropriate. These non-compliances are generally voluntarily reported, rectified and have controls put in place to prevent any recurrence.

4.2.2.2 Warning letter

A warning letter is issued where the breach is of a minor nature, and it is determined that no formal enforcement action is necessary. This may arise in situations where the degree of harm and the culpability of the offender are low, the offender has no history of non-compliances, and the offender has remedied the breach quickly.

4.2.3 Formal action (criminal)

4.2.3.1 Official caution

A formal caution under the *Fines Act 1996* may be used when a PN could be issued for the breach. This may include instances where the seriousness of the breach is low, a person has no history of non-compliance, the breach results in no harm, the impact on the integrity of the legislative system is low, or where an incident is promptly rectified.

The written caution would outline that further breaches can lead to escalating enforcement action, such as issuing a PN.

Official cautions are to be issued in accordance with the Caution Guidelines under the *Fines Act 1996* issued by the NSW Attorney General.

4.2.3.2 Penalty Notice (PN)

A PN is a financial penalty issued for specific, minor breaches of legislation. A PN requires payment by a certain date, and if the PN is paid then no criminal conviction is recorded. A PN can be contested in the Local Court, and then Council has to prove the offence. Council issues PNs in the following circumstances:

- the cause of and responsibility for the breach is clear;

- the seriousness of the breach is low to medium;
- a financial penalty is considered an effective deterrent to future breaches; and
- the investigation officer has sufficient evidence to prove all elements of the offence beyond a reasonable doubt.

PNs are not appropriate for more serious offences where a breach is:

- causing or is likely to cause significant harm to the community or environment;
- ongoing and not within the alleged offender's capacity to remedy quickly; and
- warranting a higher penalty than the fine prescribed for a PN.

4.2.3.3 Prosecution

Prosecutions are taken for the more serious offences where there is sufficient evidence, there is a significant breach and the reason to prosecute serves the public interest. The offender may have been subject to other enforcement actions that have failed to deter further breaches, or the breach may have had a significant impact on the integrity of the relevant legislative system.

Council's decision to prosecute will be made in accordance with section 6 below.

Upon conviction, the LEC can:

- impose financial penalties of up to \$5 million for a corporation or \$1 million for an individual;
- publicly name and shame offenders; and
- require restoration of any damage caused.

Prosecution proceedings can also be taken in the Local Court; however, the maximum penalty the Court can impose is \$110,000.

4.2.4 Formal action (Civil)

4.2.4.1 Civil enforcement order (directions, notices and orders)

A range of directions, notices and orders are available to Council under various pieces of legislation. Council will issue these instruments to address harm which has occurred or is about to occur. These instruments can be issued relatively quickly to respond to a wide range of issues, and it is an offence not to comply with the requirements of these instruments. Some examples are:

- POEO Act – clean-up notices, prevention notices, noise abatement directions;
- EPA Act – development control orders; and
- LG Act – s124 orders.

4.2.4.2 Civil proceedings to remedy or restrain breaches

Council may bring proceedings in the LEC to remedy or restrain a breach (or threatened or apprehended breach) of the EPA Act or POEO Act (or regulations made under those Acts).

Council may bring civil proceedings for a number of reasons, including:

- to obtain an order that the Respondent either do, or stop doing, something to prevent harm from occurring; or
- to achieve an outcome quickly and more cost-efficiently than through prosecution, or where a punitive outcome is not required.

4.2.4.3 Enforceable undertaking

For breaches of the EPA Act, Council can recommend that the Planning Secretary (or delegate) can accept an enforceable undertaking under s 9.5 of the EPA Act. An enforceable undertaking allows the offender to acknowledge issues involved in the contravention and propose solutions to address the conduct.

Council may seek to use an enforceable undertaking in the case of matters that would otherwise warrant civil proceedings or prosecution. It provides an alternative to litigation where it is the public interest to propose extensive remedies to address the breaches which will result in a more efficient and timely outcome.

4.3 Review of enforcement action

Council will review any enforcement action it takes to ensure compliance with any undertakings, directions or orders issued by Council or a Court. Reports alleging continuing unlawful activity will be assessed and further action taken if necessary. Council will review any unlawful activity that has ceased or rectification works to ensure compliance outcomes are met. If initial enforcement action has not been effective, Council Officers will consider taking other enforcement options.

4.4 Legal or technical issues

Where legal and/or technical issues are in question, Council Officers will consider whether legal advice or other professional advice is required (see section 5 Commencing legal proceedings).

4.5 Requirements of Council Officers considering enforcement action

Council Officers must do the following when considering enforcement action:

- consider the requirements of the Policy;
- 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;
- not take enforcement action as a response to the behaviour of an individual such as making persistent demands or threats;
- maintain records about decision-making processes in relation to reports alleging Unlawful Activity and any enforcement action, as well as records of interactions with relevant parties; and
- take steps to ensure that any enforcement action is taken against the correct person or organisation.

5 Commencing legal proceedings

5.1 Matters to consider

Where considered necessary, Council Officers will obtain legal advice and be guided by that legal advice in deciding whether to commence criminal or civil proceedings. Council officers will consider the following:

- the outcome that is sought, i.e. there is a need to restrain or remedy a breach, or to take punitive action;
- 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; and
- whether the public interest warrants legal action being pursued.

5.1.1 The outcome that is sought

In determining whether to commence criminal or civil proceedings, Council Officers must consider the factors under sections 4.1.1 and 4.1.2, as well as when a prosecution or civil proceedings are appropriate as set out at sections 4.2.3.3 and 4.2.4.2.

5.1.2 Reasonable prospects of success

The decision to commence legal civil or criminal proceedings is a serious matter, and Council will generally only commence legal proceedings if:

- Council has sufficient evidence to establish the contravention to the required standard of proof (i.e. beyond a reasonable doubt for a criminal prosecution, and on the balance of probabilities for a civil enforcement proceeding), and
- Council has reasonable prospects of success, considering:
 - the availability, competence and credibility of witnesses,
 - the existence or otherwise of evidence to support any defence that may be raised by the defendant,
 - similar cases that have occurred in the past,
 - current law in force at the relevant time, and
 - any other factors, which may affect the likelihood of a successful outcome.

5.1.3 Whether the public interest requires legal action be pursued

A further consideration in deciding whether to commence legal proceedings is whether to do so is in the public interest. In making this determination, Council Officers must consider the factors under sections 4.1.1 and 4.1.2, and also consider the following factors that relate more specifically to the decision to commence legal proceedings:

- whether there are any available 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; and
- whether the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive.

5.1.4 Time within which to commence proceedings

Council Officers can only commence prosecution proceedings if it is not statute barred.

For example, criminal proceedings for an offence under the EPA Act must be commenced within two (2) years of the offence being committed or within two (2) years from the date when evidence of the offence first came to the attention of an authorised officer (section 9.57 of the EPA Act).

5.2 Recovery of Legal Costs

Prior to commencing legal proceedings, Council will generally obtain legal advice as to whether there are reasonable prospects of success for the proceedings.

The Council's policy for recovery of its costs in the LEC is that Council will:

- seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by court order;
- seek to recover the penalty imposed by the court where such penalty is imposed; and
- adopt the recommendations of its solicitors to accept a lesser amount than the full legal costs incurred by the Council if, in the circumstances, the acceptance of such an offer will result in the Council not incurring further and unnecessary legal costs.

The Council's policy for recovery of costs in the Local Court is that Council will:

- seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the court; and
- seek to recover the penalty imposed by the court where such penalty is imposed.

6 Prosecutions – additional matters

Council considers prosecution a strong regulatory response to a breach of the legislation, because of the criminal liability that may be imposed. However, given the time and expense of prosecutions, the decision whether prosecution action is the most appropriate enforcement response is made on a case-by-case basis with regard to the circumstances of the matter being dealt with.

Generally, Council will consider taking prosecution action for serious breaches of the legislation, or in situations where other enforcement actions have been ineffective. The decision of whether or not to prosecute is generally made by the Council Officer with the appropriate delegation or authorisation.

6.1 Who may be prosecuted?

6.1.1 Selecting Defendants

A wide range of persons who may have participated in or contributed to an offence may be liable under the relevant legislation. A number of persons may have committed an offence arising out of a single incident, however, it is not always appropriate to prosecute every person who may be liable for an offence.

Council will determine who is the appropriate Defendant/s by having regard to:

- who is primarily responsible for the alleged offence, that is:
 - who was primarily responsible for the acts or omissions giving rise to the alleged offence;
 - who was primarily responsible for the material circumstances leading to the alleged offence; and
 - who formed any relevant intention in committing the offence.
- the effectiveness of any court orders that might be made against the proposed Defendant.

6.1.2. Corporate and director/manager liability

Where an offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be commenced against the corporation. However, if the offence has occurred because the employee, agent or officer has embarked on a venture of their own making and volition, outside the scope of their employment, proceedings may be instituted against the employee, agent or officer.

Managers and directors may also be held personally liable under the legislation for offences as a result of their acts or omissions. This generally requires the relevant person to be a director of the corporation, or an individual involved in the management of the corporation, and in a position to influence the conduct of the corporation in relation to the commission of the offence.

6.1.3 Employee / worker liability

Council may bring proceedings against an employee, agent or worker where an offence has occurred, regardless of whether that person has embarked on a venture of their own making and volition, or one that is outside the scope of their employment or engagement. Council may charge an employee where their degree of culpability in committing the offence is high. Council will assess the degree of culpability having regard to the following:

- whether the employee knew or should have known that the activity in question was illegal;
- the seniority of the employee and the scope of the employee's employment duties; and
- whether, having regard to the employee's seniority and employment duties, the employee had taken reasonable steps to prevent the commission of the offence.

6.2 Determining charges

Once Council decides to deal with an alleged contravention of the legislation by way of prosecution, Council will select charges that are consistent with the seriousness of the offence and that it can prosecute successfully (see section 5.1).

Council has a duty to refine its case to avoid laying duplicate or multiple charges for the same alleged offence (e.g. laying charges under two separate statutes for the same conduct). Council will only lay duplicate or multiple charges if it is considered appropriate in the circumstances.

6.3 Court election of Penalty Notices

Where a PN issued by Council is court elected, Council will review the matter against parts 5 and 6 of this Policy and will only proceed with the prosecution if:

- there are reasonable prospects of success; and
- there are any discretionary factors that suggest the matter should proceed.

7 Accountability

Enforcement activities necessarily involve the use of discretion by Council officers. To ensure the appropriate oversight, only officers with the appropriate appointment or delegation are authorised to approve an enforcement action. Further, Council will seek legal advice prior to proceeding with the more serious enforcement action such as prosecution.

Council officers are also required to comply with this Policy and Council's Code of Conduct in investigating allegations of Unlawful Activity and taking enforcement action. These policies require Council officers to behave in an ethical manner and formally disclose conflicts of interest.

Public disclosure is an integral part of both specific and general deterrence. The disclosure of information relating to Council's compliance and enforcement activities is undertaken in accordance with the requirements of the GIPA Act and Regulation.

Council will improve community awareness of compliance and enforcement matters by providing advice on its website, and publishing press releases and information brochures as necessary.

Council will review its application of this policy every 24 months to determine whether it is being applied consistently and is effective. Council will seek to improve its performance wherever possible.

8 Shared enforcement responsibilities

Some reports of unauthorised activity will raise matters involving shared regulatory responsibilities between Council and other authorities including the Environment Protection Authority, NSW Building Commissioner, Secretary of the Department of Customer Service, NSW Police Force, Liquor and Gaming NSW and NSW Fair Trading.

Where there are shared legislative responsibilities, Council adopts a collaborative and co-operative approach, and Council Officers 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; and
- 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.

9 Role of the Principal Certifier

Where a private certifier is appointed the Principal Certifier for a development (as is the case for most development in the Woollahra LGA) the Principal Certifier is responsible for ensuring that the building work complies with the development consent and construction certificates.

Any concerns about non-compliance should be directed to the Principal Certifier in the first instance. Contact details for the Principal Certifier are to be displayed on a sign at the front of the building site. Complaints received by Council will be referred to the Principal Certifier to consider and investigate. Council will notify the complainant of this action and provide the complainant with the Principal Certifier's contact details.

Principal certifiers have a mandatory obligation to act on non-compliant aspects of a development. Once the Principal Certifier becomes aware that there is a likely non-compliance, the certifier must issue a written directions notice (**WDN**) to the person responsible (i.e. the principal contractor or owner-builder) within 2 days. If the responsible person fails to comply with the WDN the Principal Certifier must provide a copy of the completed WDN and supporting evidence to Council within 2 days after the follow-up inspection was carried out.

Once the Principal Certifier refers the completed WDN to Council any further enforcement action is Council's responsibility. Any enforcement action Council takes will be determined in accordance with this Policy.

Council is not the regulator of private certifiers, with certifiers being required to be registered by NSW Fair Trading. Any complaints about the actions or inactions of a private certifier are to be lodged directly with NSW Fair Trading.

10 Role of Councillors in enforcement

Individual Councillors do not have the right to direct Council Officers in their day-to-day activities, including the performance of their functions. Councillors can help individuals who raise concerns with them by satisfying themselves that Council's policies are being complied with.

11 Acknowledgements

This policy is based on the 'Model Policy' developed by the NSW Ombudsman and the following documents were used in its preparation;

1. *Model Compliance and Enforcement Model Policy*, NSW Ombudsman (December 2015);
2. *Enforcement Guidelines for Councils*, NSW Ombudsman (December 2015);
3. *Guideline Managing Reports of Non compliance*, Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS) (2012); and
4. *Compliance Policy*, Department of Planning, Industry and Environment (October 2020).

Policy Amendments

| Date | Responsible Officer | Description |
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Appendix 1 – Definitions

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

| Term | Meaning |
|-----------------------|---|
| CAN | A court attendance notice issued and filed in accordance with the <i>Criminal Procedure Act 1986</i> . A CAN may be used to commence summary proceedings in the local court. A CAN specifies the offence and its essential particulars as well as the address of the court where the matter is to be heard. |
| Council | Woollahra Municipal Council |
| Council Officers | Council officers who are duly authorised under any Act to exercise functions on behalf of the Council for investigating contraventions of any law and taking action consequent upon any such contravention. |
| Defendant | The accused person against whom criminal proceedings are brought. |
| EPA Act | <i>Environmental Planning and Assessment Act 1979</i> , and as amended from time to time. |
| GIPA Act | <i>Government Information (Public Access) Act 2009</i> , and as amended from time to time. |
| Heritage significance | As defined in Woollahra LEP means historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value. |
| LEC | NSW Land and Environment Court |
| LG Act | <i>Local Government Act 1993</i> , and as amended from time to time. |
| PN | Penalty notice. Sometimes referred to as an 'on-the-spot' fine. PNs may only be issued for prescribed offences and the value of the fine is also prescribed by legislation. |
| POEO Act | <i>Protection of the Environment Operations Act 1997</i> , and as amended from time to time. |
| Respondent | The party against whom civil proceedings are brought in Land & Environment Court proceedings |
| Unlawful activity | 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: <ul style="list-style-type: none"> terms or conditions of a development consent, approval, permit or licence an environmental planning instrument that regulates the activities or work that can be carried out on particular land |

| | |
|---------------|---|
| | <ul style="list-style-type: none">• a legislative provision regulating a particular activity or work• a required development consent, approval, permission or licence. |
| Woollahra LEP | <i>Woollahra Local Environmental Plan 2014</i> , and as amended from time to time. |

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