

THE BAROSSA COUNCIL ENFORCEMENT POLICY



1. Purpose

- 1.1. To provide a framework which guides Council and its officers in investigating and addressing matters of non-compliance within the community. The framework provides consistency, and ensures that any action is proportionate to the circumstances and situation being investigated in each case. The framework ensures that transparency and procedural fairness principles are applied.

2. Scope

- 2.1. Local Government is charged with a range of legislative responsibilities which assist in protecting the community, the landscape, the local environment and amenity. Council's customers include both those on whom the law places a duty and those whom the law protects.

Council staff are required to investigate, enforce and ensure compliance with a range of legislative provisions. This Policy outlines Council's approach to matters of non-compliance, where enforcement is an option, and provides Council Officers with direction about the manner in which enforcement matters are to be undertaken.

3. Policy Statement

- 3.1. Council encourages and supports its officers to consider and carry out activities and initiatives which encourage and ensure compliance with relevant legislation.

It is Council policy position to seek to resolve enforcement matters in the first instance through a collaborative or negotiated approach where possible and appropriate, but acknowledges the need for formal enforcement action in certain circumstances.

4. Principles of Enforcement

Council will ensure that it adheres 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 want to comply with the law. Authorised Officers will assist by being open and helpful, offering advice and providing the opportunity to discuss compliance issues to rectify non-compliances where possible.

A range of legislative and non-legislative options are available to Council. Prosecution will generally be used as a last resort, or for serious or repeat non-compliances.

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4.2 Consistency

Council will endeavour to take a similar approach in similar cases. Decisions on enforcement require the use of professional judgement and discretion to assess varying circumstances. To assist with this, Authorised Officers will:

- (i) Follow standard operating procedures wherever applicable;
- (ii) Ensure fair, equitable and non-discriminatory treatment;
- (iii) Record and store all relevant information relating to enforcement in accordance with Council's Knowledge Management Policy and procedures; and
- (iv) 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 actions and the legislation under which the action is enforced.

Officers will provide the opportunity and will be open to discussing all matters including potential and actual non-compliances.

When remedial action is needed Council will:

- (i) Explain clearly why the action is necessary;
- (ii) Where practicable, or where required by legislation, give notice of Council's intent to commence formal enforcement action;
- (iii) Identify what action is required to achieve compliance and the appropriate timeframe for undertaking that action;
- (iv) Provide advice on the process to seek a review of or appeal that decision when requested, or where required by legislation.
- (v) Provide guidance on accessing relevant documents, legislation and where required, legal aid.

Enforcement decisions must be fair, consistent, balanced and relate to standards that ensure the public is adequately protected.

In circumstances where legislation enables (or requires) Council to undertake immediate action and where it is not practical to give formal notice of its intention to enforce a matter due to the urgency or immediate risk to the community, the reasons why will provided at the earliest opportunity and will be recorded in accordance with Council's Knowledge Management Policy.

Council Officers will follow established policies and processes when keeping a complainant informed of the progress of a particular matter; or otherwise notifying of an outcome.

4.4 Conflict of Interest

Where a Council Officer has a personal association or relationship, or a perceived association or relationship, with an individual or entity who may have breached a law or is subject of a request for service (or with any other individual or entity

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involved) an alternate Authorised Officer will investigate the matter and make decisions, where possible.

The facts regarding the conflict/relationship will be reported and recorded in accordance with Council's Knowledge Management Policy and procedure. The Council Officer who has a conflict of interest shall not make a decision or undertake any enforcement action in relation to the non-compliance, and abstain from further/any action that give rise to the conflict. The Council employee or contractor will further ensure that they disclose the conflict to the Chief Executive Officer in accordance with Council procedure and Section 120(2) of the Local Government Act 1999.

4.5 Authorisation of Officers

Only Officers who have the required training, qualification and/or experience will be authorised by Council or its delegate to take enforcement action. Officers will also have sufficient training and understanding of Council's policies and processes to ensure a consistent approach to their duties.

4.6 Written Documentation

All enforcement decisions shall be recorded and documented in accordance with Council's Knowledge Management Framework.

All notices or forms used shall comply with relevant legal requirements.

When providing written documentation to an alleged offender, Authorised Officers will provide:

- (i) All information necessary to comply with legal requirements;
- (ii) If remedial action is required, the required time frame to secure compliance;
- (iii) If necessary, the reasons why the legislation was contravened; and
- (iv) Measures necessary to ensure compliance and the consequences of non-compliance; and
- (v) Any requirement detailed in 5.4

5. Enforcement Options

5.1 No Action

No action is an option and will be considered when, after investigation, no breaches of the legislation are discovered, no best practice options can be determined or the matter is outside of Council's area of jurisdiction or authority.

It may also be appropriate to take no action when:

- (i) The complaint is frivolous, vexatious or trivial in nature; or
- (ii) Taking action may prejudice other major investigations

Following an investigation of a matter, where a decision is made not to take enforcement action, the decision and reasons will be recorded in accordance with Council's Knowledge Management Framework.

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5.2 Informal Action

Informal action to achieve compliance with legislation may include:

- (i) Providing verbal or written advice on the matter, which may include recommendations to prevent further non-compliances;
- (ii) A verbal or written warning with a request for remedial action.

Advice from Authorised Officers will be clear and confirmed in writing where deemed necessary. The circumstances in which informal action may be appropriate in the Authorised Officer's opinion include:

- (iii) The act, activity or omission is not serious enough to warrant formal action;
- (iv) The Duty Holder's past history reasonably suggests that informal action will secure compliance;
- (v) Confidence in securing ongoing compliance is high;
- (vi) The consequence of the non-compliance will not pose a significant risk;
- (vii) There are other examples where informal action has achieved the desired approach in similar circumstances;
- (viii) Where informal action may prove more effective or efficient than a formal approach.
- (ix) The cost of formal action is disproportionate to the matter at hand.

5.3 Mediation

Mediation is a possible alternative where, after investigation, Council Officers consider that the matter is unlikely to be easily resolved through either 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; or where Council has no legal authority to act.

If deemed appropriate by the relevant officer, Council will provide guidance and information on suitable mediation services, if both parties agree.

Council will not contribute to the costs of mediation, any costs associated with mediation services is the responsibility of both parties.

5.4 Formal Action

Where informal action has failed to achieve the desired outcome, or where there are greater public interests, or due to the seriousness, systemic or ongoing nature of the matter; the following action will be considered.

5.4.1 Service of Orders, Notices and Directions (Not including Expiation Notices)

Various Acts specify the processes which Council must follow, in order to:

- Advise of the intention to issue an Order or Notice;

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- Invite submissions with respect to the matter;
- Order a person to act or refrain from acting in a specified manner; and/or
- Issue directions specifying how the Order may be complied with.

Council Officers must have regard to Council's Order Making Policy when considering an Order under Chapter 12, Part 2 of the Local Government Act 1999.

- (i) Authorised 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 or Direction and the timeframe to comply.
- (ii) In circumstances such as a threat to life or immediate or impending threat to public health or safety, Formal action may commence without giving notice of intention to expedite a matter. In these circumstances the action must be supported by relevant legislation.
- (iii) In most cases the person receiving the Order or Notice has a right of appeal to the appropriate Court or Tribunal. If an Order or Notice is served for which an appeal is possible, Council will include information detailing the right to appeal and the relevant legal provisions at the time of serving the Order.
- (iv) Where there is evidence that an offence has been committed, Council may issue an Expiation Notice or commence a prosecution in addition to serving an Order or Notice. This will only be done where it is determined by an Authorised Officer that the conduct of the recipient justifies taking both steps. Council may also apply to the Court for an Order to be made.

5.4.2 Action in Regard to a Default

- (i) Failure to comply with Orders or Notices may incur further enforcement action and/or prosecution.
- (ii) Where legislation provides, Council may undertake further action following non-compliance or default in relation to an Order, Notice or Direction and may proceed to undertake the work contemplated by the Order or Notice and seek to recover the costs of that work.
- (iii) The decision to carry out action in default will be made by an Authorised Officer of Council with appropriate delegated authority.
- (iv) Before entering into a contract to undertake the work, Council will consider whether there is a realistic prospect that the person responsible will complete the work within a reasonable time. Where Council determines to undertake the work in default, Council will seek to recover all reasonable costs in accordance with legislation. A decision not to recover costs will be made by staff with appropriate authority to do so, or Council.
- (v) Where an Order, Notice or Direction has not been complied with and where legislation allows, Council may issue an Expiation Notice or launch a

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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.

5.4.3 Expiation Notices

Various Acts allow councils to issue expiation notices for a range of matters. Council will avoid using expiation notices as a means of securing compliance in the first instance, unless:

- (i) There has been a failure to correct an identified breach of a similar nature after informal or formal action, or;
- (ii) There is evidence of systemic, regular or ongoing breaches of legislation, by an individual or by a range of individuals and informal action is unlikely to achieve the desired outcome effectively or efficiently, or
- (iii) The breach creates a significant risk to the community, or
- (iv) There is a desire to provide appropriate disincentive for the behaviour or breach.


A person receiving an Expiation Notice is entitled to elect to be prosecuted for the alleged offence, as such Council officers must have sufficient and admissible evidence to prove the offence beyond reasonable doubt as if the matter was proceeding to court.

Council will ensure that its officers are fully trained in all aspects of conducting investigations, evidence gathering, statement taking and issuing of expiation notices.

5.4.4 Prosecution

A prosecution will only proceed where, after gathering all available evidence, it is believed that the offence can be proved on the balance of probabilities or beyond reasonable doubt whichever applies to the particular standard of proof required for the prosecution and must be supported by Council's solicitor/s.

- (i) The following circumstances, by example only, may be referred for prosecution:
 - An alleged breach of the law such that public health, safety, and 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 or other formal or informal action;
 - A failure to correct an identified serious problem after having been given reasonable opportunity to do so through other formal action or expiation;
 - 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, or rectify, the problem, or;
 - To facilitate the recovery of the costs of remedial work or financial compensation.

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- (ii) Where it is held that the matter should be referred for prosecution, all relevant evidence and information will be made available to Council's legal representative to enable a consistent, fair and objective decision to be made.
- (iii) Before a prosecution is recommended there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the offence; and that all reasonable steps have been taken to resolve the matter prior.
- (iv) A decision to prosecute must 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 alleged offender's future behaviour;
 - The availability and efficiency of any alternatives to prosecution;
 - The prevalence of the alleged offence and the need for deterrence, both personal and general; and
 - The likely expense, length and outcome.
- (v) The final decision to initiate a prosecution will be made by the Chief Executive Officer or where deemed necessary, Council.

5.5 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, Council will seek to recover costs incurred where possible.

6 Supporting Processes and Documents

- 6.1 Model Council Enforcement Policy; Local Government Association of South Australia

7 Related Policies

Order Making Policy
 Knowledge Management Policy
 Delegations Register

8 Legislation and References

Order Making Policy
 Local Government Act 1999
 Development Act 1993
 Dog and Cat Management Act 1995
 Expiation of Offences Act 1996
 Fire and Emergency Services Act 2005
 Food Act 2001
 Local Nuisance and Litter Control Act 2016
 Planning, Development and Infrastructure Act 2016
 SA Public Health Act 2011

9 Review

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7.1 This Policy shall be reviewed by Policy Owner in consultation with the relevant stakeholders, within four years or more frequently if legislation or Council needs change.

10	Further Information
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This Policy is available on Council's website at www.barossa.sa.gov.au. It can also be viewed electronically at Council's principal office at 43-51 Tanunda Road, Nuriootpa and all Council branches, during ordinary business hours. A copy of this Policy can be obtained at those venues upon payment of a fixed fee.

Complaints regarding this Policy or its application can be made to the Customer Service team on 8563 8444 or barossa@barossa.sa.gov.au at first instance, who will refer you to the most appropriate officer according to Council's *Customer Service Policy* (see clause 0 above for availability).

11	Document Control
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Corporate Plan Link:		6.2 Ensure that Council's policy and process frameworks are based on principles of sound governance and meet legislative requirements.		
Document Owner:	Director, Development and Environmental Services	Document Control Officer:	TBC	
Consultation Rating:	A	Audience:	Internal/External	Next Review Date: 01/07/2022
Version history				
Version No.	Date		Description of Change	
1.0	16 / 03 / 2021		New Policy	

12	Definitions
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Enforcement	Enforcement refers to the use of legislative provisions to direct a person or body to make good a breach of legislation and/or otherwise penalise a person for a breach. Enforcement is a tool to ensure compliance and accountability for illegal conduct or other wrongdoing.
Authorised Officer	A Council Officer who is authorised to carry out statutory functions or powers specified within a particular piece of legislation. The decision to appoint an Authorised Officer may only be made by Council or a delegate of Council.
Council Officer	Includes Elected members, Council employees and Contractors.
Compliance (or Compliant)	The act of adhering to, following or abiding by Legislation. Compliance may or may not involve the process of enforcement.
Non-Compliance (or Non-Compliant)	An Act by a duty holder which demonstrates a failure to meet an obligation or requirement imposed by legislation.
Council	Means The Barossa Council or an Officer with appropriate delegated Authority.
Legislation	Includes any Act, Regulation, By-Law, Code, Policy, Standard or other legislative provision to which Council has a legislative obligation or responsibility to enforce.
Duty	A responsibility required, placed or imposed by legislation.
Duty Holder	A person, business, organisation or entity that has a duty.
Alleged Offender	A Duty Holder that has been identified as having committed a non-compliant act, through the course of an investigation.
Offender	A person, business, organisation or entity that has been deemed to have committed a non-compliant act by a Magistrate or relevant Court of law.