

Council Policy

Enforcement



COUNCIL POLICY

 <p>Adelaide Hills COUNCIL</p>	ENFORCEMENT
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Policy Number:	GOV-10
Responsible Department(s):	Waste, Health & Regulatory Services
Relevant Delegations:	Delegations made under legislation relevant to this policy including all regulations, codes and policies made thereunder
Other Relevant Policies:	Order Making Policy 140826 Code of Conduct For Council Employees 140213 Complaint Handling 140610
Relevant Procedure(s):	Standard Operating Procedures
Relevant Legislation:	<i>Local Government Act 1999</i>
Policies and Procedures Superseded by this policy on its Adoption:	Reporting of Offences , 27/02/2001, Item 15.2.2
Adoption Authority:	Council
Date of Adoption:	26 June 2018
Effective From:	10 July 2018
Minute Reference for Adoption:	Item 12.4, 139/18
Next Review:	No later than November 2020 or as required by legislation or changed circumstances

ENFORCEMENT POLICY

1. INTRODUCTION

- 1.1 The Adelaide Hills Council is responsible for the administration and enforcement of various legislation. This responsibility includes taking action where necessary to protect the community and/or preserve the amenity of the Council area.
- 1.2 This Policy outlines Council's approach, method and priorities for ensuring compliance with the legislation for which it is responsible, including by carrying out enforcement functions where necessary. The Policy provides a framework to promote consistency in enforcement action and to ensure that any action taken is proportionate to the alleged offence and, where applicable, the principles of natural justice are observed.

2. OBJECTIVES

- 2.1 This Policy is relevant to all enforcement actions undertaken by Council staff and its authorised contractors for and on behalf of the Council within the Adelaide Hills Council. This includes but is not limited to, enforcement activities relating to Adelaide Hills Council By-laws and the following legislation (including all regulations, codes and policies made thereunder):

- *Local Government Act 1999*
- *Expiation of Offences Act 1996*
- *Road Traffic Act 1961 and the Australian Road Rules*
- *Private Parking Areas Act 1986*
- *Dog and Cat Management Act 2005*
- *Fire and Emergency Services Act 2005*
- *Local Nuisance and Litter Control Act 2016*
- *The South Australian Public Health Act 2011*
- *The Food Act 2001*
- *The Environment Protection Act 1993*
- *The Development Act 1993*
- *The Water Industry Act 2012*

3. DEFINITIONS

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

"Enforcement" means a combination of the provision of education, encouragement and formal enforcement when required to assist achieve compliance.

"Formal Enforcement" means use of legislative or regulatory mechanisms to achieve compliance including orders, expiations, prosecution and notices.

"Prosecution" means the process of instituting legal proceedings.

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

“3E’s “ means Educate, Encourage, Enforce.

“In writing” means - letter or email.

4. POLICY STATEMENT

4.1 Introduction

Council is charged with legislative responsibilities which protect individuals and the community. Council’s customers include those whom the law places a duty and those whom the law protects. Whilst it is ultimately the responsibility of individuals and other bodies to comply with the law, from time to time Council is required to carry out enforcement activities to secure compliance with legislative obligations.

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 (3E’s philosophy) to secure legislative compliance. In line with the 3E’s, it is recognised that prevention of behaviours to avoid a breach of legislation is optimal. Education and encouragement is a critical component in achieving this objective.

Taking the above into account, the provision of education and encouragement to the community is an important element for all Regulatory and Compliance staff to influence the prevention of inappropriate practices and behaviours. It is recognised that prevention may not always be achievable, which is where encouragement and enforcement may take the lead role.

Compliance responsibilities under Council’s Regulatory and Compliance staff are unique and require careful consideration to ensure that the right balance of education, encouragement and formal enforcement is achieved. All compliance responsibilities are managed according to their merits, having regard to the evidence in Council’s possession.

4.2 Principles of Good Enforcement

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

4.2.1 Proportionality

A proportionate response means that Council’s actions will be scaled to the seriousness of the breach. It is important to note however, that expiation amounts for offences (with the exception of offences under Council By-laws) are set by the State Government. Council does not have the discretion to reduce or set expiation 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 activities that give rise to the most serious risks, or where potential hazards are ineffectively 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. Mediation may also be considered and utilised where considered appropriate to resolve disputes.

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

4.2.2 Consistency

Council will take a consistent 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; and
- ensure fair, equitable and non-discriminatory treatment.

4.2.3 Transparency

Council will be open and transparent about the manner in which it undertakes enforcement activities and the laws it enforces. Council 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.

In educating the community, Council will make 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. However, subject to legal requirements, information will not be disclosed that would likely prejudice an investigation of an alleged breach of legislation or enforcement action that is proposed to be taken.

When remedial action is required Council will explain clearly and in plain language why the action is necessary. Where practicable, Council will give notice of its intent to commence formal action and advice will be provided on the process for seeking a review of, or how to appeal against that decision.

Wherever practicable, people raising concerns will be advised of what action has been taken and why that action has been taken.

4.3 Authorised 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 relevant Manager or Director and the reasons for action recorded in accordance with Council's records management protocols.

Officers are required to show their Authorised Officer/Person Identification card on request or otherwise as required by legislation.

4.4 Decision Making

Where non-compliance is discovered as a result of enforcement investigations, 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, eg lodge a Development Application to seek retrospective approval;
- facilitating mediation between affected parties;
- issuing a verbal or written warning; or
- enforcement actions such as:
 - issuing an expiation;
 - issuing a an enforcement order notice; 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 concerns raised, the decision and reasons will be recorded in accordance with Council's records management systems and protocols and the person raising the concerns will be advised verbally and/or in writing. Decisions will be evidence based and made taking into account any public interest considerations such as public safety and environmental risk and Council resources.

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

- severity of the incident including whether it resulted in injury to a person or damage to property and the seriousness of any injury or damage;
- the impact of the breach/offence on the community;
- the degree of wilfulness involved on the part of the offender;
- the consequences of non-compliance;
- the offender's attitude, history, degree of cooperation and consistency of approach to similar/repeat breaches or offences;
- the degree of any hazard/danger or risk to health/safety posed to the community or the environmental risk;
- the impact of any previous actions to address the breach/offence;
- the likely effectiveness of the various enforcement options at preventing any repeat offending;
- other public interest factors;
- whether there is sufficient evidence upon which Council may rely to exercise its powers;
- the personal situation of the individual concerned including health matters, hardship and family/relationship matters;
- consistency of approach to similar breaches/offences;
- if the property is on the market, the need to ensure the non-compliance is listed to inform the real estate agent and potential purchasers.

In the case of a decision to prosecute, such decision will only be made where Council is satisfied (having regard to any legal advice regarding the merits of the prosecution case) that there is a likelihood of securing a conviction and a prosecution is in the public interest.

Where a staff member has a personal association or relationship with the alleged offender or any other person involved, the Authorised Officer will ensure:

- the matter will be brought to the attention of the relevant Team Leader, Manager, Director and the Executive Manager Governance and Performance;
- facts about any conflict/relationship will be recorded in accordance with Council's records management protocols; and
- decisions on who will investigate the alleged contravention will be made by the relevant Manager, Director and the Executive Manager Governance and Performance.

Written documentation to the land owner and/or tenant 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.

Council will assess all reports of breaches of legislation received and will prioritise matters according to the seriousness of any alleged breach whilst ensuring the most effective use of resources.

4.5 Enforcement

Prior to considering any enforcement action Council Officers will, in the first instance, determine if any action is required or justified. Action will not be taken when, after investigation, no breach of legislation or other regulatory mechanism is discovered.

It may also be appropriate to take no action when:

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

If, after investigation, it is established that enforcement action is required the following enforcement activities will be utilised in line with the 3E's philosophy and in accordance with departmental standard operating procedures.

4.5.1 Education

Education is a key component in achieving voluntary compliance in a number of regulatory functions in which Council has a responsibility. This can be achieved a number of ways through several platforms such as websites, social media, community forums, local media outlets and one on one discussions with relevant Council staff.

Use of education aims to prevent or minimise the potential for community members to breach legislative or regulatory compliance in the first instance. Generally, education focuses on ensuring community members are aware of compliance requirements. In circumstances where a compliance breach occurs, and subject to the severity of the matter, Council will take into consideration the principles of good enforcement and educate rather than commence formal enforcement action.

The availability of Council policies is another form of education to ensure stakeholders have the ability to understand requirements and therefore compliance ensues. An example of using education to ensure voluntary compliance is the annual 'dog registration due' signs used to provide advance warning of dog registration requirements.

4.5.2 Encouragement

Encouraging community members will generally occur when a compliance breach has occurred but is not severe enough to warrant formal enforcement action.

Council places a strong emphasis on engaging with, educating and assisting stakeholders to build trust, confidence and encourage voluntary compliance. Council will listen, respond and provide information and opportunities for stakeholders to ask questions and discuss issues of concern. Where a contravention is detected, the party will be informed and given the opportunity to voluntarily comply. To assist the party to comply, Council will provide guidance to help them understand how to comply. An example of encouraging voluntary compliance is use of 'written warnings' affixed to motor vehicles when parking breaches of a minor nature have occurred.

Council may use informal actions to encourage compliance with legislation which may include:

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

Advice from Council 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;
- 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 a statutory action is not possible, but it would be beneficial in a wider public safety context to urge a particular outcome, informal action will be taken by a Council officer and the reasons recorded in accordance with Councils records management protocols.

Mediation is a useful tool for encouraging self-resolution between disputing parties and when successful negates the need for Council to undertake formal enforcement action against one or both parties.

Where appropriate and dependent upon the severity of the breach, Council may make mediation available. Mediation is a possible alternative where, after investigation, it is determined that the non-compliance is capable of resolution through mediation rather than enforcement. The use of mediation services may also be appropriate where a positive outcome for Council, in the interests of the broader community, is considered possible through this alternative dispute resolution process in order to minimise the costs to both Council and the individual.

4.5.3 Formal Enforcement Options

A number of formal enforcement options are available which will be dependent on the merits of each matter being considered. These options are outlined below.

Serving of Orders/Notices

An Order/Notice is a written direction of Council issued in exercise of a statutory power that requires specific action to be taken to secure legislative compliance. A range of legislation administered across the organisation provides Authorised Officers with the ability to issue an Order. To the extent that the legislation outlines process requirements for issuing of an Order/Notice, Council officers will ensure compliance with these requirements.

For example, some legislation requires the following steps be observed before an Order/Notice is issued:

- 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 a 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.

If legislation does not prescribe requirements to advise of an intention to issue an Order/Notice, Council will determine whether it is appropriate in the circumstances to give such notice. In circumstances where there is a threat to life or immediate threat to public health and safety, an Order/Notice will be made without giving notice of intention. In these circumstances immediate compliance to resolve the situation can be required.

In circumstances when the threat to public health and safety is significant, and the property owner cannot reasonably undertake the required work within a reasonable time, Council may undertake the action required.

In many cases the person receiving the Order/Notice has a right of appeal to the appropriate Court or directly to Council. 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 in accordance with the relevant legislation.

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/Notice. This will only be done where it is determined that the conduct of the recipient justifies taking both steps.

Action in Regard to a default of Order/Notice

Failure to comply with an Order/Notice may result in further enforcement action being taken, such as the issuing of an Expiation Notice or commencement of a prosecution.

Where legislation confers power on Council to take action in default of an Order/Notice and the necessary work has not been carried out in the time allowed without good reason, Council may consider undertaking the required work. Where work in default is undertaken, Council will seek to recover all costs over a fair period, using all statutory means available.

Wherever practicable and appropriate, Council will notify the person who is in default of an Order/Notice before taking action.

The decision to carry out action in default will be made by the Authorised Officer in conjunction with the Team Leader and/or Manager.

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 recipients delay will be considered in determining additional enforcement actions.

Service of an Expiation Notice

A person receiving an Expiation Notice is entitled to elect to be prosecuted for an alleged offence and 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 to establish a person has committed an offence before an Expiation Notice is issued to that person.

The following circumstances are likely to warrant an Expiation Notice:

- certain breaches of legislation administered by Council, including parking and stopping offences under the Australian Road Rules;
- 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/Notice (unless Council considers that the failure is sufficiently serious to warrant prosecution);
- confidence in the individual/other body is low; or
- a written warning has been given for a similar offence.

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 such that public health, safety and welfare has 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/Notice;
- an established and recorded history of similar offences;
- a person or body elects to be prosecuted;
- 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. Before a prosecution is recommended there must be substantial, reliable and admissible evidence that an identifiable individual or other body has committed an offence. 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 premediated;
- the need to influence the offenders future behaviour;
- the effect on the offenders or witnesses physical or mental health, balanced against the seriousness of the offence;
- 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 length, expense and outcome of a trial.

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

5. DELEGATION

The Chief Executive Officer has the delegation to:

- Approve, amend and review any procedures that shall be consistent with this Policy; and
- Make any formatting, nomenclature or other minor changes to the Policy during the period of its currency.

6. AVAILABILITY OF THE POLICY

This policy will be available for inspection at Council Offices during ordinary business hours and via Council's website www.ahc.sa.gov.au. Copies will also be provided to the public upon request, and upon payment of a fee in accordance with Council's Schedule of Fees and Charges.