

# **Enforcement and Compliance Policy**

*Adopted by Council 22 February 2022*

MITCHAM

public policy

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MITCHAM

## 1. PREAMBLE

It is the responsibility of individuals, business owners, and other bodies to always comply with the law. Notwithstanding this, Council is empowered to address unlawful activity by enforcing and administering certain laws, to protect individuals, property, and the community as a whole.

Unlawful activity may come to Council's attention in various ways, for example, from public complaints, South Australia Police, or by Council officers themselves. Not all non-compliance and unlawful activity warrants actioning by Council. Council must determine its response to non-compliance and/or an unlawful activity, and in doing so will consider a range of factors as a matter of law, public policy and proper public administration.

The compliance and enforcement tools available to Council are quite broad. Council's response will be tailored to the individual situation, with the ultimate aim of encouraging high levels of voluntary compliance.

## 2. PURPOSE

The purpose of this policy is to establish a framework which guides Council in compliance, enforcement and prosecution responses and actions with respect to matters of legislative and regulatory non-compliance and illegal activity. The framework encourages consistency and promotes actions which are proportionate to the non-compliance, alleged offence or unlawful activity in each case. This policy also assists in informing the public that transparency and procedural fairness principles are applied in every compliance and enforcement action.

## 3. SCOPE

This policy applies to all Council Officers and Authorised Officers undertaking compliance and enforcement action on behalf of the Council, and (subject to the relevant legislation) pursuant to the following legislation:

- Local Government Act 1999
- Planning Development and Infrastructure Act 2016
- Dog and Cat Management Act 1995
- South Australian Public Health Act 2011
- Food Act 2001
- Fire and Emergency Services Act 2005
- Private Parking Areas Act 1986
- Road Traffic Act 1961
- Local Litter and Nuisance Control Act 2016

#### 4. DEFINITIONS

**Compliance** means adhering to and demonstrating adherence to Acts, By-laws, Regulations or similar.

**Council** means the Corporation of the City of Mitcham.

**Authorised Officer** is a person authorised by the Council to carry out statutory functions or powers as specified within a particular piece of legislation.

**Complainant** means the individual or organisation who makes a complaint or first brings issues of suspected Non-Compliance or Illegal Activity to the attention of the Council.

**Council Officer** means a member of the Council administration who is acting under the Council's delegated authority.

**Direction** means a written direction or requirement, such as an order or notice, requiring specific action to be taken to require Compliance.

**Enforcement** refers to the use of legislative powers to direct or require a person or body to remedy a breach of the legislation and/or seek to penalise a person for Illegal Activity, and includes action taken in relation to Non-Compliance. Enforcement is a tool to promote and require compliance and accountability for illegal conduct or other wrongdoing.

**Illegal Activity** is an activity that is:

- Contrary to a legislative provision regarding that activity;
- Undertaken without the required permit or license or other consent;
- Contrary to the terms or conditions of a permit or licence or other consent; and/or
- Contrary to the terms of a Direction,

and includes activities of a criminal nature.

**Non-Compliance** means failure to comply with a Direction.

**Prosecution** means a process of instituting legal proceedings to prosecute an offender for alleged Illegal Activity, and is a form of Enforcement. A successful prosecution can result in a criminal conviction, fines, and/or terms of imprisonment being imposed on the offender.

## 5. PRINCIPLES

Enforcement action is taken within a legal and policy framework. Council will carry out its Enforcement actions having regard to principles that include:

### 5.1 Proportionality

A proportionate response means that Council's response and any action will be scaled and determined by having regard to the seriousness of the suspected Illegal Activity, and a measured response will be applied.

The following criteria will be considered by Council, (including Council Officers and Authorised Officers) in determining the preferred course of response and/or action:

- whether there are serious safety risks or concerns;
- where actual or potential hazards are controlled;
- the seriousness and nature of the suspected Illegal Activity;
- the relevant legislation, including the powers of Council;
- the willingness of the individual or entity to cooperate with any enquiries or investigation;
- the cost to the Council in pursuing the suspected Illegal Activity;
- the benefit to the community; and
- any other factor that may be relevant (e.g. if Council has already taken another action in relation to the matter).

### 5.2 Consistency

Council will endeavour to take a similar approach in comparable matters to ensure consistent responses and outcomes. Decisions regarding Enforcement require the use of professional judgement and discretion to assess varying circumstances. To assist with this, Council will ensure fair, equitable and non-discriminatory treatment.

### 5.3 Transparency and clarity

Council will be open and transparent about the manner in which it undertakes Enforcement action, and the laws it enforces.

For example, when remedial action is needed, Council will explain clearly in plain language why the action is necessary. Where legally required and otherwise where practicable, Council will give notice of any intent to commence formal action, advising what action is required to achieve Compliance by remedying the suspected Illegal Activity, and the timeframe for undertaking that action. Information will be provided to the individual or organisation on the process of

seeking a review of, or how to appeal, a decision (within the relevant legal/policy framework).

Complainants will be advised of what action has been taken, and why that action has been taken.

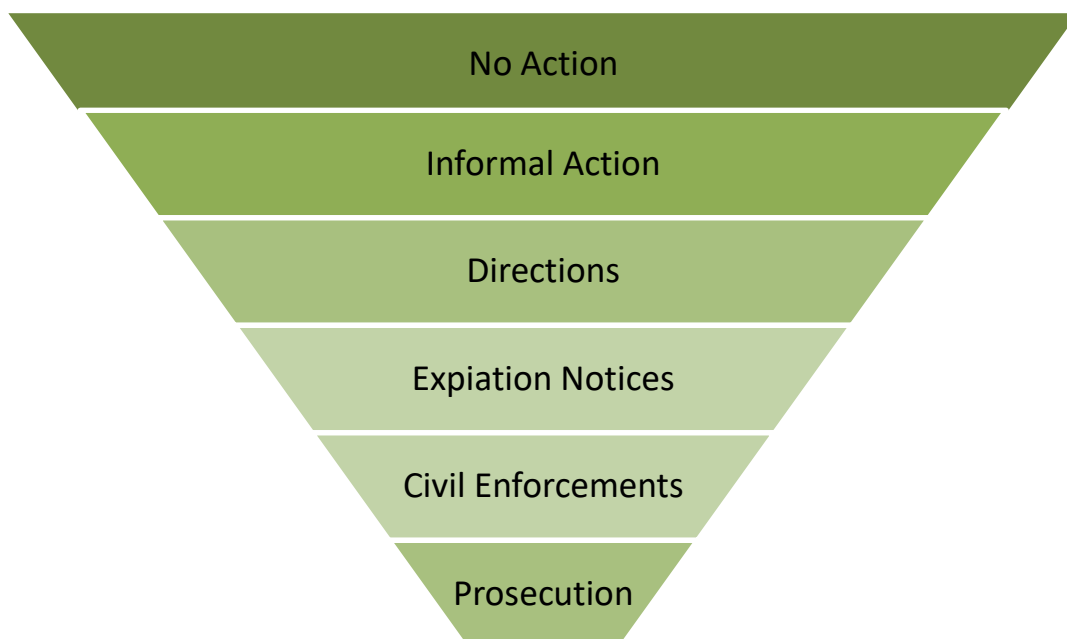
#### 5.4 Cost Recovery

Council may incur significant costs (legal and/or otherwise) when Enforcement action is taken. In the interest of reducing the financial burden of pursuing Enforcement matters, where possible, the Council will seek to recover those costs incurred in attempting to rectify the breach.

### 6. ENFORCEMENT RESPONSES

Council administers and enforces a broad range of legislation. As a result, which Enforcement actions Council takes can vary depending on the legislation being enforced. In some circumstances, more than one option for Enforcement action will be available to Council, in which case it will need to consider which option is most appropriate, having regard to the principles listed in Section 5 above. Suspected Illegal Activity as well as suspected Non-Compliance will give rise to the potential for (other) Enforcement action. The kinds of responses (listed in the general order of preference) are:

- **Education:** Encourage Compliance with the relevant legislation through education of rights and responsibilities.
- **Encouragement:** Council will listen, respond and provide information and opportunities for stakeholders to ask questions and discuss issues of concern, as well as giving parties an opportunity to voluntarily comply, without need for Enforcement action.
- **Enforcement:** Enforcement options (which are dependent on the applicable legislation) can include: no action, informal action (eg education), Directions, expiations, civil enforcement, and/or prosecution. Each Enforcement action (and the situations in which they may be pursued) are outlined below.



## 6.2 No Action

It is open for Council to take no action in relation to suspected Non-Compliance or Illegal Activity, on a number of grounds. For example, it may be appropriate to take no action where:

- The complaint is frivolous, vexatious or trivial in nature.
- The individual or entity who may have breached a law has rectified the breach (or has committed to doing so).
- The alleged breach is outside of Council's jurisdiction or there is another (potentially more appropriate) jurisdiction to manage the breach.
- Taking action may prejudice other more significant investigations.
- Having regard to the principles of proportionality and consistency, Council has determined that the breach is of such a nature that action would be an unreasonable use of Council resources.

A determination to take no action is itself a deliberate decision of the Council which occurs after full consideration of the matter.

## 6.3 Informal Action

Informal action to achieve Compliance may include:

- Issuing an individual or entity who may have breached a law with a verbal or written warning.
- Verbal or written warnings that may include requests for remedial action.

The circumstances in which informal action may be appropriate include situations where:

- The Non-Compliance or Illegal Activity is not serious enough to warrant formal action.
- The past history of the individual or entity who has committed the breach reasonably suggests that informal action will achieve compliance.
- Council's confidence in the individual or entity is high.
- The consequences of Non-compliance will not pose a significant risk of harm or nuisance to other persons or property.
- Informal action may be considered more effective than a formal approach.

## 6.4 Formal Action

Council may choose to take formal action in certain circumstances. When considering whether to commence formal action in relation to Enforcement, Council will use professional judgement and discretion to assess the suspected Illegal Activity or Non-Compliance, including the reasonableness of the actions required by Council, and the timeframe to comply. Examples of formal action include:

### 6.4.1 Directions

Depending on the nature of the breach and the legislation relevant to the breach, Directions may be issued by Council itself, or by a relevant court of competent jurisdiction (which may occur following an appropriate application by the Council). Directions to address matters of Non-Compliance will only be used, or sought from a court, where:

- An order is required to prevent further Illegal Activities or Non-Compliance.
- The Non-Compliance is of such a serious nature so as to warrant immediate action.
- The Non-Compliance has resulted in a threat to life or an immediate threat to public health or safety.
- Informal action has failed to achieve Compliance.

A decision for Council to seek a Direction through a court will only be made with the prior written consent of the Chief Executive Officer or their delegate, having completed an assessment of the matter and after considering the options available.

Directions will be recorded in accordance with the relevant legislation. Directions will also be confirmed in writing within any timeframe prescribed by the relevant legislation.

If permitted by the relevant legislation, an individual or entity receiving a Direction may have a right of appeal. If a Direction is served for which an appeal is possible,



Council will endeavour to advise the recipient in writing of the right of appeal and the relevant legal provisions at the time of serving the Direction.

Failure to comply with a Direction may result in further Enforcement action.

#### 6.4.2 Expiation Notices

An expiation notice alleges that an individual or entity has committed an offence, and sets out an expiation fee, which can be paid to expiate the offence, rather than Council commencing Prosecution.

Expiation notices may be issued by Council for:

- Parking Offences under the Road Traffic Act 1961, Australian Road Rules and the Private Parking Areas Act 1986.
- Dog management offences pursuant to the Dog and Cat Management Act 1995.
- Development related offences pursuant to the Planning, Development and Infrastructure Act 2016.
- Food safety offences under the Food Act 2001.
- Public realm use and management offences under the Local Government Act 1999.
- Public health offences under the South Australian Public Health Act 2011.
- Supported residential facility management offences under the Supported Residential Facilities Act 1992.
- Offences against Council's By-Laws.

Council may choose to issue an expiation notice under the abovementioned legislation where it assesses that the relevant legislative criteria or requirements have not been met.

#### 6.4.3 Civil Enforcement Penalties – Development Compliance

A range of civil enforcement penalties are contained within the *Planning, Development and Infrastructure Act 2016* and allow a targeted, pragmatic and efficient way to address development compliance matters commonly faced by Council.

This includes situations involving a breach of the *Planning, Development and Infrastructure Act 2016* which prove serious enough to warrant some form of statutory compliance action, over and above a formal warning, but not serious enough to warrant the full force of Prosecution or civil enforcement proceedings.

A civil penalty may be recovered in one of two ways, either by negotiation with the alleged offender, or by application to the Environment, Resources and Development Court.

Council may consider the use of all enforcement tools available under the *Planning, Development and Infrastructure Act 2016*. Additionally, Council has obtained authorisation from the State Planning Commission to use certain enforcement tools under sections 225(17)(b) and 230(14)(b) of the *Planning,*

*Development and Infrastructure Act 2016.* These additional avenues for civil enforcement will form part of the Council's Enforcement options, so long as that authorisation remains current.

It is a condition of Council's authorisation that it must, to the best of its ability, make use of the enforcement tools available under the relevant sections in a consistent manner that is proportionate to the alleged offence or breach of the Act.

#### **6.4.4 Prosecution**

Council may choose to initiate Prosecution where it is deemed appropriate, for example where:

- The Illegal Activity or Non-Compliance is of a serious nature.
- A person who receives an expiation notice does not expiate the offence by payment or otherwise elects to instead be prosecuted.
- Prosecution is in the public interest.

In considering whether prosecution is in the public interest, the following factors may be considered:

- The prevalence of the alleged offence and the need for deterrence, both personal and general.
- Whether the individual or entity has committed a similar offence in the past.
- Whether the individual or entity has shown remorse or contrition.
- Whether the alleged offence was premeditated.
- The effect on the physical or mental health of relevant individuals (including witnesses).
- The availability, competence and credibility of witnesses and their likely impression on the court.
- The admissibility of any alleged confession or other offence.
- Any defences available to the individual or entity.
- The need to maintain confidence in the Council as a prosecuting authority.

Council may choose not to commence Prosecution proceedings in circumstances where there is no reasonable prospect of success in securing a finding of guilt against the alleged offender.

The likely length and expense of a trial is a relevant (but not decisive) consideration when deciding whether to prosecute for Illegal Activities. Similarly, the implications and financial burden on an individual or entity will not be a decisive consideration when determining whether to proceed with a Prosecution.

#### **6.5 Complex Situations**

At times, Council may be involved in a matter or dispute which involves more than one suspected Illegal Activity, and/or more than one relevant party, or some other delicate or complicating factor.

In such cases, it may not be appropriate for Council to pursue a single option for Enforcement action, but rather a blended approach, encompassing more than one Enforcement avenue.

In these situations, the usual hierarchy of preferred options may need to be selectively applied as deemed most appropriate by Council.

Council will have regard to the principles listed in Section 5 in exercising its discretion to act in such complex situations, and will always act within the bounds of the relevant legislation.

## 7 POLICY REVIEW

This Policy will be subject to review every four (4) years or sooner at the discretion of the relevant General Manager, or upon any changes to legislation, policies or by-laws referred to in this Policy.

The Chief Executive Officer has delegated authority to endorse any amendments to the Policy that does not vary the intent of the Policy.

## 8 VERSION HISTORY

VERSION	AUTHOR(S) POSITION	CHANGES	DATE
1	Elected Member Support	Nil	22/02/2022

## 9 DOCUMENT CONTROL

<b>Responsible Department</b>	Community Safety & Development Services		
<b>Delegations Contained within Policy</b>	YES		
<b>Classification</b>	Development Control		
<b>Applicable legislation</b>	Local Government Act 1999, Planning Development and Infrastructure Act 2016, Dog and Cat Management Act 1995, South Australian Public Health Act 2011, Food Act 2001, Fire and Emergency Services Act 2005, Private Parking Areas Act 1986, Road Traffic Act 1961, Local Litter and Nuisance Control Act 2016		
<b>Related Policies &amp; Corporate Documents</b>	Order Making Policy		
<b>Additional references</b>			
<b>Endorsed by Council</b>	22/02/2022	<b>Item No:</b>	9.8
<b>Effective Date</b>	22/02/2022	<b>Next Review Date:</b>	22/02/2026
<b>Policy Set ID</b>		<b>Template Set ID:</b>	3345084