



# Enforcement & Order Making Policy

<b>Responsible Officer</b>	Chief Executive Officer
<b>Relevant Delegations</b>	Manager Development & Environment
<b>Legislation and References</b>	Chapter 12, Local Government Act 1999 Also refer to '3 References'

## Procedure

Local Government is charged with legislative responsibilities, which protect individuals and the community as a whole. Council's customers include both those on whom the law places a duty and those whom the law protects. While it is ultimately the responsibility of individuals and other bodies to comply with the law, Council staff are required to carry out activities, which enforce compliance.

This policy is an "umbrella" policy, which outlines Council's approach to enforcement matters and order making processes to be followed, and provides staff with direction about the manner in which enforcement activities are to be undertaken.

In addition to enforcement, Council carries out a range of activities to ensure compliance such as community education programs to encourage conformance. Detailed policies and procedures about these specific activities may also apply.

Enforcement activities include:

- patrolling streets and public places;
- inspecting premises either on a routine programmed basis or on a random basis; and
- responding to enquiries and complaints.

## Purpose of the Policy

- to provide consistency in enforcement action in matters of non-compliance;
- to ensure transparency, procedural fairness and natural justice principles are applied; and
- to ensure that enforcement action is proportionate to the alleged offence in each case.

## Defining Enforcement

Council adopts a broad definition of "enforcement" which combines the provision of advice and assisting compliance with formal action where necessary. This is intended to encourage higher levels of voluntary compliance with legal requirements by individuals, businesses and other bodies.

Notwithstanding the above, Council will take immediate action when required (for example to ensure public health and safety or to protect the environment) and take firm action, when circumstances warrant, against those who act unlawfully.

## 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 work with due regard to the following principles.

## Proportionality

A proportionate response means that Council's actions will be scaled to the seriousness of the breach.

File Path	Last review	Next review	Page
W:\Council Policies\CURRENT COUNCIL POLICIES\2018 Policies\Enforcement And Order Making Policy.Docx	March 2019	March 2023	Page 1 of 8

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# Enforcement & Order Making Policy

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

Attention will be focussed on those whose activities give rise to the most serious risks, or where potential hazards are least well controlled. Depending on the seriousness and persistence of the infringement, Council will minimise the costs to the person or body infringing the law by enforcing the minimum action necessary to secure future compliance. Prosecution will generally be used as a last resort, or for continuous serious offences.

## Consistency

Council will take a similar approach in similar cases to achieve similar outcomes. While decisions on enforcement require the use of professional judgement and discretion to assess varying circumstances, officers will:

- follow standard operating procedures wherever possible;
- ensure fair, equitable and non-discriminatory treatment; and
- record any deviation from standard operating procedures and the reasons.

## Transparency

Council will be open and transparent about the manner in which it undertakes enforcement activities and the laws it enforces. It will consult on, provide ready access to published standards and levels of service and performance that can be expected, be clear, and be open about what is expected from those on whom the law places a duty (duty holders).

In educating the community at large and dealing with duty holders, Council will make a clear distinction between what is legally required and what is desirable but not compulsory.

Staff will be open to discussing potential and actual compliance failures, before, during and after formal action has been taken.

When remedial action is needed, Council will explain clearly and in plain language why the action is necessary. Where practicable, it will give notice of its intent to commence formal action. It will point out what action is required to achieve compliance and the timeframe for undertaking that action. Advice will be provided on the process for seeking a review of, or how to appeal against, that decision.

Where it is not practical to give notice, the reasons why will be recorded in accordance with Council's Records Management Policy.

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

## Authorisation of Officers

Only officers who are competent by training, qualification, and with relevant delegation 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 the relevant Manager and the reasons for action recorded in accordance with Council's Records Management Policy. Officers are required to show their authorisations on demand.

File Path	Last review	Next review	Page
W:\Council Policies\CURRENT COUNCIL POLICIES\2018 Policies\Enforcement And Order Making Policy.Docx	March 2019	March 2023	Page 2 of 8

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# Enforcement & Order Making Policy

## Decision Making

Where non-compliance is discovered as a result of enforcement activities, 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;
- facilitating mediation between affected parties;
- issuing a verbal or written warning; or
- enforcement actions such as issuing an expiation, issuing an order/direction or prosecution.

Enforcement decisions must be fair, consistent, balanced and relate to common standards that ensure the public is adequately protected. Where a decision is made not to investigate a complaint, the decision and reasons will be recorded in accordance with Council's Records Management Policy. The complainant will be advised in writing.

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

- the seriousness of the offence;
- the degree of wilfulness involved;
- any past history of complaints and compliance;
- the consequences of non-compliance;
- the likely effectiveness of the various enforcement options;
- deterrence;
- the effect on the community and other people;
- Hazard/danger posed to the community;
- Risk to health/safety of the community;
- Detraction from the amenity of the locality;
- Sufficient evidence;
- Number of complaints received in respect of the matter (if any); and
- consistency of approach to similar breaches/offences.

When choosing an enforcement strategy authorised officers should not take into account any element of discrimination or bias against the person, such as ethnicity, nationality, political association, religion, gender, sexuality or beliefs.

Enforcement strategies should not create a possible political advantage or disadvantage to a government person holding (or candidate for) public office, or any political group or party.

Where a personal association or relationship with the alleged offender or any other person involved exists:

- an alternative person will make decisions; and
- the facts about any conflict/relationship will be recorded in accordance with Council's Records Management Policy.

Written documentation 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

File Path	Last review	Next review	Page
W:\Council Policies\CURRENT COUNCIL POLICIES\2018 Policies\Enforcement And Order Making Policy.Docx	March 2019	March 2023	Page 3 of 8



# Enforcement & Order Making Policy

- clearly differentiate between legal requirements and recommendations of good practice.

## Enforcement Options

### No Action

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

It may also be appropriate to take no action when:

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

### Informal Action

Informal action to achieve compliance with legislation may include:

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

Advice from 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;
- the duty holder's past history reasonably suggests that informal action will secure compliance;
- confidence in the individual/other body is high;
- the consequences of non-compliance will not pose a significant risk; or
- where informal action may prove more effective than a formal approach.

Where statutory action is not possible, but it would be beneficial in a wider public safety context to urge a particular outcome, a senior officer of Council will take such action and the reasons recorded in accordance with Council's Records Management Policy. The recipient will be made aware that the requested actions are not legally enforceable.

### Mediation

Where practical, Council will make mediation available. Mediation is a possible alternative where, after investigation, an officer determines that the problems being complained of are incapable of resolution through other formal or informal means. The use of mediation services may also be appropriate where an aggrieved individual has no wish to pursue action to resolve a complaint by legal means.

### Service of Orders and Directions

Except in the case of an emergency (described below), Council will take reasonable steps, within available resources, to resolve cases of local nuisance by negotiation and agreement before issuing an order. Before making an order, unless the circumstances are urgent, the Council will take the following actions:

1. Give the person to whom an order is intended to be directed, a notice in writing stating:
  - a. The proposed actions
  - b. Terms of the proposed order (what is required of the person)
  - c. A period of time in which compliance is required
  - d. Reasons for the proposed order

File Path	Last review	Next review	Page
W:\Council Policies\CURRENT COUNCIL POLICIES\2018 Policies\Enforcement And Order Making Policy.Docx	March 2019	March 2023	Page 4 of 8



## Enforcement & Order Making Policy

- e. The right of the person to make representations within a specified period of time
  - f. The penalties for non-compliance
2. The Council will take reasonable steps, within available resources, to resolve cases of local nuisance by negotiation and agreement before issuing an order, except:
    - a. In cases of a threat to life;
    - b. An immediate threat to public health or safety; or
    - c. In an emergency situation
  3. Where notice of a proposed order has been given to a person who is not the owner of the relevant land, the Council must take reasonable steps to supply a copy of the notice to the owner of the land.
  4. After considering the representations made by the person to whom notice of the order is directed, the Council may:
    - a. Make an order with terms of the original proposal; or
    - b. A modification of the original proposal (the Council is not required to give new notice of the order in the case where a modification of requirements is the outcome); or
    - c. Determine not to proceed with making an order.
  5. Upon issuing an order, the Council may:
    - a. Include two or more orders in the same instrument; or
    - b. Direct two or more persons to do something specified in the order jointly.
  6. An order that is issued must:
    - a. Specify a reasonable period within which the order must be complied with; and
    - b. State the reasons for the order.
  7. An order must be served by the Council on the person to whom it is addressed. If the person to whom the notice an order is addressed to is not the owner of the land, the Council must take reasonable steps to serve a copy of the notice and order on the owner of the land.
  8. If the land is owned or occupied by more than one person, the order is not invalid merely because it is not directed to all the owners. An owner or occupier who complies with an order may recover a fair contribution from the other owners or occupiers.
  9. The Council may, at the request or agreement of the person to whom the order is directed, vary an order or may, on its own initiative, revoke an order if satisfied it is appropriate to do so.
  10. If the Council in a particular case considers an activity constitutes, or is likely to constitute a threat to life or public health or safety, or an emergency situation exists, it may proceed to make an order without giving notice, and require immediate compliance with the order.

Except in the case of an emergency described below, before making an order, Council will give notice of its intention to make an order by:

- Giving the person to whom an order is intended to be directed a notice in writing stating:
  - The proposed action
  - The terms of the proposed order
  - A time period in which compliance must be achieved
  - The penalties for non-compliance

File Path	Last review	Next review	Page
W:\Council Policies\CURRENT COUNCIL POLICIES\2018 Policies\Enforcement And Order Making Policy.Docx	March 2019	March 2023	Page 5 of 8



# Enforcement & Order Making Policy

- The reasons for the proposed action
- The opportunity for the person to give reasons within a specified time, why the proposed actions should not be taken.

Council will proceed to make an order without negotiation or notice where Council considers the circumstance or activity constitutes, or is likely to constitute:

- A threat to life; or
- An immediate threat to public health or public safety; or
- In an emergency situation.

Any person whom an order is issued to, has a right to appeal against the order. Any such appeal must be lodged within 14 days of that person's receipt of the order. The Council will ensure that reference to this right of review is included in any order issued.

If an order is not complied with within the time fixed for compliance (or if there is an application for review, within 14 days after the determination of the review), the Council may (subject to the outcome of any review) take the action required by the order. The reasonable costs and expenses incurred by Council in taking action under this section may be recovered by Council as a debt from the person who failed to comply with the requirements of the order. Where an amount is recoverable by Council, Council may, by notice in writing to the person, fix a period, being not less than 28 days from the date of the notice, within which the amount must be paid. If the amount is not paid by the person within that period, the person is liable to pay interest. Council may impose a charge over the land for the unpaid amount, together with interest, in accordance with Section 257(5) of the Local Government Act 1999.

## Action in Regard to a Default

Failure to comply with Orders will incur further enforcement action such as launch of a prosecution.

Where action in regard to a default is provided for by legislation and the necessary work has not been carried out in the time allowed without good reason, Council may undertake the required work. Before doing the work Council will consider whether there is a realistic prospect that the person responsible will complete the work within a reasonable time. Where work in default is undertaken Council will seek to recover all costs over a fair period, using all statutory means available.

The decision to carry out action in default will be made by the Chief Executive Officer or delegate.

Where an offence has been committed, Council may issue an Expiation Notice or launch a prosecution in addition to taking action to fulfil an Order. This will only be done where the conduct of the recipient justifies taking such steps. Factors such as giving false information, the obstruction of Council staff and the harm or risk of harm caused by the recipient's delay will be considered in determining additional enforcement actions.

## Service of an Expiation Notice

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

File Path	Last review	Next review	Page
W:\Council Policies\CURRENT COUNCIL POLICIES\2018 Policies\Enforcement And Order Making Policy.Docx	March 2019	March 2023	Page 6 of 8

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# Enforcement & Order Making Policy

The following circumstances are likely to warrant an Expiation Notice:

- certain breaches of the legislation administered by Council;
- failure to correct an identified problem after having been given reasonable opportunity to do so by an Authorised Officer;
- failure to comply with the requirements of an Order;
- confidence in the individual/other body is low; or
- a written warning has 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 flagrant 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;
- a failure to correct an identified serious problem after having been given reasonable opportunity to do so;
- a failure to comply with the requirements of an Order;
- an established and recorded history of similar offences;
- an unwillingness, on the part of the individual or other body, to prevent a recurrence of the problem; or
- the recovery of the costs of the investigation or remedial work or financial compensation that are required by Council or an aggrieved party.

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

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

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

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

File Path	Last review	Next review	Page
W:\Council Policies\CURRENT COUNCIL POLICIES\2018 Policies\Enforcement And Order Making Policy.Docx	March 2019	March 2023	Page 7 of 8



# Enforcement & Order Making Policy

## Review & Availability

This policy will be reviewed every four years, or as required.

The public may inspect a copy of this policy without charge at the Council offices during office hours and may obtain a copy for a fee fixed by Council

The policy is also available on Council's website [www.claregilbertvalleys.sa.gov.au](http://www.claregilbertvalleys.sa.gov.au)

## References

- Local Government Act 1999
- Fire and Emergency Services Act 2005
- Development Act 1993
- Road Traffic Act 1961
- Dog and Cat Management Act 1995
- Environment Protection Act 1993
- Food Act 2001
- Expiation of Offences Act 1996
- Housing Improvement Act 1940
- South Australian Public Health Act 2011
- Local Nuisance and Litter Control Act 2016

## Document History

Approved by	Issue Date	Minute Reference – Details of Review
CGVC	18/03/19	Created the Enforcement Policy and amalgamated Order Making Policy
CGVC		

SIGNED: .....

CEO

Date: \_\_\_\_/\_\_\_\_/\_\_\_\_

File Path	Last review	Next review	Page
W:\Council Policies\CURRENT COUNCIL POLICIES\2018 Policies\Enforcement And Order Making Policy.Docx	March 2019	March 2023	Page 8 of 8

*Electronic version on the Intranet is the controlled version. Printed copies are considered uncontrolled. Before using a printed copy, verify that it is the current version*