

Compliance and Enforcement Protocol

DOCUMENT PROFILE

Title	Compliance and Enforcement Protocol
Summary	To guide unlawful activity compliance and enforcement in a manner that is accountable and transparent, consistent, proportional and timely and to assist the community in understanding its role and the role of Council in relation to unlawful activity compliance and enforcement
Background	<p>Council is responsible for unlawful activity compliance and enforcement under various legislations with delegated/ authorised officers responsible for the investigation of such matters.</p> <p>Council has an adopted Compliance and Enforcement Policy and the NSW Ombudsman's office encourages as best practice Councils to have a protocol which covers this area and for that protocol to be publically available.</p>
Document Type	Protocol
Relevant Council References	<ul style="list-style-type: none"> ▪ Compliance and Enforcement Policy ▪ Code of Conduct Policy ▪ Complaints Management Policy and Procedure
Applicable Delegation Of Authority	As per delegations' register
Other External References	NSW Ombudsman website
Attachments	See Appendixes
Record Notes	External available document
Version Control	See last page

Document:	Protocol	<i>Uncontrolled Copy When Printed</i>	
Custodian:	Primary Procedural Custodian	Version #	Version #
Approved By:	Group Manager XXXXXX	TRIM Ref #	XXXXXX
Adopted By:	Leadership Team	Publish Location	Intranet/ Internet
Adopted Date and Minute #:	Xx / xx / xx	Next Review Date	XX / XX / xX

1. PURPOSE

xxx

2. BACKGROUND AND OBJECTIVE

Xxx

3. SCOPE

3.1. In scope:

Xxx

3.2. Out of scope:

Xxx

4. PROTOCOL STEPS

4.1. Responding to concerns about unlawful activity:

4.1.1. How reports alleging unlawful activity will be dealt with by Council:

- a) Council will record and assess every report alleging unlawful activity.
- b) Council will respond to every such report unless the person raising the matter has indicated they do not wish to receive a response about Council's handling of the matter, the report is anonymous or it is obvious the matter has been resolved.
- c) Generally speaking, Council's objectives when dealing with reports alleging unlawful activity are to:
 - maintain the collective good and welfare of the community;
 - prevent or minimise harm to health, welfare, safety, property or the environment;
 - consider the broader public interest having regard to Council's priorities and any resource limitations;
 - consider the report fairly and impartially.
- d) Not all reports will need to be investigated. A preliminary assessment of all matters will be made to determine the priority for a response, and whether investigation or other action is required.
- e) An investigation of alleged unlawful activity may take a significant amount of time to complete, particularly where the issues are complex. If Council decides to investigate, staff will give the person who reported the alleged unlawful activity regular feedback on the progress of the investigation, and any reasons for delay. This does not mean that the individual can expect to be given details about every aspect of the investigation or information that would compromise the integrity of the investigation.
- f) Decisions about what action should be taken by Council are made at the Council's discretion. This means the objective is that reports alleging unlawful activity will be resolved to the satisfaction of Council, not necessarily the person raising the matter. Council will generally try to resolve matters as quickly and informally as possible so as to avoid the need to take formal action.
- g) Council staff will endeavour to manage the expectations of people who report alleged unlawful activity, and in particular explain that in the absence of sufficient evidence of unlawful activity, Council may be unable to take further action. They will also explain that Council does not have unlimited resources and powers to deal with reports alleging unlawful activity. If Council is unable to fully investigate or take action on

a matter because it is restricted by any legal or resource limitations, this will be explained to the individual.

- h) While there are certain statutory requirements that must be met in relation to notices and orders, Council staff will ensure that all explanatory communications are made in plain English and explain any technical language the law requires to be used.

4.1.2. Unlawful activity outside business hours:

- a) Unlawful activity can occur outside business hours. In particular, Council may receive reports about matters such as offensive noise, park and reserve usage and failure to comply with limitations on consents and permits of operation during nights and weekends.
- b) Due to resource and operational capability restraints on Council, investigations into alleged unlawful activity outside business hours will be assessed on the basis of risk of harm to health, welfare, safety, property or the environment or it is otherwise in the public interest to take such action.

4.2. Neighbour disputes:

- 4.2.1. 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 issue in dispute. Some reports will raise several matters, some of which will require Council's involvement and some of which will be personal to the parties.
- 4.2.2. Council staff will thoroughly assess such reports to determine whether there is evidence of any possible unlawful activity requiring action by Council. Care will be taken to explain which aspects of a report Council can deal with and which cannot be dealt with and why. Where possible, individuals will be provided with information about how to resolve neighbour disputes including referral information resources such as LawAccess NSW and Community Justice Centres.
- 4.2.3. It is possible that one party will provide further information about a matter which changes Council's decision about whether it will become involved. In such circumstances, Council staff will carefully consider the matter before taking action and document reasons for the new decision. Relevant parties will be advised about the reasons Council has changed its position on a matter. Council staff will not change a decision about whether or not Council should be involved purely as a response to the conduct of an individual such as persistent demands or threats.

4.3. Investigating alleged unlawful activity:

- 4.3.1. Not all reports alleging unlawful activity will warrant investigation. A preliminary assessment of all matters will be made to determine whether investigation or other action is required. Council will prioritise matters on the basis of risk to public safety, human health and environment.
- 4.3.2. If there is insufficient information in the report to undertake a preliminary assessment, further information may need to be sought from the person who made the report or an inspection undertaken.
- 4.3.3. Circumstances where no action will be taken:
 - a) Council will take no further action if, following a preliminary assessment, it is identified that:
 - Council does not have jurisdiction to investigate or is not the appropriate authority to take action on the issues raised. Where there is another appropriate authority or course of action, Council may bring the matter to the attention of the authority or provide information and contact details to the individual. For example,

SafeWork NSW for workplace safety matters; the NSW Environment Protection Authority for possible environmental offences and Community Justice Centres NSW for personal disputes;

- 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. In this case, staff will acknowledge the report and advise that no further action will be taken as no new information had been provided (other than where the person has previously been advised they would receive no further response);
- the allegations relate to a lawful activity (eg where there is an existing approval or the activity is permissible without Council approval or consent being required);
- the report is not supported with evidence or appears to have no substance;
- the relevant Manager, Group Manager, Deputy General Manager 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.

4.3.4. Relevant factors guiding decisions as to whether to take action:

- a) When deciding whether to investigate, Council will consider a range of factors including whether:
- the activity is having a significant detrimental effect on the environment or it constitutes a risk to public safety;
 - the report is premature as it relates to some unfinished aspect of work that is still in progress;
 - the activity or work is permissible with or without permission;
 - all conditions of consent are being complied with;
 - much time has elapsed since the events the subject of the report took place;
 - another body is a more appropriate agency to investigate and deal with the matter;
 - it appears there is a pattern of conduct or evidence of a possible wide spread problem;
 - the person or organisation reported has been the subject of previous reports;
 - the report raises matters of special significance in terms of the Council's existing priorities;
 - there are significant resource implications in relation to an investigation and any subsequent enforcement action;
 - it is in the public interest to investigate the report.

The above are factors for Council to consider and weigh in making a determination. Council staff are not limited in their use of discretion by these considerations and may decide to investigate based on these and other factors.

4.3.5. The objective of the processes Council staff use when investigating incidents of alleged unlawful activity is to:

- a) determine the cause of the incident;
- b) determine if there has been a contravention of law, policy or standards;
- c) gather evidence to the required standard to support any required enforcement action;

- d) determine any necessary action to mitigate the possibility of reoccurrence of similar incidents.
- 4.3.6. Any decision not to investigate an allegation of unlawful activity will be recorded and the reasons for that decision clearly stated.

4.4. Taking enforcement action:

- 4.4.1. When deciding whether to take enforcement action in relation to a confirmed case of unlawful activity, Council will consider the full circumstances and facts of the matter and the public interest.
- 4.4.2. The following common considerations will assist Council staff in determining the most appropriate response in the public interest:
 - a) Considerations about the alleged offence and impact:
 - the nature, extent and severity of the unlawful activity, including whether the activity is continuing;
 - the harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity;
 - the seriousness of the breach, including whether the breach is merely technical, inconsequential or minor in nature;
 - the time period that has lapsed since the date of the unlawful activity.
 - b) Consideration should be given to the nature, extent and severity of any actual or potential impact of the unlawful activity. If there is actual or potential detriment to the natural or built environment, to the health or safety of residents or the amenity of an area, this would normally warrant a decision to take action to remedy or restrain the breach. It is also important to consider whether the unlawful activity is ongoing or has ceased.
 - c) Consideration should be given to whether the likely costs and benefits of any enforcement action is justifiable where breaches result in no material impacts upon any other party or the health, safety and amenity of the environment and community. A breach of a technical, inconsequential or minor nature, in the absence of any other aggravating factor, will generally not warrant a decision to take action to remedy or restrain the breach.
 - d) Legislation may provide time limits in which to commence proceedings and take enforcement action, and sometimes prosecution will be statute barred despite good evidence that unlawful activity has taken place.
 - e) In addition, consideration should be given to the time which the offence or breach occurred and the *reasonableness* of taking enforcement action if a significant time has lapsed since the time of the offence or breach.
- 4.4.3. Considerations about the alleged offender:
 - a) any prior warnings, instructions, advice that was issued to the person or organisation reported or previous enforcement action taken against them;
 - b) whether the offender is, or at least should be expected to be, familiar with the law applicable to their circumstances due to their profession, training or expertise;
 - c) whether the offence was committed with intent;
 - d) whether the person or organisation reported has been proactive in the resolution of the matter and assisted with any Council requirements and instructions;
 - e) any mitigating or aggravating circumstances demonstrated by the alleged offender;

- f) any particular circumstances of hardship affecting the person or organisation reported;
 - g) whether the person or organisation being reported is a community based non-for-profit organisation.
- 4.4.4. Consideration should be given to the previous history of the offender. If prior warnings, instructions or advice has been issued to the person or organisation reported which was not followed, a more formal and coercive enforcement approach would appear more appropriate.
- 4.4.5. Consideration should be given to whether the offence was committed deliberately, recklessly or with gross negligence. It may be appropriate that cases of this nature are more likely to result in prosecution. Where an offence was committed as a result of an accident or genuine mistake, providing education and guidance or a formal warning may be more suitable in achieving desired outcomes.
- 4.4.6. Where the offender has been proactive in the resolution of the matter and has assisted Council in the resolution of the matter, it may be that the public interest would not be best served by prosecuting the offender, especially if the offending conduct or work has been rectified. If the offender has demonstrated a lack of contrition and is uncooperative with the investigation or remediation, a prosecution or monetary penalty would appear more appropriate.
- 4.4.7. Consideration should be given to any genuine mitigating circumstances of the offender such as age, physical or mental health, disability and any financial hardship of the offender resulting in an inability to pay.
- 4.4.8. Considerations about the impact of any enforcement action:
 - a) the need to deter any future unlawful activity;
 - b) whether an educative approach would be more appropriate than a coercive approach in resolving the matter;
 - c) the prospect of success if the proposed enforcement action was challenged in court;
 - d) the costs and benefits of taking formal enforcement action as opposed to taking informal or no action;
 - e) what action would be proportionate and reasonable in response to the unlawful activity;
 - f) whether Council is prevented from taking action based on earlier advice given, ie whether an estoppel situation has been created.
- 4.4.9. If there is evidence of a significant issue of unlawful activity and that matter can be easily remedied by some action on the part of the person the subject of the report, there is a less compelling case for enforcement action, depending on the other circumstances of the case such as the conduct of the offender.
- 4.4.10. If retrospective approval is possible, it may be reasonable to allow an opportunity to obtain this prior to taking other enforcement action. In some cases, compliance by informal means may be the most efficient way to resolve the matter and other enforcement action may not be necessary.

This needs to be balanced with other considerations such as the public interest in enforcing the law.
- 4.4.11. Considerations about the potential for remedy:
 - a) whether the breach can be easily remedied;
 - b) whether it is likely consent would have been given for the activity if it had been sought;
 - c) whether there is a draft planning instrument on exhibition that would make the unauthorised use legal.
- 4.4.12. Legal or technical issues:

- a) Where legal and/or technical issues are in question, Council staff will consider whether legal advice or professional advice (for example heritage, arborist, environmental, engineering etc) from duly qualified staff or other experts should be obtained and considered.
- b) Council may also require a person subject to possible enforcement action to obtain professional advice in relation to issues of concern to Council for assessment as to whether further action is required.

4.4.13. Requirements of Council staff considering enforcement action:

- a) Prior to taking enforcement action, Council staff will take into account the above considerations as well as the evidence gathered during their investigation. Council staff must 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. Enforcement action will not be taken purely as a response to the conduct of an individual such as persistent demands or threats.
- b) Council staff are required to maintain records about critical thinking and decision-making processes in relation to reports alleging unlawful activity and any enforcement action, as well as records of interactions with relevant parties. Council staff will at all times adhere to Council's internal approval processes prior to the commencement of any enforcement action.
- c) Council staff will take steps to ensure that any enforcement action is taken against the correct person or organisation. Where there are multiple possible parties to an alleged unlawful activity, it will generally not be appropriate to take enforcement action against every person who may be liable for the alleged unlawful activity. In such circumstances, Council staff will be guided by legal advice in determining the appropriate persons to pursue.

4.5. Options for dealing with confirmed cases of unlawful activity:

- 4.5.1. Council will try to use the quickest and most informal option to deal with unlawful activity wherever possible unless there is little likelihood of compliance with such options. Council staff will use discretion to determine the most appropriate response to confirmed cases of unlawful activity and may take more than one approach.

Any enforcement action taken by Council will depend on the full circumstances and facts of each case, with any decision being made on its merits.

- 4.5.2. At all times, Council's key concerns are:

- a) to prevent or minimise harm to health, welfare, safety, property or the environment;
- b) to influence behaviour change for the common good and on behalf of the community.

- 4.5.3. The following enforcement options to be considered by Council are ordered to reflect an escalation in response that is proportionate to the level of risk, the seriousness of the confirmed breach or the need for a deterrent:

- a) **Level of Risk/ Seriousness/ Need for Deterrent: Very Low**

Enforcement options:

- take no action on the basis of minor technical issue with no impact or some other appropriate reason;
- provision of information/advice on how to be compliant.

- b) **Level of Risk/ Seriousness/ Need for Deterrent: Low**

Enforcement options:

- negotiating with the person to obtain voluntary undertakings or an agreement to address the issues of concern;

- issuing a warning or a formal caution.
 - c) **Level of Risk/ Seriousness/ Need for Deterrent: Medium**
Enforcement options:
 - issuing a letter requiring work to be done or activity to cease in lieu of more formal action;
 - issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate.
 - d) **Level of Risk/ Seriousness/ Need for Deterrent: High**
Enforcement options:
 - issuing a penalty notice;
 - carrying out the works specified in an order at the cost of the person served with the order.
 - e) **Level of Risk/ Seriousness/ Need for Deterrent: Very High**
Enforcement options:
 - seeking an injunction through the courts to prevent future or continuing unlawful activity;
 - commence legal proceedings for an offence against the relevant Act or Regulation.
- 4.5.4. Following up enforcement action:
- a) All enforcement action will be reviewed and monitored to ensure compliance with any undertakings given by the subject of enforcement action or advice, directions or orders issued by Council.
 - b) Reports alleging continuing unlawful activity will be assessed and further action taken if necessary. If the unlawful activity has ceased or the work has been rectified, the matter will be resubmitted for follow up action to ensure compliance outcomes are met.
 - c) Should initial enforcement action be found to have been ineffective, Council staff will consider other enforcement options.

4.6. Taking legal action:

- 4.6.1. The Council and its delegated staff will be guided by legal advice in deciding whether to commence criminal or civil proceedings and will consider the following:
- a) whether there is sufficient evidence to establish a case to the required standard of proof;
 - b) whether there is a reasonable prospect of success before a court;
 - c) whether the public interest warrants legal action being pursued.
- 4.6.2. Whether there is sufficient evidence to establish a case to the required standard of proof:
- a) Council considers the decision to take legal action a serious matter, and as such will only initiate and continue proceedings once it has been established that there is admissible, substantial and reliable evidence to the required standard of proof.
 - b) The basic requirement of any criminal prosecution is that the available evidence establishes a prima facie case. The prosecutor is required to prove the elements of the offence beyond reasonable doubt.
 - c) In civil enforcement proceedings, Council will require sufficient evidence to satisfy the court that an actual or threatened breach has occurred on the balance of probabilities.
- 4.6.3. Whether there is a reasonable prospect of success before a court:
- a) Given the expense of legal action, Council will not take legal action unless there is a reasonable prospect of success before a court. In

making this assessment, Council staff will consider the availability, competence and credibility of witnesses, the admissibility of the evidence, all possible defences, and any other factors which could affect the likelihood of a successful outcome.

4.6.4. Whether the public interest requires legal action be pursued:

- a) The principal consideration in deciding whether to commence legal proceedings is whether to do so is in the public interest. In making this determination, the same factors to be considered when taking enforcement action apply. (See *Section 4.4 - Taking Enforcement Action*).
- b) The following considerations relate more specifically to the decision to commence legal proceedings and will assist Council and its delegated staff in making this determination:
 - the availability of any 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;
 - whether the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive.

4.6.5. Time within which to commence proceedings:

- a) Council staff must be aware of legislative time limits in which enforcement proceedings must be commenced. Sometimes legal action will be statute barred despite good evidence that unlawful activity has occurred.

4.7. Shared enforcement responsibilities:

- 4.7.1. Some reports will raise matters involving shared regulatory responsibilities between Council and other authorities including the Environment Protection Authority; the NSW Police Force; the Office of Liquor, Gaming and Racing; NSW Fair Trading; NSW Food Authority and Crown Lands.
- 4.7.2. Council recognises that collaboration and cooperation between authorities to address issues of shared regulatory responsibility is the best approach. To this end, where there are shared legislative responsibilities, Council staff will liaise with relevant authorities to establish:
 - a) which authority will take the leading role on any joint investigation;
 - b) which activities each authority will carry out;
 - c) responsibilities for updating an individual where relevant;
 - d) protocols for exchanging confidential information between the relevant authorities.
- 4.7.3. Council will reasonably endeavour to respond to requests for information or assistance on joint regulatory matters in a timely manner.

4.8. Role of Council where there is a principal certifier:

- 4.8.1. Council retains its regulatory role and enforcement powers where a certifier has been appointed the principal certifier. However, a principal certifier is the first point of contact to take steps to address non-compliance with the consent.
- 4.8.2. Principal certifiers have limited enforcement powers. They have the power to issue a notice of intention to issue an order to the owner or builder to comply with the conditions of consent or rectify any breaches. A copy of any notice of

intention issued by a principal certifier must be provided to Council for assessment as to whether Council will enforce the notice by issuing an order.

4.8.3. Council (when appropriate) and the principal certifier will work together to resolve any issues when they arise to achieve compliance with the development consent or complying development certificate. Council staff when contacted will take steps to ensure individuals are clear about which agency performs which role and when.

4.8.4. If a principal certifier has been notified of a non-compliance (when the reported issue clearly relates to the consent) and has had sufficient time to investigate but fails to act Council will investigate.

5. RELATED LEGISLATION, POLICIES AND PROCEDURES/ PROTOCOLS

- Compliance and Enforcement Policy
- Code of Conduct Policy
- Complaints Management Policy and Procedure

6. DEFINITIONS

Complaint means an expression of dissatisfaction made about Council services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.

For the purposes of this policy, a complaint does not include:

- a report alleging unlawful activity (*see definition below*)
- a request for information about a Council policy or procedure/ protocol
- a request for an explanation of actions taken by Council
- a request for internal review of a Council decision

Council means Inner West Council.

Enforcement means actions taken in response to serious or deliberate contraventions of laws.

Estoppel is a legal principle that precludes a person from alleging facts that are contrary to his previous claims or actions. In other words, **estoppel** prevents someone from arguing something contrary to a claim made or act performed by that person previously.

Officer means a Council officer authorised to undertake unlawful activity compliance and enforcement investigations.

Prima facie means something that has been proven or assumed to be true unless there is evidence presented to the contrary.

Regulation means using a variety of tools and strategies to influence and change behaviour to achieve the objectives of an Act, Regulation or other statutory instrument administered by Council.

Report alleging unlawful activity means an expression of concern or a request for service in relation to alleged unlawful activity, where a response or resolution is explicitly or implicitly expected or legally required.

Unlawful activity means any activity or work that has been or is being carried out contrary to and/or failure to take required action in order to be compliant with:

- the 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.
- a legislative provision regulating a particular activity or work.
- a required development consent, approval, permission or licence.
- signage regulating a particular activity.

7. ASSOCIATED DOCUMENTS

Xxx

Version Control - POLICY HISTORY:

Governance Use only - The history of modifications and approval to the Policy must be detailed in the table below post adoption.

Governance Use only:

Version	Amended By	Changes Made	Date	TRIM #
1	Governance: Policy and Risk	New IWC Policy replacing pre-merged versions	June2017	74655.17
2				