



# Enforcement Guide and Procedure

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# Enforcement Guide

## Introduction

Council has statutory responsibilities to ensure compliance with various Acts (including by-laws) by undertaking enforcement action.

As the governing body for the City of Glenorchy, Council must set a high standard in its dealings with the public, by balancing the need to ensure that laws achieve their objectives and are adequately enforced with the right of the community to procedural fairness.

This enforcement guideline provides Council officers with direction about what should be considered before enforcement activities are undertaken.

## Defining Enforcement

Council adopts a broad definition of 'enforcement' which, in the first instance, encourages higher levels of voluntary compliance with legal requirements through to more formal enforcement tools. These include:

- promoting compliance through public awareness information, via website, gazette, information booklets/flyers, and social media
- responding to enquiries and complaints
- inspecting premises either on a routine programmed basis or on a random basis
- issuing warning letters or cautions, and
- formal enforcement (infringement notices, orders, prosecution).

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

## Authorisations/Delegations

Only officers who are competent by training, qualification and/or experience and who hold the relevant delegations are to be authorised to take enforcement action. Officers will act in accordance with Council's Enforcement Policy, this guide and procedure.

Officers are required to present their identification card or evidence of delegated authority (if required) on request from a member of the public.

## Principles guiding enforcement option selection

The following principles are recognised and endorsed as being essential for ethical and effective enforcement and should underpin all enforcement action:

*Graduated* - enforcement action should start with the lowest penalty such as a warning letter, and progress gradually towards the highest available penalty (e.g. prosecution) until compliance is secured. Where the offence creates a significant risk to public order or safety, a

number of enforcement options may be used or a higher level of enforcement action employed.

*Appropriate/Proportionate* - the level of enforcement must be balanced by the severity of the behaviour, action or offence and the potential impacts on the environment and the community. Consider if the breach is only technical and inconsequential or if approval to carry out the offending activity may have been given if it was sought. Also consider whether the breach can be easily remedied and whether the response would be sufficient to encourage behavioural change in the future, remediate damage done and/or eliminate any economic advantage the offender obtained through avoiding compliance?

*Authorised by law* – enforcement officers must have a thorough understanding of their statutory powers (including delegated powers), and must not exceed those powers or take enforcement action that is not authorised by law.

*Consistent* - enforcement agencies and officers should be consistent in the way they apply enforcement actions. There should not be any arbitrary or inexplicable differences in the way individual cases are treated. It should always be considered whether the enforcement action is consistent with enforcement action taken for similar offences?

*Offender culpability* – Consider if the offence was committed knowingly or recklessly. Does a history of non-compliance exist that would warrant an escalated response? Are there particular personal hardship factors that should be considered (e.g. that may prevent the offender from undertaking remedial actions, or that may make proving existing use rights unreasonable)?

*Recentness* – How long ago did the offence occur and is the proposed response within the statute of limitations for the offence?

*Level of evidence* – Does sufficient evidence exist to warrant the action or response? Can the offence be proven to the required standard (e.g. beyond reasonable doubt or on the balance of probabilities)?

*In the public interest* - the overriding consideration in taking enforcement action is to consider whether taking the enforcement action is in the public interest in terms of costs and benefits, likelihood of success, the effect of the outcomes, impacts to council resources, and potential to deter similar offences.

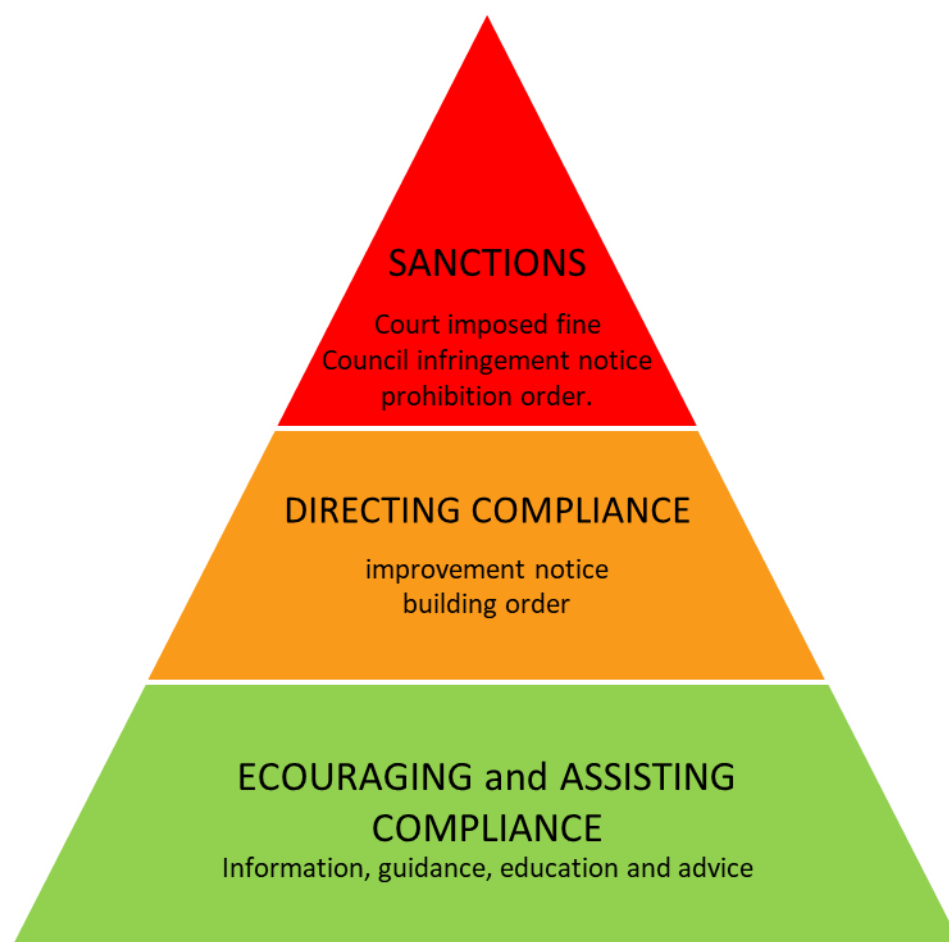
*Likelihood of success* – Consideration should be given to the likelihood of success based on:

- whether there is sufficient evidence available to support the response
- the credibility and competence of any reports or witness statements
- the timeliness of the complaint, the time of the alleged offence, and the effect of any statute of limitations, and
- the likely outcome of enforcement proceedings.

The following diagram represents, in the general sense, the relative volume or proportionate and graduated use of enforcement tools and the ability to escalate if an initial intervention does not achieve the desired outcome.

The lowest level of the pyramid involves an approach which should be employed most frequently, often in combination with other tools, to assist in achieving compliance. Sanctions (such as court actions) are at the top of the pyramid and should generally only be considered as a last resort.

The Council will commence intervention using the tools that are most appropriate in the circumstances. Some tools are alternatives while others may be used in combination.



## Enforcement options

### *Informal advice and letters*

Advice should be routinely provided and must:

- be written in plain English
- distinguish between general advice and legal requirements
- not be beyond the expertise and authority of the officer

- be noted on file and followed up in writing where appropriate, and
- be saved to Council's approved document management system.

### *Written or Verbal Warnings*

Warning letters should be used in instances where the issuing of a higher-level response (i.e. infringement notice) is not appropriate or warranted in the first instance. Warnings letters must:

- be in plain English
- detail the exact nature of the offence
- cite the relevant legislation and clauses breached
- state the required remedial action, in terms of desired outcome
- state the timeframe for compliance
- specify the maximum penalty for the offence
- identify follow-up action intended for non-compliance, and
- be saved to Council's approved document management system.

Warning letters dealing with serious issues must be followed-up at the expiry of the timeframe for compliance. However, written warnings should not be overused as an enforcement response as this may lead to the belief that offences are not taken seriously. In this way they may not deter further offences. A more serious enforcement response should be considered for a continuing non-compliance or a subsequent similar offence.

### *Infringement Notices*

Infringement notices, also called Penalty Infringement Notices (or PINs), involve the issue of a fine prescribed by regulation for the identified offence. Infringement notices can be issued by enforcement officers when it appears that an offence has been committed.

Infringement notices are a well recognised and accepted way of dealing with common breaches of the law where impacts are not considered serious enough to warrant prosecution and are used as a general deterrent to a widespread commission of certain offences.

In some cases, Council will regularly issue infringement notices for offences which are relatively minor because it is the only practical way to deter offenders and prevent the relevant law from being widely disregarded, leading more significant negative impacts. Examples of this are infringements for parking violations or taking dogs into areas where dogs are prohibited.

In other cases, it will only be appropriate to issue an infringement notice as a last resort and after other types of enforcement action have failed. Examples of this are infringements for certain types of planning and development offences which carry much larger penalties.

The following are examples of situations where it would be suitable to issue an infringement notice:

- for minor offences that are 'one-off' instances, or are of a short duration with low to moderate environmental impacts and offender culpability
- when facts appear obvious and well-defined (e.g. the evidence is considered prima facie sufficient to prove the elements of the offence if challenged in court)
- when the penalty can be given at, or close to, the time of the offence, and
- when the penalty (fine amount) is likely to be a practical deterrent.

The following are examples of situations where (depending on the circumstances of each case) it may be inappropriate to issue an infringement notice:

- when further investigations may be necessary to determine whether an offence has occurred or the level of harm
- if evidence is insufficient or unlikely to stand up in court
- if the penalty is either inadequate or excessive for the severity of the offence
- if the breach is ongoing, cannot be rectified easily or is reoccurring
- if many breaches are apparent (it is usually inappropriate to issue more than two simultaneous infringement notices for multiple breaches as multiple breaches often indicate a more serious offence)
- when a period of several weeks or more has elapsed since becoming aware of the alleged breach, and
- if another department/agency is involved and intends to prosecute or use another enforcement option.

### *Notices and orders*

Notices and orders are written directions enforceable by law requiring some action by the identified party. There is usually an offence provision in the legislation to allow a fine for non-compliance with the order or notice.

Generally, notices and orders are applicable to situations that are not seriously urgent. Notices are usually in the form of notices of intent or require the respondent to show cause as to why further enforcement action should not be taken. This is to provide time and opportunity for the recipient to make representations, for these representations to be considered in line with the principles of procedural fairness and for any remedial action required or committed to by the recipient to be taken. In the case of certain types of emergency, some orders can be given without providing a notice of intent.

The appropriateness of notices and orders varies according to their type and the incident. Notices and orders are valuable enforcement tools, as they set a legal framework that is enforceable and contain offence provisions that can lead to significant penalties if they are not complied with.

## Prosecutions

Prosecutions occur in a court of law and seek to provide an appropriate sanction for the offence and to deter the commission of future offences by the same offender and others. They are appropriate when a reasonable prospect of conviction exists i.e. based on strength of admissible evidence, availability and credibility of witnesses.

Prosecution, if successful, has benefits including:

- it may result in court enforced orders which have more strength than other orders
- media coverage of the issue can be used to publicise the offence and consequences
- significant penalties can be handed down which will act as a deterrent, and
- the court may award costs.

However, prosecutions can be lengthy and expensive processes (in terms of both money and resources). They are also high-risk given that outcomes are not able to be guaranteed. Unsuccessful prosecutions can result in:

- a risk of negative media coverage
- high legal costs, and
- reluctance by Council to undertake future prosecutions.

## Ethical decision-making concepts and considerations for enforcement

### Procedural fairness

Procedural fairness is the term used in relation to administrative decision making and requires decision making to be fair and reasonable. This encompasses:

*Fair Hearing* – Any person who is the subject of an investigation has a right to be informed of the substance of the allegations against them and be provided with an opportunity to present their side/an explanation. This must be done prior to an enforcement decision being made.

*Impartiality* – Before deciding on the action to take because of an investigation a Council officer needs to be unbiased and impartial. In other words, they need to make a decision that is not prejudiced in any way.

*Decisions based on evidence* – Investigators must ensure that all decisions are fact-based and that evidence and sound reasoning exists to support these facts. Records should exist to show how evidence has been collected and considered and why decisions have been made.

*Acting in good faith* – Investigations must be conducted in an ethical manner and no individual / corporation is to be subjected to any threat, inducement or other compelling circumstance in providing information. Procedural Fairness also requires Council to carry out the discharging of duties under law in a fair and equitable manner that is consistent with policy and procedure adopted by the regulatory authority.



## Discretion

Discretionary powers are powers granted either under statute or delegation that allows the decision maker to decide what should be done in each situation, having regard to the applicable law, policy, relevant public interest considerations and the facts of the individual case. Simply put, it is the answer to the question: 'what is the right thing to do in the circumstances?' and embraces the notion of procedural fairness outlined above.

Councils and Council officers have a moral and ethical obligation to consider the effects of rigid adherence to the letter of the law on members of the community when exercising discretion. Unintended, inequitable or unreasonable treatment of an individual or organisation resulting from administering the law must be mitigated. Where the law does not give an agency a discretion, fairness may mean adopting a broad interpretation in certain circumstances, rather than a rigid adherence to the letter of the law.

The role of Council officers is to make a judgement considering all relevant information. In exercising discretionary powers, decision makers are obliged to:

- use discretionary powers in good faith, including for the intended and authorised purpose
- base their decisions on facts and findings supported by the evidence, only relevant considerations and not irrelevant ones
- give proper, genuine and realistic consideration to the merits of each case, including weighing up the relative importance of relevant factors
- exercise the discretion independently and not under the dictation of a third person or body
- make decisions in accordance with a rule or policy but without applying the policy inflexibly
- consider, and act, in the public interest where appropriate and within the scope and purpose for which they were provided in the legislation, and
- observe the basic rules of procedural fairness.

## Acting in the public interest

Council staff must exercise any discretionary powers, in ways that promote or preserve the public interest. The 'public interest' refers to the benefit to society, the public or the community, rather than to individual or sectional interests.

As public interest is difficult to define, it is helpful to consider what is clearly *not* in the public interest. This includes:

- private interests of an individual or individuals
- personal interests of the decision maker
- personal curiosity - what is of interest to know as opposed to something that is of interest to the public in general

- personal opinions - for example, the political or philosophical views of the decision maker, or considerations of friendship
- parochial interests - the interests of a small or narrowly defined group of people with whom the decision maker shares an interest or concern
- partisan political interests - for example the avoidance of political/council embarrassment.

The act of exercising discretion can add a level of complexity to the decision-making process, as the decision to be made may not be straightforward. There are a range of considerations that Council need to consider when deciding to take enforcement action, or deciding which action is appropriate.

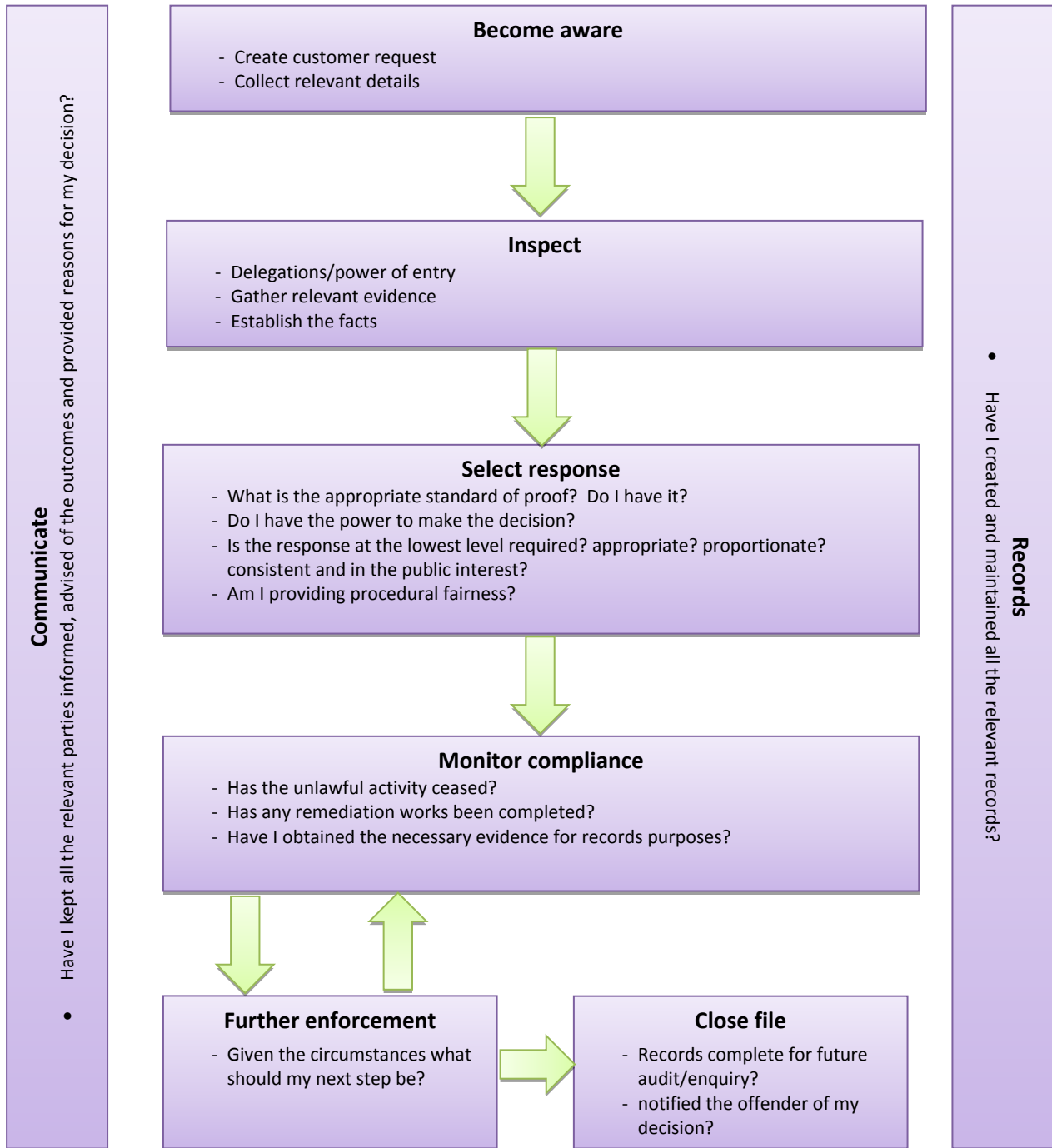
In some cases, the appropriate response to non-compliance will be dictated by the relevant legislation that will require particular enforcement action to be taken. In other cases, the legislation will provide the specific framework for council to enforce the rules and regulations, but how council chooses to enforce will remain at its discretion.

Some examples that may be taken into consideration when considering the public interest:

- would the intended outcome be best for the collective good and for the welfare of the community generally?
- would the decision/discretion constitute a significant and unreasonable allocation of Council resources (ie prosecution)?
- is the unlawful activity solely a minor technical nature and any enforcement is not warranted?
- would the cost outweigh the benefits?
- what is the likelihood of success for the level of intervention?
- would the enforcement option deter similar offences?

Acting in the public interest is more than legal compliance and is as much about process and procedure as it is outcome. It is also to do with what is right at the time.

# Enforcement Procedure



## Risk vs Enforcement Option Matrix

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:

Level of risk	Enforcement options
<b>Very low</b>	<ul style="list-style-type: none"> <li>• take no action on the basis of a lack of evidence or some other appropriate reason</li> <li>• provision of information/advice on how to be compliant</li> </ul>
<b>Low</b>	<ul style="list-style-type: none"> <li>• negotiating with the person to obtain voluntary undertakings or an agreement to address the issues of concern</li> <li>• issuing a warning or a formal caution</li> </ul>
<b>Medium</b>	<ul style="list-style-type: none"> <li>• issuing a letter requiring work to be done or activity to cease in lieu of more formal action</li> <li>• issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate</li> </ul>
<b>High</b>	<ul style="list-style-type: none"> <li>• issuing a penalty notice</li> <li>• carrying out the works specified in an order at the cost of the person served with the order</li> </ul>
<b>Very high</b>	<ul style="list-style-type: none"> <li>• seeking an injunction through the courts to prevent future or continuing unlawful activity</li> <li>• commence legal proceedings for an offence against the relevant Act or Regulation.</li> </ul>

## Document Control

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