

# SOUTH WAIRARAPA DISTRICT COUNCIL

9 AUGUST 2017

---

## AGENDA ITEM D4

### COMPLIANCE, ENFORCEMENT AND PROSECUTIONS (PE GROUP)

---

#### **Purpose of Report**

To inform Councillors of the content and purpose of the Planning and Environment Groups instruction for "Compliance, Enforcement and Prosecution" activities.

#### **Recommendations**

Officers recommend that the Council:

1. *Receive the Compliance, Enforcement and Prosecutions Report (PE Group).*

## **1. Executive Summary**

The nature of work undertaken in the Planning and Environment Group means that staff are often faced with managing and/or responding to a wide range of compliance, enforcement and prosecution issues.

Consequently an instruction to cover these activities has been developed and adopted for staff to apply in such circumstances. No instruction or policy previously existed.

This "instruction" is presented to a) provide context for Councillors about when/how/why officers engage in these areas and b) to enable Councillors to gain an understanding of the key drivers, principles and process limits around such activities.

## **2. Background**

The functions of the Planning and Environment Group are predominantly regulatory in nature. This field is not an easy space to work in, but any effective regulatory system has at its core, the ability to force compliance with legally established policies and rules.

It is an expectation placed upon Council by parliament when laws are enacted, that Council will undertake enforcement in all its guises to protect individuals from harm caused by others and to enforce what parliament has defined as the wider public interest.

Many of the policies and rules are contained in statute (Acts), with Council being the nominated (by parliament) mechanism through which they are applied and enforced. In this case Council has no option but to apply and enforce the law as written. This is a prescriptive approach.

Statutes in the main however, have combinations of policies and rules within them, but at the same time enable Council to overlay a local context.

This is partly prescriptive and partly enabling. Some enable or empower Council to make policy and rules with reference to a loose guidance framework (principles and purposes). This can be even more enabling.

Most acts however have a set of regulations made by order in Council attached to them which direct how key components are implemented.

Regulations tend to be prescriptive in nature as they are the tool by which an Act is implemented. In addition acts can have specified codes tied into them, while others enable other forms of regulation to be promulgated by government such as an NPS or NES under the Resource Management Act.

Regardless, but in every case, policies and rules (regulations) have to be administered fairly and without favour by Council, as in every case where a person is affected by a council action, they have a right of appeal in some form or another.

Often the statutes contain and set out in detail these appeal rights and processes and the grounds that can be tested on review/appeal before specialised authorities set up for that specific purpose.

Thus many statutes contain provision for "Courts" or "Independent Authorities" to consider these appeals (e.g. Environment Court, ARLA, BIA) by way of a full review of Council's actions, decision making process, policies and facts.

Where that is not the case, the statutes enable challenges to be made instead before the District Court (and if required right through to the Supreme Court of NZ). In these case the process is very strict and quite legalistic in context and requirements.

What all that means is that we are involved in a very serious process when it comes to compliance, enforcement and /or prosecutions.

### **3. Discussion**

#### **3.1 Content and key principles of CEP Instruction**

This instruction is broken up into 3 sections, commencing with compliance, then enforcement and lastly prosecutions.

This structure enables the detail in the first section to underpin the following section and then for that to underpin the final section.

In other words when dealing with a compliance matter only the matters in compliance is applied, when dealing with enforcement the matters in

compliance and enforcement are jointly considered, and for prosecutions all 3 are conjunctively applied.

The reason for formatting the instruction in this way is that compliance represents the broadest reach of our regulatory activities (refer to pyramid on page 6) and in a systematic sense is where things start for staff.

At the next 2 levels, detail and consideration must expand commensurate with the potential harm to be addressed and extent of penalty that could be imposed (some statutes envisage imprisonment for instance or fines in the hundreds of thousands of dollars following a prosecution).

Having said that another key principle in the document is that you do not escalate through those levels of action, rather staff must exercise careful judgement at the beginning to “plug” the event of concern into the “right” level of response.

There are other over-lying extra judicial principles at work throughout the document; the principles of the separation of functions and natural justice.

In short the separation of functions principle means that decisions are taken only on the facts and on the basis of law. There must not be any other driver such as political interest or financial consequence or bias or predetermination. Thus in a Council system the decision to act is taken by officers as an “operational” matter.

That concept flows in part but not wholly, from the long established “principle of natural justice” which has been applied for centuries under the “Westminster” form of government. In prosecutions natural justice comes to the fore, but in reality it applies within every form of action we take, that is it underlies our responses.

The principle of natural justice is founded upon the notion of the individual’s right to a fair trial or hearing, and this aspect is “referenced” throughout the Solicitors Generals Prosecution Guidelines which we apply.

In the CEP instruction, where it sets out the requirements on how, when and for what reason staff act, any directives are founded on and directly relate to the natural justice principle.

### **3.2 Content for compliance**

The main idea behind the compliance section is that we generally seek to help, aide and assist parties to achieve compliance. We do that through a wide range of tools, most of which do not have a regulatory structure, but which nevertheless have a regulatory end, that people act/operate lawfully.

This means that promoting good behaviour through education, advice, incentives and general encouragement and direction, are the key focus; although lighter forms of enforcement may also fit into this space (e.g. an instant fine).

### **3.3 Content for enforcement**

The enforcement section is implicitly based on the idea that a problem likely sits beyond education alone and other normal compliance activities due to the level of actual or potential (risk) harm.

Education, advice and the like are still important but they sit in a different context as our actions need to be more formal (a formal written warning with a clear pathway to being fined or subject to an enforcement order, but still with advice on how compliance can be achieved).

Documentation of all interactions becomes much more important as well, as enforcement can be an outcome. A range of enforcement tools may be used such as enforcement notices or abatement notices or notices to rectify or fines.

### **3.4 Content for prosecutions**

The section on prosecutions is predicated on an assumption that something serious is at stake or has been caused. In one sense it is like reaching “the end of the road”, there is nowhere else to go with a problem but to Court so that an independent decision can be made. That decision is based on seriousness and consequence. The prosecutions section sets out how those two factors are to be determined and acted upon.

## **4. Conclusion**

While the Compliance, Enforcement and Prosecutions Instruction can be further developed, it now provides a reasonably sound basis for staff to engage in these core activities.

## **5. Appendices**

Appendix 1 – PE Group Compliance, Enforcement and Prosecutions Instruction

Contact Officer: Murray Buchanan, Group Manager, Planning and Environment

# **Appendix 1 – PE Group Compliance, Enforcement and Prosecutions Instruction**

2017

# Compliance Enforcement and Prosecutions

## South Wairarapa District Council - Practice Note 2

ISSUED BY

MURRAY BUCHANAN - GROUP MANAGER, PLANNING AND  
ENVIRONMENT GROUP

JULY 2017

# Contents

## 1. General

## 2. Our approach to compliance

### 2.1 Overview

### 2.2 Clear principles

### 2.3 What we are trying to achieve

### 2.4 Achieving a law abiding society

## 3. Our approach to enforcement

### 3.1 Overview

### 3.2 Clear principles

### 3.3 Making enforcement decisions

### 3.4 Enforcement options

## 4. Our approach to prosecution

### 4.1 Overview

### 4.2 Clear principles

### 4.3 Making prosecution decisions

### 4.4 Other matters

# 1.0 General

## 1.1 Compliance, enforcement and prosecutions

Under statute Council is required to manage a wide range of activities. These include subdivision, land use and development, building works, food, the sale and supply of alcohol, dogs and stock, littering (and parking), various trades, and nuisances.

Council develops local regulation through Bylaws and Policies which reinforce the statutory roles it has a duty to undertake. These local bylaws and policies cover public nuisances and risks to public health, safety, social controls or the environment.

The primary purpose of all statute is to protect people and the environment, whether built or natural, from harm.

## 1.2 Our statutes, bylaws and policies

The Council has a duty to act on and apply regulatory requirements set out in the statutes, bylaws and policies below. In addition Council has developed a suit of bylaws under the statutes listed above and these fit under the title of **Council policies, plans and bylaws**. These are set out in the following tables;

<b>Primary Statutes</b>	<b>Secondary Statutes</b>
<a href="#">Building Act 2004</a>	<a href="#">Prostitution Law Reform Act 2003</a>
<a href="#">Resource Management Act 1991</a>	<a href="#">Gambling Act 2003</a>
<a href="#">Local Government Act 2002</a>	<a href="#">Racing Act 2003</a>
<a href="#">Local Government Act 1974</a>	<a href="#">Hazardous Substances and New Organisms Act 1996</a>
<a href="#">Reserves Act 1977</a>	<a href="#">Biosecurity Act 1993</a>
<a href="#">Sale and Supply of Alcohol Act 2012</a>	<a href="#">Psychoactive Substances Act 2013</a>
<a href="#">Food Act 2014</a>	
<a href="#">Health Act 1956</a>	
<a href="#">Dog Control Act 1996</a>	
<a href="#">Impounding Act 1955</a>	
<a href="#">Freedom Camping Act 2011</a>	



<b>Consolidated Bylaws</b>	<b>Other Bylaws</b>
Part 1 – Introduction	Camping in Coastal Areas 2009 (Amended 2013)
Part 2 - Public Places	Prostitution Bylaw 2009
Part 3 - Trading in Public Places	South Wairarapa Liquor Control Bylaw 2011
Part 6 - Fires in the Open Air	Featherston Liquor Bylaw 2011
Part 8 - Animals, Poultry and Bee Keeping	Dog Control Bylaw 2013
Part 15 - Beauticians, Nail Technicians, Tattooists and Skin Piercers	
Part 16 - Food Safety	

<b>Policies</b>	
Coastal Erosion (G)	Dangerous and Insanitary Buildings (S)
Development Contributions (2015-25 LTP) (S)	Earthquake Prone Buildings (S)
Naming of Public and Private Roads and Rights of Way Policy (G)	Street Days, Appeals and Raffles Policy (G)
Gambling Venues 2016 (S)	TAB Board Venues 2016 (S)
Local Approved Products Policy 2013 (S)	Control of Dogs 2013 (S)
Naming of Public and Private Roads and Rights of Way Policy (G)	Urban Tree Policy (G)
Street Banners and Flags Policy (G)	

Note: (S) Statutory policy – has legal force

(G) Non statutory policy – administrative

## 1.3 Purpose of Instruction

The achievement of the aims of these regulatory regimes is fundamental. There must, at a minimum, be general compliance with the requirements specified.

Achieving effective compliance and therefore the regulatory protections and outcomes desired by Parliament and our community, is a responsibility that both the Council and the wider community share.

Recognising that partnership, the purpose of this Instruction is to:

- inform the public of our approach to compliance, enforcement and prosecution under legislation when an enquiry is received;
- guide and assist officers in the performance of their compliance, enforcement and prosecution functions;
- enable consistent, appropriate and effective decision-making on compliance, enforcement and prosecution matters.

This instruction:

- is not to be treated as legally binding;
- is deliberately general;
- is not designed to exhaustively address **all** statutory limitations or considerations;
- does not confine, restrain or limit the discretion to take action;
- is not a substitute for specific legal advice or legal processes.

Officers considering exercising any statutory authority under any statute identified must be cognisant of the particular provisions of the applicable act and should obtain independent and specialised legal advice on their obligations where needed.

# 2. Our approach to compliance

## 2.1 Clear principles

Any system must have clear principles on which it is based. The principles we apply in our approach to compliance are:

***Get it right up front*** - we think it is in the interests of those regulated that we get things 'right first time'. We will

- work with those subject to regulation
- seek to guide and assist
- provide contact points and telephone numbers for further dealings
- encourage businesses and others to seek guidance or information from us.

***Keep things simple*** - compliance will be kept as straightforward and simple as possible in the circumstances. We will

- provide information and advice in plain language.
- disseminate information as widely as possible, through information leaflets, newsletters, guidance and on our website where practicable.

**Assist people** - support will be given when people need help to comply.

We will

- understand mistakes happen
- help rectify mistakes when they are brought to our attention openly and early
- encourage and support disclosure of unintentional non-compliance

**Encourage complaints** - as an important part of an effective environmental, social, economic and cultural management system we will seek to raise awareness of compliance.

We will

- maintain an easy-to-use complaints process
- raise people's awareness of compliance requirements.
- use complaints as information about non-compliance and things going wrong.
- use complaints as a means of identifying people who are not complying.

**Recognise good practice** – we will encourage good performance.

We will

- recognise of good practice
- identify and promote examples of good practice
- improve awareness and compliance by promoting solutions for others to follow

## 2.2 What we are trying to do

The regulatory activities we undertake provide for a range of health, safety, environmental and economic benefits for residents of the South Wairarapa.

Each statute specifies the purpose of the legislation and this should always be considered as a first step and to gain an insight into what parliament intended.

All statutes require a law abiding society if they are to be achieved. The key areas of achievement can be described as:

### **Our environment**

We are able to live in a built and natural environment that contributes to our social and cultural wellbeing.

### **Our buildings**

We are not exposed to actual or potential harm because our buildings are safe, sanitary, and have good amenity.

### **Our economy**

People are encouraged to carry out business in the district and contribute to our economic wellbeing.

### **Our people**

People are free of the harm arising from unsafe food, the effects of excessive consumption of alcohol, nuisances, are not distressed or intimidated by animals and can travel safely about the district.

## 2.3 Achieving compliance

Everyone wants and understands the benefits of a law abiding society. For us, this means and is achieved, when;

*“a person, business or activity meets the required standards, rules or policy in relation to environmental or economic or societal or cultural requirements and holds and operates in accord with licence/ permit /consent conditions and approvals”.*

An effective approach in this context, is one that

*“achieves required bottom lines without imposing unnecessary delay or consideration or expense for generally law abiding residents, visitors and businesses who may be subject to regulation”.*

We nevertheless expect everyone to comply with the regulatory requirements which we are responsible for. In that regard we know that most people are willing to comply with those obligations.

Some though will fall short from time to time but not because of any deliberate intent.

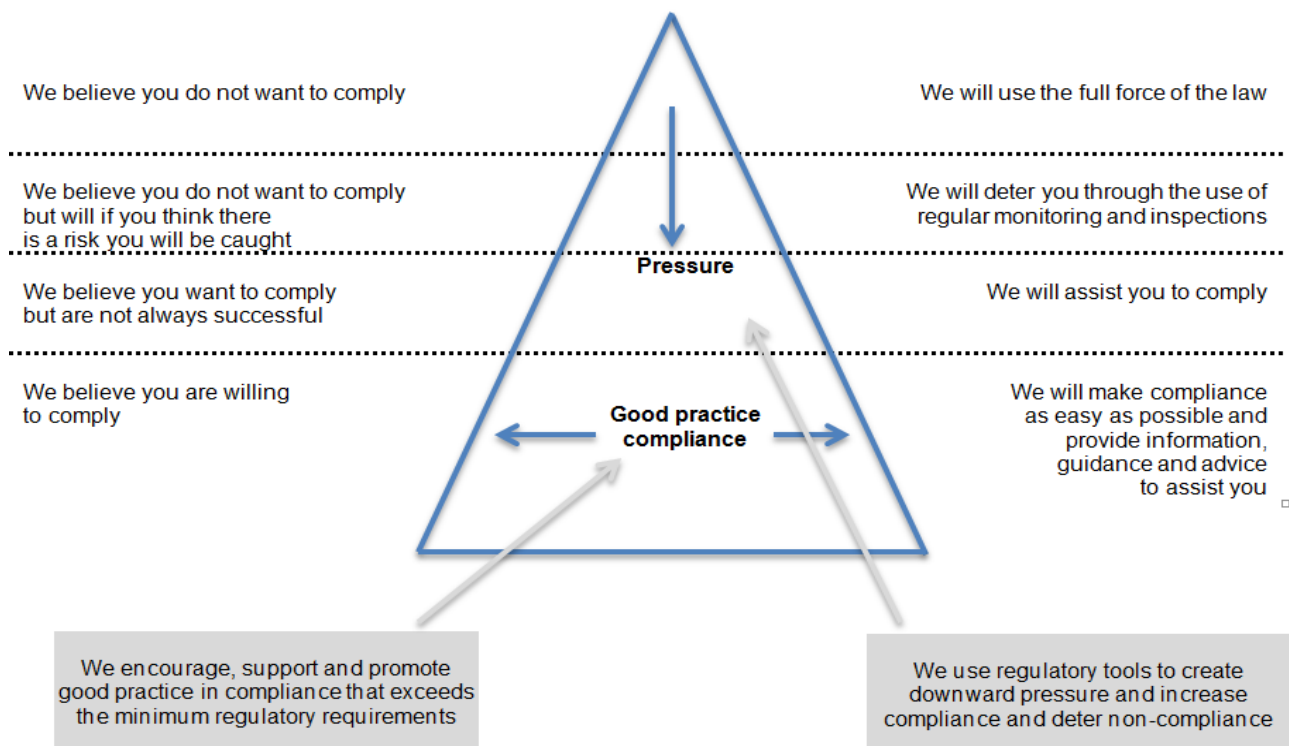
A minority of people will refuse to comply or comply only because there is a credible risk that their non-compliance will be detected and it will result in serious consequences.

Thankfully these people are rare.

The pyramid following displays this pictorially, at the bottom are those who are willing to and do comply, while at the top are those who refuse to comply (require enforcement or even prosecution).

### Attitude of person

### Approach to compliance



*Note: Derived from the Braithwaite Compliance Triangle (after KCDC Strategy)*

We will use educational and regulatory tools to create downward pressure in terms of this pyramid to increase compliance and deter non-compliance. Attitudinally we need to recognise that non-compliance can have a range of causes, in particular that people

- may not be aware they are not complying

- may not understand what is required in order to comply
- think the risk of being caught is low
- are risk takers who are prepared to pay the penalty if caught
- have made a conscious decision not to comply, regardless of the consequences.

As noted above (in the pyramid), our approach to compliance needs to be scaled to recognise that the range of causes set out above can drive non-compliance. This in turn demonstrates our approach will need to vary according to the attitude and performance of the individual.

We need to

- make it as easy as possible to comply, for those who want to comply
- assist those who are trying to comply but are not succeeding
- deter those people who are thinking of not complying
- use the full force of the law for those who refuse to comply.

We have a range of tools or interventions at its disposal to assist those people who are willing to comply including education, advice and direction.. ‘

## 3. Our approach to enforcement

### 3.1 Clear principles

The enforcement process covers the mechanisms and options that **compel** compliance. So the following should be read and interpreted in conjunction with the discussion around compliance.

For enforcement, mechanisms tend to be more formal but may still be informal. They are likely to involve exercising discretion to adopt a particular enforcement response appropriate to the circumstances.

Any enforcement process must also have clear principles on which it is based. This means we will take similar approaches in similar circumstances, but it does not mean uniformity.

Each case and set of circumstances is unique and must be handled as such. The principles we apply in our approach to decisions around enforcement are:

***Fair and consistent*** - *compliance responsibilities will be carried out in a fair, equitable and consistent manner. We will*

- be unbiased and objective
- avoid value judgements about people
- consider the principles of good administrative practice and natural justice
- treat people equally without favour to any one group or sector over another
- be timely and act without interference
- exercise judgement in individual cases with each case treated on its merits
- be consistent in our actions and decisions

***Open and honest*** - *our approach to enforcement and how we make our decisions will be open and honest. We will*

- ensure those affected by our decisions have opportunities to question us and seek review
- provide suspected individuals an opportunity to explain the circumstances surrounding any alleged offence including any statutory defences.

**Disclosure of errors and mistakes** - people are encouraged to inform us of mistakes leading to unintentional non-compliance. We will

- keep the details of any person who has laid a complaint with us about a potential compliance issue confidential
- keep a complainant informed, within legal and privacy requirements, on the progress and resolution of the complaint
- be understanding and sympathetic when genuine mistakes or errors are voluntarily disclosed to us early
- help and assist individuals and organisations that have made open and early disclosures when practicable
- take firmer action in respect of incidents where there has been a deliberate effort to hide an error or mistake
- if an error or mistake is significant or harmful still take appropriate enforcement.

**Fact led** - all information held by Council is to be utilised when making decisions. We will

- use and consider information obtained from audits, inspections, reviews, and applications
- share information, where appropriate, with and received from other agencies
- ensure consistency of approach with other agencies
- meet Privacy laws
- respect and protect the rights of people

**Priorities** - our efforts will focus on people or organisations we know are unwilling to comply. We will

- prioritise areas where Council has sole responsibility for enforcement and matters that could cause the greatest harm
- respond to and reflect public thinking and expectations of compliance
- take firmer action against deliberate, deceptive or negligent behaviour
- take strong action where any behaviour causes harm to people or adversely affects the interests of communities.

**Cost recovery** – our efforts will focus on making the offender pay their share of costs. We will

- recover costs associated with enforcement from the responsible parties
- minimise costs to ratepayers
- recover monitoring costs in relation to consents / permits / licences in accordance with Policy and the provisions of the law.

## 3.2 What we are trying to do

The following is not intended to be an exhaustive list of the factors we should consider when making enforcement decisions. Rather it is an indicative list of the most common things to assess. Other factors may exist in particular circumstances. These need to be identified and a targeted response developed.

### **Harm**

This is a **primary** factor in decision-making. It includes harm or potential harm to people or the environment. Harm can be to individuals or the community as a whole (public interest).

Actions that create risks but do not lead to actual harm can be serious and require a firm response. Safety is often a key factor here.

So we need to carefully consider the nature of the harm caused or likely to be or which could possibly be caused including whether the harm is:

- temporary, can be remedied or mitigated, or is permanent
- limited or widespread
- trivial or
- affects or is likely to affect, a particular person, group or environment or
- the particular person, group or environment is particularly vulnerable or sensitive.

### ***Behaviour***

The behaviour of the individual or party responsible for the issue is highly relevant. The main factors which should be considered include whether the:

- person or party has come to our attention for this type of issue previously
- issue is likely to be a one-off incident or is part of pattern of behaviour
- issue was a misunderstanding, accidental, careless, negligent or deliberate or they relied on advice from a third party
- person has profited or benefited directly from the issue
- person notified us of the compliance issue
- person acted alone, or acted under the control or direction of another or as part of a group or was the instigator
- person attempted to prevent the harm and if so, how soon after the issue arose and whether the actions taken were effective
- person has taken any steps to avoid such issues or incidents in the future and
- it is current or some time has passed since the issue or incident and
- there have been previous actions against the person and if so, the outcome.

### ***Attitude***

The attitude of a person to compliance is an important consideration. Belligerence, aggression and denial are core factors in influencing likely behaviour of a suspected person and level of response we may have to adopt.

Attitude is however usually better evident through the actions they have taken or not taken to be compliant.

Even if they have a high level of willingness to comply, this does not prevent significant action being taken against them for other reasons.

The factors which should be considered include whether the person:

- is willing and able to comply
- is willing but not able to comply and, if so, whether the reason they are not able to comply is within their control or not
- is reluctant or unwilling to comply
- has made a deliberate decision not to comply.

### ***Public interest***

Public interest factors are not specific to the person responsible for the compliance issue, instead they concern the public at large. Public interest can be a poorly understood.



The requirements for public interest tests are discussed in the “Our Approach to Prosecution” part of this policy.

### 3.3 Achieving enforcement

A range of enforcement options are available. There is no universal set across our group however. The compliance “pyramid” therefore is an invaluable guide to our thinking in relation to enforcement decisions.

- a) Where a person is willing or cooperative, where the harm is minor and the situation may have been unintended, written advice or guidance on compliance, or a formal warning may be what is required. *The purpose here is to educate, assist and sustain compliance so as to avoid any future offence coming to our attention.*
- b) Where the person may be unwilling to comply a formal warning, a compliance notice such as an abatement notice or notice to fix, or an infringement notice could be used. *The purpose here is to avoid, mitigate or remedy harm and to stop unlawful activity and to deter and educate others.*
- c) When dealing with persons who have decided not to comply or where the harm caused may be significant and/or the conduct intentional, our focus would be to prosecute, cancel a licence or permit, or impose a fine. *The purpose here is to avoid, mitigate or remedy adverse effects and to stop unlawful activity and to deter and to penalise offenders.*

The choice of the most appropriate enforcement option for the issue involved – *the right option at the right time* – is not reliant on any graduated approach to the issue even if the levels of response are graduated.

Enforcement options should not be used progressively / escalated (from the base up, one action leading to another on a higher level). Action should be taken using the most appropriate enforcement available in the given circumstances.

The enforcement options we have available to us include;

#### **Advice or guidance**

It is important that people have access to good quality information on how to comply with regulatory requirements.

Minor incidents should be dealt with by means of informal action such as drawing the matter to the attention of the person responsible and giving appropriate guidance.

Advice and guidance material takes many forms including verbal or written advice, or reference to other sources of information such as the Council website, FAQs, alerts, leaflets, newsletters, and posters.

Rarely will a minor or technical infringement result in more formal action being taken, particularly if it is capable of immediate rectification.

In these cases a follow-up visit should generally be made, to verify that minor matters have been rectified.

**A written record of action so that we can check for previous behaviours / attitude must be made.**

If previous advice has been ignored or if there is another factor that warrants action exists, a more formal response may occur.

#### **Formal warning**

A formal warning is always documented by way of a letter to a person informing them that an offence has been committed and that they are liable, but that no further action is to be taken in respect of that offence.

The person is to be informed that the formal warning will be documented and recorded and taken into account should there be further offending.

The types of situations where a formal warning may be given are when:



- an administrative, minor or technical breach has occurred;
- the harm, or potential harm, is minor or trivial in nature;
- a person does not have a history of offending;
- the matter is one which can be quickly and simply put right;
- a written warning would be appropriate in all the circumstances.

### **Publicising enforcement action**

Any publicity about enforcement matters should be restricted to the simple fact that we are undertaking enforcement action in respect of an alleged breach.

Under no circumstance during the course of an action, can any information be given that can lead to the identification of the names of the defendants, or other parties to proceedings.

### **Audits and inspections**

We have powers organisationally and in some case individually to conduct announced and unannounced inspections to check on-site compliance. We can also conduct more in-depth audits to determine compliance.

### **Statutory powers**

We have a range of statutory tools available under legislation for more formal enforcement. Key statutory powers include the following:

- **Excessive noise direction**

We may issue an excessive noise direction in writing or verbally, that requires a person to immediately reduce the excessive noise to a reasonable level. This direction is additional to any power to issue an abatement notice or take an enforcement order for excessive noise. The issue of a notice binds a person to cease or reduce the noise for a period of up to 72 hours. Contravention of the direction can result in seizure or incapacitation of the device causing the noise.

- **Compliance notice such as an abatement notice or notice to fix**

These notices under the Resource Management Act 1991 and the Building Act 2004 are written directives. They are drafted and served to instruct an individual or company to cease an activity, prohibit them from commencing an activity or requiring them to do something. The form, content and scope of these notices is prescribed in statute. It is an offence to fail to comply with these notices.

- **Enforcement order or injunction**

An enforcement order can direct a person to cease an activity, or to take particular action. An application for an enforcement order must be made to the Environment Court. It is an offence to fail to comply with an enforcement order. In some of our regulatory roles, we have the ability to seek a court injunction to require a person to undertake something they have refused or previously failed to do.

- **Cancel, amend, suspend or refuse to renew a licence, consent or permit**

We have the ability to cancel, amend or suspend licences where the

- grounds for being licensed are no longer met
- licence holder is failing (or has failed) to comply with the Act and/or
- false or misleading information has been provided

- **Infringement notice**

An infringement notice alleges that a person has committed an offence which requires the payment of a fine. If the fine is paid the matter is concluded. Payment of the fine does not lead to the recording of a criminal conviction. However the person can elect to have the matter

heard in court. The actual fine for each type of offence is set within a statutory schedule or bylaw. The types of situations where an infringement notice may be issued are

- there is sufficient evidence of a breach
- a one-off or isolated breach has occurred which is of a lesser nature which can be remedied easily
- it is likely to be a sufficient deterrent.

### ***Enforcement Decisions***

The decision-making process for enforcement decisions will involve the officer who conducted the investigation (initial recommendation), their line senior (confirmation of recommendation), the Group Manager (authorisation) and where appropriate the CE.

A proposal for enforcement action that involves a fine, prosecution or application to court must be referred to the line senior who will liaise with the Group Manager responsible for authorising such actions (authorisation may be by way of general delegation).

### ***Investigating Officer***

Where information about a compliance issue comes to our attention an initial investigation will be conducted by the Officer responsible for that subject area. The powers that may be exercised by Officers are prescribed in their position descriptions or in formal delegations (for statutory powers), and vary according to the area for enforcement and the nature of the enforcement option.

## **4. Our approach to prosecution**

### **4.1 Clear principles**

Prosecution of an individual or business is a serious matter. The consequences of conviction can be severe. We should always take great care in determining whether to follow this course of action both from the offender's perspective and in terms of what we wish to achieve.

The principles set out in section 3.1 for enforcement all apply to prosecutions to a greater or lesser degree and must be considered.

Section 3.2 sets out in broad terms what we are trying to do for enforcement. This applies for prosecutions.

### **4.2 Achieving a prosecution**

The standards of good prosecution practice expressed in the Solicitor-General's Prosecution Guidelines (2013) are to be adhered to. Our prosecutions are conducted by external lawyers and while the Solicitor-General's Prosecution Guidelines are not binding on local authorities, they represent best practice.

#### ***Prosecution***

A prosecution is initiated by laying criminal charges in the District Court. This will only commence after a rigorous assessment process involving:

- a thorough investigation
- an independent legal review
- authority to prosecute being given by the Group Manager PE and/or CE  
(Note: CE, to advise Audit and Risk Committee).

Such matters are heard by a District Court Judge or High Court Judge. All criminal evidential rules and standards must be met in a prosecution. A successful prosecution will generally result in a

conviction, and a penalty may be imposed. Some legislation enables substantial fines and even imprisonment upon conviction.

### ***Negotiated settlements***

A person may propose a settlement. Resolving non-compliance by agreement where a remedy is possible is acceptable. A negotiated settlement can be achieved that is prompt, easily implemented and in the public interest. Negotiated settlements tend to result in lower costs to the parties, faster outcomes, and greater flexibility of terms and outcome.

A negotiated settlement typically requires all or some of the following

- the person to admit that they are likely to have breached the law
- cessation of the non-compliant conduct
- payment of compensation - pay our costs
- appropriate publicity.

A negotiated settlement will only be agreed to if it is in the public interest. It is unlikely that an agreement to a negotiated settlement where the non-compliance has caused serious harm or the person is a repeat offender, lacks contrition or actively resists compliance would occur.

Each aspect of the test for prosecution is to be separately considered and we must be reasonably satisfied before a decision is taken to prosecute. If a matter does not pass the evidential test it should not proceed to prosecution, no matter how important it may be. The evidential test must be considered first and before the public interest test.

### ***The evidential test***

This test requires a legal assessment of whether the

- evidence relates to an identifiable person (whether natural or legal).
- evidence is credible.
- we can produce the evidence before a court.
- evidence is likely it will be admitted by the court.
- evidence can satisfy an impartial jury (or Judge), beyond a reasonable doubt, that a criminal offence has occurred.
- individual has given any explanations and, if so, whether the court is likely to find the explanations credible in the light of the evidence as a whole.
- we should seek out other evidence which may support or detract from the case.

Once it has been established that there is sufficient evidence to provide a reasonable prospect of conviction, the test for prosecution requires a consideration of whether the public interest requires a criminal prosecution.

### ***The public interest test***

This test is important for ensuring that the discretion to prosecute is exercised in accordance with the rule of law and any relevant statutory requirements.

Some of the indicative matters that may be relevant and require consideration when determining whether a prosecution will be in the public interest are set down below.

The list is illustrative and not comprehensive.

Public interest considerations that may properly be taken into account when deciding whether the public interest requires prosecution will vary from case to case.

Under the Solicitor-General's Prosecution Guidelines a prosecution is more likely if:

- a conviction is likely to result in a significant sentence
- significant harm or created a risk of significant harm has been caused

- an offence was committed against a person serving the public (a Council officer)
- the individual was in a position of authority or trust
- evidence shows the individual was a ringleader or an organiser of the offence
- there is evidence that the offence was premeditated
- there is evidence that the offence was carried out by a group
- a victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance
- the offence was committed in the presence of, or in close proximity to, a child
- there is an element of corruption
- an individual's previous convictions or cautions are relevant to the present offence
- there are grounds for believing that the offence is likely to be continued or repeated
- the offence, although not serious, is widespread in the area where it was Committed
- it would have a significant positive impact on maintaining community confidence
- the individual committed the offence while subject to an order of the Court
- a confiscation or some other order is required and a conviction is a pre-requisite

Under the Solicitor-General's Prosecution Guidelines a prosecution is less likely if:

- the court is likely to impose a nominal penalty on sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order of penalty.
- the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence).
- the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement.
- there has been a long delay between the offence taking place and the date of the trial, unless the:
  - offence is serious,
  - delay has been caused in part by the individual,
  - offence has only recently come to light, or
  - complexity of the offence has meant that there has been a long investigation.
- a prosecution is likely to have a bad effect on the physical or mental health of a victim or witness, always bearing in mind the seriousness of the offence.
- the individual is elderly or very young or is or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is real possibility that it may be repeated.
- the individual has put right the loss or harm that was caused (but individuals must not avoid prosecution or diversion solely because they pay compensation).
- where other proper alternatives to prosecution are available (including disciplinary or other proceedings).

Even if a matter meets the test for prosecution in terms of the Solicitor-General's Prosecution Guidelines, the decision whether to undertake a prosecution in a specific case will be made in accordance with this Enforcement Policy.

We are not required to prosecute all offences for which there is sufficient evidence and we will exercise prosecutorial discretion in each case as to whether a criminal prosecution is required in the public interest.

In some cases, while a prosecution may be possible, it may be considered that a different compliance response is more appropriate.

In taking a decision whether to prosecute, we will consider:

- this Instruction, which guides our discretion as to what enforcement action it will undertake.
- alternatives to criminal prosecution that are set out in this Instruction
- the purposes and objectives of the laws which we are seeking to enforce by a proposed criminal prosecution
- the objectives and enforcement priorities in this Instruction
- expected cost of a prosecution (including our resources and funding)
- whether another prosecuting agency has or may bring criminal proceedings in relation to the same subject-matter as the proposed prosecution.

### ***Independent legal review***

Before commencing a prosecution, the matter must be referred to our Legal Counsel (Hazelton Law) who will review the case and if necessary seek input from suitable barristers. The purpose of the independent legal review is to ensure the tests for prosecution as set out in the Solicitor-General's Prosecution Guidelines (2013) are met.

The test for prosecution requires that there is sufficient evidence to lay charges (the evidential test) and that such charges are in the public interest (the public interest test).

The advice provided by Legal Counsel will explicitly consider these requirements.

The legal review must be carried out independently to:

- ensure the facts, advice and recommendation provided by the officer is free of any improper or undue pressure.
- lessen the chance of perceived corruption or improper motive such as bias or prejudice.
- **bring greater independent judgment to bear.**

### ***Roles and responsibilities during prosecution***

Once a decision to prosecute has been made and the external lawyers will prepare the charging documents.

The relevant officer and Group Manager have responsibility for managing the conduct our inputs to the prosecution and will work with the prosecution lawyer. All decisions regarding the prosecution process are the responsibility of the prosecution lawyers.

All staff involved in managing a prosecution will maintain a high standard of professional and ethical conduct and manage the case in a way that is consistent with the individual's right to a fair trial. In particular, those involved in the prosecution should:

- act in a manner that is fundamentally fair, performing their obligations in a detached and objective manner, impartially and without delay.
- conduct themselves in accordance with their ethical obligations and the rules of professional conduct.
- comply with the disclosure obligations contained in the Criminal Disclosure Act 2008.
- be aware of the needs of victims and ensure that in accordance with the law and the requirements of a fair trial, victims and witnesses are treated with care and respect.

Legal Counsel is responsible for keeping the relevant Group Manager (or other delegated officer) informed about progress with the prosecution and consulting on key decisions such as amendments to the charges, plea discussions and arrangements, or a decision to discontinue proceedings.

Legal Counsel is also responsible for ensuring the relevant Group Manager and the Investigating Officer are kept informed of progress with the prosecution.

Legal Counsel will ensure that we promptly provide all information and assistance required for the prosecution.

## **4.3 Other matters**

### ***Contact with individuals***

Once charges are filed, no staff involved with the prosecution will have any communication with the individual, or the individual's legal representative, in relation to the prosecution, unless this has first been discussed and agreed to by Legal Counsel.

Because individuals may have other dealings with us during the course of the prosecution process, the Group Manager will ensure that relevant staff are aware of any prosecutions underway.

Staff and elected Council members must ensure that they do not interact with such individuals during the course of the prosecution in a manner that could jeopardise the right to a fair trial or adversely affect the prosecution.

### ***Review of charges***

The evidential test is an ongoing requirement as is the public interest test. The Legal Counsel will continue to monitor whether the evidential test is met throughout the course of a prosecution.

If, as a result of continued investigation following the laying of charges it is considered that another charge is more suitable, we may amend the charge, or if a charge should be withdrawn, we will withdraw the charge.

### ***Decision not to prosecute***

A decision not to prosecute does not preclude further considering the case if new and additional evidence becomes available, or if a review of the original decision is required (provided always that we are within the applicable limitation period for bringing a prosecution).

### ***Appeals relating to a prosecution***

Every decision to appeal against a sentence or appeal on a question of law must go through the same decision making process as for the initial action.

### ***Elected Members***

Once a decision to prosecute has been made, Councillors/Community Board will be advised of the prosecution and the nature of the charges. This will ensure elected representatives are aware of the prosecution and so are able to avoid being drawn into any media comment or improper contact with the individuals that could jeopardise the right to a fair trial. It is important to note that names of defendants and other parties must not be revealed to the public.

### ***Media***

Public scrutiny is beneficial to the administration of justice and the community has a right to information, subject to lawful restrictions and the individual's right to a fair trial.

It is of primary importance that public statements do not prejudice an individual's right to a fair trial.

The public interest in a fair trial is fundamental and can override other important principles such as open justice and freedom of expression.

### ***Release of information to the media***

Only the CE or relevant Group Manager or Legal Counsel has authority to release information to the media. Under no circumstances are the investigating Officer(s) or other staff to discuss enforcement issues with the media.

Before providing any information to the media the officers must first discuss with Legal Counsel the information that is proposed to be released.

In prosecutions before the Courts the rule of “*sub judice*” applies.

“*Sub judice*” means that while a matter is under consideration by a Court public comment on the case is prohibited, as the matter has yet to be decided.

As the media often report about matters prior to the Court making a decision, any press releases about enforcement matters should be restricted to the simple fact that we are undertaking enforcement action in respect of an alleged breach.

Under no circumstance can any information be given that can lead to the identification of the individuals or other parties to proceedings.

Evidence that is to be brought before the courts must not be released to the media.

DRAFT