

**Mayor and Councillors**  
COUNCIL

**15 MARCH 2018**

Meeting Status: **Public**

Purpose of Report: For Decision

## **ENFORCEMENT POLICY REVIEW**

### **PURPOSE OF REPORT**

- 1 This report seeks Council's endorsement of a Enforcement Policy Review.

### **DELEGATION**

- 2 Council has the authority to consider this matter.

### **BACKGROUND**

- 3 Council, as a regulator, is responsible for a wide ranging list of statutes. The primary purpose of Council regulatory activities is to protect the public, the environment and groups such as consumers and residents. At times the Council is required to take formal enforcement action against individuals or entities that fail to comply with aspects of the various statutes that Council is obliged to manage as a Territorial Authority.
- 4 To manage the way staff undertake their enforcement duties the Council endorsed an Enforcement Policy in September 2014. This initial Enforcement Policy was drafted with assistance of Richard Fowler QC.
- 5 The Enforcement Policy sets out the Councils general approach to enforcement, principles we will apply, and puts in place a series of requirements around how enforcement actions are undertaken. It puts in place a consistent decision making processes for enforcement actions that result in Court based actions being undertaken.
- 6 A review date for the policy was set for September 2017.
- 7 This review is to look at how the Enforcement Policy has been implemented and whether any changes to the policy are required in order to ensure that Council meets it obligations as a regulator.
- 8 This review has been completed in house and informed by a series of workshops and interviews with staff whose work involves aspects of compliance and enforcement.

### **ISSUES AND OPTIONS**

#### **Issues**

- 9 Council has a duty to ensure that various statutes are upheld in order to ensure that the outcomes/objectives of those statutes are achieved. For example one of Councils role under the Building Act is to ensure that people who use buildings can do so safely and without endangering their health.

- 10 A review of enforcement actions undertaken since the adoption of the Enforcement Policy 2014 indicates that the policy remains fit for purpose and contains the appropriate guidance and mechanisms for staff to utilise in undertaking their duties.
- 11 One key part of the Enforcement Policy is the creation of the Enforcement Decision Group [EDG]. The EDG has the sole authority to approve enforcement actions that involve prosecutions or applications to court. The EDG comprises of a panel of two of the five group managers appointed by the Chief Executive. An external person with relevant experience may also be appointed as required and all group members will hold relevant delegations to perform the role outlined in the policy.
- 12 Since the adoption of the Enforcement Policy there have been eight formal meetings of the EDG that relate to four enforcement matters. The EDG has made no decisions requiring court based actions during this time.
- 13 The EDG discussed three enforcement cases that did not require prosecution or applications to court. The EDG framework provided guidance on how to progress these enforcement cases. Informal use of the EDG framework and templates has proved useful to ensuring that robust decisions are made by staff. This reinforces the value the Enforcement Policy has brought to ensure robust decisions are being made on compliance and enforcement matters.
- 14 In this report staff are proposing minor changes to the Enforcement Policy to align the policy with Council's "Open for Business" values and to ensure that the terminology in the policy is broadened to ensure that it applies to the wide range of statutes that Council is required to regulate. This includes changing the title of the policy to the Compliance and Enforcement Policy and updates to references of legislation.

### Option 1 – Make minor changes to policy [recommended]

- 15 Option 1 is to make the recommended minor changes to the policy as set out in Appendix 1.
- 16 These changes help align the policy with the Councils "Open for Business" values and ensures that the terminology used is generic and is easily applied across the range of regulatory functions Council is required to administer.
- 17 These changes do not alter the direction and nature in which compliance and enforcement work is undertaken in the Kapiti Coast District.

### Option 2 – Keep existing policy

- 18 Making no change to the Policy will not have any fundamental impact on staff's ability to undertake their compliance and enforcement functions.
- 19 Making no changes does not alter the direction and nature in which compliance and enforcement work is undertaken in the Kapiti Coast District.
- 20 As part of the review, discussions were had with a wide range of staff and teams that interact with the policy on either a regular or infrequent basis. One of the key points noted was that some of the terminology used in the existing policy was not relevant to the legislation that they administer.

### Option 3 – Seek a substantial external review of the policy

- 21 Option 3 is to undertake a substantial review of the policy and set new direction on how compliance and enforcement work is undertaken in the Kapiti Coast District.
- 22 The review undertaken to date does not indicate such a step is necessary. The initial policy was developed through a robust process and under the supervision of a Queens Counsel.
- 23 This option would seek to make a fundamental change to our policy in order to address any issues that the Council sees with the way that staff are currently undertaking our regulatory functions.
- 24 Data collected on our current enforcement and compliance actions have shown that our current approach is generally using informal tools to ensure compliance is achieved and with a few exceptions this is largely getting the desired results. This includes using education, persuasion and encouragement to ensure that the regulatory requirements are met.
- 25 Noise control, animal management and parking are the only areas where regular use of formal enforcement tools occurs. The significant majority of these are the use of infringement notices and excessive noise directives. No court based actions have taken place since the adoption of the policy.
- 26 The major risks in undertaking this option are:
  - Both increasing and decreasing the level of compliance and enforcement has impacts on the various sectors within the community, and any changes may not meet their expectations.
  - Increasing or decreasing our levels of compliance and enforcement can impact on our ability to achieve the outcomes required under the various statutes we administer.
- 27 A full external review of the policy is not the recommended option although staff are keeping an abreast of any changes in direction being signalled by central government, such as the Best Practice Guidelines currently being drafted by the Ministry for the Environment for Compliance, Monitoring and Enforcement under the Resource Management Act.

## CONSIDERATIONS

### Policy considerations

- Adopting Option 1 and 2 has no policy implications as it does not fundamentally change the status quo.
- Adopting Option 3 could impact on a range of policies that we have in place should it significantly increase or decrease Council's approach to compliance and enforcement.

### Legal considerations

- 28 All statutes have outcomes and a purpose which they have been put in place to achieve. Option 1 and 2 will continue to achieve those outcomes/purposes as they do not seek to fundamentally change the policy. Council has legal duties,

functions and responsibilities under numerous statutes, this commonly includes ensuring parties comply with the law.

- 29 Option 3 has the potential to impact on Council's ability to deliver the outcomes of the statutes should we seek to decrease Council's approach to compliance and enforcement.

### Financial considerations

- 30 There is a cost to compliance and enforcement. Attempts to resolve issues using informal methods such as education and persuasion carry a cost and can involve a significant amount of staff time. Likewise, the use of formal enforcement methods also carries a cost and can not only involve a significant amount of staff time, but can have associated administration and legal costs.
- 31 Section 10 of the Local Government Act 2002 notes that the purpose of local government is to meet the current and future needs of communities for good quality performance of regulatory functions in a way that is most cost-effective for households and businesses. Good quality is defined as being efficient, effective and appropriate to present and anticipated future circumstances.
- 32 Options 1 and 2 do not change the financial implication for Council.
- 33 Option 3 has the implication to either increase or decrease the costs to Council in undertaking our compliance and enforcement duties depending on the outcome of the review.

### Tāngata whenua considerations

- 34 In order to deliver on the priorities of our Iwi partners the Council requires a robust compliance and enforcement policy.

## **SIGNIFICANCE AND ENGAGEMENT**

### Significance and Engagement Policy

- 35 Under Council's Significance and Engagement Policy it is deemed that the recommended changes to the Enforcement Policy has a low level of significance.

### Consultation already undertaken

- 36 No external consultation has occurred as part of this review.

### Engagement planning

- 37 An engagement plan is not needed to implement this decision.

### Publicity

- 38 As this is a review of an existing policy public interest is expected to be limited.
- 39 Ensuring that the public is aware of the existence of Council's Enforcement Policy is important and therefore a media release will be prepared noting that has been updated. An updated copy of the policy will also be available on our webpage.

## RECOMMENDATIONS

- 40 That the Council adopts **Option 1** to make minor changes to the Enforcement Policy and endorses the new Compliance and Enforcement Policy 2018 in Appendix 1.

**Report prepared by**      **Approved for submission**      **Approved for submission**

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## ATTACHMENTS

Appendix 1 – Compliance and Enforcement Policy 2018



# Compliance and Enforcement Policy

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Approved by:	Council
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Responsible Group:	Regulatory Services

# Introduction

The Council is required by various statutes to regulate a wide range of activities including matters such as land use and development under the District Plan, the carrying out of building work, the preparation of food for sale at cafes, restaurants and other outlets, controls on the sale and consumption of alcohol in public, controls on dogs, littering and parking.

The primary purpose of these regulatory activities is to protect the public, the environment and groups such as consumers and residents. The main statutes under which the Council has responsibilities for enforcing regulatory requirements are listed below. (Note this is not a complete list.)

Building Act 2004	Local Government Act 1974
Burial and Cremation Act 1964	Local Government Act 2002
Criminal Procedure Act 2011	Machinery Act 1950
Dog Control Act 1996	Public Works Act 1981
Fire Service Act 1975	Reserves Act 1977
Food Act 1981 and 2014	Resource Management Act 1991
Forest and Rural Fire Act 1977	The Sale and Supply of Alcohol Act 2012
Freedom Camping Act 2011	Summary Proceedings Act 1957
Gambling Act 2003	Transport Act 1962
Health Act 1956	Trespass Act 1980
Impounding Act 1955	Various Regulations, Council policies, plans and bylaws
Land Transport Act 1998	Any other relevant regulatory requirements including amendments or substitutes
Litter Act 1979	

In order to achieve the protection provided by these regulatory activities there must be compliance with the regulatory requirements.

At the end of the day, achieving effective regulatory protections and outcomes is a responsibility that both the Council and the wider community share.

The purpose of this Enforcement Policy is to:

- inform the general public of the Council's approaches to the compliance, enforcement and prosecution of the legislation it is responsible for enforcing;
- outline the possible enforcement actions able to be administered by the Council;
- guide and assist officers of the Council in the performance of their compliance, enforcement and prosecution functions;
- ensure consistent, appropriate and coordinated decision-making of compliance, enforcement and prosecution matters.



This Enforcement Policy is supplemented where necessary by other documents, which set out in greater detail the specific procedures and standards for carrying out enforcement actions.

For example, the Council has developed specific enforcement guidance that sits under this Enforcement Policy across all regulatory activities.

This policy is provided for information purposes only so as to provide general guidance on how compliance, enforcement and prosecution matters are dealt with by the Council. This policy:

- is not legally binding on the Council;
- is general in nature and does not exhaustively address all the specific statutory limitations and considerations that may be relevant under the legislation administered by the Council;
- does not confine, restrain or limit the discretion of the Council to take any action;
- is not a substitute for legal advice or legal processes.

Individuals, companies and others should obtain independent legal advice on their compliance obligations where needed.

## Open for Business

The Kapiti Coast District Council's core values are set out in 3 key areas:

Caring – We understand our customers' needs, share information and work as one team.

Dynamic – We bring a can do attitude to make it happen.

Effective – We get it right and deliver consistent, value for money services.

Integrating these into regulatory functions require the Council to consider the wide range of customers from the past, present and future that are impacted by Council decisions.

The nature of regulation means that Council will at times require people to modify what they are doing in order to meet the requirements of the legislation or rules that we are required to uphold. Being "Open for Business" does not mean that we will turn a blind eye to non-compliance, but it will be a factor in how we deal with all our customers during the process of obtaining compliance.

This policy is a key part in delivering these values to our community.

# Our approach to compliance

## What we are trying to achieve

The regulatory activities the Council is responsible for provide a range of health, safety and environmental benefits for the public and residents of the Kapiti Coast District. The key areas where the Council has enforcement responsibilities are:

*Our environment* – We want everyone to be able to share in the benefits of living in a built and natural environment that contributes to the outcomes agreed in the District Plan.

*Food* – We want to support local food businesses to ensure food is safe, suitable and people can enjoy food prepared in the district. We are concerned about risks to people's health that can arise from poor food safety standards when preparing food for sale at cafes, restaurants or other outlets.

*Alcohol* – We want people to enjoy public events and public spaces without being confronted by anti-social behaviour caused by excessive consumption of alcohol or alcohol being consumed by persons who are under-age.

*Dogs* – We want people to have the confidence they can live and carry out their businesses in the district without being distressed or intimidated by dogs that are not being properly controlled by their owners.

*Buildings* – We want to have buildings that are safe and provide the amenities expected by owners and users. We are concerned about buildings that expose owners and users to risks to their health or safety.

*Infrastructure* – We want infrastructure that meets the needs of current and future generations. We are concerned that premature failures of infrastructure impact on the safety and wellbeing of our community as well as creating financial implications for future generations.

## How we achieve compliance

Compliance as an outcome is when a regulated activity achieves the required environmental standards, regulatory requirements and/ or licence/ consent conditions.

An effective approach to compliance is one that improves regulatory outcomes without imposing unnecessary burdens or expense on residents, businesses and others subject to regulation.

We expect everyone to comply with the regulatory requirements the Council is responsible for and we know that most people are willing to comply with those obligations.

We know that some people will comply reluctantly only because there is a credible risk that the Council will detect their non-compliance and it will result in serious consequences.

Finally, we know that some people will not comply with the Council's regulatory requirements because:

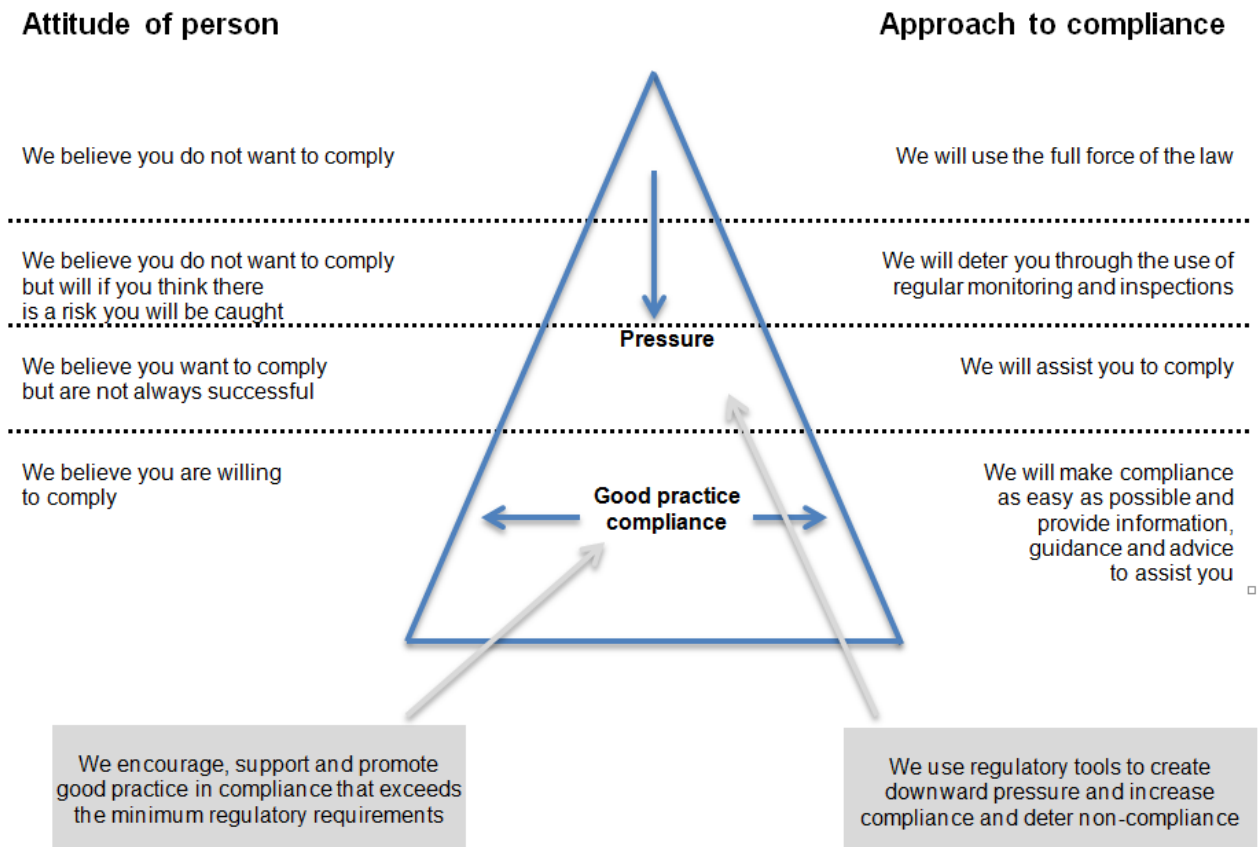
- they may not be aware they are not complying;
- they may not understand what is required in order to comply;
- they think the risk of being caught is low;
- they accept there is a risk of being caught but they are prepared to pay the penalty;
- they have made a conscious decision not to comply, regardless of the consequences.

Our approach to compliance is scaled with degrees of force 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.

## The Compliance Pyramid

The 'compliance pyramid' is a widely used model for achieving compliance. At the bottom of the pyramid are those who are willing to comply – at the top are those who refuse to comply. The compliance pyramid is designed to create downward pressure – that is, to move non-compliant individuals or organisations down the pyramid to full compliance and to where lower-level and less costly interventions will be sufficient to keep them compliant.



The compliance pyramid illustrates how the Council's approach to compliance will vary according to the attitude of the individual. The Council has a wide range of tools or interventions at its disposal to assist those people who are willing to comply through to those who do not want to comply. These tools are discussed in the section below, 'Our approach to enforcement', along with the factors the Council will consider when deciding on the appropriate approach to enforcement in any particular situation.

The compliance pyramid also contemplates the Council encouraging compliance through promoting examples of excellence in compliance, and not just encouraging compliance from those who are not complying.

## **Principles we apply in our approach to compliance**

### **'Get it right first time'**

We believe that it is in the interests both of regulated businesses and the wider public to get things 'right first time', and that therefore our compliance role should involve actively working with all those subject to regulation, especially small and medium sized businesses, to guide and assist with compliance. We will provide a contact point and telephone number for further dealings with us and we will encourage businesses and others to seek guidance or information from us.

### **Make compliance simple**

We will make compliance as straightforward and simple as possible in the circumstances. We will provide information and advice in plain language on the legislation that we are responsible for and disseminate this as widely as possible, through information leaflets, newsletters, guidance and on the Council website at [www.kapiticoast.govt.nz](http://www.kapiticoast.govt.nz).

### **Assist people to comply**

We will support individuals and organisations needing help to comply. We understand mistakes happen and can help rectify them when they are brought to our attention openly and early. We will encourage and support disclosure of unintentional non-compliance.

### **Encourage complaints**

Raising awareness of compliance is an important part of an effective compliance policy. An easy-to-use complaints process raises people's awareness of compliance requirements and can be an effective source of information about non-compliance through the complaints people make when things go wrong. An effective complaints process also increases the chances that people who are not complying with regulatory requirements will be identified.

### **Recognising good practice**

We will recognise examples of good practice in regulatory compliance particularly where it contributes to better levels of compliance. Identifying and publicising examples of good practice in regulatory compliance can improve awareness of compliance requirements and improve levels of compliance in a sector by providing a model for others to follow.

# Our approach to enforcement

The enforcement process covers the mechanisms and options that are designed to compel compliance. These enforcement mechanisms and options may be formal or informal and involve the Council exercising its discretion to adopt the enforcement response that is appropriate to the circumstances.

## Principles we apply in our approach to enforcement

### Fair and consistent

We will carry out our compliance responsibilities in a fair, equitable and consistent manner. Our responses will be unbiased, objective, and made in accordance with the principles of good administrative practice and natural justice. We will treat residents, businesses, complainants, consent holders, resource users and others equally, and will not favour any one group or sector over another. Decisions on enforcement action will be taken in a timely manner and without undue delay or interference.

While Investigating Officers are expected to exercise judgement in individual cases and to treat each case on its own merits, we will have arrangements in place to promote consistency. More details on the decision making process are available on page 12. 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.

### Transparent and open

We will be transparent and open about our approach to enforcement and how we make our decisions. Those affected by our decisions will have opportunities to ask questions and to seek review.

Individuals will be allowed the early opportunity to give an explanation of the circumstances surrounding any alleged offence including, where provided for by the legislation, any statutory defences.

### Encouraging disclosure of errors and mistakes

Our approach to compliance encourages people to inform us of errors and mistakes leading to unintentional non-compliance. When considering enforcement options we will be more sympathetic when genuine mistakes or errors have been voluntarily disclosed to us early. When we identify compliance issues or incidents we are more likely to offer help and assistance to individuals and organisations that have made open and early disclosures. We are more likely to consider firmer enforcement options in respect of mistakes or errors where there has been a deliberate effort to hide the error or mistake from us. However, this does not mean we turn a blind eye to breaches of the law – particularly if an error or mistake is significant or harmful.

## **Intelligence led responses**

We will ensure that information is shared within the Council to ensure Council has the most relevant and up to date information when making decisions about enforcement. This includes information obtained from audits, inspections, reviews, and applications etc. This approach also requires the Council to share and receive information, where appropriate, with other Government Departments and Councils in a manner that respects and protects the rights of an individual/entity to ensure consistency of approach to enforcement issues.

## **Priorities for enforcement**

We will focus our enforcement efforts on those people or organisations we have reason to believe are unwilling to comply. We will prioritise our efforts and interventions in those areas where the Council has sole responsibility for enforcement, and in respect of those matters that could cause the greatest harm.

We will ensure that our priorities for enforcement understand and acknowledge the public's expectations for compliance and, where appropriate, respond to and reflect shifts in the public's thinking and expectations of compliance. This may at times require us to enforce in order to maintain the integrity of the law.

Our goal is long-term ongoing compliance. We are likely to take firmer action against non-compliance that we consider is deliberate, deceptive or negligent. Non-compliance that causes harm to people, or adversely affects the interests of communities, is likely to attract more serious action.

## **Cost recovery**

The Council will seek to recover a contribution towards the costs associated with enforcement from the responsible parties where possible. This enables enforcement functions to be undertaken efficiently and to minimise the costs to ratepayers.

Where monitoring costs are incurred in relation to a specific consent, these costs will be recovered from the consent holder in accordance with the Kāpiti Coast District Council's Long Term Plan (Revenue and Financing Policy) and the provisions of any relevant laws.

## **How we make enforcement decisions**

We consider a range of factors when deciding how to respond to compliance issues or incidents. No single factor will be determinative of an enforcement response but all the relevant factors must be weighed up in deciding what is the most appropriate response to take to remedy a compliance issue or incident.

The following is not an exhaustive list of the factors we consider but is a list of the most commonly considered factors. Other factors may exist in particular circumstances.

## **Harm**

The primary factor that drives our enforcement decision-making is the harm or potential harm to health, safety or the environment. Actions that create risks but do not actually lead to harm occurring can also be serious and require a firm response. We will carefully consider the nature of the harm caused or likely to be caused including factors such as:

- whether the harm is temporary, can be remedied or mitigated, or is permanent;
- whether the harm is limited or widespread;
- whether the harm is trivial and does not require an enforcement response;
- whether the harm affects, or is likely to affect, a particular group or section of the community or environment;
- whether that particular group or section of the community or environment is particularly vulnerable or sensitive.

## **Conduct of person responsible for compliance issue or incident**

We consider the behaviour and intent of the individual responsible for the compliance issue or incident. The factors we consider include:

- whether this is the first time the person has been responsible for this type of compliance issue or incident;
- whether the compliance issue or incident is likely to be a one-off incident or is a pattern of behaviour;
- whether the Council has previously undertaken enforcement action against the person and, if so, the outcome of that enforcement action and whether it was successful;
- whether some time has passed since the issue or incident;
- whether the compliance issue or incident was a misunderstanding, accidental, careless, or deliberate;
- whether the person profited or benefited from the issue or incident;
- whether the person notified the Council of the compliance issue or incident;
- whether the person was acting alone, acting under the control or direction of another person, part of a group, or a ringleader;
- whether the person attempted to avoid or mitigate the harm and, if so, how soon after becoming aware of the harm the person did so and whether this was effective;
- whether the person has taken any steps to avoid such issues or incidents in the future;
- whether the person relied on advice from a third party.

## **Attitude of person to compliance**

We consider the attitude of the person to compliance. A person's attitude is usually evident by 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 we consider include:

- whether the person is willing and able to comply;
- whether the person 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;
- whether the person is reluctant or unwilling to comply;
- whether the person has made a deliberate decision not to comply.

## **Public interest**

Public interest factors are not specific to the person responsible for the compliance issue or incident but concern the public at large and may be relevant to the enforcement response. The requirements for public interest tests as set out in the *Solicitor-General's Prosecution Guidelines* are discussed in full under the section "Our Approach to Prosecution" in this policy.

## **Enforcement options**

We have available to us a range of enforcement options under the legislation we are responsible for enforcing. There is no universal set of options. The compliance pyramid underpins our approach to enforcement decisions.

The enforcement options at the base of the pyramid for those who are willing to comply, where the harm caused is minimal and the conduct may have been accidental, may be to provide written advice or guidance on compliance, or give a formal warning. The purpose of these enforcement options could be to educate others, assist and sustain compliance, to avoid, mitigate or remedy adverse effects, and to stop unlawful activity.

The enforcement options in the middle of the pyramid where the person may be unwilling to comply may involve a formal warning, a compliance notice such as an abatement notice or notice to fix, or an infringement notice. The purpose of these enforcement options could be to avoid, mitigate or remedy adverse effects, to stop unlawful activity, and to deter and educate others.

The enforcement options at the top of the pyramid for persons who have decided not to comply, where the harm caused was significant, or the conduct was intentional, may be to prosecute, cancel a licence or permit, or impose a fine. The purposes of these last enforcement options could be to avoid, mitigate or remedy adverse effects, to stop unlawful activity, to deter, and to penalise.

We will choose the most appropriate enforcement option for the issue or incident involved – the right option at the right time. Enforcement options will not be used progressively (from the base up, one action leading to another on a higher level). Action will be taken using the appropriate enforcement option available as determined by the consideration of the harm caused, the conduct of the person responsible for the issue or incident, the attitude of the person to compliance, and the public interest factors.

The range of enforcement options we have available to us include the following.

### **Provide advice or guidance**

We understand the importance of people having access to good quality information and guidance on how to comply with regulatory requirements. Minor incidents are frequently dealt with by means of informal action and would involve the Council Investigating Officer drawing the matter to the attention of the person responsible for the compliance issue or incident, and giving appropriate guidance. Advice and guidance material can take many forms including verbal or written advice, or reference to other sources of compliance 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.



A follow-up visit will be made, where circumstances demand, to ensure minor matters have been rectified. An officer will make a written record of action (so that we can check for previous behavioural attitude). However, if previous advice has been ignored, or if there is another factor that warrants a formal response, the Investigating Officer may choose to treat the incident in a formal way.

## **Give a formal warning**

A formal warning is 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 will be taken in respect of that offence. The person will also be informed that the formal warning will be documented and recorded by the Council, and will be taken into consideration 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;
- the 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 the circumstances.

## **Publicising enforcement action**

Any publicity about enforcement matters should be restricted to the simple fact that Council is 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 names of the defendants, or other parties to proceedings.

## **Audits and inspections**

We have powers 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 powers available to us under the legislation we are responsible for enforcing. Some of the key statutory powers include the following:

- **Compliance/Directive notice such as an abatement notice or notice to fix**  
These notices are formal, written directives. They are drafted and served by Council staff instructing 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.
- **Court order or injunction**  
Like an abatement notice an enforcement order can direct a person to cease an activity, or to take particular action. However, 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 (or apply for cancellation or suspension) licences where we believe:
  - the grounds for being licensed are no longer met;
  - the licence holder is failing (or has failed) to comply with the Act or the conditions of the licence;
  - false or misleading information has been provided.
  
- **Infringement notice**  
An infringement notice is a written notice alleging that a person has committed an offence which requires the payment of a fine or the election to have the matter heard in court. The actual fine for each type of offending is set within a statutory schedule or bylaw. Payment of the fine does not lead to the recording of a criminal conviction. The types of situations where an infringement notice may be issued are when:
  - there is evidence of a regulatory breach;
  - a one-off or isolated regulatory breach has occurred which is of minor impact which can be remedied easily;
  - it is likely to be a sufficient deterrent.
  
- **Prosecute**  
A prosecution is initiated by laying criminal charges in the District Court. However, this will only commence after a rigorous internal process involving:
  - a thorough investigation;
  - an independent legal review;
  - authority to prosecute given by the Enforcement Decision Group. Details of the Enforcement Decision Group are available on page 12.
 The matter is then heard by a District 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.

## **Negotiated settlements/Restorative Justice**

A person may approach the Council with a proposal for the settlement of a compliance issue or incident. The Council is open to resolving non-compliance by agreement where a remedy is possible and 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, to cease the non-compliant conduct, pay compensation, pay our costs, and may involve some publicity. A negotiated settlement will only be agreed to if it is in the public interest. For example, we are unlikely to agree 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.

# Decision-making process for enforcement decisions

## Investigating Officer

Where information about a compliance issue or incident comes to the attention of the Council the initial investigation will be conducted by the relevant Council Investigating Officer responsible for that subject area. The powers that may be exercised by Investigating 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.

For more serious enforcement options an Investigating Officer must obtain the approval of the relevant line manager or team leader and, where appropriate, may need to seek legal advice from the Senior Legal Counsel in respect of any legal or enforcement questions that arise. Neither the Investigating Officer, nor the relevant line manager or team leader has the ability to approve any enforcement options that involve prosecution or an application to court. Those matters must be approved by the Enforcement Decision Group.

A proposal for enforcement action that involves a prosecution or application to court must be referred to the Enforcement Decision Group by the relevant Group Manager responsible for the area in which the enforcement action is to be undertaken.

When an Investigating Officer feels that:

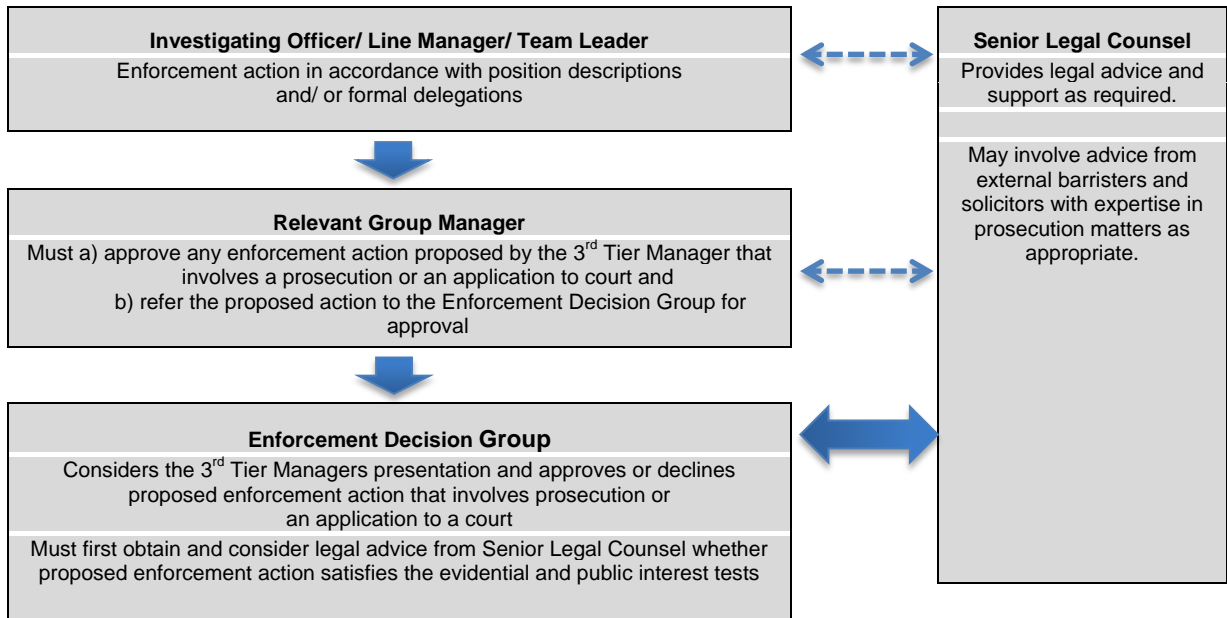
- 1) due to the seriousness of the case; or
- 2) the decision making needs to be depersonalised; or
- 3) they need support in the decision making process;

they should use the Enforcement Decision Group framework with their supervisor and line manager in order to document and record their decision making process. Should this decision indicate that court based action is the preferred course of action it should be referred to the Enforcement Decision Group with the approval of the relevant Group Manager.

## Enforcement Decision Group

The Enforcement Decision Group will usually comprise a panel of two of the five Group Manager positions. However, an additional external person with relevant experience may be appointed as required. These appointments are made by the Chief Executive and all group members will hold the relevant delegations to perform the role outlined in this policy.

The Enforcement Decision Group considers any enforcement options that involve prosecution or an application to court. In these potentially more serious matters the enforcement discretion is exercised by the Enforcement Decision Group, and not by an individual Council Investigating Officer. The process that enforcement matters involving a prosecution or an application to court must follow is set out below.



Where any proposed enforcement action involves a prosecution or an application to a court, the proposal must be approved by the relevant Group Manager for submission to the Enforcement Decision Group and accompanied by a report from the relevant Investigating Officer. The Enforcement Decision Group operates by consensus.

The Enforcement Decision Group may only approve a prosecution having considered advice from the Senior Legal Counsel (or external legal advice), and reviewed and confirmed that the proposed enforcement action is in the public interest.

The factors to be considered by the Enforcement Decision Group when considering whether a prosecution is in the public interest are described in the last section of the document under the heading 'Our approach to prosecution'.

The Enforcement Decision Group is responsible for the final decision to commence a prosecution. The decision must be made independently of any undue or improper pressures such as political pressures or pressures from elected members of the Council.

## **Independent legal review**

Before the Enforcement Decision Group consider commencing a prosecution, the matter must first have been referred to the Senior Legal Counsel who may seek further independent legal review. The purpose of the independent legal review is to ensure the test for prosecution as set out in the *Solicitor-General's Prosecution Guidelines* (2013) is satisfied.

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 Senior Legal Counsel to the Enforcement Decision Group will explicitly consider these requirements.

The legal review must be carried out independently to:

- ensure the advice provided to the Enforcement Decision Group 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.

In most cases, the Senior Legal Counsel will seek the advice of the external lawyers with prosecution expertise before providing advice to the Enforcement Decision Group.

## **Other considerations relevant to the decision whether to prosecute**

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

The Enforcement Decision Group is not required to prosecute all offences for which there is sufficient evidence. The Enforcement Decision Group 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, the Enforcement Decision Group will also consider:

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

## **Communication with Elected Members**

Once a decision to prosecute has been made by the Enforcement Decision Group, the Mayor, Councillors, the Māori representatives appointed to Council or Standing Committees, and any relevant Community Board members should be advised of the identity of the parties being

prosecuted and the nature of the charges. This will ensure the Mayor, Councillors, Māori representatives and Community Board Members are aware of the prosecution and so 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. (See guidance provided in the sections below under the headings 'Media', and 'Contact with defendants').

## Evaluating enforcement outcomes

In order to develop an effective enforcement process, all enforcement action undertaken by Investigating Officers should be evaluated for effectiveness in achieving the desired outcome. In both successful and unsuccessful actions where further enforcement action was required, it is useful to examine what was effective or not, what could have been improved or changed to make the process more effective. This information will be reported annually to the Senior Leadership Team to implement change if necessary and then through to the Standing Committee charged with responsibility for regulatory management issues (this was the Regulatory Management Committee at the time of adopting this Policy). The information will also be used to inform any review of this Policy.

## Media

Public scrutiny is beneficial to the administration of justice and the community has a right to accurate information, subject to lawful restrictions and the individual's right to a fair trial. However, 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 relevant Group Manager or the Senior Legal Counsel has the authority to release information to the media. Before providing any information to the media the relevant Group Manager must first discuss with the Senior Legal Counsel the information that is proposed to be released. Under no circumstances are Investigating Officers or other Council officers to discuss enforcement issues with the media.

In prosecutions before the Courts the rule of *sub judice* applies. "Sub judice" means that while a matter is under judicial consideration public comment on the case is prohibited, as the matter has yet to be decided by the Court.

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 Council is 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 names of the individuals, or other parties to proceedings. Evidence that is to be brought before the courts must also not be released to the media.

# Our approach to prosecution

The Council will adhere to the standards of good criminal prosecution practice expressed in the *Solicitor-General's Prosecution Guidelines* (2013). The Council's criminal prosecutions are conducted by external lawyers, on the Council's behalf, and the *Solicitor-General's Prosecution Guidelines* and the *Media Protocol for Prosecutors* (Crown Law, 2013) while not binding on local authorities, represent best practice.

## Independent legal review of proposed prosecution

Before the Enforcement Decision Group can approve a prosecution or application to court for an enforcement order or injunction, the Enforcement Decision Group must consider the legal advice from the Senior Legal Counsel as to whether there is sufficient evidence to lay charges (the evidential test) and that such charges are in the public interest (the public interest test). The requirements for these tests are set out in the *Solicitor-General's Prosecution Guidelines*.

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

### The evidential test

The first part of the test is the evidential test for prosecution and requires a legal assessment of whether:

- the evidence relates to an identifiable person (whether natural or legal);
- the evidence is credible;
- the Council can produce the evidence before the court and it is likely it will be admitted by the court;
- the evidence can reasonably be expected to satisfy an impartial jury (or Judge), beyond a reasonable doubt, that the individual has committed a criminal offence;
- the 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;
- there is any other evidence the Council should seek out 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

The second part of the test for prosecution is the public interest test, which 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 described below.

The list, based on the *Solicitor-General's Prosecution Guidelines*, is illustrative only and not a comprehensive list of the matters to be considered as the matters will vary in each case according to the particular facts. Under the *Solicitor-General's Prosecution Guidelines* a prosecution is more likely if:

- a conviction is likely to result in a significant sentence;
- the offence caused significant harm or created a risk of significant harm;
- the offence was committed against a person serving the public (for example, a police officer or Council officer);
- the individual was in a position of authority or trust;
- the evidence shows that 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;
- the 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;
- the 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, for example, by a history of recurring conduct;
- the offence, although not serious in itself, is widespread in the area where it was committed;
- a prosecution would have a significant positive impact on maintaining community confidence.
- the individual is alleged to have 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;
- the individual has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order;
- 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, the delay has been caused in part by the individual, the offence has only recently come to light, or the 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).

These considerations are not intended to be comprehensive or exhaustive. The public interest considerations that may properly be taken into account when deciding whether the public interest requires prosecution will vary from case to case.

## **Solicitor-General's Prosecution Guidelines**

The *Solicitor-General's Prosecution Guidelines* also provide guidance on other aspects of the conduct of public prosecutions including matters such as:

- what charges should be filed;
- once criminal proceedings are commenced, whether they should be continued or discontinued;
- the conduct of criminal prosecutions;
- standards of conduct and practice for lawyers conducting prosecutions;
- plea discussions and arrangements.

## **Roles and responsibilities during prosecution**

Once a decision to prosecute has been made by the Enforcement Decision Group, the Senior Legal Counsel will refer the file to the external lawyers who have been engaged to undertake the prosecution. The external prosecution lawyers will review the file and the recommended charges. Once this review is complete, the prosecution lawyers will prepare the charging documents.

The Senior Legal Counsel has responsibility for managing the conduct of the prosecution and works with the prosecution lawyers conducting the prosecution on the Council's behalf. All decisions regarding the prosecution are the responsibility of the prosecution lawyers and Senior Legal Counsel.

All Council 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; and
- 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.

The Senior Legal Counsel is responsible for keeping the relevant Group Manager informed about progress with the prosecution and consulting the Enforcement Decision Group on key decisions such as amendments to the charges, plea discussions and arrangements, or a decision to discontinue proceedings.

The Senior Legal Counsel is also responsible for ensuring the relevant Group Manager and/or the 3<sup>rd</sup> Tier Manager of the Investigating Officer is kept informed of progress with the prosecution.

The Senior Legal Counsel will ensure that the Council promptly provides all information and assistance required by the prosecution lawyers.

## **Contact with individuals**

Once charges are filed, no Council staff members 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 the Senior Legal Counsel or the prosecution lawyers acting for the Council.

Because individuals may have other dealings with Council staff during the course of the prosecution process, the relevant Group Manager will ensure that relevant staff are aware of any prosecutions underway. Council 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 Senior Legal Adviser and prosecution lawyers 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, the Council may amend the charge, or if a charge should be withdrawn, the Council will withdraw the charge.

## **Decision not to prosecute**

A decision not to prosecute does not preclude Council from 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 including the Enforcement Decision Group.

## **Investigations involving other agencies**

It is not uncommon for more than one prosecution agency to investigate a particular matter where prosecution by any of those agencies could result.

Wherever possible, we will work collaboratively with those other agencies to ensure that investigations and criminal prosecutions are conducted effectively and efficiently. For example, in some cases it may be possible for agencies to share information, such as witness statements, to ensure that witnesses are not subjected to multiple interviews by different agencies.

Where reasonably practicable, we will consult with other relevant agencies before commencing a criminal prosecution, to satisfy ourselves that criminal prosecution by us is in the public interest.